

SOME REFLECTIONS ON THE USE OF CRIMINAL LAW
FOR THE PROTECTION OF THE ENVIRONMENT⁽¹⁾

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*«We must sincerely pity our
economists who doggedly debate the
costs of the furniture of a house that
has already burnt down»*
Anatole France
(*The Opinion of Jerome Coignard*)

I. Some Historical Considerations

There are two historical periods which could be considered as real milestones in the evolution of the legal protection of the environment. These two periods are the so called Industrial Revolution, which took place in the first half of the 19th century, and the period of economic recovery that followed World War II. That second period lasted until the 70's in the 20th century.

The clear connection that exists between economic development and the use of natural resources is well known. It is a truism that the more we develop industry, commerce, and other economic sectors, the more natural resources are needed. Human beings have been exploiting natural resources for centuries without nature having been seriously affected⁽²⁾. Minerals, raw materials, water, air, etc., have been used in all sort of industrial activities

⁽¹⁾ I would like to thank to my friend Mr. LIAM CASHMAN, Principal Administrator of the European Commission, for reading a draft of this paper. However, all errors and omissions remain my responsibility.

⁽²⁾ There were exceptional cases, however, of environmental problems and the subsequent social or political reaction. According to KISS and SHELTON, even in Fifth Century Rome, there were complaints that the Tiber river was seriously polluted by the filth of the city, as well as protests against odours emanating from various homes. One of the earliest known environmental measures is an ordinance adopted by Edward I in 1306 to prohibit the use of coal in open furnaces in London. Also in the Fourteenth Century, Charles VI forbade in Paris bad smelling and nauseating smoke. *Vide* KISS A. and SHELTON D., (1993), *Manual of European Environmental Law*, Cambridge, Cambridge University Press, page 9.

throughout history without having seriously impinged on nature or natural resources. Traditionally, nature could easily recover without too many negative effects. Serious problems began when, as a result of the Industrial Revolution, natural resources began to be exploited, not lightly or occasionally as before, but in a systematic and significant manner. That situation provoked a sort of initial environmental protectionist approach and drove some European countries to enact environmental laws⁽³⁾. Accordingly, it could be said, roughly speaking, that the Industrial Revolution was the starting point for the system of legal protection of the environment as it is known today.

The laws enacted were basically civil and administrative, and were aimed at providing proper compensation when cases of pollution occurred, as well as at introducing an initial regulatory scheme to avoid damage and safeguard public health. It was generally not considered necessary to resort to criminal law, since instances of serious environmental disruptions were still not too widespread (although it is worth noting that early industrial towns suffered serious pollution), technology was still not advanced and the value attached to a clean environment was still limited.

The situation changed radically with the reconstruction following World War II and the Marshall Plan, and the subsequent increase in exploitation of the natural resources. For the first time international public opinion began to demonstrate concern over the general state of the environment. It was a widespread movement developed in response to a visible environmental deterioration. Not coincidentally the concept of «ecological pessimism» also emerged. Not coincidentally either some literary works began to be published questioning the human behaviour affecting an important number of environmental aspects, such as Bertrand Russell's *Has a Man Future?*⁽⁴⁾. The catalyst for many individuals and groups was the Torre Canyon accident in 1967, the first of a series of major oil tanker spills⁽⁵⁾.

This led to the search for new measures to combat environmental destruction. One of these measures was to resort to criminal environmental law and soon an increasing number of countries resorted to criminal law as a way of assuring environmental protection. The Japanese Diet was the first to come up with a truly criminal law for the punishment of environmental

⁽³⁾ The British Waterwork Clauses Act of 1845, the German General Industrial Code of 1845, etc.

⁽⁴⁾ I have been using the Spanish translation of the book. RUSSELL B., (1982), *¿Tiene el Hombre Futuro?* (Barcelona, Editorial Bruguera).

⁽⁵⁾ KISS A. and SHELTON D., *Op. cit.* pags. 9 and 10.

pollution offences, by its pioneering law, the Law for the Punishment of Pollution Offences, 1970. Several countries, following the Japanese example, enacted criminal environmental provisions in the form of special provisions or as a special part of their penal codes⁽⁶⁾.

Accordingly, serious environmental infractions or behaviour presumed to be hazardous to the environment have become criminal offences. This is an understandable reaction to a behaviour considered highly intolerable to society⁽⁷⁾.

However, this criminalisation of actions which were not previously criminal offences, poses an important number of problems. It is, to a certain extent, understandable since there is a lack of precedents in relation to environmental crimes within criminal legal systems. This entails the need to face the whole subject-matter with a pioneer's perspective, since part of it is still an unexplored field.

Let us see where the aforementioned problems lie, focusing on the more relevant. Some problems are of a general or abstract kind; others, however, are of a more practical character and are specifically connected to the day-to-day application of the law.

The approach taken in this article is firstly, to describe and examine these problems, and secondly, to analyse the future perspectives of the use of criminal law for the protection of environment.

II. General Aspects Regarding Problems of an Abstract Nature

It could be said, first of all, that there is a key difference between what could be called the traditional or classical criminal law and the new area of criminal law aimed at avoiding environmental degradation.

⁽⁶⁾ PRABHU M., (1994), «General Report. Crimes against the Environment. Preparatory Colloquium», in *International Review of Penal Law*, vol. 65. Nos. 3-4, page 700.

⁽⁷⁾ «...there is a widespread concern that available regulatory instruments are not adequate to attack the ongoing threat posed by pollution to environment. The view has been expressed by the Law Reform Commission of Canada in Working Paper 44, that the pollution control armoury needs to be augmented by providing in the Criminal Code a separated new offence entitled crimes against the environment» in *Pollution Control in Canada: the Regulatory Approach in the 1980s*, Law Reform Commission of Canada, Administrative Law Series. Study Paper, 1988, page 69.

Roughly speaking, the traditional or classical criminal law tries to obtain «a certain degree of social stability⁽⁸⁾», using for that purpose methods of social control and, occasionally, prevention⁽⁹⁾. The expression «a certain degree of social stability» is used since it is commonly assumed that delinquency has never, and probably will never be completely eradicated from the social context. This is probably due to the fact that delinquency is inherent to society itself. Accordingly, wherever any social structure emerges, criminal actions cannot be ruled out.

Environmental crimes, however, introduce a completely different perspective into the criminal legal system. While traditional criminality poses a menace to social stability, environmental crimes do not so much threaten social stability as pose a threat to the survival of human beings themselves. As a result, it is not the maintenance of social stability but the survival of society itself which is at stake. In this regard Commoner has noted that «The survival of all living things – including man – depends on the integrity of the complex web of biological processes which comprise the earth's ecosystem. However, what man is doing on the earth violates this fundamental requisite of human existence. For modern technologies act on the ecosystem which supports us in ways that threaten its stability; with tragic perversity we have linked much of our productive economy to precisely those features of technology which are ecologically destructive. These powerful, deeply entrenched relationships have locked us into a self-destructive course⁽¹⁰⁾». This is the reason why Commoner describes this

⁽⁸⁾ This is why criminal law is, generally speaking, concerned with acts or omissions which are contrary to public order an society as a whole and which render the guilty person liable to punishment. *Vide* FARRAR J., (1977), *Introduction to Legal Method*, London, Sweet and Maxwell, page 16. Denham asserts that «Social deviance in general may be viewed as a failure to change society in a particular way, and criminal behaviour in particular is an acute form of deviance» DENHAM. P., (1983), *A Modern Introduction to Law* (London, Edward Arnold) page 150.

⁽⁹⁾ As SMITH and HOGAN indicated «While the definition of offences can adequately forbid unjustifiable and inexcusable conduct, it can rarely prevent it. The Children and Young Persons (Harmful Publications) Act 1955 was said to have been completely successful at a time when no prosecution has been brought under it. But this is unusual». *Vide* SMITH J.C. and HOGAN B., (1983), *Criminal Law*, London, Butterworths page 5.

⁽¹⁰⁾ COMMONER B., (1975), *The Ecological Facts of Life*. in SHAW, B., *Environmental Law. People, Pollution and Land Use* (St. Paul, Minn) West Publishing CO) pages 11-12.

process by resorting to the very strong expression, «suicidal track⁽¹¹⁾». It is, nonetheless, an evolutionary and quite complex suicidal track⁽¹²⁾.

Secondly, it is also important to make clear that environmental crimes are «real» crimes. As has been stated before, there is at present considerable concern about the criminal nature of some serious environmental degradation. This concern reflects a new and widespread public ethic that demands a strong response to environmental abuse⁽¹³⁾. This is why an important list of countries have criminalized serious environmental infractions, creating in that way a new specialised area within the criminal law system as a way of confronting serious environmental degradation.

However, states initially resorted to criminal law as an alternative to solve social problems when other legal mechanisms had previously failed. In fact, some legal systems began to make use of criminal law as an alternative to protect the environment when no other options were left. In France, for instance, the crime of poaching, regulated by the Law of 15 April 1829 on «river fishing» was applied by the courts after 1859 to manufacturers who discharged any pollutant into the water, since there was not any other effective legislation to repress this type of behaviour. In the United States the potential significance of the Refuse Act of 1899, which made it a crime to discharge any refuse matter into the navigable waters of the United States without the permission of the Army Corp. of Engineers, was recognised by the Waters and Wetlands Report in 1970. In fact, it was the starting point for the use of Criminal Law for the protection of the environment in the United States. After the rediscovery of the Act there was a spate of criminal prosecutions aimed at avoiding environmental pollution⁽¹⁴⁾. More recently, it has been argued that the new crime related to

⁽¹¹⁾ COMMONER B., *Op. cit.* page.12.

⁽¹²⁾ «When the first cannons were fired, in the early fourteenth century, they affected ecology by sending workers scrambling to the forest and mountains for more potash, sulfur, iron, ore and charcoal, with some resulting erosion and deforestation. Hydrogen bombs are of a different order: a war fought with them might alter the genetics of all life on this planet». *Vide* WHITE LYNN Jr., *The Historical Roots of Our Ecologic Crisis*, in edit. by LORI GRUEN and DALE JAMIESON (Oxford, New York, Oxford University Press 1994) page 6.

⁽¹³⁾ «The (United States) Government's Memorandum» in *Aid of Sentencing cited in the case United States v. Holley Electric Corp*, Case No. 83-119-CR-J-6.

⁽¹⁴⁾ «After the 1970 Waters and Wetlands Report (...) prosecutors across the country began to wield the sword of strict criminal liability in the battle against water pollution.» *Vide* Mc NOLD D., UNKOVIC J.C. and LEVIN J.L., «Thoughts on the Role of

land planning introduced in the recent 1995 Spanish Criminal Code enacted in 1995⁽¹⁵⁾ was an alternative to the lack of efficiency of the administrative sanctions which were normally being applied to serious land planning abuses.

This is why environmental crimes have occasionally been defined as a sort of utilitarian solution⁽¹⁶⁾ to remedy the lack of efficient administrative measures to protect the environment. The fact is that criminal offences, especially environmental criminal offences, should not only be considered in terms of efficiency or utilitarian cost-benefit analysis. Whether efficient or inefficient, criminal provisions express society's moral condemnation of pollution. As Heine has very accurately indicated, circumstances such as the greenhouse effect, changes in climate, acid rain, etc., have all become part of a new scenario which ultimately involves the course of developments on which the future of human beings may depend. Accordingly, «it may appear as a necessity, even a duty for government to provide the criminal law with adequate instruments for the protection of the environment⁽¹⁷⁾».

However, this is not the only problem. It has been generally accepted that a «crime» means a serious breach of the criminal law. Nonetheless, when it comes to analysis of environmental crimes, there is a certain tendency to downgrade this specific type of criminality. Walker, for instances, asserts that «Nowadays there is a tendency to use «crime» to stigmatise almost any intentional behaviour of which the speaker disapproves. Calling a rubbish-dump a crime is a conservationist's way of stimulating public protest against something which is deplorable⁽¹⁸⁾...».

Penalties in the Enforcement of the Clean Air and the Clean Water Acts». in *Duquesne Law Review*, volume 17, No. 1, 1977-1978, page 4 .

⁽¹⁵⁾ Article 319 of the Spanish criminal code.

⁽¹⁶⁾ The classical utilitarian theories took the fundamental basis of morality to be a requirement that happiness should be maximised: the basic principle of utility required as to weight up the consequences, in terms of happiness or unhappiness, of various alternative actions, and choose that action which would, on balance, have the best consequences, in the sense of producing the largest net balance of happiness. Utilitarianism holds that, in deciding what we should do, we should consider only the consequences of our actions: an action cannot be justified purely by its relationship to past facts. Vide SIMMONDS N.E., (1987), *Central Issues in Jurisprudence. Justice, Law and Rights*, London, Sweet and Maxwell, pages 15 and 17.

⁽¹⁷⁾ HEINE G., «Environmental Protection and Criminal Law», in *Frontiers of Environmental Law*, edit. By OWEN LOMAS, (1991), London, Chancery Law Publishing, pages, 76-77.

⁽¹⁸⁾ WALKER N., (1987), *Crime and Criminology. A Critical Introduction*, Oxford, New York, Oxford University Press, page 1.

Environmental crimes represent a new type of criminality, but nevertheless environmental crimes are real crimes. Judge Charles M. Allen expressed at the time of sentencing in the *United States v. Donald Distler*, that «It was and is the opinion of this court that business and industries who pollute our environment are guilty of grave crimes against man and nature themselves. Such crimes, if allowed to continue, will soon reach the point where their effects are irreversible by any known technology...⁽¹⁹⁾».

III. Some Practical Problems Posed by the Penal Protection of the Environment

The penal protection of the environment raises some very interesting questions, some of which will be outlined in the following paragraphs. As has already been indicated, it is necessary to select those questions which appear to be more relevant. Otherwise, one runs the risk of getting involved in endless discussions, mainly taking into consideration the understandable limited character and nature of the Congress in which this paper will be submitted.

III.1. Conceptual Problems Raised by the Criminal Protection of the Environment and the Need of Special Courts

It has been previously asserted that the penal protection of the environment is relatively new. This is completely logical since environmental law itself is basically «virgin law», unprecedented in history. In fact, as has been observed, most environmental legislation has emerged in these last decades⁽²⁰⁾. Besides, environmental matters constitute a specialised area of science which has its own terminology, its own technical concepts, etc.. This means that the judiciary will have to deal with some special aspects with which it will not be familiar. Examples include pollution of the atmosphere, discharges to water, noise, waste, land planning, protected areas and release of poisonous substances. The emergence of certain fundamental principles underpinning environmental protection policy (such as the principle of preventing damage and the precautionary and polluter pays principles) also deserved recognition.

⁽¹⁹⁾ *United States v. Donald F. Distler*. Cr. No. 77-00108 (W.D. Ky. 1979).

⁽²⁰⁾ KRAMER L., (1989), «The Open Society, its Lawyers and its Environment», in *Journal of Environmental Law*, vol. 1, No. 1, page 9.

For instance, the concept of environment itself was subject to strong discussion by the Spanish judiciary when it came to apply the first environmental offence introduced in the Spanish criminal code⁽²¹⁾. This type of difficulty led the British Labour Party Policy Commission to recommend in 1994 in the United Kingdom an environmental division of the High Court⁽²²⁾. As De Prez asserted, such a court with a specialist bench would be better equipped to deal with the technical matters often raised in environmental disputes, and would perhaps have a better idea of what is reasonable or feasible to expect of industry in terms of pollution abatement⁽²³⁾.

This explains as well why in the European context the Council of Europe Resolution (77) 28, on the Contribution of Criminal Law to the Protection of the Environment, recommended the establishment of specialist branches of courts and offices of public prosecution to be able to deal properly with environmental cases⁽²⁴⁾.

From what has been said, it is evident that special courts will be better equipped to face technical matters. However special environmental courts will also be better prepared to avoid situations where environmental crimes could be treated as a sort of privileged crime. These situations may appear in cases where the courts lack the appropriate guidance or knowledge

⁽²¹⁾ The issue was finally resolved by the Spanish Supreme Court in a decision of November 30, 1990, which interpreted the term «environment» in a limited sense. According to the Supreme Court, criminal law protects the «ecological balance» from a human perspective and not in a general way. It is an anthropocentric view of environment and not an ecocentric one.

⁽²²⁾ In *Trust for Tomorrow*. Labour Party Commission Report on the Environment. 1994, page. 50. This was previously recommended by Sir HARRY WOLF, *Vide* WOLF, Sir HARRY, *Are the Judiciary Environmentally Myopic?* in "Journal of Environmental Law, volume 4, No.1, 1992, page 13.

⁽²³⁾ DE PREZ P., (2000), «Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions», in *Journal of Environmental Law*, volume 12, No.1, page 76.

⁽²⁴⁾ The Committee of Ministers made the following recommendations:
«4. Re-examination of criminal procedure in matters of environmental protection and in particular:

- a) creation of specialist branches of courts and offices of public prosecution to deal with environmental cases;
- b) means of providing persons or groups the right to become associated with criminal proceedings for the defence of the interests of the community;
- c) creation of a special criminal register of persons convicted for pollution, independently of the general criminal register;
- d) exclusion from amnesty of serious criminal offences...».

on environmental matters. In this regard, the words of Michel Brown, the American EPA's⁽²⁵⁾ enforcement counsel, are expressive: «You have got judges out there who will put a man behind bars for shooting someone, but if the same guy dumps three buckets of stuff in a town's water supply that will destroy the guts of all of the people of that town for generations, he will draw a suspended sentence⁽²⁶⁾».

III.2. *The Coexistence between Administrative and Criminal Environmental Law*

This is probably one of the most important obstacles when it comes to applying most criminal environmental provisions in countries with civil law jurisdictions. This is so because, as it will be seen, administrative law plays an essential role in the definition of environmental criminal offences. The situation varies in the United Kingdom – which is part of the common law legal system –, since its administrative justice approach is completely different from any civil law jurisdiction. Grottanelli de Santi, when comparing the systems of administrative justice in England and Italy, observes that «In Italy indeed, we speak of administrative justice, as in France, whereas the English speak of justice without attributes, and become suspicious and perplexed when faced with any special sort of justice such as military or ecclesiastical justice⁽²⁷⁾». As a result, in the United Kingdom, the distinction between regulatory or administrative infractions and «real» crimes is not as clear as in countries like Germany or Spain²⁸.

Due to the fact that administrative law is not consistently defined in the different civil law countries⁽²⁹⁾ it is difficult to apply to them a common

⁽²⁵⁾ Environmental Protection Agency, United States.

⁽²⁶⁾ The *ORLANDO SENTINEL*. Sunday, October 9, 1983, page A-7.

⁽²⁷⁾ GROTANELLI goes saying, however, that despite the apparent differences between both systems (civil and common law), the real differences «lie less in the institutions or statutory texts than in the approach and way of thinking of judges». *Vide* GROTANELLI DE SANTI G., (1986), «An Italian Looks at English Administrative Law», in *Public Law*, Spring, page.115.

⁽²⁸⁾ Editor's note in Heine's article on Environmental Protection and Criminal Law. *Vide* HEINE G., *Op. cit.*, page. 76. There are other differences, though. For instances, in the United Kingdom environmental criminal law is dominated by strict liability offences with prosecution generally undertaken by the Environmental Agency in front of a local lay magistrate.

⁽²⁹⁾ HEINE G., *Op. cit.*, pags. 82-86. Heine refers to four basic models in the relationship between criminal law and administrative law in the field of environmental protection. Those are as follows: criminal offences which are absolute independent of

description. However, as a general rule, in these countries behaviour presumed hazardous to the environment may be subject to administrative legal rules as well as to repressive criminal law. This is so since «Most of the measures for environmental protection form part of the administrative law in order to submit harmful behaviour to prior control. These administrative devices are usually completed by repressive means which enable administrative agencies to ban unlawful activities (...) Whereas criminal prosecution is intended as reaction highly intolerable to society, these administrative offences are designed to suppressing mere unlawfulness not requiring an express moral verdict⁽³⁰⁾».

Besides, administrative law uses concepts which have traditionally been outside the criminal legal system. Logically, a criminal law court may have problems to interpret them. Moreover, since the terms of administrative law serve different purposes in different contexts to those of criminal law, they lead to inappropriate results if adopted uncritically by criminal law.

This coexistence, which frequently becomes an overlapping tension, between both sets of legal norms (administrative and criminal), is basically due to the fact that before it became common practice to draft criminal environmental legislation there were only administrative violations. Accordingly, what was a purely administrative field, is now a mixed administrative-criminal one. Previously, it was left to the administrative agency to lay down the permissible level of pollution through administrative regulations. Now, the criminal judicial authorities also intervene to decide whether the pollution caused is acceptable under the criminal law standards.

Another very important problem that arises from that relationship is the incapability of the Public Administration to cope with the enormous control programme related to environment in the wider sense⁽³¹⁾. However, very often, in order to determine the scope of criminal liability, penal law has, therefore, generally deferred to the definition of socially acceptable/unacceptable behaviour, made by the administrative law.

administrative law (Model 1), criminal provisions absolutely dependent of administrative law (model 2), criminal law relatively dependent on administrative law (model 3) and environmental offences separated from the real crimes of the penal code (model 4).

⁽³⁰⁾ PAEFFGEN H.U., «Overlapping Tensions between Criminal and Administrative Law: The Experience of West German Environmental Law», in *Journal of Environmental Law*, vol. 3, No.2, pages 247-248.

⁽³¹⁾ WINTER G., (1989), «Perspectives for Environmental Law – Entering the Fourth Phase», in *Journal of Environmental Law*, vol. 1, No.1, page 45.

Legal commentators have referred to a set of different questions which appears as a result of the coexistence of both set of legal norms. For instance, and according to the undeniable influence of administrative decisions on criminal liability, under certain circumstances an administrative decision, or even a lack of decision, may leave unapplied a criminal law provision. This is, for example, the case of what has been called «active toleration» of pollution by administrative authorities. Paeffgen defines active toleration «when the applicant, relying on the permissibility of his purpose begins to pollute a river, etc., before actually receiving a formal consent, and when the administrative authority knowingly fails to take against him⁽³²⁾». Using other words, toleration is when administration, in the general pursuit of economic growth, declines to discipline one who breaches pollution regulations. Toleration is thus postulated to legitimise such offences and to avoid sanctions⁽³³⁾.

It may also happen that in the discussion between the administrative authority and the public prosecutor, regarding the criminal character of the environmental infraction, if they do not reach an agreement there is always a risk of passivity on both sides, which is not so rare, for instances, in Holland, as Fangman pointed out⁽³⁴⁾.

In other cases, if the administrative authority intervenes with an administrative act that entirely covers the relevant criminal activity, then the author has committed no offence, since one of the definitional elements of the crime is missing⁽³⁵⁾ or the administrative act is considered a defence justifying the author's action⁽³⁶⁾.

There are some other examples of this type of abuse and all them prove that in that sort of cases modern states – and their administrations – very often do not take a too «active» position in the protection of environment⁽³⁷⁾. Moreover, they are occasionally capable of breaking the rules and of subverting the institutional order⁽³⁸⁾. Occasionally, as it is the case, in Germany the competent public authorities, following a purely

⁽³²⁾ PAEFFGEN H.U., *Op. cit.*, page 260.

⁽³³⁾ WINTER G., *Op. cit.*, page 45.

⁽³⁴⁾ FANGMAN N., (1990), *Criminal Enforcement on Environmental Legislation. Environmental Enforcement Workshop*. May 8-10, Utrecht, The Netherlands, page 131.

⁽³⁵⁾ Since it is not an illegal act from the administrative point of view.

⁽³⁶⁾ PAEFFGEN H.U., *Op. cit.*, page 231.

⁽³⁷⁾ LEPAGE JESSUA, C., «L'Etat ennemi ou protecteur de l'environnement», in *La Vie Judiciaire*, Du 19 au 25 Septembre 1988, page 9.

⁽³⁸⁾ VERCHER A., (1990), «The Use of Criminal Law for the Protection of the Environment in Europe», Council of Europe Resolution (77) 28, in *Northwestern Journal of International Law and Business*, Winter, vol. 10. No. 3, page 457.

utilitarian strategy and even knowing the existence of a serious infraction, may enter into «futile and endless negotiations with the polluter (...) intervening for years. The motive of this strategy is to achieve better compliance with environmental provisions by imposing mutually agreed conditions than by the threat of punishment – the results often are poor nonetheless⁽³⁹⁾». This type of negotiations has been equally problematic in Spain⁽⁴⁰⁾ and in Holland, although in the last case judicial authorities may participate in the negotiations themselves⁽⁴¹⁾.

Under these circumstances, can we make use of criminal prosecution against members of public administration for this kind of abuse? It is certainly possible, although it has to be admitted that it is extremely difficult to obtain a conviction. Up to the present, there is a limited number of convictions in Germany and none in Spain, although in the Spanish legal system new legal criminal provisions have recently been created to confront the possible criminal responsibility of administrative authorities in this sort of case⁽⁴²⁾. The reasons are obvious: very often the public administrative authorities carry on investigations, or even negotiations, without providing the proper information to the police or to the judicial authority. Moreover, a recent Spanish constitutional case⁽⁴³⁾ left open the possibility for administrative authorities to infringe the well known principle of «double jeopardy», also known in civil law jurisdiction as the «*non bis in idem*» principle. According to the Spanish Constitutional Court, the administrative authorities are allowed to sanction an environmental infraction from the administrative point of view and, after punishing it, to refer the case to the judicial authorities «in case there were any criminal responsibilities for the commission of a possible environmental penal offence⁽⁴⁴⁾». In fact, the judicial authorities convicted the accused of

⁽³⁹⁾ PAEFFEGEN H.U., *Op.cit.*, page 261.

⁽⁴⁰⁾ That type of initiatives, as described in PAEFFGEN's quotation, are known in the Spanish legal system as «Programas de descontaminación gradual».

⁽⁴¹⁾ «There is an enormous investment in time for talks, often without matching results». FANGMAN N., *Op. cit.*, page 134.

⁽⁴²⁾ Articles 319, 321 and 329 of the 1995 Spanish penal law.

⁽⁴³⁾ Court decisión 177/1999, of October 11th.

⁽⁴⁴⁾ *Vide* TORRES FERNÁNDEZ M.E., «El Principio non bis in idem en la Jurisprudencia Constitucional», *La Ley*, 7 de junio de 2000. page 1 et seq.; DE VICENTE MARTÍNEZ R., *Teoría y Práctica* o el Dr. Jekyll y Mr. Hyde (a Propósito de la Sentencia del Tribunal Constitucional 177/1999, de 11 de Octubre, sobre el Principio ne bis in idem. In: *Actualidad Penal*. No. 22. Semana de 29 de mayo al 4 de junio de 2000. También CORCOY BIDASOLO M. y GALLEGOS SOLER J.I., «Infracción Administrativa e Infracción Penal en el Ambito del Delito Ambiental: ne bis in idem Material y Procesal», in

releasing serious polluting substances into a river, an action that had been already sanctioned by the administrative authorities.

III.3. Corporations and the Protection of the Environment

The question could be put in the following way: A Corporation or a legal person, is an organised group of persons. If a person individually considered can be criminally and civilly liable for any kind of action, why when that person combines with some other persons, should that capacity disappear?

Certainly there are not too many countries which adhered to the principle «*Societas delinquere non potest*⁽⁴⁵⁾». For instance, France eliminated the aforementioned principle in its last penal code, as did Portugal. However, some other countries, and Spain is a good example, kept adhering to it. There are some important arguments to take into consideration when analysing the need to admit or to reject the adherence to the principle «*Societas delinquere non potest*», at least in cases of environmental crimes.

First of all, as Hazlitt argued, «Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief and are less amenable to disgrace or punishment. They feel neither shame, remorse, gratitude or good will...»⁽⁴⁶⁾. Accordingly, the corporations' capacity to commit environmental offences must not be underestimated.

Secondly, we must keep in mind that an environmental crime is a crime like any other, albeith a new crime born as a consequence of social, economical and industrial development. To consider it as a crime we must expand the stereotypical traditional definition of crime and the traditionally portrayed criminal, to embrace those who break this new form of socio-economic and industrial wrong against society.

Thirdly, reflecting the early and crucial role of corporations in anglo-saxon economic development (now exported worldwide), the American Supreme Court long ago held that «It is true that there are some crimes which in their nature can be committed by corporations but there is a large

Actualidad Penal., No. 8. Semana de 21 al 27 de febrero de 2000. Also, VERCHER NOGUERA A., «La Incorporación del Principio "el que no corre vuela" en Derecho Constitucional», in *Derecho y Medio Ambiente. Revista Jurídica para el Desarrollo Sostenible*. vol. 1. No. 2. Abril-junio 2000, page 67 et seq.

⁽⁴⁵⁾ Civil law jurisdictions are based on Roman law and Roman law traditionally established the principle «*societas delinquere non potest*», that is, societies are unable to commit a criminal action and so only physical individuals have the capacity to infringe criminal law.

⁽⁴⁶⁾ HAZLITT W., (1952), *Table Talk*, London, Everyman Editions, page 254.

class of offences (...) where in the crime consists in purposely doing the things prohibited by statutes. In that class of crimes we see not good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them⁽⁴⁷⁾».

Fourthly, perhaps the type of punishment applicable to corporations is the most complex point. The fact that a fine is the only type of punishment applicable to corporations is totally unfair. That is not only because managers and executives can go to jail for the commission of the same kind of crimes when their culpability is individual, but also because a fine does not have a properly deterrent effect on a corporation, considering that the amount of the fine can, like any other cost, be included in the cost/benefit balance. Judge Donald W. Van Arsdale stated as follows: «As to the defendant there are two types of effective deterrents. One of course is imprisonment of the responsible official. The other is that the law provides for either or both, in cases of this sort. If the only punishment is a fine, the person might be inclined to violate the law and tend to look at it as being a bad business investment and they must pay a fine and thereafter can forget about any other type of restraint upon them⁴⁸».

Considering those facts, the research for new types of punishment applicable to corporations is not merely a theoretical problem but also a practical concern for scholars and legal practitioners. Likely effective types of punishment that have been proposed include management intervention, community service order and adverse publicity. Management intervention may take the form of internal discipline and organizational reform orders. A community service order consists of requiring a corporate offender to undertake socially useful work projects tailored to the corporate offender capacity and resources. Finally, regarding adverse publicity it consists of publishing in the current press the court decision against the corporation.

Of all them, adverse publicity (name and shame) could perhaps be the most effective, considering the nature and characteristics of corporations. In fact, according to Fisse, adverse publicity is «the quintessentially stigmatic corporate sanction⁽⁴⁹⁾». It is the type of sanction

⁽⁴⁷⁾ New York Cent. H. R.R. Co. v. United States 212 U.S. 489, 494-495 (1909).

⁽⁴⁸⁾ United States v. Lanigen, Cr. No. 81-297 (E.D. PA. 1982). The owner and operator of a sanitary landfill was convicted for negligent violations of the American Clean Water Act and violations of the Refuse Act.

⁽⁴⁹⁾ FISSE BRENT, (1982), «Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions», in *Southern California Law Review*, vol. 36, No. 4, page 1229.

that has enjoyed the most considerable support because it affects the corporation's prestige as well as its financial success. In that regard, Fisse added: «...to attach the marke of Cain to a corporation is to strike at an organizational mantle which shields individual persons from being subjected to the stigma⁽⁵⁰⁾».

Corporate criminal law is, nonetheless, surrounded by complexities. It is important to point out that in some countries, such as the United States, China or Japan, where corporations can be prosecuted, to prosecute a corporation does not exonerate individuals implicated in the offence from criminal liability. However, it is often expedient to prosecute only the corporation because it spares the investigating and prosecuting officials the trouble of going behind the corporate veil and identifying the actual director, manager or other employee responsible for the crime. Such a task is particularly difficult in large and complex organisations⁽⁵¹⁾.

However, this is not the most important problem. The greatest lies in the fact that, as Laufer points out, referring to United States, corporate criminal law has moved through different phases, the last one being characterised by a novel sort of partnership of corporations with the government. This means a worrying Government-corporate cooperation where command and control strategies of corporate regulation has been replaced by negotiated compliance, coerced cooperation and regulatory persuasion⁽⁵²⁾.

IV. Recent Evolution of the System of Criminal Law for the Protection of the Environment in the European Context

As is widely known, national and international environmental law have taken giant steps in the last decades. During this period of time, many countries, inspired by Principle I of the 1972 Stockholm Declaration, amended their Constitutions, thereby providing their citizens a guaranteed right to a safe and healthy environment or imposing on the state an obligation or duty to protect the environment, or in some cases imposing a similar obligation or duty on citizens.

⁽⁵⁰⁾ FISSE BRENT, *Op. cit.*, page. 1230.

⁽⁵¹⁾ PRABHU M., *Op. cit.*, page. 717.

⁽⁵²⁾ LAUFER W. and GEIS G., (2001), «Corporate Criminal Law, Cooperative Regulation and the Parting of Paths», in *Cahiers de Defense Sociale. Bulletin de la Société Internationale de Defense Sociale*, pag. 103 et seq.

The European continent has witnessed some important developments not only in the protection of the environment in general, but also in the use of criminal law for the protection of the environment. The legal developments which have taken place within the European Union on the protection of the environment are well known. It is a process that has been defined as «The emergence of the Community as an environmental actor⁽⁵³⁾». The same could be said of the Council of Europe, especially taking into consideration its efforts to transform the right to a decent environment into a «real» human right⁽⁵⁴⁾.

It is not surprising, therefore, that both the Council of Europe and the European Union, have resorted, at a certain stage, to the criminal law for the protection of the environment. Let us analyze the use of criminal law for the protection of the environment separately in both organizations. We will begin, following a chronological order, with the Council of Europe.

IV.1. The Council of Europe

The penal protection of the environment became a matter of real concern in the Council of Europe in 1978, when the Committee of Ministers adopted Resolution (77)88 on the contribution of criminal law to the protection of the environment. The Committee of Ministers first considered the need to protect the health of human beings, animals and plants, and the beauty of landscapes. Second, the Committee considered that various aspects of present-day life, especially industrial development, entail a degree of pollution which is especially dangerous to the community. Finally, the Committee concluded that a need to resort to criminal law as an «*ultima ratio*» existed when other measures are ignored, ineffective or inappropriate. Based on these conclusions, the Ministers made a number of recommendations to member state governments⁽⁵⁵⁾.

⁽⁵³⁾ SCOTT J., (1998), *EC Environmental Law*, London and New York, Longman, page 4.

⁽⁵⁴⁾ VERCHER NOGUERA A., «Derechos Humanos y Medio Ambiente», in *Claves de Razón Práctica* No.84. Julio/Agosto 1998. Page 14 and seq.

⁽⁵⁵⁾ «1. Examination of criminal penalties for damage to the environment and whilst maintaining the traditional penalties of fine and imprisonment (possibly conditional) in the most serious cases:

- a) introduction in this field of particular forms of pecuniary penalty, such as daily fines (astreintes), day fines, suspended fines and conditional fines;
- b) allocation of proceeds from pecuniary penalties for pollution to environmental uses;

Later on, the Council of Europe Justice Ministers' Resolution No 1 (1990) reaffirming Resolution (77)28, called upon Member States «...to examine the advisability of (i) drawing up a list of offences the purpose of which would be to provide adequate criminal law protection for water, soil, the air, and another components of the environment meriting protection, and also for man and in its environment; (ii) applying the concept of endangerment offences irrespective of the damage actually done, and (iii) making environmental impairment a criminal offence liable to prosecution not only in the country where the offence is committed but also in all countries where the offence had consequences, subject to the principle of avoiding double jeopardy».

Following the adoption of the Resolution No.1 (1990), the Committee of Ministers of the Council of Europe established a new select committee of experts in 1991 under the name of the Group of Specialists on the protection of the environment through criminal law⁽⁵⁶⁾. On 4 November 1998 the Convention on the Protection of the Environment through Criminal Law opened for signature⁽⁵⁷⁾.

The most outstanding points could be described as follows:

1) Article 2 of the Convention requires signatory countries to criminalise various serious offences⁽⁵⁸⁾.

c) introduction in this field of measures such as restoration of the former state possibly ordered in connection with a suspended custodial penalty, work for the benefit of the community (as principal penalties) and publication of convictions:

2. Re-examination of the principles of criminal liability, with a view, in particular, to the possible introduction in certain cases of the liability of corporate bodies, public or private.

3. Examination of the advisability of criminalizing acts and omissions which culpably (intentionally or negligently) expose the life or health of human beings or property of substantial value to potential danger...». Vide as well note 19 *supra*, on the recommendation to introduce environmentally specialized courts and prosecutors.

⁽⁵⁶⁾ In October 1991 it started to work and completed the new Convention for the protection of environment through criminal law in December 1995, after holding seven plenary and ten working group meetings.

⁽⁵⁷⁾ For an analysis and discussion of the Convention *vide* CHAMOT C., «La Convention du Conseil de l'Europe sur la protection de l'environnement par le droit penal» (Strasbourg, 4 novembre 1998), in *L'effectivité de Droit européen de l'environnement*, edited by SANDRINE MALJEAN-DUBOIS, (2000), Paris, La Documentation Française, page 199 et seq.

⁽⁵⁸⁾ Release of substances or ionising radiation into air, soil, or water which causes death or serious injury to any person or creates a significant risk of causing death or serious injury.

2) Article 4 extends the scope of the Convention to a wide range of environment-related illegal conduct by a reference to «infringement of the law, an administrative regulation or a decision taken by a competent authority». Signatories can choose to impose criminal sanctions and/or measures, or administrative sanctions and/or measures. Other measures of a punitive nature may be the withdrawal of a permit, the prohibition to continue environmentally dangerous processes, etc., etc.

3) Article 9 requires signatories to impose corporate liability, without excluding criminal proceedings against natural persons.

Through those, and other non-referred provisions, the Convention's basic aim is to approach the signatories' penal legislations on the protection of the environment, contributing in that way to increase its practical effectiveness⁽⁵⁹⁾.

IV.2. The European Union

International conventions constitute an important step towards the establishment of a real «system» of international penal law for the protection of the environment, rather than mere «principles⁽⁶⁰⁾» the European Union has also open up new possibilities. These have been expressed throughout two different initiatives.

On the one hand, Denmark presented an initiative for a framework Decision on combating serious environmental crime⁽⁶¹⁾ in March 2000. The framework Decision is aimed at introducing minimum standards on prosecution and sanctions for major offences, looking as well an enhanced

- Unlawful release of substances or ionising radiation into air, soil, or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants.

- Unlawful disposal, treatment, storage, transport, export, or import of hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants and unlawful operation of a in which a dangerous activity is carried out presenting the same risk, and

- Unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants.

⁽⁵⁹⁾ CHAMOT C., *Op. cit.*, page 200.

⁽⁶⁰⁾ BYUNG-SUN CHO, «¿El Surgimiento de un Derecho Penal Internacional del Medio Ambiente?», in *Revista Penal*, No.8, July 2001, page 22.

⁽⁶¹⁾ OJ C 39/4 of February 2000.

cooperation between Member States for detention and apprehension of offenders.

Besides the Danish initiative, the European Commission presented a proposal for a Directive of the Parliament and of the Council on the Protection of the Environment through Criminal Law⁽⁶²⁾, which was published on 13 March 2001.

IV.2.1 The Proposed Directive on the Protection of the Environment through Criminal Law

The Explanatory Memorandum of the proposed Directive is quite clear when establishing the aims of the proposal and the reasons according to which the Commission decided to prepare it. The Explanatory Memorandum points out that «Experience has shown that the sanctions currently established by the Member States are not always sufficient to achieve full compliance with Community law (...) In many cases, only criminal penalties will provide a sufficient dissuasive effect. First, the imposition of criminal sanctions demonstrates a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law. It sends a strong signal, with a much greater dissuasive effect, to offenders. For instance, administrative or other financial sanctions may not be dissuasive in cases where the offenders are impecunious or, on the contrary, financially very strong. Second, the means of criminal prosecution and investigation (and assistance between Member States) are more powerful than tools of administrative or civil law and can enhance effectiveness of investigation. Furthermore, there is an additional guarantee of impartiality of investigating authorities, because other authorities than those administrative authorities that have granted exploitation licences or authorizations to pollute will be involved in a criminal investigation».

Let us to analyse the most outstanding points of the proposed directive.

IV.2.1.a. A Minimum Standard in Criminal Offences

The Explanatory Memorandum continues «Therefore, a minimum standard on constituent elements of criminal offences in breach of Community law protecting the environment needs to be established». Accordingly, the proposal does not cover all activities regulated by Community law, but only important types of pollution which can be

⁽⁶²⁾ Commission proposal COM (2001)139 final., OJ C 180/238 E, of 26 June 2001.

attributed to individuals or legal persons. These are breaches of Community environmental law which constitute «serious impairments of the environment» and are listed in article 3⁽⁶³⁾.

It is evident that in the case of the proposed directive the role of administrative law, as a base for environmental offences, will be played by the Community's own environmental law. That is the reason why the Explanatory Memorandum states that «For reasons of legal certainty, the Annex to the proposed directive sets out exhaustively the relevant Community provisions, which prohibit the activities described in Article 3».

However, this minimum standard may vary according to the development of environmental law. So, «For the purposes of this directive, any future modifications of the directive listed in the Annex will automatically apply to this directive. As regards future Community legislation each text will regulate itself to which extent criminal sanctions shall have to be provided for». This has the advantage that any criminal offence will be treated more thoroughly in each environmental directive and according to the different circumstances at any specific time.

There are other important advantages. For instances, we said before that, occasionally, in the discussion between the administrative authority and the public prosecutor, regarding the criminal character of the environmental infraction, if they do not reach an agreement there is always a risk of passivity on both sides. It will be possible to avoid cases of administrative toleration. It is evident that the possibility to refer points of interpretation to the European Community Court, outside the administrative

⁽⁶³⁾ According to article 3:

«Member States shall ensure that the following activities are criminal offences, when committed intentionally or with serious negligence, as far as they breach the rules of Community law protecting the environment as set out in the Annex and/or rules adopted by Member States in order to comply with such Community law:

- a) the discharge of hydrocarbons, waste oil or sewage into water;
- b) the discharge, emission or introduction of a quantity of materials into air, soil or water and the treatment, disposal, storage, transport, export or import of hazardous waste;
- c) the discharge of waste on or into land or into water, including the operation of a landfill;
- d) the possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof;
- e) the significant deterioration of a protected habitat;
- f) trade in ozone-depleting substances;
- g) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used".

legal system of each Member State, and the fact that there will be an European directive at stake, may bring interesting new perspectives. Moreover, the Explanatory Memorandum also refers to new possibilities of judicial cooperation, which certainly may well improve the whole system itself⁽⁶⁴⁾.

IV.2.1.b Corporations

The proposed directive also refers to corporations, or legal persons⁽⁶⁵⁾, and the problem posed by the principle *societas delinquere non potest*, is still admitted by some Member States. Looking for a solution, the Explanatory Memorandum seeks for an intermediate way: «As concerns legal persons, it is essential for effective enforcement of Community law protecting the environment that legal persons can be held liable and that sanctions against legal persons are taken throughout the Community. However, for some Member States it might be difficult to provide for criminal sanctions against legal persons without changing fundamental principles of their national legal systems. Therefore, Member States would be able to foresee sanctions other than of criminal nature, as long as they are effective, proportionate and dissuasive. For instance, they could impose non-criminal fines, judicial supervision, judicial winding-up orders or exclusion from entitlement to public benefits or aid». Accordingly, article 4 provides, regarding natural persons, that «Member States shall provide for criminal penalties, involving in serious cases deprivation of liberty». However, when it comes to provide sanctions for legal persons (although it is applicable to natural persons as well), article 4 b) indicates that «Member States shall provide for fines, exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision winding up orders». In that way, the European proposal avoids corporations escaping environmental sanctions simply because they are not natural persons.

It is easy to observe that the proposed directive has adopted an extremely pragmatic attitude, trying to obtain solutions to the problems

⁽⁶⁴⁾ «Beyond the rules of this directive, further steps might have to be taken under the EU-Treaty, with regard to improved judicial cooperation. On the basis of the current discussion in the Council following the initiative of the Kingdom of Denmark, it may be envisaged to set up in addition a framework decision according to article 32 (2) b EU. It could concern criminal jurisdiction, measures guaranteeing mutual extradition and/or coordination of prosecutions and investigations»

⁽⁶⁵⁾ Article 2 a) defines «legal persons» as «any legal entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of their sovereign rights and for public international organizations».

which have been posed by different legislations. In fact, the various legal systems of the European Union Member States probably cover the majority of the abovementioned problems. To provide a minimum standard for environmental crimes; to base criminal offences on environmental directives, listed in the Annex, which may increase in number with the different amendments of the directives; the introduction of a flexible system of sanctions for legal persons or corporations: all this implies a high level of flexibility and a powerful instrument towards harmonising the environmental penal system in Europe. The possibility to refer to the European Community Court of Justice is another positive aspect to take into consideration in the future development of this legal area.

IV.2.2. The Present Situation

At the time of writing, there seems to be certain conflict between the European Parliament and the European Commission, on the one hand, who support the proposed Directive and some Member States and the European Council, on the other, who support the Danish initiative. The reason for this different attitude on the use of criminal law for the protection of environment is rather obvious: whereas the proposed Directive is subject to full co-decision under the European Union's «first pillar», Denmark's «third pillar plan would be adopted by Governments alone, nor would the European Court of Justice have jurisdiction over its implementation.

There are similarities, nonetheless, between both initiatives. Both would harmonise the definition of crimes against the environment and require Member States to put in place «effective and dissuasive» penalties against them. Neither would stipulate the precise punishment that offenders should receive. However, though the effects of the initiatives would be similar in practice, Member States fear the Commission proposal would set a precedent for further proposals in other areas of criminal law. This is perhaps the biggest obstacle. Accordingly, the conflict remains unsolved at present.

V. Conclusions

It is evident that environmental criminal law is undergoing an unstoppable evolution. In fact, although it practically did not exist at the beginning of the 70's, right now it is even proposed to be introduced in the European Union, something which was almost inconceivable just a few years ago. However, its unavoidable evolution is completely logical since it is an essential instrument to achieve effective protection of the

environment. The newly created environmental criminal law had to face an important number of problems, due to its characteristics and nature. Recent developments, especially the proposed directive on the protection of the environment through criminal law and the Danish proposal on the same matter, have introduced new and interesting perspectives. In fact, both initiatives within the European Union had to search for new solutions as a way to harmonise the different penal legal systems existing within the European Union. This may represent – whatever be the solution adopted within the European Union – a force for innovation in this new legal area.