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Environmental Criminal Law Dependence on Administrative Law. Assessing the Opportunity for a Limited Number of Offences Being Autonomous from Administrative Law

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1. Pluses and minuses of an "integrated" (criminal-administrative) model of environmental protection. An introdution

A wide ranging and highly debated question in the sphere of environmental criminal law is which techniques of protection are most suitable, in relation to administrative discipline[1].

For a long time, reference has been made to the concept of "accessory criminal law", or "administrative criminal law (*Verwaltungstrafrecht*: the concept has been examined in depth by German legal scholars[2]), in the sense that criminal law in this field lives in close and constant interaction with administrative provisions, adopted at various levels of government: from administrative acts to State regulations, to regional ones, and ending with municipal ones.

The reasons for this traditional and consolidated model of administrative dependence of environmental criminal law are well known[3].

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[1] See M. Catenacci, *La tutela penale dell'ambiente. Contributo all'analisi delle norme a struttura "sanzionatoria"*, Padua, 1996, 53; A. Fiorella, *Ambiente e diritto penale in Italia*, in C. Zanghì (ed.), *Protection of the environment and criminal law*, Bari, 1993, p. 232; C. Ruga Riva, *Diritto penale dell'ambiente*, Torino, 2013, p. 13 ff.; Id., *Parte generale,* in M. Pelissero (a cura di), *Reati contro l'ambiente e il territorio. Trattato teorico-pratico di diritto penale,* Torino, 2013, para. 5 and 8.1; C. Bernasconi, *Il reato ambientale. Tipicità, antigiuridicità, offensività, colpevolezza,* Pisa, 2008, p. 21 ff.; V. Plantamura, *Diritto penale e tutela dell'ambiente*, Bari, 2007, p. 107 ff.; A. L. Vergine, *Ambiente nel diritto penale (tutela dell')*, in *Dig. disc. pen.*, IX, Appendix, Torino, 1995, p. 757 ff.; in European doctrine, v. especially the essays of M. G. Faure, and in particular S. F. Mandiberg-M. G. Faure, *A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe*, in *Columbia Journal of Environmental Law*, 2009, 34, 447, and in *Lewis & Clark Law School Legal Research Paper Series*, 2008-21.

[2] See G. Heine, *Verwaltungsakzessorietdt des Umweltstrafrechts*, in *Neue Juristische Wochenschrift*, 1990, 2425; Id., *Zur Rolle des Strafrechtlichen Umweltschutzes*, in *Zeitschrift Fur Die Gesamte Strafrechtswissenschaften*, 1989, 722; Id., *Aspekte des Umweltstrafrechts im internationalen Vergleieh*, in *Goltdammer's Archiv Fur Strafrecht*, 1986, 88; W. Winkelbauer, *Zur Verwaltungsakzessorietat Des Umweltstrafrechts*, Berlin, 1985.

[3] See C. Bernasconi, *Il reato ambientale*, cit, 21.

The first reason, as regards in particular to Continental law systems, is of a historical nature. Environmental criminal law developed as complementary, *extra-codicem* legislation, whereby the permeation between criminal and administrative norms became physiologically more marked.

The second reason is of a criminal policy nature and is connected to the legal goods involved in environmental law. This area of law lives by its nature in the constant, decisive need to balance the protection of environmental assets (understood in a broad sense, also in reference e.g. to the landscape) with other interests, even constitutionally relevant, such as private economic initiative, employment, the national development policy, the right to housing (if you think of the construction sector), etc. Assuming that the prevalence of one interest over the others cannot be determined *a priori* and theoretically, the managing and solving of potential conflicts is left to authorities endowed with the technical qualifications necessary to carry out specific evaluations and checks[4]; according to an "integrated" criminal-administrative protection model, so called in contrast to a "pure criminal" protection technique, in which the conflict between opposing interests seems to be more easily resolved, in the sense of the prevalence of a given good (the environment, the habitat, the landscape) over the others[5].

With this in mind, the advantages of the integrated (administrative-criminal) model, instead of the "purely criminal" model of environmental protection, would be appreciated in terms of providing more effective prevention, before arriving at levels of repression; while also allowing a more flexible and timely management of the conflict between the various interests at stake in the area at issue, a management aimed at individual, concrete situations[6].

In principle, the integrated administrative-criminal model also offers the advantage of guaranteeing an easier orientation for the operators. The administrative authority is considered, with respect to the judge, a subject with greater cognitive resources, or in any case able to more easily draw on the technical-scientific information most relevant in this area[7]. And, above all, setting generally valid *ex ante* standards (e.g. about emissions), that provides the operators with precise parameters with which to adapt their activities; with beneficial effects in terms of the certainty of precepts.

The disadvantages can instead be firstly grasped on the level of a proliferation of legal sources, especially in legal systems where constitutional provisions require that criminal matters only be governed by Parliament, as the criminal precept in environmental law is often integrated by non-state or subordinate sources of law. Think of the numerous references made by environmental crimes to ministerial decrees, containing threshold values, technical standards, or classifications of certain substances, e.g. as by-product rather than waste[8]. Are they purely specific additions of a technical nature, allowed e.g. by the Italian Constitutional Court[9]? Or do such forms of integration veil evaluations of a

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[4] *Ibid.* p. 23.

[5] For this modeling, see D. Pulitanò, *La formulazione delle fattispecie di reato: oggetti e tecniche,* in CRS (cur.), *Beni e tecniche della tutela penale,* Milano, 1987, p. 37; of a "compositional" nature of the protection technique in the environmental field speaks C. Bernasconi, *Il reato ambientale*, cit., p. 22; cf. G. Fiandaca, U. Tessitore, *Diritto penale e tutela dell'ambiente*, in G. Neppi Modona et al. (cur.), *Materiali per una riforma del sistema penale,* Milano, 1984, p. 36 ff.; G. Insolera, *Modello penalistico puro per la tutela dell'ambiente,* in *Dir. pen. proc.*, 1997, p. 737; S. Panagia, *La tutela dell'ambiente naturale nel diritto penale dell'impresa,* Padua, 1993, p. 2 ff.

[6] V. G. Fiandaca, U. Tessitore, *Diritto penale*, cit., p. 54; C. Bernasconi, *Il reato ambientale*, cit., p. 26.

[7] In the most advanced international literature, v. M. G. Faure, *Environmental Crimes, in Criminal law and economics*, 2009, p. 327; on the relationship between judge and legislator, in the field of environmental criminal law, cf. Id., *The Implementation of the Environmental Crime Directives in Europe*, in Gerardu et al. (eds.), *Ninth International Conference on Environmental Compliance and Enforcement (INECE)*, Washington, 2011, p. 365.

[8] On this issue, see A. R. di Landro, *Rifiuti, sottoprodotti e 'fine del rifiuto' (end of waste): una storia ancora da (ri-)scrivere?*, in *Riv. trim. dir. pen. econ.*, 2014, p. 913 ff.

[9] On the unfoundedness of a question of legitimacy pursuant to art. 25, 2 of the Italian Constitution, in the field of drugs, v. Constitutional Court, n. 333/1991, in www.giurcost.org, 1991: "The discretion of the primary legislator was exercised at the time, between the various possible solutions, the legislator opted for the criterion of the average daily dose, as dividing line between criminally and non-criminally sanctioned detention. As the threshold of punishment is so defined, the type of offence is sufficiently described in its essential elements and, beyond this policy option, only a technical determination remains, based on notions of toxicology, pharmacology and health statistics, but not also a choice of criminal policy (so much so that the penal precept could exist autonomously, even without the integration of the ministerial decree [...]). It is therefore this technical knowledge that fixes in sufficiently defined terms the coordinates of the integration submitted to the Minister of Health, which is

political nature regarding the balance of environmental and productive interests, evaluations that should rather be remitted to Parliament[10]?

A possible way out of the problematic and thorny co-existence between principles of criminal law reserved to Parliament and secondary, not exclusively 'technical' or regulatory sources, is to introduce relevant shares of democratic legitimacy through the formation process of secondary regulatory rules, on the basis of general principles (such as those originating from International and European Law[11]: of participation for collaborative purposes in the environmental field.

2. The purely accessory model as the first possible form of integration between criminal and administrative law: examples from the legislations of Germany, France and USA

At this point, it seems useful to introduce a bifurcation between two different integrated protection sub-models corresponding, respectively, to the so-called "purely accessory" (or "purely sanctioning") model on the one hand and the "partially accessory" (or "partially sanctioning") one on the other.

In "purely accessory" model, the criminal discipline represents the mere sanctioning appendix of precepts and procedures belonging to other fields of the legal system, in our case administrative law at both national and local level. A typical 'formal' criminal law[12] , which consists in the punishment of mere 'disobedience'[13], regardless of any connection to an event of damage or danger to environmental goods[14].

It is the most criticized technique of environmental criminal law protection, precisely because of the excessive dependence on extra-criminal legal sources[15], as regards:

1) A protection of administrative functions, rather than environmental assets[16];

2) A protection inherent to the very ineffective form of the environmental misdemeanor[17]: where it is difficult to accumulate evidence (minor crimes usually do not allow probative instruments like wiretapping), and easy to cancel out the crime (through statute barred and bail);

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therefore required to exercise only technical discretion: the updates indeed are possible only in the case of 'evolution of knowledge of the sector' (and not of tightening or loosening of the repression of the trafficking). With this in mind, the criterion indicated in sub c) of the first paragraph of art. 78 – according to which "the maximum quantitative limits must be established in relation to the active ingredient for the average daily doses" – appears to bind, in a way sufficiently adequate to the current state of the aforementioned knowledge, the determination of the Minister of Health, to whom the law does not allow any evaluation in terms of prevention or repression, that is, aimed at integrating the choice of criminal policy that only primary legislation can operate".

[10] On the problem of the proliferation of the legal sources, especially in the legal systems where constitutional provisions require that criminal matter only be governed by Parliament, and on the problem, in those legal systems, of distinguishing the 'technical' and 'political' evaluations, the first ones that can be remitted to non-state or subordinate legal sources, the latter to be governed by the Parliament, see M. Catenacci, *I reati in materia di ambiente,* in A. Fiorella (cur.), *Questioni fondamentali della parte speciale del diritto penale*, Torino, 2013, p. 368; F. Giunta, *Ideologie punitive e tecniche di normazione nel diritto penale dell'ambiente*, in *Riv. trim. dir. pen. econ*., 2002, p. 852; A. Manna, *Struttura e funzione dell'illecito penale ambientale. Le caratteristiche della normativa sovranazionale*, in *Giur. mer*., 2004, p. 2172; C. Ruga Riva, *Diritto penale dell'ambiente*, cit., p. 42 ff.; V. Plantamura, *Diritto penale e tutela dell'ambiente*, cit., p. 151 ff.

[11] Provided for by Århus Convention (1998), on *Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, and by Directive 2003/35/EC, *Providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.*

[12] See F. Giunta, *Tutela dell'ambiente (diritto penale)*, in *Enc. dir., Annals*, II, tome 2, Milano, 2008, p. 1154.

[13] See P. Patrono, *I reati in materia di ambiente*, in *Riv. trim. dir. pen. econ*., 2000, p. 680 ff.

[14] See C. Bernasconi, *Il reato ambientale*, cit., p. 29.

[15] See V. Plantamura, *Diritto penale e tutela dell'ambiente*, cit., p. 146 ff.; for recent criticisms of the sanctioning model see A. L. Vergine, *I nuovi delitti ambientali: a proposito del d.d.l. n. 1345/2014*, in *Amb. & Svil*., 2014, p. 445; G. Amendola, *Il d.d.l. sui delitti ambientali oggi all'esame del Parlamento: spunti di riflessione*, report presented to the Senate and published on www.lexambiente.it, 2014.

[16] See F. Giunta, *Il diritto penale dell'ambiente in Italia: tutela di beni o tutela di funzioni?*, in *Riv. it. dir. proc. pen.*, p. 1112.

[17] See C. Ruga Riva, *Diritto penale dell'ambiente*, cit., p. 20 ff.

3) A protection potentially in conflict with the principle of harm to others: it risks punishing facts that are not conform to the norms, but are harmless[18];
4) An incomplete protection that it risks not punishing facts that are conform to the administrative norms, but are offensive to environmental goods[19].

For legal systems in which principles of criminal law are reserved solely to the Parliament, the purely accessory model is the one that is exposed to major objections: the hetero-integration of the criminal law by external sources, indeed, does not concern detailed aspects, but only the most significant elements of the offence, from a structural and/or value oriented point of view. The penal precept does not receive "its entire enunciation with the imposition of the ban"[20]: requirements, characteristics, content and limits of subordinate acts determined as essential for the type of offence are not indicated by the primary law. Think of the type of offence built on the overcoming of threshold limits (regarding discharges, the introduction of chemical substances, electromagnetic wave emission, etc.), centered on non-compliance with parameters intended to be specified or modified by the determinations of administrative bodies, or ministerial decrees, permeated with evaluations apparently more political than technical.

The purely accessory model of criminal protection of the environment, despite the limits just highlighted, is still wide spread in many countries, in complementary *extra-codicem* legislations as well as in the codes.

A) Germany (*some types of purely accessory offences*).

The German Criminal Code in section 327 contemplates various conducts of unauthorized operation of facilities, and in particular in subsection I, punishes with imprisonment for a term not exceeding five years or a fine:

> Whoever 1. Operates a nuclear facility, possesses an operational or decommissioned nuclear facility or in whole or in part dismantles such a facility or substantially modifies its operation or 2. Substantially modifies a plant in which nuclear fuels are used or its location without the required permit or contrary to an enforceable prohibition".

And in subsection II with the slighter penalty of imprisonment for a term not exceeding three years, or a fine for:

> Whoever operates 1. A facility that requires a permit or any other facility within the meaning of the Emission Control Act (*Immissionsschutzgesetz*) whose operation has been prohibited in order to protect against hazards 2. A pipeline facility for the transportation of water-polluting substances within the meaning of the Environmental Impact Analysis Act (*Gesetz über die Umweltverträglichkeitsprüfung*) that requires a permit 3. A waste disposal facility within the meaning of the Closed Substance Cycle Act (*Kreislaufwirtschaftsgesetz*) or 4. A sewage treatment facility under section 60(3) of the Federal Water Act (*Wasserhaushaltsgesetz*).
> Without a permit or the planning approval required under the relevant statute or contrary to an enforceable prohibition based on the relevant legislation.

In the pure sanctioning model, the pivot of the crime structure is towards the unlawfulness of the conduct: unlawfulness that may arise from the violation of the conditions imposed by laws, regulations, statutes, or by the permit itself, as well as the absence of necessary permits or authorizations.

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[18] See P. Patrono, *I reati in materia di ambiente*, cit.; about the threshold limits in criminal law, F. D'Alessandro, *Pericolo astratto e limiti-soglia. Le promesse non mantenute del diritto penale,* Milano, 2012, p. 255 ff.; with reference to crimes of abstract danger, cf. S. F. Mandiberg- M. G. Faure, *A Graduated Punishment Approach to Environmental Crimes*, cit., par. II A, p. 8 ff. (draft).
[19] See S. F. Mandiberg, M. G. Faure *A Graduated Punishment Approach to Environmental Crimes*, cit., par. II, A, 8; P. Patrono, *I reati in materia di ambiente*, cit., p. 679.
[20] According eg. to the well-known teachings of the Italian Constitutional: Italian Court Constitutional Court, sentence no. 282/1990, cit., as well as previously Constitutional Court, no. 26/1966, in *Giur. cost.*, 1966, p. 255 ff.; and Constitutional Court, n. 168/1971, *ibid.*, p. 1971, 1774, with note of A. Pace.

B) France.

Analyzing the criminal environmental legislation of another European country, as an example of articulated and complex crime with a purely accessory structure, it is possible to cite art. L. 541-46, subsection I, of the French environmental code, as recently modified by Law n° 2021 (1104 of August 22, 2021), art. 279:

> It is punishable by two years imprisonment and a fine of 75,000 euros the act of:
> 1. Refusing to provide the administration with the information mentioned in subsection III of Article L. 541-9 or providing inaccurate information;
> 2. Being unaware of the prescriptions of subsections I and II of article L. 541-9, of subsection IV of article L. 541-10 or of article L. 541-10-22;
> 3. Refusing to provide the administration with the information referred to in Article L. 541-7 or providing inaccurate information, or voluntarily making it physically impossible to provide this information;
> 4. Abandoning, depositing or having deposited waste, under conditions contrary to the provisions of this chapter;
> 5. Carrying out the collection, transport or brokerage or trading operations of waste without meeting the requirements taken under Article L. 541-8 and its implementational acts;
> 6. Delivering or having delivered waste to anyone other than the operator of an approved installation, in disregard of Article L. 541-22;
> 7. Managing waste pursuant to article L. 541-1-1 without holding the authorization provided for by Article L. 541-22;
> 8. Managing waste pursuant to Article L. 541-1-1, without meeting the requirements concerning the characteristics, quantities, technical and financial conditions for handling the waste and the treatment processes established in the application of Articles L. 541-2, L. 541-2-1, L. 541-7-2, L. 541-21-1, L. 541-21-2 and L. 541-22;
> 9. Being unaware of the prescriptions of Articles L. 541-10-23, L. 541-31, L. 541-32 or L. 541-32-1.

A criminal regulation that certainly does not stand out for its legibility and clarity, corroborating just how the purely sanctioning model, through the cross-reference technique, raises several problems based on the principles of certainty, obliging the interpreter and (what is worse) the operators to a strenuous exercise of researching and running after the relevant data.

C) USA.

Looking overseas, in the US law we can see a lesser diffusion of strongly accessory (to administrative law) to federal crimes, aimed at punishing violations of regulations, authorizations or permits, even in the absence of any emission, discharge or abandonment[21].

The Clean Air Act (*CAA*) of 1963 contains a provision that can be said to belong to this category. Such legislative act amends Title 42, about public health and welfare, of the United States Code (USC), regulating federal enforcement (art. 7413) through criminal sanctions (letter c), in the following terms:

> 1. Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475(a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a(a) or 7661b(c) of this title (relating to permits), or any requirement or prohibition of subchapter IV–A (relating to acid deposition control), or subchapter VI (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, and

[21] Cf. S. F. Mandiberg, M. G. Faure, *A Graduated Punishment Approach to Environmental Crimes*, cit., p. 11.

> including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II) shall, upon conviction, be punished by a fine pursuant to title 18 or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

Due to its complexity, it is a criminal rule that is not easy to decipher and is almost impracticable for interpreters not accustomed to drafting techniques of this kind. The type of environmental offence is constructed as an appendix sanctioning a large number of administrative precepts, even some tax law provisions, when an appropriate place for it seems to be of another type.

Another of the, fortunately few, crimes of a purely accessory mold in US environmental legislation has been introduced with the Resource Conservation and Recovery Act (RCRA) of 1976. This regulation also intervenes on title 42 of the USC, with the provision of a federal enforcement, in the form of criminal penalties (art. 6928-d), such as a fine of not more than $ 50,000 for each day of violation, or imprisonment not to exceed five years, or both, for anyone who "knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter [...] Or, in knowing violation of any material condition or requirement of any applicable interim status regulations or standards"(art. 3008-d-2 RCRA / 6928-d-2 USC).

The penalty of imprisonment, always alternative to or combined with a fine of not more than $50,000, drops to an edictal maximum of two years, for anyone who "knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement "(art. 3008-d-6 RCRA / 6928-d-6 USC).

And the same penalties are provided for anyone who:

> knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter —
> (A) In knowing violation of any material condition or requirement of a permit under this subchapter; or
> (B) In knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter" (art. 3008-d-7 RCRA / 6928-d-7 USC).

Activities carried out in the absence of required authorizations or permits, represent the most numerous types of punishable offences found under US law.

The RCRA punishes with imprisonment for not to exceed five years, alone or jointly with a fine of not more than $ 50,000 for each day of violation, anyone who:

> (1) Knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.],
> (2) Knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—
> (A) Without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.]; or
> (B) In knowing violation of any material condition or requirement of such permit; or
> (C) In knowing violation of any material condition or requirement of any applicable interim status regulations or standards; under Title I of the Law on Protection, Research and Reserves marine (86 Stat. 1052) [33 U.S.C. 1411 et seq.] "(Art. 3008-d-1,2 RCRA /6928-d-1,2 USC).

While the aforementioned CAA punishes, with the sanctions seen above (42 USC 7413-c-1), anyone who:

— after the effective date of any permit program approved or promulgated under this subchapter, […] operate an affected source (as provided in subchapter IV–A), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts [1] C or D of subchapter I, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) [42 USC 7661-a, subsection a].

3. The partially accessory model as the second possible form of integration between criminal and administrative law; examples from the legislation of Germany, Austria, Portugal, Spain, France, England, EU and USA

The so-called partially accessory protection model (also recently accepted in the Italian criminal code) creates less friction with the principle of harm, the principle of effectiveness, as well as with the legal provisions requiring, in some legal systems, that certain matters only be governed by Parliament.

In the partially accessory model, the conduct must not only violate extra-criminal provisions, but also produce an event of damage or danger[22].

An intermediate paradigm, which is "halfway" to the "autonomous" criminal law model. The element of causation of the damage or danger is typical of "classic" criminal law, but this model is not autonomous from administrative law, since the violation of extra-criminal legislation remains an essential modality of the offence to the good.

The residual accessory component preserves the principle of unity of the legal system: a behavior permitted by administrative law cannot be sanctioned by criminal law[23].

As in the model seen above, the note of unlawfulness connoting the conduct can take the form of the absence of the necessary permissions or authorizations, or the violation of the conditions established by law, regulations, statutes, or by the authorization itself.

A) Germany (*"special unlawfulness" clauses*).

Section 324 of the German Criminal Code (*Strafgesetzbuch: StGB*), subsection 1, makes the following statement with regards to water pollution:

> Whoever, without being authorized to do so [*unbefugt*[24]], contaminates a body of water or otherwise negatively alters its properties incurs a penalty of imprisonment for a term not exceeding five years or a fine.

The subsequent Section 324a, which addresses soil pollution, punishes offenders with the same alternative punishment:

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[22] See C. Bernasconi, *The environmental crime*, cit., p. 29 s. e 114 ff.; V. Plantamura, *Criminal law and protection*, cit., p. 160 ss.; M. Caterini, *L'ambiente "penalizzato". Storia e prospettive dell'antagonismo tra esigenze preventive e reale offensività*, in K. Aquilina, P. Iaquinta (cur.), *Il sistema ambiente, tra etica, diritto ed economia*, Milano, 2013, p. 141.

[23] Cf. M. Maiwald, *Il diritto dell'ambiente nella Repubblica federale tedesca*, in M. Catenacci, G. Marconi (cur.), *Temi di diritto penale dell'economia e dell'ambiente*, Torino, 2009, p. 325.

[24] The term "*unbefugt*" literally means without authorization, but seems to occur in the German legal system also in the more comprehensive meaning of "unlawfully": this is also the understanding of the German scholar of comparative law M. Bohlander, in *www.gesetze-im.internet.de*, website of the *Bundesministerium der Justiz* (Ministry of Justice).

(1) Whoever, in breach of duties under administrative law, introduces, allows substances to penetrate or releases substances into the soil, and thereby contaminates it or otherwise negatively alters it
1. In a manner which can cause damage to the health of another, to animals or plants, other property of significant value or a body of water or
2. To a significant extent.

To complete the picture, with regards to air pollution, Section 325, subsections (1) and (2), punishes offenders with the same penalty of imprisonment for a term not exceeding five years or a fine:

(1) Whoever, in the operations of a facility, in particular a plant or a machine, in breach of duties under administrative law, causes alterations of the air which are capable of causing damage to the health of another, to animals or plants or other property of significant value outside the area belonging to the facility […]
(2) Whoever, in the operations of a facility, in particular a plant or a machine, in breach of duties under administrative law, releases harmful substances in significant amounts into the air outside the grounds of the facility.

And with a milder sanction of imprisonment for a term not exceeding three years, again as an alternative to a fine, in subsection (3): "Whoever, in breach of duties under administrative law, releases harmful substances in a significant amount into the air […] unless the offence is subject to a penalty under subsection (2)." Subsection (6) provides the definition of harmful substances:

'Harmful substances' included within the definitions of subsections (2) and (3) are substances that are capable of
1. Causing damage to the health of another, to animals or plants or other property of significant value or
2. Permanently contaminating or otherwise negatively and permanently altering a body of water, air or soil.

Some quick notes.
The "special unlawfulness" clauses of eco-crimes seem to have been constructed by the German legislator in broad terms, through the asides "without being authorized to do so" (*unbefugt*) and "in breach of duties under administrative law " (*unter Verletzung verwaltungsrechtlicher Pflichten*).
The first term in German recurs both in the literal meaning of "without authorization" (*nicht berechtigt*), as well as in the wider meaning of "unlawfully" (*nicht erlaubt*)[25].
The second term is defined by the legislator, in Section 330d *StGB*, and clarifies that a "duty under administrative law" means a duty arising from:

a) A legal provision,
b) A court decision,
c) An enforceable administrative act,
d) An enforceable condition or
e) A contract under public law, to the extent that the duty could also have been imposed by an administrative act and which serves to protect against hazards or harmful environmental impacts, in particular on humans, animals or plants, bodies of water, the air or soil.

Unlike in other legal systems, where offences to various environmental goods (water, air, soil/subsoil) are grouped together into a single crime (e.g. in art. 452 *bis* of the Italian Criminal Code), the German criminal code seems to create a different protection status for water (§ 324 *StGB*), which is protected even when the alteration does not reach a significant level.
As far as soil is concerned, significant deterioration (§ 324 a, subsection 1 *StGB*) is placed as an alternative to the danger to human health, animals, plants, a body of water or other property of significant value (§ 324 a, subsection 2, *StGB*).

[25] See Langenscheidt Dictionary, München, 2015.

Finally, with regards to air, the German legislator makes a distinction between harmful emissions in the management of business activities (§ 325, subsection 1-2, *StGB*) and those caused by any physical person, which is punishable to a lesser extent (§ 325, subsection 3, *StGB*).
With reference to the problem of offensiveness, raised by offences of abstract danger characteristic of the purely accessory model, the partially accessory model allows a significant step forward by requiring, contrarily, the occurrence of an offence, whether that is of damage or danger.

The defining of offences to environmental goods guarantees a more pregnant dimension of protection, appropriately relocating the center of gravity of the protection, from abstract administrative and control functions, to "denser" (on the level of content or material) legal goods.

Thus, at the same time, the problem of effectiveness is also met, since the presence of the element of damage or danger favors the passage from the area of misdemeanors to the area of delicts/felonies, and therefore, to the "effective, proportionate and dissuasive" sanctions required by Directive 2008/99/EC, both for physical persons (art. 5) and legal persons (art. 7)[26].

The types of offences within a partially accessory structure, as opposed to a purely accessory one, appear to be more consistent with provisions requiring, in many legal systems, that certain matters only be governed by parliament, since the hetero-integration by cross-reference to administrative law, expressed by clauses of special unlawfulness, do not constitute the main axis of the incrimination, which is rather centered on the production of a danger or a damage: The reference to extra-criminal discipline, which represents the modality offending the good at issue, appears in the construction of the crime as "not preponderant", from either a structural nor a value point of view[27].

B) Austria.

The partially accessory model adopted by German legislature in 1980 represents, compared to the purely accessory model, a welcome development in the field of environmental protection; this is evidenced by the fact that it has also been largely adopted by other countries, who have subsequently introduced eco-crimes into their criminal codes.

The Austrian legislator of 1989[28], for example, has provided for the crime of voluntary damage to the environment, in Section 180 of the Criminal Code, as described as follows:

> Whoever, in violation of a legal rule or an order by authority, pollutes or damages water, land or air in such a way that thereby
> 1. Endangers life or causes serious bodily harm (section 84(1)) of another person, or otherwise to the health or physical safety of many people,
> 2. Endangers animal or plant populations to a considerable extent.

C) Portugal (*a recent extension of the special unlawfulness claus*e).

Portugal introduced eco-crimes into the Criminal Code (Code dated 1982) in 1995[29].

Since that time, the crime of damage to nature, provided for by article 278 of the Portuguese Criminal Code, has undergone several modifications, most recently by Act no. 81 of 3 august 2015.

In its current formulation, the crime continues to present a partially accessory structure, though enriched in comparison to the previous version. According to subsection I, in particular:

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[26] On sanctions as the 'definitive test bench' of the implementation of Directive 2008/99/CE, see recently A. Alberico, *Obblighi di incriminazione e "controlimiti" nell'adempimento della Direttiva 2008/99/CE in materia di tutela penale dell'ambiente*, in *Riv. trim. dir. pen. econ.*, 2014, p. 265 ff.
[27] Cf. V. Plantamura, cit., p. 163
[28] See G. Azzali, *La tutela penale dell'ambiente: il "modello austriaco"*, in *Riv. trim. dir. pen. econ.*, 1998, p. 1 ff.
[29] See J. De Figueiredo Dias, *The Portuguese Criminal Code of 1982 and its reform*, in *Riv. it. dir. proc. pen.*, 1995, p. 25; Id., *Introduction*, in *Il codice penale portoghese* (translated and edited by G. Torre), Padova, Italy, 1997; recently, see R. M. Pereira, *Environmental Criminal Liability and Enforcement in European and International Law*, Leiden, 2015, p. 219 ff.

> Whoever fails to observe provisions of laws, regulations, or obligations imposed by the competent authority in accordance with such provisions:
> (a) Suppresses, destroys or captures specimens of protected species of wild fauna or flora, animal or plant, or suppresses specimens of fauna or flora in a significant manner;
> (b) Destroys or significantly damages a natural habitat;
> (b) Destroys or significantly damages a protected natural habitat or an unprotected natural habitat causing the latter a loss of protected species of wild fauna or flora in significant number; or
> (c) Depletes subsurface resources in a serious manner;
> shall be punished by imprisonment for a term not exceeding five years.

The second subsection of the same provision provides for less serious penalties of imprisonment for a term not exceeding two years or a fine for an amount not exceeding 360 days for:

> Whoever, by failing to comply with the provisions of laws, regulations or obligations imposed by the competent authority in accordance with such provisions, puts on the market or holds for trading purposes a specimen of a protected species of wild fauna or flora, alive or dead, or any part or product obtained therefrom.

And continuing, in an ideal scale of descending gravity, according to subsection III:

> Whoever, by failing to comply with the provisions of laws, regulations, or obligations imposed by the competent authority in accordance with such provisions, possesses or holds a specimen of protected species of wild fauna or flora, shall be punished with imprisonment for a term not exceeding one year or with a fine for an amount not exceeding 240 days.

At the end of the descending climax, subsection IV of the same provision codifies a hypothesis of particular tenuity/exiguity:

> The conduct referred to in the preceding subsection is not punishable if:
> (a) The number of specimens held is not significant; and
> (b) The impact on the conservation of the species concerned is not significant.

Another cardinal norm of the Portuguese system of environmental protection through criminal law is article 279 of the Penal Code, regarding environmental pollution (this crime was also reformed by Act No. 81/2015). The crime is equated to the previous one, due to the presence of an identical component of special unlawfulness: according to subsection I:

> Whoever, by failing to comply with the provisions of laws, regulations, or obligations imposed by the competent authority in accordance with these provisions, causes noise pollution or pollutes the air, water, soil or otherwise worsens the quality of these environmental components, causing significant damage, shall be punished with imprisonment for a term not exceeding five years.

The same punishment is provided for in subsection II for:

> Whoever, by failing to comply with provisions of laws, regulations, or obligations imposed by the competent authority in accordance with such provisions, causes substantial damage to the quality of air, water, soil, fauna or flora, by proceeding with:
> (a) The discharge, emission or introduction of ionizing materials or ionizing radiation into air, soil or water,
> (b) The operations of collection, transport, storage, sorting, treatment, recovery and disposal of waste, including the aftercare of disposal sites, and the activities carried out by dealers and intermediaries,
> (c) The operation of an installation in which a dangerous activity is carried out or in which dangerous substances or mixtures are stored or used; or
> (d) The production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances;
> shall be punished by a maximum imprisonment of five years.

Whereas subsection III provides for the following 'minor' offence of danger, rather than damage:

> When the acts described in the preceding subsections are likely to cause substantial damage to the quality of air, water or soil or to fauna or flora, the perpetrator shall be punished by imprisonment for a term not exceeding three years or a fine for an amount not exceeding 600 days.

The Portuguese legislator, like the German one, seems to have put effort into clarifying definitions.

Article 279(VI) of the Portuguese Criminal Code provides a detailed list of what may constitute substantial damage. Within the context of the previous subsections:

> Substantial damage is considered
> a) The prejudice, significant or lasting, of physical integrity or well-being of persons in the enjoyment of nature
> (b) The significant or permanent impairment of the use of an environmental component;
> (c) The spread of microorganisms or substances harmful to the body or health of humans;
> (d) Causing significant impact on the conservation of species or their habitats; or
> (e) The significant impairment of the quality or status of an environmental component.

The framework of protection is brought to completion by legislation introduced in 2011 (art. 279 A) which addresses offences with regards to activities that endanger the environment:

> Whoever proceeds to the shipment of waste, where such activity falls within the scope of application of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and the Council of 14 June 2006 on shipments of waste, and is carried out in a non-negligible quantity, whether it is a single shipment or several apparently linked shipments, shall be punished by imprisonment for a term not exceeding three years or a fine for an amount not exceeding 600 days.

The conduct is described by means of a reference to a European legal source, the Regulation (EC) No. 1013/2006 of 14 June 2006, Art. 2 (35), which provides that:

> 'illegal shipment' means any shipment of waste effectuated:
> (a) Without notification to all competent authorities concerned pursuant to this Regulation; or
> (b) Without the consent of the competent authorities concerned pursuant to this Regulation; or
> (c) With consent obtained from the competent authorities concerned through falsification, misrepresentation or fraud; or
> (d) In a way which is not specified materially in the notification or movement documents; or
> (e) In a way which results in recovery or disposal in contravention of Community or international rules; or
> (f) Contrary to Articles 34, 36, 39, 40, 41 and 43; or which, in relation to shipments of waste as referred to in Article 3(2) and (4), has resulted from:
> i. The waste being discovered not to be listed in Annexes III, IIIA or IIIB, or
> ii. The non-compliance with Article 3(4),
> iii. The shipment being effected in a way which is not specified materially in the document set out in Annex VII.

Aside from the difficulties in reading and interpreting the norm, due to the often "suffocating" techniques of cross-referencing and numbering practiced in environmental (first by European and then by national) law, it stands to be noted that the sub-categories referred to in the above-mentioned provision include not only cases in which the cross-border shipment of waste is not authorized by the competent authorities concerned, but also in cases in which the authorization is obtained by means of

falsification, misrepresentation or fraud, or where the shipment, although formally authorized, is in conflict with other provisions of the Regulation, or with European or international law, more generally[30].

According to this approach, the court, irrespective of whether the shipment at issue is authorized, has to verify the lawfulness of the shipment, in so far as it is carrying out a disposal or recovery contrary to the legislation on waste management.

The final and most serious offence in the Portuguese Criminal Code regards pollution with common danger (Art. 280):

> Whoever, through conduct described in paragraphs 1, 2 [see before] and 7 [ship-source pollution] of article 279, creates danger to the life or physical integrity of another person, to third-party property of high value or to cultural or historical monuments, shall be punished by imprisonment:
> (a) From 1 to 8 years, if the conduct and the creation of danger are intentional;
> (b) Up to six years, if the conduct is intentional and the creation of danger occurs through negligence.

The structure of all eco-offences present in the Portuguese Criminal Code appears, in the end, to be a partially accessory model. The special offence clause, initially provided for in the wording "by not complying with provision of laws and regulations", is subsequently extended by adding to it the phrase, of specific content, "or obligations imposed by the competent authority in accordance with those provisions".

D) Spain (*two different clauses of special illegality*).

The Spanish Criminal Code of 1995 regulates "offences against natural resources and the environment", distinguishing them from "offences relating to land use and town planning", "offences against historical heritage" and those "relating to the protection of flora, fauna and domestic animals".

Article 325[31], subsection (I), in light of the amendments made by Organic Law (Ley orgànica) No. 1 of 30/3/2015, provides that:

> Anyone who, in contravention of the laws or other general provisions in the protection of the environment, directly or indirectly causes or carries out emissions, discharges, radiations, extractions or excavations, landfalls, noises, vibrations, injections or deposits in the atmosphere, soil, subsoil or land, underground or sea waters, including the high seas and trans boundary areas, as well as the abstraction of water which, alone or jointly with others, causes or is likely to cause substantial damage to the quality of air, soil or water, or to animals or plants, shall be punished with a prison sentence from six months to two years, a fine from ten to fourteen months and special disqualification for a period from one to two years.

The progression of the offence is outlined in the following subsection:

> If the above conducts, alone or jointly with others, could seriously damage the equilibrium of natural systems, a prison sentence from two to five years, a fine from eight to twenty-four months and special disqualification from a profession or trade for a period from one to three years shall be imposed.
> If a risk of serious harm to human health has been created, the term of imprisonment shall be in the higher range and able to reach the highest level.

[30] On the problems in terms of precision and knowability of the criminal norm, that such a wide-ranging reference may entail, see C. Ruga Riva, *Diritto penale dell'ambiente* , cit., p. 147; G. De Santis, *Diritto penale dell'ambiente. Un'ipotesi sistematica*, Milano, 2012, p. 290.

[31] On the interpretation of the offences typified in Article 325 of the Spanish Criminal Code, in the version prior to the latest reforms, see M. Polaino Navarrete, *Riflessioni sul delitto ecologico nel modello del Codice penale spagnolo del 1995*, in M. Catenacci, G. Marconi (cur.), *Temi di diritto penale dell'economia e dell'ambiente*, cit., p. 309; L. Siracusa, *La tutela penale dell'ambiente. Bene giuridico e tecniche di incriminazione*, Milano, 2007, p. 247 ff.

Article 326 of the Iberian Penal Code deals with waste and subsection I, in particular, deals with the management of waste:

> The penalties provided for in the previous article shall be imposed on those who, in contravention of the law or other general provisions, collect, transport, recover, transform, dispose of or use waste, or fail to adequately control or monitor such activities, in a way that causes or may cause substantial damage to the quality of air, soil or water, or to animals or plants, death or serious injury to persons, or may seriously damage the equilibrium of natural systems.

Subsection II deals with the trafficking of illegal waste:

> Anyone who, outside the cases referred to in the preceding subsection, transfers a non-negligible quantity of waste, whether in the case of one or more shipments which appear to be linked, in one of the cases referred to in European Union law on waste shipments, shall be punished by a prison sentence from three months to one year, or a fine from six to eighteen months and disqualification from the profession or trade for a period from three months to one year.

Activities deemed dangerous for the environment are the subject of Art. 326-*bis*, recently introduced by Organic Law 1/2015:

> Those who, in contravention of the law or other general provisions, carry out the managing of plants in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used in such a way that they cause or may cause substantial damage to the quality of air, soil or water, to animals or plants, death or serious injury to persons, or may seriously damage the equilibrium of natural systems, shall be punished with the penalties provided for in Article 325, in the respective cases.

All these rules have a partially accessory structure: The first through its inclusion of a special offence clause that is narrower than the others, since the reference is to the violation of "laws or other general provisions in the protection of the environment"; while in the case of waste and dangerous activities, this last clause disappears to make room for the violation of "laws or other general provisions" of any kind.

Article 327 of the Spanish Criminal Code, furthermore, contains an extensive list of aggravating circumstances:

> The acts referred to in the three previous articles shall be punished with the highest penalty in degree, without prejudice to those that may be applicable in accordance with other precepts of this Code, when any of the following circumstances concurs in the commission of any of the acts described in the previous article:
> a) That the industry or activity operates clandestinely, without having obtained the mandatory authorization or administrative approval of its installations.
> b) That the express orders of the administrative authority to correct or suspend the activities typified in the previous article have been disobeyed.
> c) Falsification or concealment of information on environmental matters.
> d) That the inspection activity of the Administration has been obstructed.
> e) That there has been a risk of irreversible or catastrophic deterioration.
> f) Illegal extraction of water during the period of restrictions.

It is worth noting that, in the systematics of the Spanish legislator, the 'clandestine nature' of the conduct is constructed as a more serious species of illegality[32]; likewise, the hypotheses of "risk of

[32] For "criticism of the Spanish legislator's choice to provide for the absence of authorisation as an aggravating circumstance", see L. Siracusa, *La tutela penale dell'ambiente,* cit., p. 270 ff. (and p. 286 ff. on the other aggravating circumstances).

irreversible or catastrophic deterioration" (Art. 327 (e)), and (although more doubtful[33]) of the "risk of serious harm to persons" (Art. 325, last subsection) are configured as aggravating circumstances.

E) France (*strengthening of the "protective umbrella" of authorization*).

Continuing to delve into the legislation of European countries, without any claim to being fully comprehensive, but with the objective of testing the various possible forms of integration between criminal and administrative protection in the environmental field, it seems appropriate to devote attention to the French system, where environmental offences are not included in the criminal code (with the exception of the more serious crime of ecological terrorism, see *infra*, par. 4.4), but rather in a single text of complementary legislation, the Environmental Code (in force since 2002). It is interesting to observe how the link with administrative law, typical of the partially accessory model, can be stiffened here by the presence of certain rules.

According to Article L. 216-6 of the French environmental code, subsection I:

> The act of throwing, discharging or allowing to flow into surface or underground waters or the waters of the sea within the limits of territorial waters, directly or indirectly, any substance or substances whose action or reactions lead, even temporarily, to harmful effects on health or damage to flora or fauna, with the exception of the damage referred to in Articles L. 218-73 and L. 432-2, or significant modifications to the normal water supply regime or limitations on the use of bathing areas, is punishable by two years' imprisonment and a fine of 75,000 euros. *When the discharge operation is authorized by order, the provisions of this subsection only apply if the requirements of this order are not respected* (italics added).

Focusing on this last part of the provision, it is notable, in the panorama of the European States' legislation that have been rapidly reviewed so far, in its effort to expressly resolve the potential conflict between authorization and the underlying general legislation.

The solution offered by the French legislature seems to make the most of the criminal law principles of certainty and culpability. If the person acts in conformity with the authorization, he does not appear to be punishable where the authorization is flawed; nor where the authorization is lawful, and the person is accused of violating other regulations or a 'residue' of so-called general guilt: The agent seems to be punishable only in the event of violation of the authorization itself and must relate solely to that individual administrative act.

One could argue that this is a strong model of permit defence, which cannot be easily overridden in the courts; unlike with what can happen with special illegality clauses constructed in other ways.

F) England and Wales (*the "strong model" of permit defence*).

Remaining within the European context, consider offences regarding water pollution under English law, in particular the combined provisions of Articles 12/1, 38/1 and 39/1 of Environmental Permitting (England and Wales) Regulations (EPR) 2010, which replace the previous Aquatic Resources Act (1991), linking criminal liability for water pollution more closely to the permit system[34].

According to the first of the above regulations:

> 12. (1) A person must not, except under and to the extent authorized by an environmental permit
> (a) Operate a regulated facility; or
> (b) Cause or knowingly permit a water discharge activity or groundwater activity.

[33] See M. Polaino Navarrete, *Riflessioni sul delitto ecologico*, cit., p. 313 ff.; L. Siracusa, *La tutela penale dell'ambiente*, cit., p. 292 ff.

[34] See S. Wolf, N. Stanley, *Wolf and Stanley on environmental law*, Abingdon, 2014, p. 135 ff. On the system of authorisations and the type of offences about water pollution, E. Fisher, B. Lange, Scotford, *Environmental Law: Text, Cases and Materials*, Oxford, 2013, p. 579 ff.

The *offences* provided for by Art. 38(1) EPR are: to "contravene regulation 12(1)", or to "knowingly cause or knowingly permit the contravention of regulation 12(1)(a)"; and these are the *penalties* (Art. 39 (1) EPR):

(a) On summary conviction[35] to a fine not exceeding £50,000 or imprisonment for a term not exceeding 12 months, or to both; or
(b) On conviction on indictment[36] to a fine[37] or imprisonment for a term not exceeding 5 years, or to both.

The concepts of "water discharge activities" and "groundwater activities" are defined in the subsequent Annexes to the Regulations, and in particular the first one in the Schedule 21, art. 3, subsection 1:

A "water discharge activity" means any of the following—
(a) The discharge or entry to inland freshwaters, coastal waters or relevant territorial waters of any
(i) Poisonous, noxious or polluting matter,
(ii) Waste matter, or
(iii) Trade effluent or sewage effluent;
(b) The discharge from land through a pipe into the sea outside the seaward limits of relevant territorial waters of any trade effluent or sewage effluent;
(c) The removal from any part of the bottom, channel or bed of any inland freshwaters of a deposit accumulated by reason of any dam, weir or sluice holding back the waters, by causing it to be carried away in suspension in the waters, unless the activity is carried on in the exercise of a power conferred by or under any enactment relating to land drainage, flood prevention or navigation;
(d) The cutting or uprooting of a substantial amount of vegetation in any inland freshwaters or so near to any such waters that it falls into them and failure to take reasonable steps to remove the vegetation from these waters;
(e) An activity in respect of which a notice under paragraph 4 or 5 has been served and has taken effect.

It seems clear that the "water discharge activity", to which this offence refers, is not entirely neutral from the point of view of material disvalue, but tends to be dangerous or harmful to the environment and therefore appears to be of a partially accessory nature.

Subsection 2 of the last-mentioned provision then provides an interesting negative definition:

A discharge or an activity that might lead to a discharge is not a "water discharge activity"
(a) If the discharge is made, or authorized to be made, by or under any prescribed statutory provision; or
(b) If the discharge is of trade effluent or sewage effluent from a vessel.
According to Schedule 22, Art. 3, subsection 1: "groundwater activity" means any of the following—
(a) The discharge of a pollutant that results in the direct input of that pollutant to groundwater;
(b) The discharge of a pollutant in circumstances that might lead to an indirect input of that pollutant to groundwater;
(c) Any other discharge that might lead to the direct or indirect input of a pollutant to groundwater;
(d) An activity in respect of which a notice under paragraph 10 has been served and has taken effect;
(e) An activity that might lead to a discharge mentioned in paragraph (a), (b) or (c), where that activity is carried on as part of the operation of a regulated facility of another class.

[35] For the traditional description of *summary convictions*, see W. Blackstone, *Commentaries on the Laws of England* (1st ed. 1765, book IV, ch. 20, at www.avalon.law.yale.edu): "In these there is no intervention of a jury [...] An inftitution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harrassing the freeholders with frequent and troublesome attendances to try every minute offence. But it has of late been so far extended, as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unleas only in capital cases". In the UK, trials for summary offences take place in the lower courts: in England and Wales at the Magistrate's Court, in Scotland at the Sheriff Court or (in minor cases) the District Court, while Northern Ireland has its own system of Magistrates' Court.
[36] Cases for which proceedings are brought in the Crown Court.
[37] For which there is no upper limit.

Subsection 3 of the same provision provides for other interesting exceptions to the applicability of the offence:

> The regulator may determine that a discharge, or an activity that might lead to a discharge, is not a groundwater activity if the input of the pollutant
> (a) Is the consequence of an accident or exceptional circumstances of natural cause that could not reasonably have been foreseen, avoided or mitigated;
> (b) Is or would be of a quantity and concentration so small as to obviate any present or future danger of deterioration in the quality of the receiving groundwater; or
> (c) Is or would be incapable, for technical reasons, of being prevented or limited without using
> (i) Measures that would increase risks to human health or to the quality of the environment as a whole, or
> (ii) Disproportionately costly measures to remove quantities of pollutants from, or otherwise control their percolation in, contaminated ground or subsoil.

The defences provided for water pollution offences, which are, first and foremost, those resulting from authorizations, therefore complete the framework.

Generally speaking, it can be said that anyone who has requested, received and complied with the conditions set out in an environmental authorization can easily defend himself against a charge for any offence concerning polluting discharges into surface water or groundwater[38].

Specific defences, then, are expressly provided for where the discharge is made in accordance with:

> (a) A license issued by the Ministry of Agriculture (now Department of Environment, Food and Rural Affairs, or Defra) pursuant to Part II of the Environment and Food Protection Act 1985;
> (b) Section 163 of the Water Resources Act 1991, or section 165 of the Water Industry Act (WIA) 1991 on discharges for business reasons of the Agency or the water service companies;
> (c) Any local statutory provision or any statutory order expressly conferring the power to discharge into water;
> (d) Any provision of primary or secondary legislation.

As with the French legislation examined above, links with administrative law also appear in English legislation. In these hypotheses the measures are more stringent, as to provide a guarantee of the principle of guilt and therefore the impossibility of overriding, by judicial means, certain types of authorizations, administrative orders, or regulatory provisions, and thus to condemn the holder of such permits.

G) EU law (*Directive 2008/99/EC*).

The partially accessory model is also utilized in the well-known Directive 2008/99/EC of the European Parliament and in the Council on the protection of the environment through criminal law, in the previously cited Article 3 - Offences: "Member States shall ensure that the following conduct constitutes a criminal offence, *when unlawful* and committed intentionally or with at least serious negligence"(emphasis added).

Art. 2(a) of the Directive dictates the definition of "unlawful":

> For the purpose of this Directive:
> (a) 'Unlawful' means infringing:
> (i) The legislation adopted pursuant to the EC Treaty and listed in Annex A; or
> (ii) With regard to activities covered by the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in Annex B; or
> (iii) A law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i) or (ii).

[38] See S. Wolf, N. Stanley, *Wolf and Stanley on environmental law*, cit., p. 147.

Art. 3 of the same Directive also detail the extensive list of 9 offences. Four of these expressly provide for the element of damage or danger to health or the environment, particularly in the following points:

> (a) The discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water, *which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*" (italics added);
> (b) The collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), *which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*" (italics added);
> (d) The operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and *which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants* (italics added);
> (e) The production, processing, handling, use, holding, storage, transport, import, export or disposal 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, the quality of soil or the quality of water, or to animals or plants* (italics added).

The association of a requirement of special unlawfulness, in a function that limits the ability to punish, to profiles of damage or danger to the health, or even the life, of a certain number of persons, or of significant damage to environmental matrices, is therefore present at European level.

On this point, some preliminary remarks:

Firstly, the Directive provides a very concise formulation of the offences, within which different protection perspectives, from the danger to individual environmental matrices to damage to several human lives, are lumped together without distinction.

More analytical and less conditioned by the ancillary component of administrative law seems to be the previous model of criminalization followed by the Convention on the Protection of the Environment through Criminal law of the Council of Europe (1998[39]), where in Article 2(1), types of offences marked by the clause of special unlawfulness (unlawful: see sub-paragraphs b, c, d and e) were placed side by side with offences of an autonomous nature, without such a clause, such as the hypothesis of:

> the discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which:
> i. Causes death or serious injury to any person, or
> ii. Creates a significant risk of causing death or serious injury to any person (sub-paragraph a).

The second and more general point is that the European rules act as a minimum level of protection, and only in relation to the attainment of those minimum objectives do they impose constraints on the Member States, while leaving member States free to adopt higher standards of protection.

Having said that, in light of the above-mentioned provisions of the Directive, the following question arises spontaneously: Can discharges, immissions or emissions potentially causing death or serious injury to several persons not be unlawful, and therefore not punishable?

This question would appear to be answered in the affirmative, according to the wording of the Directive, which lays down two different cumulative conditions for punishability: the first of a formal nature (special unlawfulness); the second of a substantive (damage or danger) nature.

A set up of protection deemed agreeable by authoritative doctrine, in light of the principle of the separation of powers[40].

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[39] Convention not entered into force.

[40] See C. Ruga Riva, *I nuovi ecoreati*, cit., p. 5 ff., p. 29 ff.; Id., *Il caso ILVA: profili penali*, in www.lexambiente.it, 2014, par. 4.

The choice of what is deemed a tolerable level of pollution is political, and therefore falls to legislative powers. According to this reconstruction, the non-punishability even of acts that are seriously damaging to public safety (like disasters), if they are caused by authorized production activities, within the limits of threshold values and sector regulations, is appropriate.

On this point, however, there appears to be a clear contrast with the most followed exponents of the engage judiciary[41] and with other relevant parts of the doctrine[42]: The legislative solution of not punishing a disaster caused, for example, by the use of a substance not subject to regulatory requirements and limits, or due to a deficiency in a plant that is not covered by regulations; or, in any event, the solution of making punishment contingent upon non-compliance with rules or administrative acts is inappropriate, in light of the primary legal goods at stake, such as life and human health.

In looking to trace it back to basic legal principles, a contrast emerges between the principle of the separation of powers, on the one hand, and the principle of protecting human health (together with the environment), on the other hand.

This contrast is not easily resolved.

In reference to the crime of pollution, and therefore the protection of the environment without direct implications for human safety, the search for a point of equilibrium between conflicting goods (production, employment, etc.), as well as preferring to entrust the search for equilibrium, *ex ante*, to the legislative power, rather than to the judicial power *ex post facto* seems to be justifiable. It is therefore also justifiable to structure the different types of offences in a partially accessory sense with a special illegality clause. Admittedly, however, the same is true about more serious crimes, like disasters, in so far as they also protect the value of human health, and thus confer balance, with a possible loss, enshrined in legislation, of this primary good in relation to other values, as much as it may be considered by somebody as unavoidable, in terms of *real-politik* (perhaps an outlook that is a slightly cynical), and does indeed seem 'painful', both for the jurist and for those without specific legal training.

One can attempt to introduce limitations to this power of balancing opposing interests (which certainly lie within the competence of political bodies), in cases where the outcome of this balance is manifestly unfavorable to primary rights.

Legislation determining the prevalence of interests that are opposed to human health assets may result from a knowledge deficit on the part of political bodies, which can be seen *ex post facto* by the subsequent evolution of scientific knowledge, or already due *ex ante* to the failure to keep up to date with currently available scientific evidence.

In both the first and the second case, where obsolete standards are not autonomously updated at the administrative or political level, remedies that can be easily accomplished seem to be a judicial review of the legality of administrative acts, or the review of the constitutional legitimacy of laws, albeit while remaining aware of their limitations.

These remedies seem scarcely feasible in case of gaps in the legislation, or where there are no rules imposing restrictions on the operator, with possible penal repercussions. Examples of this would be damages caused by substances not subject to limits or regulations, or by deficiencies in a plant that are not covered by specific regulatory; or also of threshold values that have not yet been transposed into legislation, but are regulated, for example, only by professional associations.

It must be said that the partially accessory model of environmental protection, like all other models, has inevitable criticalities. Although it represents a positive development in many respects compared to the purely sanctioning model, the partially accessory model does not make it possible to overcome one

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[41] See G. Amendola, *La Confindustria e il disastro ambientale abusivo*, in www.questionegiustizia.it, 2015; Id., *Non c'è da vergognarsi se si sostiene che nel settore ambientale la responsabilità penale degli industriali dovrebbe essere più limitata di quella "normale"*, in *www.lexambiente.it*, 2015; Id., *Il d. d. l. sui delitti ambientali oggi all'esame del Parlamento*, cit.; M. Santoloci, *In Italia ci si ammala e si muore di "parametri". I disastri ambientali a norma di legge (da evitare con la nuova legge sui delitti ambientali)*, in *www.diritto-ambiente.net*, 2015.

[42] See A. Manna, *La legge sui c.d. eco-reati: riflessioni generali critiche di carattere introduttivo*, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (cur.), *Trattato di Diritto Penale. Parte Generale e Speciale. Riforme 2008-2015*, Torino, 2015, 980 ff.; P. Patrono, *I reati in materia di ambiente*, cit., p. 12; A. L. Vergine, *I nuovi delitti ambientali*, cit., p. 445.

of the characteristic problems of the so-called integrated protection paradigms, namely the incompleteness of the protection itself. In light of the persistent dependence of these models on administrative law, there will continue to be facts which are offensive for the goods at stake, but which do not conform to the type of offence, and therefore remain unpunishable[43].

These are the risks associated with the so called "fragmentary nature" of criminal law, as pointed out by Binding more than a century ago and in terms as graphic as they are topical: the legislator "lets actions play out before his feet, and then he picks up these actions with a lazy hand, in order to elevate them to criminal offences because of their intolerability. In the beginning, he perceives only the coarsest forms of manifestation. *He does not perceive, or does not know how to grasp what is more sophisticated and rarer, even when it exists. This often has a more serious illicit content than what has already been sanctioned*"[44] (italics added).

The limits of a model of environmental protection that relies heavily on the role of public authority in setting standards has also recently been highlighted by authoritative administrative doctrine: The so called integrated (administrative-criminal), or accessory model of protection presupposes an exhaustive knowledge, on the part of the authority, of the situations subject to regulation; whereas the necessary information for the setting of standards is often held by the private sector[45].

The tendency towards rigidity in the so-called integrated or accessory model makes the protection system less rapid in adapting to emerging environmental problems, while requiring long and complex processes of political-legislative mediation and administrative implementation[46].

The functionality of the accessory model of criminal protection appears to be directly proportional, in essence, to the qualitative level of administrative regulation.

Where a positive regulation determines the loss of health assets with respect to interests theoretically inferior on a constitutional level, in the partially accessory model the judge's actions tend to be subordinate to the legislator's choices (without prejudice to possible recourse to the Constitutional Court).

The requirement of special unlawfulness, characteristic of the partially accessory model of protection, poses fewer problems when incorporated in cases which are 'neutral' from the point of view of material disvalue, such as article 3(c) of Directive 2008/99/EC: "The shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (1) and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked".

The use of the partially accessory model, with its special unlawfulness profiles, seems to inevitably penalize behaviors which also seem to be abstractly feasible in a legal way, such as the hypothesis referred to in: sub-paragraph g): "Trading in specimens of protected wild fauna or flora species or parts or derivatives thereof"; sub-paragraph i): "The production, importation, exportation, placing on the market or use of ozone-depleting substances"; and finally, sub-paragraph f): "The killing, destruction, possession or taking of specimens of protected wild fauna or flora species".

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43 See P. Patrono, *I reati in materia di ambiente*, in *Riv. trim. dir. pen. econ*., 2000, p. 679; V. Plantamura, *Diritto penale e tutela dell'ambiente*, cit., p. 163; the most heated criticism is by M. Santoloci, *In Italia ci si ammala e si muore di "parametri". I disastri ambientali a norma di legge (da evitare con la nuova legge sui disastri ambientali)*, in *www.dirittoambiente.net*, 2015: "It has been clear for a long time that in Italy one falls ill and dies of "parameters". There are environmental disasters permitted by law. This is the real black hole of our current legal and regulatory legal system, and it is the keystone that has long been pleasantly discovered and exploited by those who want to operate (in the small, medium and large/criminal) illegally in all environmental sectors [...]. In our country we have radicalised and totalised the whole environmental legal/regulatory system, basing it solely and exclusively on tables and parameters, avoiding to foresee also and contextually the possibility of identifying environmental disasters, and along with the consequent damage to public health, regardless of this formal bottleneck. [...] Therefore, in this context, what (formally and on paper) is "polluting" today, may not be so tomorrow, and vice versa. To make an environmental/health damage disappear in our country, it has always been enough to change the numbers of the parameters".

44 K. Binding, *Lehrbuch des Gemeinen Deutschen Strafrechts*, B. T., Bd. 1, Leipzig, 1902, p. 20.

45 See F. Fracchia, *Introduzione allo studio del diritto all'ambiente. Principi, concetti e istituti*, Naples, 2015, p. 29 ff.

46 *Ibid*, p. 30.

The integrated, administrative-criminal, model of protection appears inevitable in a large part of environmental criminal law: despite the potential problems of incomplete protection, due to the possible presence of offensive acts that are not conform to the type of offence, the composite nature of the interests that characterizes environmental criminal law does not seem to allow us to renounce (at least for less serious criminal offences) coordination with the administrative system, as the first line of protection for the environment.

The problem of incomplete protection could only be solved by 'emancipating' environmental criminal law from administrative law, *i.e.* by resorting to a so-called 'pure' criminal model, with offences that are 'autonomous' to the criminal system, in which the description of the typical fact is entirely contained in the incriminating provision, and focuses on the cause of damage or concrete danger to the protected good, without reference to the acts of the public administration, or in general to sub-legislative sources[47]. But this criminal policy option is not without its difficulties (see below, para. 4).

H) US law (*The attenuation of the accessory nature in the direction of the autonomous criminal protection of the environment, in case law: the unnecessary administrative predetermination of standards for dangerous substances*).

Before moving on to the analysis of the so-called purely criminal protection paradigm, it is worth concluding this review of regulations structured in a partially accessory sense with a brief comparative insight on US law, which is also rich in provisions constructed in this way.

The Clean Water Act of 1972, for example, inserts in the body of the U.S. Code (CWA § 309 c / 33 *USC* § 1319 c), in addition to offences of a purely accessory nature, such as negligent violations (c 1) and knowing violations (c 2), the offence of knowing endangerment (c 3), which has a more marked offensive dimension, without, however, renouncing the reference to administrative law:

> Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person that is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

The formal dimension of the breach of administrative precepts, referred to in the first part of this offence, is emblematically associated with a profile of material disvalue, contained in the second part of the provision ("and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury").

An offence of concrete and (borrowing the language of the US legislator) knowing endangerment, structured in a partially accessory sense, is also provided for by the RCRA § 3008, 42 USC § 6928, at *letter e*:

> Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

[47] On this model of protection, see M. Catenacci, *La tutela penale dell'ambiente*, cit., p. 258; C. Bernasconi, *Il reato ambientale*, cit., 29; V. Plantamura, *Diritto penale e tutela dell'ambiente*, cit., p. 166 ff.

The US command-and-control system of eco crimes also includes partially accessory offences that render the accessory model less rigid, and contemplates limited forms of "autonomy" of the criminal system from the administrative system. This is emblematic regarding the hypothesis of dangerous substances that are not fully regulated by the administrative system (see below). On the other hand, the US system also contains partially accessory offences that cannot be applied to conducts that comply with authorization, as seen in the French system (see above, para. 3 *E*).

In the context of criminal penalties provided for in federal enforcement of the Clean Air Act (CAA§ 113 c, 42 USC § 7413 c), paragraph 4 contains, for example, the following negligent endangerment offence:

> Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under title 18 or by imprisonment for not more than 1 year, or both.

The following paragraph 5A of the same § 7413 c USC provides for the offence of knowing endangerment:

> Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under title 18 or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation.

In terms of application, with regards to the first rule of the CAA mentioned above (however, the same applies to the second, specular case of knowing endangerment), the 9th Circuit Court of Appeals, in United States v. Grace, 504 F.3d 745 (2007)[48], makes clear that prior identification of praxeological standards, in relation to the particular substance emitted, such as to connote the conduct as already illegal in extra-criminal, is not required for punishment.

H) US law (*A 'strong' model of permit defence in the Clean Air Act (CAA): the exclusion of permit-compliant activities from the application range of criminal law*).

Although the limits of protection typical of partially accessory offences seem to be partly surmountable, the link with administrative law also seems to be strengthened at the same time by the final clause of the US rule on emissions, through the provision of a specific "protective shield" given by the permit (the so-called permit shield), similar to the French provision mentioned above (see para. 3, sub *E*).

The last part of § 7413 c 5 A of the USC states that:

> For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

[48] See S. F. Mandiberg, M. G. Faure, *A Graduated Punishment Approach to Environmental Crimes*, cit., note 154.

4. The autonomous, or purely criminal model: the elimination of the link with administrative law, through the removal of the component of "special unlawfulness" from the structure of eco-crimes; examples from the legislations of Germany, Spain, Poland, France, England and Italy

The traditional, integrated paradigm of criminal-administrative protection of the environment can be surpassed, in some cases, if we assume that the conflict between different interests, which are at stake, can be resolved in absolute terms, without the mediation of rules and/or administrative acts, but by identifying *a priori* the prevailing legal good; and thus establishing a direct relationship between criminal law and the judge called upon to ascertain the offence[49].

This is the so-called purely criminal, or autonomous, type of protection, in which the type of offence is entirely described in the criminal norm, and is structured around the causing of a danger or damage to the protected good, without the presence of normative elements that refer to other branches of the legal system.

This model of protection normally concerns only the most critical cases of environmental pollution, the effects of which tend to be long lasting, or to affect public/individual safety, outside of a possible balance with interests pertaining to the economic sphere.

The elimination of the link with administrative law occurs through the uncoupling of the offence from the violation of other legal norms, *i.e.*, conditions imposed by authorizations, licenses or permits[50].

While the accessory or "political-administrative" model of environmental protection, "conceives of environmental protection as a moment of unitary and articulated program of territorial management, and as such, under the primary responsibility of the public administration"[51], the autonomous, or pure criminal model of environmental protection, instead, enhances the role of the judge as a direct protagonist in the fight against pollution[52].

In this case, criminal law intervenes autonomously from administrative law, because the offence is of a greater magnitude than that contemplated by administrative law. This type of protection assumes that the administrative discipline can never allow damage of this magnitude.

In this perspective, the effects of the polluting activity are characterized by their extreme nature. The idea is to contain both the abstract provisions and the practical applications of the criminal figures belonging to the pure/autonomous criminal model within a rigorous canon of *extrema ratio* (last resort option).

By adopting a model of protection that refers the task of ascertaining the offence directly to the judge, regardless of factors of interaction and mediation with administrative law, factors that "convey" the criminal instrument of protection in the furrow already traced by administrative norms, there is a real risk that applicative certainty can be weakened. A risk which seems to be contained through a severe reduction in the number and content of such autonomous offences, limited to the most serious ones.

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[49] See C. Bernasconi, *The environmental crime*, cit., p. 23 ff.

[50] See S. F. Mandiberg, M. G. Faure, *A Graduated Punishment Approach to Environmental* Crimes, cit., p. 29; M. G. Faure, *Environmental Crimes*, cit., p. 327: "Administrative law, however, cannot be the sole source of environmental criminal law since some serious cases of environmental pollution should be directly punishable, even if no violation of administrative provisions is at hand"; more recently, on the "autonomous"/purely criminal offence for the protection of the environment, in a general-preventive view, see M. G. Faure, C. Gerstetter, S. Sina, G. M. Vagliasindi, *Instruments, Actors and Institutions in the Fight against Environmental Crime*, in *www.efface.eu*, 2015, para. 3.3.4; and M. G. Faure, *The Revolution of Environmental Criminal Law in Europe,* in 35 *Virginia Environmental Law Journal,* 2017, 335 ff.; Id., *The Development of Environmental Criminal Law in the EU and its Member States,* in 26 *Review of European, Comparative & Internation Environmental Law,* 2017, p. 139 ff.

[51] G. Fiandaca, G. Tessitore, *Diritto penale e tutela dell'ambiente*, in G. Neppi Modona et al. (cur.), *Materiali per una riforma del codice penale*, Milano, 1984, p. 35.

[52] See G. Insolera, *Modello penalistico puro per la tutela dell'ambiente*, in *Dir. pen. proc.*, 1997, 739: "In a purely criminal model [...] it is the judge who through a direct appreciation of the damage or the danger (in the example given, damage to natural beauty; in the environmental field *stricto sensu*, damage to an ecosystem), is the direct author of the mediation between specific (of the concrete case) opposing interests"; in favor of this model, see more recently EFFACE, *Conclusions and recommendations*, in *www.efface.eu*, 2016, p. 28 ff.

Another principle that potentially comes into discord with the autonomous/purely criminal model of protection is the unity of the system, with connected, negative repercussions on the principle of guilt. If the operator complies with the administrative norm, but may nevertheless incur, for the same fact, the violation of the criminal norm, it seems possible that a dystonia may be produced between the two levels of the system. Moreover, at the same time producing a contrast with principles of the subsidiary and fragmentary nature of criminal law, which requires criminal law to intervene as a last resort of protection, within a field of action that is more restricted than the overall sphere of the "illicitness".

To limit the scope of such systematic problems, the range of action of the autonomous/purely criminal types of offence must be based on profiles of "merit of punishment" such as to justify the prevalence of the criminal norm over another, possibly conflicting, administrative source: the operative terrain that would be ideal for the autonomous model of protection would seem to be the hypotheses in which the administrative norm is obsolete or non-existent.

In the event of an alternative evaluation of the conduct, from administrative to criminal law, possible inconveniences seem to arise with regards to the principle of guilt. By making the choice to leave these possible inconveniences as unresolved on the level of *actus reus*, the autonomously/purely criminal model requires that they be appropriately addressed in ascertaining *mens rea*.

What advantages does the total emancipation of repressive action from the administrative sphere entail?

Criminal law recovers full functional autonomy, and therefore able to identify premises and elements that are worth making a fact "deserving of punishment", within a logical framework of legal asset protection characterized in an empirical-effective sense, and detached from any conditioning by the political-administrative model "of government" of the community.

In this way, even residual reservations under the profile of legal provision which require that certain matters only be governed by Parliament, and raised by offences that are hetero-integrated by threshold values resulting from "technical" evaluations, as referred to by administrative sources and only apparently "neutral"[53], are overcome.

The pure criminal paradigm serves to remedy the problem of incomplete protection, *i.e.*, the problem of facts (which are) substantially offensive, but not illegal under administrative norms (a problem present in both the purely accessory and the partially accessory models). The problem is remedied by establishing, between judge and criminal offence (of pollution), a relationship that is not mediated by administrative norms and/or acts.

It's worth noting that the offences that respond to this model of protection are relatively rare in the criminal law of European countries and the USA.

In these cases, the link with administrative regulations is eliminated by removing the "protective umbrella" provided by authorization, or by eliminating the so-called "special unlawful" component from the structure of the crime.

Where the legislator follows this approach, the criminal norm knows no (so to speak) "formal-intrinsic" application limits, due to the possible non-violation of administrative/authorizing prescriptions.

A) Germany (*Offence of causing severe danger through the emission of toxic substances*).

An example of an eco-crime structured in an autonomous, or purely criminal way is provided by § 330a *StGB*, "Causing severe danger by releasing toxic substances", introduced into the German Criminal Code in 1994:

[53] See M. Catenacci, *La tutela penale dell'ambiente*, cit., p. 191 ff.; V. Plantamura, cit., p. 166.

(1) Whoever diffuses or releases substances which contain or can produce poisons, and thereby causes the danger of another person's death or serious damage to another person's health or the danger of damage to many people's health, incurs a penalty of imprisonment for a term of between one and ten years.
(2) If, by committing the offence, the offender causes another person's death, the penalty is imprisonment for a term of at least three years.
(3) In less serious cases under subsection (1), the penalty is imprisonment for a term of between six months and five years, in less serious cases under subsection (2) imprisonment for a term of between one year and ten years.
(4) Whoever causes danger by negligence in the cases under subsection (1) incurs a penalty of imprisonment for a term not exceeding five years or a fine.
(5) Whoever acts recklessly in cases under subsection (1) and causes danger by negligence incurs a penalty of imprisonment for a term not exceeding three years or a fine.

A crime structured according to the traditional scheme of "Crimes of the poisoning of water, air and soil", in which there is no reference to administrative precepts as the conduct is so serious that it cannot be subject to authorizations of any kind.[54]

The hypothesis in question seems to have been constructed in an anthropocentric perspective of protection[55] in which the autonomy from administrative law seems to be justified by the fact that the offence in question has, as its object, a danger of damage to human life or health.

B) Spain (*Crimes of damage to natural areas and crimes relating to nuclear energy and ionizing radiation*).

The Spanish Criminal Code also appears to contain some offences of an autonomous/purely criminal nature[56].

Article 330 of the Código penal states:

Whoever, in a protected natural area, seriously damages any of the elements that have served to qualify it, shall be sentenced to imprisonment from one to four years' and a fine from twelve to twenty-four months.

The act is also punished by way of gross negligence (*lett*. imprudencia grave), "with a lesser degree of penalty" (art. 331).

In the context of crimes relating to nuclear energy and ionizing radiation, the following can be cited as a serious offence that lacks the administrative accessory link: Art. 343, subsection I, of the Iberian Criminal Code states:

Whoever by means of the discharge, emission or introduction into the air, soil or water of a quantity of materials or ionizing radiation, or exposure by any other means to such radiation, endangers the life, integrity, health or property of one or more persons, shall be punished with a prison sentence from six to twelve years and special disqualification from public employment or office, profession or trade for a period from six to ten years. The same penalty shall be imposed when this conduct endangers the quality of the air, soil or water or animals or plants.

An offence of concrete danger, placed to protect not only interests of a personal nature but also natural resources in themselves, in a purely eco-centric dimension.

It also envisages punishability on the grounds of gross negligence ("with a lesser penalty in degree": art. 344) and of legal persons (art. 343, subsection III).[57]

[54] See M. Catenacci, *La tutela penale dell'ambiente*, cit., p. 220 and note 41.
[55] See S. Sina, *Fighting Environmental Crime in Germany: A Country Report. Study in the framework of the EFFACE research project*, in *www.efface.eu*, 2015, p. 29.
[56] See T. Fajardo, J. Fuentes, I. Ramos, J. Verdù, *Fighting Environmental Crime in Spain: A Country Report. Study in the framework of the EFFACE research project*, *ibid.*, p. 38.
[57] *Ibid.*, p. 42 ff..

C) Poland (*Crimes of destruction and pollution*).

The Polish Criminal Code, enacted in 1997, is also worth mentioning in this review. In the field of eco-crimes (ch. XXII[58]), this Code seems to dose in an interesting way, on the one hand, partially accessory offences, and on the other hand, autonomous/purely criminal offences of danger to human health or of particularly significant environmental damage (so-called destruction offences).

In particular, offences concerning waste management (art. 183) provide for the typical clauses of special unlawfulness: "in violation of the law" (subsection I), "despite his or her duties" (subsection III), or "without the required notification or permission, or going against its conditions", just as the case of dangerous activity (art. 188) is referred to administrative legislation.

On the other hand, the offences of destruction set out in art. 181 are autonomous. Limiting ourselves to the first paragraph of this article: "Anyone who causes significant destruction to plant or animal life is liable to imprisonment between three months and five years"; with no variation for the offence of destruction of protected plants or animals (subsection III).

Negligent offences, punished more lightly, are also included (subsections IV and V).

Nor is there a connection with administrative law for the crime of pollution of environmental matrices, "with a substance or radiation in such quantities or form that could pose a danger to the life or health of many people, or cause significant destruction to plant and animal life" (art. 182); a hypothesis punishable for both voluntary and negligent forms, with the same penalties as the crime of destruction mentioned above.

D) France (*Autonomous/purely criminal offences*).

Looking at French legislation, and starting from the *Code pènal*, it's worth pointing out that articles 421-2 and 421-4, which regulate so-called "ecological terrorism" represent cases without "administrative predicates".

This is a multi-offensive hypothesis, in which the prevailing legal good appears to be not the environment, but the consideration of national public safety ("*la nation, l'Etat et la paix publique*").

The first of the two cited norms contains the definition of the concept:

> It is also an act of terrorism, when intentionally related to an individual or collective enterprise aimed at seriously disturbing public order through intimidation or terror, to introduce into the atmosphere, on the ground, in the subsoil, in foodstuffs or food components, or in waters, including those of the territorial sea, a substance of such a nature as to endanger human or animal health or the natural environment.

Article 421-4 modulates the treatment of sanctions:

> The act of terrorism defined in Article 421-2 is punishable by twenty years' imprisonment and a fine of 350,000 euros.
> When this act results in the death of one or more persons, it is punishable by life imprisonment and a fine of 750,000 euros.

Other autonomous, or purely criminal offences are provided for in the French environmental code. According to Article L. 432-2 of the *Code de l'environnement*:

> The act of throwing, dumping or allowing to flow into the waters mentioned in article L. 431-3, directly or indirectly, any substances whose action or reactions have destroyed the fish or harmed its nutrition, reproduction or food value, is punishable by two years imprisonment and a fine of 18,000 euros.

[58] Translated in English by M. Mitsilegas, M. Fitzmaurice, E. Fasoli, *Fighting Environmental Crime in Poland: A Country Report. Study in the framework of the EFFACE research project*, in *www.efface.eu*, 2015, p. 15 ff.

A case in which there is consideration for the protection of natural assets in itself stands in the background, while in the foreground the dominant perspective is focused on the protection of the aquatic environment for breeding purposes[59]. The rule is placed systematically in Book IV of the French Code of the Environment, which is dedicated to *Natural Heritage*, where the provision in question is placed under Title III - *Freshwater fishing and management of fish resources*, Chap. II - *Preservation of aquatic environments and protection of fish stocks*, Section II - *Protection of fish fauna and its habitat*.

The regulation, in any case, does not require that the discharge in question must be illegal.

A similar argument can be made for Article L. 218-73 of the same *Code de l'environnement* (as modified in 2021): "The act of throwing, dumping or allowing to flow, directly or indirectly into the sea or into the part of waterways, canals or bodies of water where the water is salty, substances or organisms that are harmful to the conservation or reproduction of marine mammals, fish, crustaceans, shellfish, mollusks or plants, or that are likely to render them unfit for use, is punishable by a fine of 100,000 €, which may be increased up to twice the amount of the benefit derived from the commission of the infraction".

Here again, the perspective of environmental protection merges with the interests of food safety and public health, as well as the interest in protecting certain productive activities.

E) England and Wales.

Moving on to the United Kingdom, it can be seen that the link with administrative law, which characterizes the discipline on water protection (closely linked to the permit system, according to Regulation 38 of the EPR 2010: see above, para. 3, sub *F*), is less marked in the waste sector, which represents the other "macro-area" of environmental criminal litigation in Great Britain[60].

Alongside new offences relating to the absence or violation of authorization for the management of waste, introduced by the EPR of 2010, there are other offences relating to waste management, as referred to in sect. 33 of the Environmental Protection Act of 1990. Among these latter hypotheses, there is an autonomous/purely criminalistic offence that seems to show, when compared to the others, a greater significance and gravity in terms of material disvalue.

In section 33 we find the following heading, "Prohibition on unauthorized or harmful deposit, treatment or disposal etc. of waste", which is indicative of the twofold option of criminal policy followed by the UK legislator. That is, to foresee, alongside accessory offences based on "non-authorization", autonomous offences centered on the danger for the environment or human health.

The first paragraph of section 33, as last amended, states:

> Subject to subsections (1A), (1B), (2) and (3) below and, in relation to Scotland, to section 54 below, a person shall not—
> (a) Deposit controlled waste or extractive waste, or knowingly cause or knowingly permit controlled waste [F2or extractive waste] to be deposited in or on any land unless an environmental permit authorizing the deposit is in force and the deposit is in accordance with the license;
> (b) Submit controlled waste, or knowingly cause or knowingly permit controlled waste to be submitted, to any listed operation (other than an operation within subsection (1)(a)) that—
> (i) Is carried out in or on any land, or by means of any mobile plant, and
> (ii) Is not carried out under and in accordance with an environmental permit.
> (c) Treat, keep or dispose of controlled waste or extractive waste *in a manner likely to cause pollution of the environment or harm to human health*." (Italics added).

For all three hypotheses the sanction is, as usual, indicated in differentiated measure, depending on the procedure followed (subsection. 8):

[59] See S. F. Mandiberg, M. G. Faure, *A Graduated Punishment Approach to Environmental Crimes*, cit., footnotes 117 and 153.
[60] See E. Fisher, B. Lange, E. Scotford, *Environmental Law. Text, Cases, and Materials*, Oxford, 2013, p. 721.

A person who commits an offence under this section is liable—
(a) Subject to subsection (9) below, on summary conviction, to imprisonment for a term not exceeding 12 months or a fine or both;
(b) On conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both.

On the substantive level of the precept, with reference to the third crime (marked by letter c), unlike the previous two, compliance with an environmental permit does not appear to exclude *ipso jure* the responsibility of the subject, or rather does not seem to constitute a defence. The possibility that a subject operates in compliance with an authorization for the management of waste and, nevertheless, commits the offence referred to in letter c, paragraph 1, is allowed[61], since this offence is a "free form" type of crime, oriented towards the probable causing of "environmental pollution" (to be understood according to the interpreters as damage to flora or fauna[62]) or "damage" to human health.

A general offence (as the commentators define it[63]) of environmental pollution through waste, with a wide scope, for which a full understanding it seems necessary in order to analyze its components in detail, in light of the preliminary indications contained in section 29 of EPA 1990.
It is therein provided (in paragraphs from 2 to 4) that:

(2) The "environment" consists of all, or any, of the following media, namely land, water and air.
(3) "Pollution of the environment" means pollution of the environment due to the release or escape (into any environmental medium) from—
(a) The land on which controlled waste or extractive waste is treated,
(b) The land on which controlled waste or extractive waste is kept,
(c) The land in or on which controlled waste or extractive waste is deposited,
(d) Fixed plant by means of which controlled waste or extractive waste is treated, kept or disposed of, of substances or articles constituting or resulting from the waste and capable (by reason of the quantity or concentrations involved) of causing harm to man or any other living organisms supported by the environment.
(4) Subsection (3) above applies in relation to mobile plant by means of which controlled waste or extractive waste is treated or disposed of as it applies to plant on land by means of which controlled waste or extractive waste is treated or disposed of.

This concept of pollution is defined not only in an anthropocentric sense, but also as potential harm to any living organism, or as interference with the ecological systems of which these living organisms are part.

The definition of damage in subsect (5) of the same section appears similarly broad and inclusive:

For the purposes of subsections (3) and (4) above "harm" means harm to the health of living organisms or other interference with the ecological systems of which they form part and in the case of man includes offence to any of his senses or harm to his property; and "harmless" has a corresponding meaning.

It should be noted that sanction levels, set by the legislation only in the maximum, are the same for cases of unauthorized management and hazardous waste management, but with a differentiation made for homeowners.

The crime of hazardous waste management, which is of an autonomous nature and not partially accessory, seems generally appreciated by commentators for its simplicity and operational functionality, to punish behavior ranging from abandonment and other careless forms of waste disposal, to depositing in the place of production, with possible harm to employees, to the dangerous management of waste in the courtyard of one's own home[64].

[61] S. Wolf, N. Stanley, *Wolf and Stanley on environmental law*, cit., p. 225, 227.
[62] *Ibid.*
[63] See E. Fisher, B. Lange, E. Scotford, *Environmental Law*, cit., p. 723 ff.
[64] See S. Bell, D. McGillivray, O. Pedersen, *Environmental Law*, Oxford, 2013. p. 699.

Given that, in the presence of a danger of environmental pollution or damage to health, within the meaning of the aforementioned offence of hazardous waste management (sub clause c, para. 1, section 33 EPA 1990), the possession of and compliance with a permit is not a defence (unlike the English offences concerning discharges into water, which are constructed partly in accessory terms: see above, para. 3, sub *H*), are there any situations or behaviors on the part of the operator to exclude criminal liability? What are they?

The analysis of this problem is interesting because it sheds light on the functioning of the autonomous or purely criminal offences.

The two defences, which are not linked to compliance with the formal profiles of the authorization, are the following: due diligence and the emergency.

Paragraph 7 of section 33 provides:

> It shall be a defence for a person charged with an offence under this section to prove—
> (a) That he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence; or
> (b) That he acted under instructions from his employer and neither knew nor had reason to suppose that the acts done by him constituted a contravention of subsection (1) above; or
> (c) That the acts alleged to constitute the contravention were done in an emergency in order to avoid danger to human health in a case where—
> (i) He took all such steps as were reasonably practicable in the circumstances for minimizing pollution of the environment and harm to human health; and
> (ii) Particulars of the acts were furnished to the waste regulation authority as soon as reasonably practicable after they were done.

The due diligence defence requires, according to case law, a high level of diligence. The accused must prove that he/she has put in place an adequate system to avoid the commission of the offence. Adherence to routine practices or reliance on the assurances of others, are not normally considered sufficient.

Defence has not been recognized, for example, where a waste transporter, who by contract made regular visits to the waste producer's premises to collect the material stored in a container, had not checked the material contained therein, on each collection[65]. According to the court, the transporter had not adequately informed himself about the nature of the waste he was collecting.

Some further indication of the stringent content of "due diligence" comes, at a normative level, from the analysis of the provision dedicated to the duty of care about waste, as set out in section 34 of the EPA 1990. It provides that:

> (1) Subject to subsection (2) below, it shall be the duty of any person who imports, produces, carries, keeps, treats or disposes of controlled waste or, as a dealer or broker, has control of such waste, to take all such measures applicable to him in that capacity as are reasonable in the circumstances
> (a) To prevent any contravention by any other person of section 33 above;
> (aa) To prevent any contravention by any other person of regulation 12 of the Environmental Permitting Regulations or of a condition of an environmental permit;
> (b) To prevent the escape of the waste from his control or that of any other person; and
> (c) On the transfer of the waste, to secure—
> (i) That the transfer is only to an authorized person or to a person for authorized transport purposes; and
> (ii) That there is transferred such a written description of the waste as will enable other persons to avoid a contravention of that section or regulation 12 of the Environmental Permitting Regulations, or a contravention of a condition of an environmental permit, and to comply with the duty under this subsection as respects the escape of waste.

[65] See "Durham County Council v. Peter Connors Industrial Services Ltd.", in *Env. L. R.*, 1993, p. 197 ff.

Interestingly then, regarding duty of care, is the provision of "codes of practice", as set out in para. 7 of the same sec. 34:

> The Secretary of State shall, after consultation with such persons or bodies as appear to him representative of the interests concerned, prepare and issue a code of practice for the purpose of providing to persons practical guidance on how to discharge the duty imposed on them by subsection (1) above.

The procedure for approving the code of practice is specified in para. 9 of the same section:

> A code of practice prepared in pursuance of subsection (7) above shall be laid
> (a) Before both Houses of Parliament; or
> (b) If it relates only to Scotland before the Scottish Parliament.

The procedural role of the code of practice is dealt with in para. 10:

> A code of practice issued under subsection (7) above shall be admissible in evidence and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.

At the end of the section on duty of care it is finally provided that: "Different codes of practice may be prepared and issued under subsection (7) above for different areas."

With reference to the autonomous/criminal pure offence of harmful waste management, the defence of "due diligence" seems, in conclusion, to replace the "permit" defence, surrounding the proof of non-liability with stricter limits, at regulatory and judicial levels, and through the provisions contained in codes of practice.

F) Italy.

Autonomous or purely criminal offences do not seem to be unknown to Italian environmental legislation.

The relatively recent offence of "unlawful burning of waste" seems to be an autonomous/purely criminal one. It is set out, in Article 256-*bis* of the Environmental Consolidated Act, by the so-called "land of fires" decree[66] (legislative decree No. 136/2013, converted into Law No. 6/2014): "Unless the act constitutes a more serious offence, whoever sets fire to abandoned waste [...] shall be punished with imprisonment from two to five years".

The protection of animals, a particularly extensive discipline that includes a criminal one, partly detached from the administrative accessory link, dates to Royal Decree no. 1604/1931 (Consolidated Act on fishing laws).

With reference to the exercise of fishing with prohibited means, Art. 6, subsection I, of the discipline in question provides: "It is forbidden to fish with dynamite and other explosive materials, as well as to use electricity as a direct means of killing or stunning, and to throw or infuse into the waters materials likely to numb, stun or kill fish and other aquatic animals". Prohibition sanctioned with the following penalties: "jointly or alternatively, imprisonment from ten days to six months and a fine ranging from 500 to 2000 liras" (Article 33 (2) of Royal Decree No 1604/1931).

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[66] See C. Ruga Riva, *Il decreto "Terra dei fuochi": un commento a caldo ...*, in *www.lexambiente.it*, 2013; V. Paone, *Bruciare rifiuti è reato, ma sulla carta!, ibid.*, 2014; G. Amendola, *Viva viva la terra dei fuochi*, *ibid.*, 2013; R. Bertuzzi, *Abbruciamento rifiuti: terra dei fuochi è legge*, *ibid.* 2014; A. Di Tullio D'Elisiis, *Il delitto di combustione illecita di rifiuti*, *ibid.*, 2014; A. Pierobon, *Il d. l. sulla terra dei fuochi e sull'Ilva*, *ibid.*, 2013; A. Corbo, *Rel. n. III/4/2013 dell'Ufficio del Massimario della Corte di Cassazione*, 18/12/2013, in *www.penalecontemporaneo.it*, 2014; A. Alberico, *Il nuovo reato di combustione illecita di rifiuti*, *ibid.*; A. L. Vergine, *Tanto tuonò che piovve! A proposito dell'art. 3, D. L. 136/2013*, in *Amb. e Svil*., 2014, p. 7; A. Scarcella, *Campania sì, Campania no, la terra dei fuochi ... dal decreto alla legge di conversione*, *ibid.*

Specifically, the legislation provides for the explosive substances and electric current as prohibited means, but immediately afterwards structures the prohibition in more general terms, referring to the aptitude of such means to stun, kill or even simply numb animals.

It is therefore prohibited to introduce into the waters any materials which, acting in a diffuse manner over a more or less vast area, indiscriminately endanger the fauna that finds its natural habitat there[67].

5. Conclusion

By way of conclusion, some of the relevant passages of the above can be here recollected and summarized.

In the "integrated" (criminal-administrative) protection model, marked by a more or less extensive degree of environmental criminal law dependence on administrative law, the managing and solving of potential conflicts is left to authorities endowed with the technical qualifications necessary to carry out specific evaluations and checks. The administrative authority may be considered, with respect to the judge, a subject able to more easily draw on technical-scientific information. In addition, there is the advantage of guaranteeing an easier orientation for the operators, by setting generally valid *ex ante* standards (e.g., about emissions); with beneficial effects in terms of certainty.

Out of this model, two different sub-models have developed, the so-called "purely accessory" model on the one hand, and the "partially accessory" on the other.

The "purely accessory" model (where the criminal discipline represents the mere sanctioning appendix of precepts and procedures belonging to other fields of the legal system) is the most criticized model of environmental criminal law protection, precisely because of the excessive dependence on extra-criminal legal sources: it protects administrative functions, rather than environmental assets; it potentially conflicts with the principle of harm to others, as it risks punishing facts that are not conform to the norms, but are harmless; and it is an incomplete protection, as it risks not punishing facts that are conform to the administrative norms, but are offensive to environmental goods.

The "partially accessory" model (where the conduct must not only violate extra-criminal provisions, but also produce an event of damage or danger) creates less friction with the principle of harm and the principle of effectiveness.

In this intermediate model, which can be considered "halfway" between the "purely accessory" and the "autonomous" criminal law model, the residual accessory component preserves the unity of the legal system: a behavior permitted by administrative law cannot be sanctioned by criminal law.

Partially accessory is the model of the well-known Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law, stating in Article 3 (Offences): "Member States shall ensure that the following conduct constitutes a criminal offence, *when unlawful* and committed intentionally or with at least serious negligence" (emphasis added).

The same Directive lays down an extensive list of (nine) offences in Article 3. Four of these expressly provide for the element of damage or danger to life, to health, or the environment. For these offences, the Directive provides for two cumulative conditions for punishability. The first of a formal nature: the special unlawfulness; the second, of substantive nature: the damage or danger.

This system of protection is deemed agreeable by part of the doctrine (see above, para 3, sub *G*), in light of the principle of the separation of powers. The choice of what constitutes a tolerable level of pollution is political, and therefore falls to the legislative power; according to this interpretation, the non-punishability of acts even seriously damaging the environment or public safety (like disasters), if

[67] See L. Ramacci, *Diritto penale dell'ambiente. Aggiornato con i nuovi delitti contro l'ambiente (L. 22 maggio 2015, n. 68)*, Piacenza, 2015, p. 355.

they are caused by authorized production activities, within the limits of the threshold values and sector regulations, would be appropriate.

On this point, however, there is a notable contrast with many exponents of the judiciary and with other relevant parts of the doctrine. Indeed, considering the primary legal goods at stake, such as life and human health, it seems inappropriate the solution of making punishment contingent upon non-compliance with of rules or administrative acts.

With reference to minor crimes of pollution, and therefore to the protection of the environment without direct implications for human safety, it seems justifiable to search for a point of equilibrium between conflicting goods (production, employment, etc.), and also to entrust the search for balance, *ex ante*, to the legislative or administrative power, rather than to the judicial power *ex post facto*, and it seems therefore justifiable the structuring of types of offences in a partially accessory sense, with a special illegality clause. Admittedly, however, the same is true for more serious crimes (like disasters), in so far as they are even aimed to protect the value of human health, and thus admit a balance, with a possible loss, enshrined in legislation, of this primary good in relation to other values (as much as it may be considered by somebody as unavoidable, in terms of *realpolitik*, perhaps a little cynical), does indeed seem 'painful', for both the jurist and those without specific legal training.

One can try to introduce limitations to this power of balancing opposing interests, in cases where the outcome of this balancing is manifestly unfavorable to primary rights.

Discipline determining the prevalence of interests that are opposed to human health assets may result from a knowledge deficit of behalf of political bodies, which can be seen *ex post facto* by subsequent evolution of scientific knowledge, or already due *ex ante* to the failure to keep up to date with currently available scientific evidence.

In both the first and the second case, where obsolete standards are not autonomously updated at the administrative or political level, remedies that seem accomplishable are the judicial review of the legality of administrative acts, or the review of the constitutional legitimacy of laws, albeit while remaining aware of their limitations. However, these remedies seem to be scarcely feasible in cases of gaps in the legislation; or where there are no rules imposing restrictions upon the operator.

It must be added that the partially accessory model of environmental protection presents also inevitable criticalities. In particular, it does not make it possible to overcome the problem of the incompleteness of the protection: considering the persistent dependence of the integrated (administrative-criminal) models on administrative law, there will continue to be facts which are offensive for the goods at stake, but which do not conform to the type of offence, and therefore are not punishable.

Further on, there should be reminded the limits of the model of environmental protection that relies heavily on the role of public authority in setting standards. The so-called integrated, or accessory models of protection presupposes an exhaustive knowledge on behalf of the authority of the situations subject to regulation; whereas the necessary information for standards setting is often held by the private sector.

The tendency towards rigidity of the accessory models makes the protection system long and complex in terms of required political-legislative mediation and administrative implementation; so making the protection system less rapid in adapting to emerging environmental problems

The traditional, integrated paradigm of criminal-administrative protection of the environment can be surpassed, in some cases, if we assume that the conflict between different interests, at stake in this field, can be resolved without the mediation of rules and/or administrative acts: *i.e.* by establishing a direct relationship between criminal law and the judge called upon to ascertain the offence.

This is the so-called purely criminal, or autonomous, type of protection, in which the type of offence is structured around the causing of a danger or damage, without the presence of normative elements referring to other branches of the legal system.

This model of protection normally concerns the most serious cases of environmental pollution, the effects of which tend to be long lasting, irreversible, or very difficult to remove, or affecting individual/ public health, outside of a possible balance with economic interests.

In this case, the offence is of a greater magnitude than that contemplated by administrative discipline, that can never allow serious damage of this kind.

The perspective is to contain the pure/autonomous ecocrimes within a rigorous canon of *extrema ratio* (last resort option), founding them on profiles of the "merit of punishment", such as to justify the prevalence of the criminal law over another, possibly conflicting, administrative source.

Abstract

Il contributo si propone di esaminare i vantaggi e gli svantaggi del tradizionale modello della c.d. "dipendenza" del diritto penale ambientale dal diritto amministrativo. Le due possibili forme di integrazione tra diritto penale e amministrativo, ovvero i c.d. modelli "puramente accessorio" e "parzialmente accessorio", sono analizzati in una prospettiva comparatistica, tenendo anche in considerazione la Direttiva europea 2008/99 sulla tutela penale dell'ambiente. Si valuta de iure condendo l'opzione di rendere autonome dal diritto amministrativo alcune limitate ipotesi di ecoreati.

Parole chiave: dipendenza del diritto penale ambientale dal diritto amministrativo, modello puramente accessorio, modello parzialmente accessorio, modello autonomo, Direttiva europea 2008/99/CE sulla tutela penale dell'ambiente

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The paper intends to analyse the pluses and minuses of traditional environmental criminal law's dependence on administrative law. The two possible forms of integration between criminal and administrative law, i.e., the so-called purely accessory and partially accessory models, are evaluated from a comparative perspective, while also considering the European Directive 2008/99/EC on the protection of the environment through criminal law. Followed by an assessment of the opportunity for a limited number of environmental crimes to be autonomous from administrative law.

Key words: environmental criminal law's dependence on administrative law, purely accessory model, partially accessory model, autonomous model, European Directive 2008/99/EC on the protection of the environment through criminal law