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Environmental Ethics and Right to Punish

Global Criminal Policy
in the Human–Nature Dualism

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In a democratic society,
to all those who are fighting to protect their own territory
from Finance which claims to govern the environmental policy

Living our vocation to be protectors
of God’s handiwork is essential to a life of virtue

.

H.F. Francis, *Laudato Si'*
Encyclical Letter, 24 May 2015, § 217

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Prologue

1. In the course of human history, different concepts of human-nature dualism have been developed, from those that combine the human being and nature into one single entity, to those that, on the contrary, place the human being and nature on two different planes, as if they were in perpetual conflict with each other; and lastly, to those that consider *homo sapiens* unique among living creatures. The development of these different concepts has gone through different stages: from the ancestral reverential fears of primitive man, to the first forms of pagan religions and spirituality, which contributed to creating a feeling of belonging to and community with Creation. However, the more humans increased their self-consciousness and improved their intellectual abilities, the more their fear of natural phenomena was overcome by indifference, and, later on, by hostility, which characterises the behaviour of modern and, for some, contemporary man.

The environmental issue, on which global attention is being focused from a social and consequently also legal point of view, is not a political and economic issue; i.e. it is not an issue about the type of production and the type of social and ownership relationships, as it is evident that the ecological crisis has struck both capitalism and socialist systems. On the contrary, it is an ethical issue, i.e. an issue about behaviour and the purposes to be achieved. Using ethics and morality to justify legal protection of the environment by criminal law may seem unhistorical; nevertheless, the contrary may be true. In fact, it is criminal law that outlines public ethics, since in a context of value pluralism, only the law can adopt points of view that respect pluralism and at the same time are not typical of specific ideologies – owing to superior principles, the law may not be based on a specific ideology. However, in a situation where there is a lack of public

parameters for moral assessment, the safest way to avoid a certain type of behaviour is to make such behaviour a crime, since otherwise there is no meaningful or shared value system: any actions to prevent such behaviour that are not undertaken in terms of criminal law or in juridical terms at all have very little impact in a system that has no independent code of conduct. Hence the ethical reason for a legal protection of the environment by criminal law.

2. Sovereignty, like any other juridical and social concept, has reshaped and transformed itself over time under the influence of human events. However, even though its definition is in constant evolution, its relationship with *territory* has never been questioned. Territory is the area within which the sovereignty of a state is exercised. Nevertheless, this strict and constant relationship between sovereignty and territory has been questioned by Kelsen's concept of "universal legal system", which acknowledges the right of individuals to an international legal status and absorbs all other legal systems, thus substituting the concept of sovereignty with that of a legal system that extends globally like a sort of law of the world that applies to every individual and that homogenises the political, cultural, regulation and custom differences between individual states. The extension of the legal system beyond territorial state borders reduces the need to conquer other territories to extend national sovereignty influence, thus guaranteeing international peace and security. This is one of the phenomena connected with the concept of the so-called *globalisation*[1], which has not abolished state sovereignty, but has made it relative and non-exclusive.

The protection of the environment highlights exactly the point of arrival of Kelsen's thought and plays a critical role in the interdependence between nation states, which was caused

[1] BECK, *Che cos'è la globalizzazione. Rischi e prospettive della società planetaria*, Rome, Italy, 1999; BAUMAN, *Dentro la globalizzazione. Le conseguenze sulle persone*, Rome-Bari, Italy, 2008.

by *deterritorialisation* as a further and more immediate consequence of globalisation.

It is a well-known fact that territory is an element of the state limited by boundaries, i.e. imaginary lines that separate two or more areas characterised by different political orders. However, territory is not only a juridical concept, but something real, made up of natural resources that are either static, like soil and flora, or dynamic, like fauna, rivers, seas and air, which certainly cannot be contained within imaginary lines like boundaries, but are shared between different political bodies. Sharing natural resources is of critical importance in international relationships, since, as can easily be seen, any changes made to resources by one state can prejudice the interests of a neighbouring state, thus jeopardizing the safety of its community. Therefore, the need arises to globally limit absolute sovereignty of states in traditional terms over natural resources in their territories. For example, the Rio Declaration on Environment and Development of 1992 expressly states that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". Rousseau would describe this phenomenon in anthropomorphic terms as an agreement within the international political body, while Kelsen would highlight the confirmation of the originality of the international regulations that limit sovereign will of states. This observation leads to another thought: international regulations define juridical sovereignty by requiring that international treaties be implemented like a sort of osmosis between international and national judicial systems; however, at the same time, they extend the power of a state (in Rousseau's terms) by legitimizing extraterritoriality, at least in some well-defined and shared contexts, like the protection of human rights and the protection of the environment[2].

[2] ECtHR, Grand Chamber, 12th December 2001, *Banković.*

3. The debate between anthropocentrism and ecocentrism is a cultural contrast between the western and the eastern perspectives on human-nature relationship. By comparing both perspectives, it emerges that – also on the basis of aspects highlighted by some scientific, psychological and anthropological studies – «most of the implicit presuppositions on which the theoretical and ethical framework of the western world is based should be considered, to all effects, as Gregory Bateson said, obsolete»[3]. Although it is true that human beings, as opposed to other living beings, have rational faculties, like language, thought, culture, science and technology, it is also true that such unique faculties do not justify the separation of man from nature, given that it is thanks to those natural gifts, those faculties, that human beings were able to adapt to the environment, in the same way as any other living being has one or more abilities to relate to nature. In this view, it appears evident that the maintenance of an adaptive relationship between *bios* and *oikos* is the framework around which a different (and maybe radical) paradigm of thought and cultural perspective that allows to find a significant equilibrium point between human being and natural context should be developed. It is indeed hard to take a stance in the debate between anthropocentrism and ecocentrism; nevertheless, it must be noted that the grammar used by (western) criminal lawyers has serious difficulties with dealing with different points of view, as it is deeply imbued with anthropocentrism. Therefore, it is a complex task to build a scientific argument from a purely ecocentric perspective, without using common places when it comes to identifying legal assets, which are defined as interests that imply a benefit for human society. After all, human beings interpret everything around them through their eyes, and therefore tend to have an egocentric or egoistic vision of life, despite the effort they make to build interpersonal relationships. This observation seems to highlight that the observed perspectives (egoism, anthropocentrism, ecocentrism)

[3] ANDREOZZI, *Verso una prospettiva ecocentrica*, Milan, Italy, 2011, p. 5.

are not experienced as different alternatives, but rather in a hierarchical way, even when one does not consider human beings at the top of the natural pyramid – according to the western perspective – but as living beings that are set in a context of relationship with nature. Criminal law also means social defence, guarantee for democratic security and cultural achievement; it is therefore a science of humanity, with the consequence that different perspectives can never be considered absolute, but must be considered in connection with the wellness of human beings as individuals or, if one prefers, as a community. A universal democratic perspective might lead to the combination of opposite cultural frameworks, which in turn can lead, in the context of environment, to the concept of "sustainable development", without the need for any new generation of rights (natural rights) in addition to first-generation rights (human rights) and second-generation rights (economic and social rights).

4. Looking at the Italian law, the improvement of the quality of human life is the main objective of the sector regulations provided for by Legislative Decree no. 152 of 2016, "to be achieved through the protection and the improvement of the condition of the environment and through a prudent and rational utilisation of natural resources" (Article 2). This is the mainly anthropocentric vision of the Italian regulations, which protect the general objective of improving the quality of human life by applying environment protection measures, thus creating an evident relationship between purpose and means. However, a deeper analysis of the regulations on pollution seems to outline a different relationship that is coherent with the new environmental ethics, which prioritise the protection of the environment and its resources (also by criminal law), of which human life is a vital component.

Let us take an example. Pollution is defined as "the direct or indirect introduction, as a consequence of human activities, of substances, vibrations, heat, noise or, more generally, of physical or chemical agents in the air, the water or the soil, which

may harm human health or the quality of the environment, cause damage to material property, or harm or jeopardise the recreational value of the environment or other legitimate uses of the environment" (Article 5, § i-ter, of Legislative Decree 152/2006). As regards regulations about emissions into the atmosphere, in particular Article 268 of Legislative Decree 152/2006 defines atmospheric pollution as "any modification of atmospheric air caused by introduction into the air of one or more substances in such quantities and with such characteristics as to harm or jeopardise human health or the quality of the environment, or as to damage material property or jeopardise legitimate uses of the environment". Therefore, three different types of interest emerge, which are mutually exclusive, but not dependent from each other: the quality of the environment, human health and legitimate uses of the environment (uses for economic, tourism, agricultural, etc., purposes, including the recreational value of the environment). Thus, a complex and heterogeneous protection framework is outlined.

In general, criminal protection against a particular offence provides for an additional criterion for defining the property protected, while the application of criminal law is restricted to the most serious criminal offences against higher-level property, in accordance with the principle of harm, which guarantees the correct relation between the loss of personal freedom of the criminal offender and the property protected by criminal law. Therefore, in general, the selection criteria for criminal charges limit the protection to interests or offence levels different from those covered by other branches of the law, like administrative penalty law. However, in the context of environmental penalty law, the connection with the underlying administrative regulation is particularly evident, so much so that it shows a close relation of supplementarity between criminal law and administrative law[4]. This aspect is a critical point in the entire supple-

[4] CATENACCI, *La tutela penale dell'ambiente. Contributo all'analisi delle norme penali a struttura "sanzionatoria"*, Padua, Italy, 1996, p. 127 and following.

mentary criminal protection law system. Such supplementarity or complementarity between criminal law and administrative law jeopardises the possibility of identifying the purpose of the protection in each singular criminal case, and thus jeopardises the standardisation requirement of the relevant law provision and, therefore, extends the scope of application of the law provision itself, to the detriment of the legal certainty of the intention of the legislator.

This objective observation on the margins of criminally relevant offences in matters of environmental law also has effects on prosecution techniques. Therefore, the precautionary principle is applied to human health by defining cases of danger, while the direct protection of natural resources conflicts with the interests in their exploitation by humans; such exploitation is regulated by procedures, rules and threshold limits, partly defined by law, partly by administrative bodies. With the lack of a clear identification of the purpose of the protection, as highlighted above, the application of the relevant law provision becomes optional in terms of standardisation, thus giving the legislator (but also the judge) the freedom to choose between the protection of natural resources and the preventive protection of human health or other human interests. This ambiguity in the choice between different types of protection also emerges from Article 191 of the Treaty on the Functioning of the European Union, according to which "Union policy on the environment shall contribute to pursuit of the following objectives: – preserving, protecting and improving the quality of the environment; – protecting human health; – prudent and rational utilisation of natural resources…".

As hypothesised above, the mutual exclusiveness of the interests involved in the protection of the environment may seem to outline new attention to an ecocentric vision. However, by carefully observing the positive reference framework, this hypothesis seems to be utopian.

The quality of ecosystems is protected by criminal law only when significant damage to the quality of the air, the soil or the water jeopardises human interests and not natural equilibrium.

This fact can be deduced from the concepts of threshold values, of pollutant concentration limits, and of significant damage to the quality of ecological equilibrium, which is based on a social definition of the environment that sets "rules for adapting the needs connected to the protection of the environment to the needs connected to human activities, which tend to cause pollution"[5]. Under these circumstances, the hypothesis of a direct protection of natural resources not connected with human benefits in general should be rejected; however, it should be noted that the combination between prosecution techniques and the fact that criminal law is supplementary to administrative law nullifies the ontological aspects of protection (environment, health), while favouring the ontic protection of the planning and control activities of public administration bodies responsible for the various sectors (waste, water, urban planning, etc.). In these terms, there has been discussion about a conventional protection of the environment[6], based more on juridical and administrative regulations[7] than on its naturalistic components.

Indeed, as already mentioned above, this is also shown by the techniques used to define individual criminal cases relating to the execution of certain activities (discharging waste into the water or the atmosphere, waste management, execution of construction works) without authorisation or in violation of the relevant regulations; or by making the lack of co-operation with the authorities responsible for inspections (not keeping the records, not giving access to the places where the relevant activity is carried out) a crime. In both cases, regardless of other considerations, protection by criminal law is prioritised over activities that, by themselves, do not damage final goods, but rather hide or obstruct the detection of certain activities that are poten-

[5] RUGA RIVA, *Diritto penale dell'ambiente*, III Edition, Turin, Italy, 2016, p. 5.

[6] GARGANI, *La protezione immediata dell'ambiente tra obblighi comunitari di incriminazione e tutela giudiziaria*, in Vinciguerra, Dassano (eds), *Scritti in memoria di Giuliano Marini*, Naples, Italy, 2010, p. 404.

[7] Compare PATRONO, *Il diritto penale dell'ambiente. Rilievi critici di politica criminale*, in Riv. Tr. Dir. Pen. Ec., 1996, p. 1147 and following.

tially harmful to the environment; or it is prioritised over polluting activities above threshold values which, only in combination with similar previous, simultaneous or subsequent activities in the long term, appear to have the potential of jeopardising a certain level of health of the ecological components.