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The Use of Criminal Law for the Protection of the Environment in Europe: Council of Europe Resolution (77) 28

*Antonio Vercher**

I. INTRODUCTION

To appreciate the evolution of criminal law as an instrument of environmental protection, it is useful to begin with some brief historical considerations. Even a casual glance at legal history reveals a traditional resort to criminal law as a primary and effective way to solve numerous social, political, and economic problems. This tendency may be the product of the eighteenth century "absolutist" legal thinking, according to which it was the task of the sovereign to actively promote the common good, and thereby regulate and control most aspects of civil life. Under the absolutist system, those who transgressed the rules prescribed for the good order of the community were chastised, imprisoned, or fined.¹ Unavoidably, in a political system where criminal law was subject to the prerogative of the King, who also held judicial and legislative powers, most transgressions were considered criminal offenses.²

It was not until most constitutions of continental Europe had incorporated the principle of separation of powers, and enacted uniform and modern laws, that it became possible to establish a convincing and reliable distinction between criminal law and other areas of the legal system. As criminal law came to be viewed as an "ultimate solution," it was placed under exclusive judicial control, and all violations of social norms

* LL.M, Harvard University; Ph.D., Cambridge University. The author would like to thank Professor K. D. Ewing from King's College London for his interesting comments.

¹ Weigend, *The Legal and Practical Problems Posed by the Difference Between Criminal Law and Administrative Penal Law*, 59 REV. INT. DR. PEN. 67 (1988).

² F. Y. Valiente, *EL DERECHO PENAL EN LA MONARQUIA ABSOLUTA* 147 (1969).

meriting punishment were united in a single criminal code. Subsequently, a plethora of social, economic, and, inevitably, environmental legislation produced a set of complementary penal norms outside the criminal codes. In time, these penal norms were enforced to protect the environment in countries such as France³ and Spain.⁴

In recent years, the growth of industrial development has rendered the protection of the environment a matter of sudden and immediate concern in most European countries. Some of these countries have resorted to criminal law when other measures proved to be inadequate or ineffective. This tendency is apparent in the following excerpt, quoted from a report to the Tenth International Congress on Comparative Law: "When we encounter a new disastrous phenomenon, we naturally are shocked and are apt to rush to penal legislation to suppress it. As a matter of fact, we tend to think that the problem is solved, once we have a new penal law."⁵ This was the situation when the Council of Europe adopted Resolution (77) 28, designed to promote "eventual future harmonisation of all legislations of the member states of the Council of Europe in this field"⁶

II. THE COUNCIL OF EUROPE

The Council of Europe was established in May of 1949 by ten European states⁷ at the initiative of the European Movement, itself a product of a multitude of organizations established to promote European cooperation in the aftermath of the Second World War.⁸ The aim of the Council is to achieve greater unity among the democratic countries of Europe through "common action in economic, social, cultural, scientific, legal, and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms."⁹ The organization consists of a Committee of Ministers—including the foreign ministers of the member states—and a Consultative Assembly—which provided a parlia-

³ In France, the crime of poaching regulated by the Law of 15 April 1829 on "river fishing" has been applied by courts since 1859 to manufacturers who discharged any pollutant into the water. See Tiedemann, *Théorie et Réforme du Droit Pénal de l'Environnement: étude de Droit Comparé*, 1980 *REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPAR* 264 (1986) [hereinafter Tiedemann].

⁴ A. Vercher *COMENTARIOS AL DELITO ECOLÓGICO* 27-30 (1986).

⁵ Hirano, *The Criminal Law Protection of the Environment*, in *GENERAL REPORTS TO THE 10TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 917, 935 (1981) [hereinafter Hirano].

⁶ *The Contribution of Criminal Law to the Protection of the Environment*, Eur. Consult. Ass., *Comm. on Crim. Probs.*, 29th Sess., Resolution (77) 28 [hereinafter Resolution (77) 28].

⁷ These ten states were: Belgium, France, Denmark, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.

⁸ See *THE COUNCIL OF EUROPE: A GUIDE* 7 (1986).

⁹ Statute of the Council of Europe, adopted May 5, 1949, 87 U.N.T.S. 103.

mentary forum for member states. The Council now has twenty-three members.¹⁰

One of the primary functions of the Council of Europe is to develop the law of the Participating States, by harmonizing legislation throughout the member states, and by improving legislation to protect the individual. To achieve these goals, the Council is empowered to execute two forms of legal instruments: conventions and recommendations.

Conventions are multilateral treaties which represent a general European consensus on a given topic. Upon approval by the Committee of Ministers, the conventions are opened for signature by member states. To become effective in the member states, the conventions must first be Transposed into domestic law. In other words, before a member state may comply with a convention, it must first ratify it; thereby, committing itself to respect its obligations.

On subjects ill-suited for general conventions, the Committee of Ministers adopts recommendations. These recommendations, addressed to member-state governments, present guidelines for national legislation or administrative practice. Unlike conventions, which are binding on ratifying member states, Council recommendations are "policy statements," which merely propose a common course of action to be followed. Presently, there are over 120 international conventions and many more recommendations addressed to member governments of the Council of Europe.

III. RESOLUTION (77) 28 OF THE COUNCIL OF EUROPE ON THE CONTRIBUTION OF CRIMINAL LAW TO THE PROTECTION OF THE ENVIRONMENT

A. The Thesis of Resolution (77) 28

With the advent of the industrial era, several countries in Europe enacted a variety of laws for the protection of the environment. The German General Industrial Code of 1845, the British Waterworks Clauses Act of 1845, the French Dangerous Industrial and Commercial Activities Act of 1917,¹¹ and the Spanish Water Act of 1878¹² all contain provisions aimed at preventing environmental pollution. In addition to these

¹⁰ These members are: Austria, Belgium, Cyprus, Denmark, Finland, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Hungary and Poland are about to join the Council of Europe. *See* Vide, EL INDEPENDIENTE 22 (1990).

¹¹ Resolution (77) 28, *supra* note 6, at 11.

¹² Ley de Aguas de 13 de Junio de 1878, Gaceta no. 170 de 19 de Junio.

provisions, modern industrial development and its environmentally disastrous consequences have prompted some governments to look for new means of protection to complement those already existing. Perhaps one of the most interesting "complementary" means of protection has been criminal law. Given the importance of the subject, this Article considers the role of criminal law as a technique for the protecting the environment.

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

Based on these conclusions, the Ministers made the following recommendations to member states governments:

- ...
1. examination of criminal penalties for damage to the environment and whilst maintaining the traditional penalties of fine and imprisonment (possibly conditional) in the most serious cases:
 - a) introduction in this field of particular forms of pecuniary penalty, such as daily fines (astreintes), day fines, suspended fines and conditional fines;
 - b) allocation of proceeds from pecuniary penalties for pollution to environmental uses;
 - c) introduction in this field of measures such as restoration of the former state possibly ordered in connection with a suspended custodial penalty, work for the benefit of the community, disqualifications (as principal penalties) and publication of convictions;
 2. re-examination of the principles of criminal liability, with a view, in particular, to the possible introduction in certain cases of the liability of corporate bodies, public or private;
 3. examination of the advisability of criminalising acts and omissions which culpably (intentionally or negligently) expose the life or health of human beings or property of substantial value to potential danger;
 4. re-examination of criminal procedure in matters of environmental protection and in particular:
 - a) creation of specialist branches of courts and offices of public prosecution to deal with environmental cases;

- b) means of giving persons or groups the right to become associated with criminal proceedings for the defence of the interests of the community;
- c) creation of a special criminal register of persons convicted for pollution, independently of the general criminal register;
- d) exclusion from amnesty of serious environmental offenses¹³

Resolution (77) 28 could be considered the starting point for a more systematic use of criminal law for the protection of the environment in Europe. At the very least, Resolution (77) 28:

Draws attention to the advantages which certain member states may derive from gradually compiling in a single collection in particular the criminal provisions relating to environmental protection with a view to . . . an eventual future harmonisation of all legislations of the member states of the Council of Europe in this field.¹⁴

The importance of using criminal law to protect the environment may be assessed by examining different trends which co-exist in modern criminal law. It has been suggested that there exists in modern criminal law two different trends "which appear to conflict but are, in fact, linked by one and the same philosophy; on the one hand, there is a tendency to decriminalise certain offenses, particularly those considered traditionally as involving no victims (for example vagrancy, individual use of certain drugs)."¹⁵ This trend is known as depenalization.

The process of depenalization responds to two fundamental requirements. The first is substantive, and consists of reconciling the interests protected by penal sanctions in the context of what are perceived to be prevailing primary values. The other is functional, or praxeological, and consists of reducing caseloads so that courts may concentrate on more serious crimes.¹⁶ Both requirements are perfectly consistent with the second trend which consists of treating "as criminal many forms of behavior connected with technological activities which may seriously impair the health, safety and well-being of the community. The protection of the environment by means of penal sanctions is a prime example of this extension of criminal law."¹⁷

Notwithstanding the utility of criminal sanctions for the protection of the environment, criminal sanctions merely complement other regulatory measures. According to Hawke, criminal offenses in the environmental context should "support and supplement existing regulatory offenses relating principally to land, water and air pollution and nature

¹³ Resolution (77) 28, *supra* note 6, at 7-8.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 11.

¹⁶ Paliero & Travi, *Administrative Sanctionary Law in Practice: General Aspects*, 59 REV. INT. DR. PEN. 495 (1988).

¹⁷ Resolution (77) 28, *supra* note 6, at 11.

conservation.”¹⁸ Likewise, Hirano suggests that “[p]enal Law plays only a limited role and even when it plays a role, it does it mainly in combination with administrative regulations.”¹⁹ This secondary role of criminal law is evidenced by the fact that generally, only the most serious cases are referred to criminal courts.

Recourse to criminal justice for the protection of the environment is essentially a last resort, applicable only to serious cases in which the degree of pollution is particularly dangerous to the community. In such cases, to counter the danger to the community, Resolution (77) 28 provides that “the intervention of criminal law must present maximum efficiency, and therefore severity.”²⁰

B. The Impact of Resolution (77) 28

The relationship between criminal and environmental law may be described as a system for protecting the environment by means of penal sanctions. There is, however, an important limitation within this relationship, based on the special nature of environmental law. Environmental law is “essentially virgin law, unprecedented in history.”²¹ Indeed, most environmental legislation appeared in the last few decades and continues to proliferate constantly.²² The problem is that criminal sanctions must be adapted to an area of law which lacks the necessary stability to produce reliable and effective results.

Sensitive to this limitation, the Council of Europe, via Resolution (77) 28, invited member-state governments “to report to the Secretary General of the Council of Europe every five years on the action they have taken on the recommendations contained in th[e] resolution.”²³ With this invitation, the Council attempted to trace developments made by different governments, and, presumably, to acquire information concerning new limitations and obstacles which might arise.

Responses to the Resolution have varied greatly among different European governments. On the one hand, countries such as the United Kingdom, whose criminal legal system differs substantially from the systems in continental Europe, rarely resort to criminal law to protect the environment. Hawkins has defined the process of criminal prosecution in this field as “a kind of eminence grise, a shadowy entity lurking off-

¹⁸ Hawke, *Crimes Against the Environment*, 16 *ANGLO-AM. L. REV.* 90 (1987) [hereinafter Hawke].

¹⁹ Hirano, *supra* note 5, at 936.

²⁰ Resolution (77) 28, *supra* note 6, at 15.

²¹ Krämer, *The Open Society, Its Lawyers and Its Environment*, 1 *J. ENVTL. L.* 3 (1989).

²² *Id.* at 3.

²³ Resolution (77) 23, *supra* note 6, at 8.

stage, often invoked, however discreetly, yet rarely revealed"²⁴ and very seldom used.²⁵ Sally Hughes, by contrast, explains that it was rather a problem of bureaucracy, organization, and poor enforcement by public inspectorates that kept the level of prosecutions low. In fact, pollution of rivers has been prosecuted proportionately less as the number of incidents has risen.²⁶ Hawke insisted upon that point, adding that "enforcement of environmental offenses can be characterized as being selective, unfair and uncertain. Such offenses are regulatory offenses which are in urgent need of better, more consistent discretionary enforcement in their own right."²⁷

Other countries, however, have been more receptive to Resolution (77) 28. Germany, for instance, made important amendments in that regard. Before 1980, any survey of the existing penal sanctions was hampered by the fact that most sanctions were scattered throughout different legal bodies. "The Penal Code provid[ed] only for the special case of contamination of fountain[s] and the most important penal sanctions for water and air pollution were to be found in the BImSchG [§ 62 et seq.], the WHG [§ 38 et seq.], the AbfallbG [§ 16 et seq.], and in the traffic laws."²⁸ The amendment of the Penal Code in 1980 has introduced important novelties and resulted in a more homogeneous and unified system of criminal law for the protection of the environment.

Presently, the German Penal Code contains a chapter composed of seven articles, entitled "Crimes against the Environment." Despite numerous problems associated with the implementation of these articles,²⁹ the German criminal law system is considered to be one of the best legal systems for the protection of the environment.³⁰ In addition to criminal

²⁴ K. Hawkins, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION 191 (1984) [hereinafter HAWKINS].

Regarding the difficulties in the use of criminal law, see G. RICHARDSON, A. OGUS, & P. BURROWS, POLICING POLLUTION: A STUDY OF REGULATION AND ENFORCEMENT 14 (1982) [hereinafter RICHARDSON].

²⁵ Hawkins, *supra* note 24, at 195.

²⁶ Hughes, *Bringing more Weight to the Green Corner*, *The Independent*, July 21, 1989, at 13.

²⁷ Hawke, *supra* note 18, at 96.

²⁸ S. Ercman, EUROPEAN ENVIRONMENTAL LAW 363 (1977).

²⁹ Dannecker, *La Responsabilité Pénale pour les Délits d'omission en Droit Allemand, Notamment dans le Domaine de l'Economie et de l'environnement*, 1987 REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ 379 (1987) [hereinafter Dannecker]; Tiedemann, *supra* note 3, at 262; de la Cuesta Arzamendi, *La Ley Alemana de Reforma del Código Penal para la Lucha Frente a la Criminalidad contra el Medio Ambiente*, 18 CUADERNOS DE POLITICA CRIMINAL (1982); Ruthe, *Genesis de las Norma Penal para la Protección n del Medio Ambiente*, 25 CUADERNOS DE POLITICA CRIMINAL 50 (1985).

³⁰ Conde-Pumpido Turon, *Proteccion Penal del Medio Ambiente: Cuestiones Generales*, IV MEDIO AMBIENTE: PODER JUDICIAL 81 (1988) [hereinafter Conde-Pumpido Turon].

provisions for the protection of the environment, Germany has followed several Council recommendations designed to implement the new policy of environmental protection. In that regard, the German government has organized special offices of public prosecution to deal with environmental cases in nearly all big cities.³¹ Also, German courts have criminalized or removed from the scope of administrative authorities those certain "omissions," or incomplete controls over the activities of private individuals, which expose "the life or health of human beings or property of substantial value to potential danger."³² This new policy has resulted in an important increase in criminal proceedings: 9,805 criminal proceedings in 1985, as compared to only 5,151 in 1980.³³ Moreover, comparative analysis reveals a 27% success rate of convictions in Germany, in contrast to rates of 18% in France, 14% in Sweden, and 5% in Austria.³⁴

The Italian criminal law system for the protection of the environment³⁵ is similar to the German system as it existed before the 1980 amendment. The Penal Code contains specific provisions on noise pollution, but none relating to air, water, or soil pollution.³⁶ The Penal Code does, however, contain a complex set of provisions directed to the protection of persons and things. Since pollution often results in injury to persons and things, these provisions are useful in the struggle against pollution. Article 635, for instance, punishes "whomsoever causes the destruction, dispersion, or total or partial inutility of a movable or immovable which belongs to someone else."³⁷ According to Certoma, however:

It is apparent that this provision contains certain inherent limitations, an important one being that the damaged thing must belong to another person who, incidentally, may even be the State. Therefore, because air does not have an owner the provision is inapplicable to atmospheric pollution, unless such emissions subsequently damage public or private property.³⁸

The most important limitation of the Italian system is the lack of a

³¹ Tiedemann, *supra* note 3, at 272.

³² See Dannecker, *supra* note 29; *see also* Tiedemann, *supra* note 3, at 266.

³³ Tiedemann, *supra* note 3, at 271.

³⁴ Albrecht, *Particular Difficulties in Enforcing the Law Arising Out of Basic Conflicts Between the Different Agencies with Regard to the Best-Suited Reaction upon Highly Sensitive Kinds of Crime*, in *INTERACTIONS WITHIN THE CRIMINAL JUSTICE SYSTEM* 64 (Council of Europe, 1987) [hereinafter Albrecht].

³⁵ For a detailed description of the Italian criminal law system for the protection of the environment, see G. CERTOMA, *THE ITALIAN LEGAL SYSTEM* 463 (1985) [hereinafter CERTOMA].

³⁶ *Id.*

³⁷ *Id.* at 465.

³⁸ *Id.*

uniform legal body to deal with environmental pollution³⁹ and the lack of adequate finances and personnel.⁴⁰

These observations suggest that Italy declined to follow any of the Council recommendations on the protection of the environment through criminal law.

The French legal system, like the Italian system, generally does not employ criminal law for the protection of the environment. The French legal system, as opposed to the German legal system, lacks a uniform legal body to deal with environmental disruptions⁴¹ or any criminal law provision specially aimed at deterring environmental crimes. The French system consists of a myriad of legal provisions—more than sixty, according to the De Vilmorin's classification⁴²—and their infraction is considered a "contravention." They will be considered "delits" (crimes) only when the "tribunal de police" imposes sanctions for non-compliance with "contraventions."⁴³

There have been some attempts to introduce the concept of "environmental crime" to the French legal system. M. Ciccolini, for example, made an interesting proposal to the French Senate in 1978.⁴⁴ Article 1 of the proposal provided that "quiconque aura par inattention, imprudence ou negligence, direct ou indirect, porte atteinte á la santé de l'homme, des animaux ou des plantes en alterant soit l'équilibre du milieu naturel, soit les qualités essentielles du sol, de l'eau ou de l'air, est coupable de delit de pollution." The aim of this proposal, and others like it,⁴⁵ is to put polluters on the same level as ordinary criminals.⁴⁶ These proposals have not been accepted, however, and for the most part, the system remains unchanged.

IV. THE CASE OF SPAIN

As a consequence of recent developments in Spain, the Spanish sys-

³⁹ Conde-Pumpido Turon, *supra* note 30, at 83.

⁴⁰ Certoma, *supra* note 35, at 481.

⁴¹ M. Prieur, DROIT DE L'ENVIRONNEMENT 1008 (1984) [hereinafter PRIEUR].

⁴² de Vilmorin, La Lutte contre les Atteintes a l'Environnement (Ministere de l'Environnement, 1981).

The legal provision more frequently used is article 434-1 of the Rural Code, CODE DE L'ENVIRONNEMENT 1225 (1984), replaced by article 407 (loi du 29 juin 1984), which punishes "quiconque a jeté, déversé ou laissé écouler dans les aux visées a l'article 402, directement ou indirectement des substances quelconques dont l'action ou les réactions ont détruit le poison ou nui a sa reproduction ou a sa valeur alimentaire." According to Hirano, this provision is held to be "l'arme la plus utilisée et la plus redoutée." See Hirano, *supra* note 5, at 929.

⁴³ Prieur, *supra* note 41, at 1015.

⁴⁴ Ciccolini, *Proposal Before the French Senate*, Proposition de Loi no. 292 (Apr. 6, 1978).

⁴⁵ See generally PRIEUR, *supra* note 41, at 1027.

⁴⁶ *Id.* at 1027.

tem is one of the newest among countries comprising the Council of Europe. The Spanish legislation consists of three different parts.

The first covers a myriad of laws, decrees, and other legal norms connected with the environment. Some of them are within the sphere of civil law, some within the sphere of administrative law, and others within the sphere of criminal law. They have been issued since 1878, when the Water Law appeared, and most of them were not specially issued to protect the environment, although they have some ancillary connections with it. Within this first group, the most relevant laws concerning the direct protection of the environment are: the 1878 Water Act, replaced by the 1985 Water Act; the 1961 Regulations and Technical Glossary of Incommodous, Unhealthy and Dangerous Activities; the 1964 Nuclear Power Act; the 1972 Law of Environmental Protection; and the 1988 Coasts Law.

The second part is referred to in article 45 of the 1978 Spanish Constitution, which states:

All people have the right to enjoy the environment for personal edification and also the duty of conservation.

The public authorities shall oversee the reasonable use of all natural resources, with an aim to protect and improve the quality of life and to reserve and reclaim it with the help of the people.

Criminal or administrative sanctions, as well as the obligation to repair any harm caused, will be applied by law to those who violate the provision of the preceding paragraph.

The third part is referred to in article 347 bis of the Spanish Criminal Code,⁴⁷ introduced in 1983, which provides:

The person who: violates the laws or regulations protecting the environment; brings about directly or indirectly any kind of pollution in the atmosphere, earth, fresh and sea water, creating great danger to the health of the people or great harm to animal life, forests, meadows, farms; will be punished with imprisonment from the month and a day to six months and with a fine from 175,000 pesetas (\$1,591) to 5,000,000 (\$45,455).

Corporations or enterprises that operate secretly without obtaining administrative authorisation or approval for their operations; or that disobey the express order of Administrative Authorities which corrects or suspends the pollution activity; or that obstruct inspections made by the administration will receive a higher degree of punishment (from six months to six years of imprisonment).

When the activities described in the first paragraph create a catastrophic or irreversible harm, the authors will be punished with a higher degree of punishment as well.

⁴⁷ The word "bis" added to article 347 is to identify a new article introduced between the old articles 347 and 348.

In all cases regulated by this article, the courts have the power to close the polluting premises temporarily or permanently. The courts may also propose that the administration intervene to safeguard the right of the workers affected thereby.

These three segments of the Spanish environmental system correspond to the historical development of the Spanish environmental legislation. The first part corresponds to the period from 1879 to 1978. During this period, the laws were completely disorganized, sometimes overlapping, and in such confusion that their effectiveness is unclear.

The second part coincides with the enactment of article 45 of the 1978 Spanish Constitution. As M.D. Fernandez has noted, the inclusion in the Constitution of an article referring to the protection of the environment and the quality of life means the recognition of the enormous importance of the environment and the necessity of protecting it in the most adequate way.⁴⁸ This is an interesting trend which began to appear in some European constitutions.⁴⁹

The third part corresponds to the Organic Law of June 25, 1983, which amended the Penal Code and introduced the new article 347 bis which was mentioned above. The reason for its existence is to organize the myriad of laws referring to the environment and also to comply with the statement contained in the third paragraph, article 45 of the Spanish Constitution. For these reasons article 347 bis may be considered the keystone of the Spanish system of environmental protection.

It is important briefly to describe recent developments in Spain regarding the application of article 347 bis. The use of criminal law for the protection of the environment has been endorsed by article 45 of the Constitution which provides that "criminal or administrative sanctions . . . will be established by Law" for those who commit environmental disruptions. The first attempt to carry out the command of the Constitution was through the 1980 Criminal Code Bill, although the Bill was never passed. The second attempt was more successful, resulting in the article 347 bis.

Spain, however, did not completely accept the role of criminal law for the protection of the environment. In fact, a number of authors were

⁴⁸ M. D. Fernandez Rodriguez, *PROTECCION JURIDICO-PENAL DEL MEDIO AMBIENTE* 188 (1980).

⁴⁹ That is also the case of article 66.1 of the 1976 Portuguese Constitution and article 24 of the 1975 Greek Constitution. The 1947 Italian Constitution does not contain any express reference to the environment as an object of protection. There are, however, two indirect references which imply a collective interest in the protection of the human habitat and the quality of life. Article (2)C declares that the Republic shall protect the landscape and historical and artistic patrimony of the nation. Article 32(1)C provides that the Republic shall protect health both as a fundamental individual interest and the interest of the collectivity.

suspicious of any effectiveness at all. Gimbernat Ordeig, for instance, argued that the penal protection of the environment was neither the sole nor the most effective means of protection.⁵⁰ Also Muñoz Conde, based on the conclusions reached by the Twelfth Congress on International Criminal Law, expressed the view that criminal law, when trying to protect the environment, has a quite ancillary mission and foresaw a scant application of article 347 bis.⁵¹ Regardless of these opinions, however, at present, the use of criminal law for the protection of the environment in Spain is an indisputable fact. In that regard, the "Exposición de los Motivos" or Preamble of the Law of 25 June 1983, introducing article 347 bis, expressed quite clearly that:

The criminal protection of the environment, despite the constitutional recognition, was practically non-existent. The urgency of this problem arose because irreversible harms were done. There is no argument that a few criminal precepts will not have the power by themselves to solve the problem, but it is also clear that any political attempt to solve this problem will require the coercive help of the criminal law.

Immediately after its enactment, article 347 bis raised some very polemical questions. To some extent, the reaction is not surprising because article 347 bis is a new article in the code. Although some of these questions were of great importance and complexity, two of them were particularly outstanding. The first question referred to the sense in which the term "environment" is used by the Penal Code in article 347. Does the Penal Code use a narrow or a broad definition? Needless to say, this is a basic question and, according to the sense adopted, Spanish environmental policy might vary as it evolves. There were important discussions at that time among different Spanish authors on the scope of environmental protection. This issue was resolved by the Barcelona Court in a decision of February 20, 1988 which interpreted the term "environment" in a broad sense, thereby permitting a wider scope of environmental protection. According to the Court, criminal law protects the "ecological balance" in general and not only those parts of nature which are directly related to human beings.⁵²

The second question relates to the divide between criminal and administrative law. As we have seen, paragraph 3 of article 45 of the 1978 Spanish Constitution provides the possibility of resorting to criminal or administrative punishment against those who violate the first and second

⁵⁰ O. Alzaga, *LA CONSTITUCIÓN ESPAÑOLA DE 1978* 326 (1978).

⁵¹ F. Muñoz Conde, *DERECHO PENAL: PARTE ESPECIAL* 437 (1983) [hereinafter MUÑOZ CONDE].

⁵² See Sumario 12/85 del Juzgado de Instrucción de Berga; Sentencia de 20 de Febrero de 1988; Sección Tercera de la Audiencia Provincial de Barcelona; Fundamento de Derecho Primero.

paragraphs of the aforementioned article. The problem may be phrased as follows: once the violation has occurred and a punishment has to be applied, what is the criterion to be used to decide whether a criminal or an administrative punishment should be applied? According to J. Galvez, the criterion applicable should be the one which permits a distinction between those environmental disruptions that pose a real or potential danger against humankind, and those that merely disobey an order from the competent and legitimate authority without threatening any real or potential danger against humankind.⁵³ Rodriguez Devesa expressed a similar opinion, adding that the "seriousness" of the offense should be the criterion to distinguish between the criminal and the administrative fields.⁵⁴ This is also the criterion adopted by the Spanish Constitutional Court in a decision of October 3, 1983.⁵⁵

In addition to these two initial questions, there remain others of paramount importance. One particularly notable problem has been described by Albrecht as "multifunctionality."⁵⁶ It is evident that environmental criminal laws should be applied in order to protect the natural environment. At the same time, the pursuit of this objective interferes with objectives of the economic and commercial systems. Albrecht explains that "[t]he conflict between legitimate goals of protecting the environment and the legitimate goal of economic growth and stability has not been resolved on the level of criminal legislation."⁵⁷ This conflict is even more complex when the protection of the environment and the promotion of economic growth and stability are both constitutional values, as in Spain. On the one hand, article 45 of the Constitution envisages the protection of the environment; on the other hand, articles 38 and 40 provide that the Spanish economy is based on the free market, as well as providing the necessary measures to protect economic growth and stability. In that regard, Hirano's words concerning the case of Japan are instructive:

It is a well-known fact that the Japanese industry grew at an unprecedented rate in the fifties and sixties. . . . And it is also well known by now that this growth was accompanied by an almost equally tremendous increase in environmental hazard. The Law included the clause: "The conservation of life environment should be balanced against the needs of economic development." This clause was attacked and consequently deleted by the amendment of the Law in 1970. Now, the protection of the environment is an

⁵³ J. Galvez, *COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA* 531 (1980).

⁵⁴ J. M. Rodriguez Devesa, *DERECHO PENAL ESPAÑOL: PARTE ESPECIAL* 1047 (1983).

⁵⁵ Sentencia del Tribunal Constitucional 77/83 (Oct. 3, 1983).

⁵⁶ Albrecht, *supra* note 34, at 60.

⁵⁷ *Id.*

absolute "must."⁵⁸

It is evident that in Spain, as in other Western countries, the problem of harmoniously adjusting the conflicting interests of the protection of the environment and the need for industrial development remains unsolved.

The problem of the enforcement of environmental criminal legislation becomes even more complex if one considers the point made by Albrecht that "environmental crimes are not clearly defined but represent rather open concepts with 'incomplete' criminal law serving as an elastic framework for the implementation of various policies."⁵⁹ Albrecht goes on to say that "environmental laws are 'incomplete' insofar as originally they do not define behaviour which is subjected to criminal punishment, but they refer to other, mainly administrative laws, ordinances or specific orders made by administrative bodies designed to monitor and control certain economic or environmental fields."⁶⁰ This subordination was openly denounced by the Barcelona Criminal Court, in the decision of February 20, 1988, pointing out that because the administrative agencies have a discretionary power to complete the criminal law by issuing permits or establishing general or specific limits to the discharge of air or water-polluting substances, they may become in practice the real "masters" of the environmental criminal legal system.⁶¹ The court decision of February 20, 1988; resulted in the conviction, imprisonment, and fine of the E.D.I. Director of the thermal power station in Cercs (Catalonia) for the illegal discharge of air-polluting substances.⁶² The Court pointed out that the irregular change by the administrative agency of the limits to the discharge of air-polluting substances was an important obstacle in the investigation of the environmental disruption.⁶³

It is unquestionable that the more frequently article 347 bis is applied, the more problems and difficulties will arise. Nevertheless, it is clear that article 347 bis has become a legal instrument in the hands of the ordinary citizen to participate in the fight against pollution,⁶⁴ especially since the Spanish system of Criminal Legal Procedure permits the use of class actions to protect the common interests such as the environment or the human welfare. Recently, there has been an increase in the

⁵⁸ Hirano, *supra* note 5, at 924.

⁵⁹ Albrecht, *supra* note 34, at 60.

⁶⁰ *Id.*

⁶¹ Muñoz Conde, *supra* note 51.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Fernandez de Casadevante Romani, *La Aplicación de la Normativa de Medio Ambiente en España: Analisis de un Supuesto Particular*, 23 REVISTA VASCA DE LA ADMINISTRACIÓN PÚBLICA 196 (1989).

use of criminal actions against public or private institutions based on article 347 bis.⁶⁵ Evidently, in spite of the foregoing limitations, there is a growing tendency to resort to criminal law in Spain. Whenever there is an environmental disruption, there is always a popular reaction and a general outcry demanding the application of article 347 bis.⁶⁶ More importantly, despite the lack of initiative from the central government, some organizations and institutions have begun to apply some of the recommendations made by the Council of Europe in Resolution 77 (28). For example, the public prosecutor's office in the Valencia Superior Court of Justice has created "motu proprio," a special department to investigate environmental crimes. The Madrid⁶⁷ and Zaragoza⁶⁸ Local Police, as well as the national Civil Guard (Guardia Civil)⁶⁹ have established groups or sections specially trained to investigate environmental cases. The high quality of the investigations carried out by those special police groups when dealing with environmental cases is commendable.

V. CONCLUSION

There is a slow, though significant, evolution in some European countries towards the use of criminal law for the protection of the environment. Most European countries, either because of their political systems or perhaps because of their social characteristics or special circumstances, have adopted different degrees of criminal sanctions for the protection of the environment. Notwithstanding the differences, evolution is in process, with the Council of Europe acting as harmonizer among the different legal systems. Although the foregoing analysis has discussed only a limited number of countries in the Council of Europe, other Council countries—such as Sweden, Holland, and Finland—and even non-Council countries—such as Australia,⁷⁰ Canada,⁷¹ Venezuela,⁷² Argentina,⁷³ and Brazil,⁷⁴—have on occasion resorted to crimi-

⁶⁵ *Id.*

⁶⁶ There were no criminal investigations on environmental disruption in the Valencia Superior Court in 1986. In November of 1989, by contrast, there were eighty-five criminal cases under investigation.

⁶⁷ According to *El Pais*, 300 policemen distributed in several "green patrols" began to control the environment in Madrid in 1989. *El Pais*, July 20, 1989, at 24.

⁶⁸ *El Pais*, Dec. 12, 1988, at 26.

⁶⁹ *Las Provincias*, Jan. 3, 1988, at 6; *see also El Pais*, May 22, 1988, at 25.

⁷⁰ Bentil, *Environmental Pollution Control and Strict Liability in Anglo-Australian Penal Laws*, 10 J. PLAN. & ENVTL. L. 225 (1986).

⁷¹ Hawke, *supra* note 18, at 91.

⁷² *See J. CHIOSONE, DELITOS CONTRA LA NATURALEZA Y EL AMBIENTE: DELITOS ECOLOGICOS EN VENEZUELA* (1982).

nal law. The trend has become widespread.

In spite of this trend, a number of scholars and lawyers have expressed opposition to the use of criminal law for the protection of the environment. These opponents insist that the use of criminal law is not a proper solution to face constant environmental degradation. Their objection requires further analysis.

The planned economy and collectivized society is perhaps the key-point in the historical development of modern states. At the end of the nineteenth century, states developed unprecedented administrative capabilities, transformed economies, and imposed "detailed exclusive control over tightly delimited territory and nearly every aspect of life."⁷⁵ The eighteenth century Absolutism in Europe was replaced by a brief period of "laissez faire" liberalism. This system, in due course, was replaced by the all-powerful and interfering state to which Lord Hewart referred when warning against "the pretensions and encroachments of bureaucracy."⁷⁶ In the pre-industrial liberal society, the intervention of the state was limited to functions consisting of the adjudication of disputes, collective decision-making, some administrative functions such as maintenance of control, and collection of taxes.

Since the end of the nineteenth century, the role of the state has steadily increased. One of its primary functions is to provide for the common good wherever uncoordinated individual effort is inadequate. As Walker has suggested, economic theory predicts that such goods will be undersupplied, especially in market economies.⁷⁷ This results in a "central paradox of an inherent, continuing potential for conflict between the state's roles as developer and as protector and steward of the natural environment on which its existence ultimately depends."⁷⁸ Furthermore, states, in pursuit of expansion, adopt entrepreneurial roles which often encourage environmental degradation.⁷⁹ Given such constraints, it is not surprising that environmental management has been neglected, or that criminal law has not been used properly.

In one way or another, modern states have broken the rules, subverting, to a certain extent, the institutional order. For instance, when a state, in the general pursuit of economic growth, declines to discipline

⁷³ Pierangelli, *Ecología, Polución y Derecho Penal*, 21 DOCTRINA PENAL 73 (1983).

⁷⁴ Findley, *Pollution Control in Brazil*, 15 ECOLOGY L.Q. 1 (1988).

⁷⁵ Walker, *The State in Environmental Management: The Ecological Dimension*, 37 POL. STUD. 25, 29 (1989) [hereinafter Walker].

⁷⁶ Lord Hewart of Bury, *THE NEW DESPOTISM* — (1929).

⁷⁷ Walker, *supra* note 75, at 32.

⁷⁸ *Id.*

⁷⁹ *Id.* at 34.

one who violates water pollution regulations, administrative inaction has been termed "toleration." Toleration is thus postulated to legitimize such offenses and to avoid administrative sanctions.⁸⁰ Nevertheless, states still use criminal law as an instrument of last resort against polluters. In that regard, the criminal legal framework provides a serious warning against potentially serious infractions of environmental rules, which the state, an industrial manager itself, has imposed in its economic management of society.

In England, Richardson, Ogus, and Burrows have reported:

The law was not an end in itself, but was used insofar as it provided the means of securing satisfactory effluents. In the majority of cases the legal position was never directly alluded by the officers in their dealings with traders, but it provided the tacit background to all subsequent negotiations. Direct reference to the law was made only when other means of persuasion failed. The officers' attitudes towards the imposition of the criminal sanction reflected this perception of the law as a resource.⁸¹

Moreover, Albrecht's research in several countries indicates that because state agencies have adopted bargaining strategies and because of the difficulties in dealing with complex cases and limited resources in the hands of the prosecution service, both factors have resulted in reinforcing "the trend to concentrate criminal environmental law enforcement on small-scale offenders, while large-scale pollution occurring in an organisational and industrial context is more dismissed and not prosecuted."⁸²

According to basic legal principles in any civilized society, the role of criminal law is something more than a managerial instrument, particularly in the hands of a state which often adopts an entrepreneurial role. Public perceptions of criminal justice, and public support for criminal justice agencies, seem to depend on the degree to which criminal justice operates and functions in a coherent and systematic way.⁸³ The irregular application of criminal law may result in popular mistrust, decreased public support, or even extreme public reactions as frustration mounts. Perhaps this explains why the Lugo City Counsel in Galicia (Spain), disillusioned with the application of ordinary law, has requested that the government apply harsh anti-terrorist laws in cases of forest burning or nature pollution.⁸⁴

It is important to note that environmental crimes are new crimes,

⁸⁰ Winter, *Perspectives for Environmental Law & Entering the Fourth Phase*, 1 J. ENVTL. L. 45 (1989).

⁸¹ Richardson, *supra* note 24, at 197-98.

⁸² Albrecht, *supra* note 34, at 64.

⁸³ M. D. Kaolgeropoulos, LE FONCTIONNEMENT DU SYSTEME DE LAS JUSTICE PENALE ET LES REPRESENTATIONS DE LA POPULATION EN CE QUI LE CONCERN 421 (1979).

⁸⁴ El Pais, May 7, 1982, at 23.

which represent a new development in the use of criminal law, especially in civil law countries with the decreasing influence of Positivism. One of the most important features of Positivism was that it focused almost entirely on the judicial aspects of criminal law, and paid very little attention to the social or political dimension of every crime. Roxin puts emphasis in the new attitude of the modern criminal law trying to combine both sides: the purely judicial, on the one hand, and the social and political, on the other. This new trend accomodates social and political reality by repressing all activities which may harm the common welfare.⁸⁵ Environmental disruptions are clearly among these activities.

Finally, it is important to note that an environmental crime is a crime as any other one, albeit a new crime born as a consequence of social, economic, and industrial development. To appreciate the criminal nature of environmental disruptions, it is necessary to expand the traditional definition of crime and the stereotypical criminal, to embrace those who wreak new forms of socio-economic and industrial wrong against society.

⁸⁵ C. Roxin, *Política Criminal y Sistema de Derecho Penal* 25 (19—).