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THE AUTONOMY OF CRIMINAL LAW WITH REFERENCE TO THE PROTECTION OF THE ENVIRONMENT: A NEVER-ENDING STORY

ABSTRACT. This article discusses the complex relationship between criminal law and environmental protection, with a specific focus on Italy. It highlights the interplay between criminal and administrative law in addressing environmental crimes and emphasizes the importance of understanding the actus reus in environmental offenses. The text explains that Italian environmental criminal law is closely connected to administrative law, resulting in a 'sanctioning' structure for environmental crimes. This structure implies that environmental behaviors are penalized only when they surpass specific risk thresholds defined by regulatory sources or administrative acts. The actus reus is primarily based on non-compliance with preventive-cautionary norms from administrative regulations. These offenses can take different forms, such as purely punitive, partially sanctioning (either 'weak' or 'strong'), or a combination of these. The text emphasizes the need for a balanced approach that allows for the control of environmental governance while effectively prosecuting pollution offenses, all while upholding legal principles and preventing administrative abuse of power. The author suggests that reorganization and rationalization of the system are necessary to navigate these complexities effectively.

CONTENT. 1. The interaction between criminal law and administrative law in the construction of the actus reus: the 'sanctioning' structure of environmental crimes. – 2. The problem of the criminal court's review of administrative acts referred to by the case. – 3. The paradoxical aggravation of the problem with the 2015 reform: the special illegality clauses of the new environmental crimes.

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1. The interaction between criminal law and administrative law in the construction of the actus reus: the 'sanctioning' structure of environmental crimes

Similar to the situation in the entire European context, in Italy, environmental criminal law is closely tied to administrative law. This situation implies that this specific subject is regarded as an appendix of economic-productive activities. It means that possible behaviors that jeopardize the environment are punished only when they exceed specific risk thresholds, identified or updated by regulatory sources or by local or national administrative acts.

Environmental criminal law, with a few significant exceptions,¹ ends up adopting a 'sanctioning structure'. The *actus reus* is always based on the failure to comply with preventive-cautionary norms established within the administrative legal framework, simply referred to by the incriminating provision.²

This can be either explicit or implicit, through special illegality clauses (eg the expression 'abusively').³ Once constructed, the typical offense can take on a purely punitive structure, where the offense is committed by mere disobedience to a command of the administrative authority. Alternatively, it can take on a partially sanctioning structure, where it is necessary for the failure to comply with the administrative-cautionary provisions to originate from a generally polluting source (partially sanctioning model of the 'weak' type), or even exhibit specific offensive features, precisely described by the incriminating norm (partially sanctioning model of the 'strong' type).⁴

¹ Eg the crime of 'failure to remediate polluted sites' or the cases of 'illegal waste trafficking', now stipulated in Articles 257, 259 and 260, respectively, TUA No 152 of 2006.

² The expression 'sanction structure' means that the criminal law here 'sanctions', possibly accompanying it with additional, autonomous requirements of offensiveness, disobedience to precepts of administrative source: this is, as evident, a definition inspired by Filippo Grisogni, 'Il carattere sanzionatorio del diritto criminale' (1920) 11 Riv it dir proc pen 240, and which, however, in our case – unlike the well-known approach of Grisogni himself – has a merely descriptive function and not also a content function.

³ On the particular structure of environmental crime see, in general, Francesco Antolisei, *Manuale di diritto penale. Leggi complementari*, vol 2 (12th edn, Giuffrè 2008) 486. See also, in more detail, Vincenzo Bruno Muscatiello, 'La tutela penale dell'ambiente (il diritto e il rovescio)' in Alessandro Amato and others (eds), *Diritto penale dell'ambiente* (Cacucci 2006) 23 ff; Giuseppe Palmieri, *Contributo ad uno studio sull'oggetto della tutela nel diritto penale dell'ambiente. Dal codice Rocco al 'codice dell'ambiente' (d.lgs. n. 152/2006)* (Edizioni Scientifiche Italiane 2007) 53 ff.

⁴ On the distinction between a purely and partially sanctioning structure we are here allowed to refer to Mauro

It is evident that, within this framework, the incrimination scheme that best corresponds to the principles of classical criminal law is one with a partially ‘strong’ sanction structure. It involves selecting only those ‘non-compliances’ that demonstrate a further and more pronounced detrimental attitude towards natural ecological balances. This approach avoids the merging of criminal law with administrative law and ensures a closer adherence of this area of the special part to the principles of autonomy, fragmentary and offensive nature of the crime. Moreover, by assigning the task of selecting non-compliance with administrative precepts deserving of criminal sanction to the legislature, it prevents the complete deferral of criminal law determination to the environmental governing authority, thereby ensuring full compliance with the principle of the *riserva di legge*.

In most modern penal systems, all the described models coexist, albeit with a prevailing tendency towards cases built on a partially ‘weak’ sanctioning model or even those falling under the purely sanctioning scheme.⁵ The Italian situation is particularly illustrative in this regard, as the latter two typologies, already characterizing the entire contravention apparatus of the *Testo Unico Ambientale* (TUA), are also included among the crimes against the environment in the penal code.⁶

The hegemony of such models may have various causes, including a strict transposition of the precautionary principle into criminal law, as known in the European Union legal framework.⁷ However, what primarily drives legislators towards these

Catenacci, *La tutela penale dell'ambiente. Contributo all'analisi delle norme penali a struttura 'sanzionatoria'* (Cedam 1996) 77 ff.

⁵ The finding was already evident in the mid-1980s: see Günter Heine, ‘Aspekte des Umweltstrafrechts im internationalen Vergleich’ (1986) GA 68.

⁶ These are Article 452 *sexies* (‘illegal trafficking of radioactive substances’), which basically punishes any unauthorized form of handling and/or putting into circulation of radioactive substances, and Article 452 *septies* (‘obstruction of control’), in the part that punishes anyone who ‘denies access’ in polluting facilities to supervisory authorities.

⁷ In this sense Carlo Ruga Riva, *Diritto penale dell'ambiente* (Giappichelli 2011) 41. On the precautionary principle as a cornerstone principle of the European Union see most recently Emanuele Corn, *Il principio di precauzione nel diritto penale. Studio sui limiti all'anticipazione della tutela penale* (Giappichelli 2013) 3 ff. On the penal reflections of the application of the principle to criminal law see Donato Castronuovo, *Principio di precauzione e diritto penale. Paradigmi dell'incertezza nella struttura del reato* (Aracne Editrice 2012) 87 ff; Francesca Consorte, *Tutela penale e principio di precauzione. Profili attuali, problematicità, possibili sviluppi* (Giappichelli 2013) 69 ff. The influence of EU sources in environmental matters has been registered especially in the field of waste, precisely with reference to

models is their considerable ‘symbolic’ capacity. By framing criminal sanctions as safeguards for the safety standards imposed on polluting sources, they create a perception of greater severity in the system of environmental protection, seemingly better suited to satisfy the collective need for protection from those sources.⁸

However, this perception is rather superficial and should be relativized based on a careful evaluation of the cost-benefit ratio. It does not necessarily correspond to the reality of the facts. Moreover, the use of these techniques not only takes the move from the principles of criminal law but also leads to a significant increase in the practice of so-called criminal law bagatelles, resulting in an unreasonable use of the state’s (expensive) repressive machinery. On one hand, a criminal justice system structured to take action against even minimal infringements of preventive-cautionary norms must prosecute cases where the reported infringement is merely formal or, from an environmental harm perspective, still remediable.⁹ On the other hand, it is certain that a criminal control ‘upstream’ of pollutions produces a particular deterrent effect, since, precisely because it is a question here of punishing behaviors that are still far from the actual injury or endangerment of the environment, the punishment towards potential ‘polluters’ is in any case forced, for obvious needs of proportion and reasonableness, to remain at medium-low levels and therefore accessible to the various benefits (suspension of punishment, oblation, alternative or even clemency measures etc) usually found at

the definition of the concept of criminally relevant ‘waste’: on the argument at length see Dario Franzin, ‘La Corte Costituzionale e la definizione di rifiuto: nuovo capitolo di una complessa vicenda di illegittimità comunitaria’ (2011) Cass pen 120.

⁸ On the relationship between environmental criminal law and the symbolic function of criminal law, see most recently, Leire Escajedo San Epifanio, *El medio ambiente en la crisis del estado social. Su protección penal simbólica* (Comares 2006) 181 ff. Paradigmatic precisely is the case of the unauthorized trafficking of radioactive substances, the use of which, as is well known, is a source of particular social alarm and which precisely for this reason, not by chance, even outside the Italian context is in some cases placed among the criminal hypotheses of the Criminal Code: see, eg, para 328 of the German Criminal Code.

⁹ One thinks here, with reference to purely sanctioning cases such as the one reported in Example 3, of the hypothesis in which the beneficiary of the authorization has merely ‘disobeyed’ the part of it in which he was required to keep eg a certain documentation up to date; or to cases – in practice far from infrequent – of unauthorized operation of polluting activities in which the latter, although (perhaps for mere bureaucratic reasons) not yet formally authorized, has in fact already spontaneously equipped itself with the anti-pollution measures that the incoming permit is preparing to impose on it.

the ‘lower’ end of the penalty systems.¹⁰

In reality, contrary to what has been assumed in the past, it is increasingly evident that the effectiveness of environmental protection policies depends not on downsizing the fundamental principles of criminal law, but on other multiple factors. For example, it relies on the ability to recognize the true criminological identity of pollution, which is nothing more than a branch of economic crime, sometimes taking the form of organized crime. It also depends on the ability to appropriately calibrate related penalties (such as choices regarding criminal liability of legal entities). Furthermore, it requires a clear distinction between prevention and repression of the phenomenon, limiting the use of punitive intervention to cases where alternative government policies or techniques are no longer viable.¹¹

Later on, we will see how the Italian legislature attempted to reconcile all these considerations in 2015. However, it must be acknowledged that the resulting framework, although somewhat disappointing in other aspects, managed to establish an interesting application strategy for (contraventional) cases with a purely sanctioning structure. This strategy aims to mitigate their drawbacks and compensate for the negative impact they may have on the fundamental principles of criminal law.

¹⁰ On the real applicative dimension of these ‘benefits’, by now largely far removed from the special-preventive inspirations that had historically determined them, let us here refer to Mauro Catenacci, ‘La “retribuzione mite”: riflessioni in tema di sanzioni alternative alla pena detentiva c.d. breve’ in *Scritti in onore di Alfonso M. Stile* (Editoriale Scientifica 2013) 3 ff.

¹¹ Decisive in this regard recently are the contributions of so-called ‘green criminology’: see among others Lorenzo Natali, *Green criminology. Prospettive emergenti sui crimini ambientali* (Giappichelli 2015), as well as the many authoritative contributions collected in Rob White (ed), *Environmental Crime. A Reader* (Willan Publishing 2009).

2. *The problem of the criminal court's review of administrative acts referred to by the case*

Regardless of the chosen sanction structure model, it often presents a delicate problem of the relationship between criminal jurisdiction and environmental governance, known as the criminal judge's review of administrative acts.¹² Essentially, it raises the question of how the criminal judge should proceed when, after confirming that the offense described in the indictment has occurred but was carried out in compliance with the administrative regulation referenced, they are nevertheless convinced that the regulation itself is illegitimate. Should the judge conclude that the act is atypical and therefore not punishable? Or can they consider themselves exempt from the judgment of environmental compatibility contained in that regulation and proceed with prosecuting the offense (provided, of course, that the offense appears typical in relation to the other elements of the case)?

In Italy, there are ongoing disagreements between legal doctrine and jurisprudence on this matter. Jurisprudence, suspecting that collusion or even corruption between private individuals and public administrators may be hidden behind the issuance of an authorization, has gradually supported the thesis that if the administrative regulation allowing an act, otherwise conforming to the indicted one, is found to be incidentally illegitimate, then that act must be considered typical and therefore punishable.¹³ This is either because the illegitimacy renders the act incidentally nonexistent (following the disapplication provided for by Annex E to Law No 2248 of March 20, 1865, on administrative litigation) or because an offense allowed by an illegitimate act is a *contra ius* offense and cannot be justified in any way. On the other hand, legal doctrine, particularly the majority doctrine, has always criticized this approach, invoking the prohi-

¹² On the limits of the criminal judge's review of administrative acts, among others, Adalberto Albamonte, 'Atti amministrativi illegittimi e fattispecie penale: i poteri del Giudice nella tutela penale del territorio' (1983) Cass pen 1862; Gabriele Fornasari, 'Sulla rilevanza penale delle costruzioni edilizie realizzate in base a atti concessori illegittimi' (1986) (2) Foro it 84; Marco Gambardella, *Il controllo del giudice penale sulla legalità amministrativa* (Giuffrè 2002); Marino Petrone, *Attività amministrativa e controllo penale. Scritti* (Giuffrè 2000) 89; Chiara Silva, *Elementi normativi e sindacato del giudice penale* (Cedam 2014) 25 ff.

¹³ Cass, sez un, 27 febbraio 1987, n 3, Giordano.

bition of analogy *in malam partem* (in cases where non-compliance with an administrative regulation is explicitly stipulated as a constituent element of the case)¹⁴ or, more generally, emphasizing the need to respect at least the principle of culpability in such cases. This would involve ascertaining on a case-by-case basis whether the illegality affecting the administrative act was known or knowable by the perpetrator.¹⁵

In practice, when the criminal judge's scrutiny is exercised, often during the precautionary stage, the issue becomes even more contentious due to an inconsistent application of the concept of excess of power. This, combined with the tendency to employ broad constitutional principles, such as the right to health (Article 32 of the Italian Constitution) or the EU principle of precaution, as parameters for incidental judgments of legitimacy, sometimes leads to a review of the merits of the public administration's authorization choices, thereby arbitrarily limiting its discretionary power.

This question is undoubtedly one of the most complex challenges faced by criminal science today.¹⁶ While the disapplication position is understandable from a political and criminal standpoint (as illegitimate authorizations often involve actual criminal agreements between the administrative authority and private individuals), it is unquestionably unacceptable from a dogmatic and constitutional perspective. On the other hand, the position held by legal doctrine, which is more rigorous in terms of dogmatic and constitutional legitimacy, appears to overlook the need to prevent administrative authorization from becoming an uncontrolled instrument of privilege and corruption.¹⁷

¹⁴ Cass, sez un, 21 dicembre 1993, n 11635, Borgia. For a general overview see Francesco Prete, 'Il sindacato del giudice penale sugli atti amministrativi nell'abuso d'ufficio e nei reati edilizi' (2013) *Dir pen contemp* <<https://archiviodpc.dirittopenaleuomo.org/d/2408-il-sindacato-del-giudice-penale-sugli-atti-amministrativi-nell-abuso-d-ufficio-e-nei-reati-edilizi>> accessed 3 November 2023.

¹⁵ For a more detailed overview we can only refer here to the previous edition of this work: see Mauro Catenacci, 'I reati in materia di ambiente' in Antonio Fiorella (ed), *Questioni fondamentali della parte speciale del diritto penale* (Giappichelli 2012) 364 ff.

¹⁶ Particularly insightful on this point are the analyses of German doctrine, which, since the 1980s, has sought to give a dogmatic construction to the very dependence of environmental criminal law on acts and norms of administrative law: among the most recent summary works on the point see Matthias Kemme, *Das Tatbestandsmerkmal der Verletzung verwaltungsrechtlicher Pflichten in den Umweltstraftatbeständen des StGB* (V&R Unipress 2007) 33 ff; Stephanie Bräutigam-Ernst, *Die Bedeutung von Verwaltungsvorschriften für das Strafrecht* (Nomos 2010) 241 ff.

¹⁷ Rather original on this point is the position taken by the Spanish legislature, which – in an attempt to find an

Therefore, striking the right balance in this matter is challenging. The disapplication approach risks compromising dogmatic and constitutional principles, while the doctrine's position may overlook the prevention of unchecked privilege and corruption through administrative authorization.

Finding a solution to this complex issue requires careful consideration of both political-criminal concerns and dogmatic and constitutional legitimacy. It is essential to ensure that environmental governance remains effective without undermining fundamental legal principles. Striking a balance between the criminal judge's review of administrative acts and the discretionary power of the administrative authority is crucial in maintaining a fair and just system that effectively addresses environmental offenses while safeguarding against abuse of administrative authorization.

Ultimately, resolving the delicate relationship between criminal jurisdiction and environmental governance necessitates ongoing dialogue and collaboration between legal scholars, practitioners, and policymakers. By addressing these disagreements and seeking common ground, it is possible to develop a comprehensive framework that upholds the principles of criminal law while effectively protecting the environment.

3. The paradoxical aggravation of the problem with the 2015 reform: the special illegality clauses of the new environmental crimes

In summary, this issue is both timely and delicate, entangled with conflicting interests and often accompanied by media attention and political implications.¹⁸ It was

acceptable balance between legal certainty and control of legality on the work of the PA – has provided in Article 329 of the *código penal* for a specific figure of '*prevaricación ambiental*', which, among other things, punishes the public official who has maliciously issued or otherwise contributed to the issuance of a manifestly illegitimate (*manifestamente ilegal*) environmental authorization: for an extensive and documented examination, also critical, of the norm in question, see Cristóbal J Cantero Cerquella, *La responsabilidad penal de los funcionarios por delitos ambientales* (Editorial Reus 2010).

¹⁸ We refer here above all to the court case that still involves the top management of ILVA in Taranto, a case that was triggered precisely on the assumption of an alleged conflict with the right to health under Article 32 of the Constitution of the environmental authorizations issued (moreover, according to the Taranto prosecutor's office, against payment of 'bribes') to that industrial complex, and in the course of which a bitter institutional clash has

widely believed that the inclusion of an autonomous section on crimes against the environment in the Criminal Code could provide an opportunity to address this issue. The aim was to establish a legislative framework that allows the criminal judge to exercise control over the legality of environmental governance while safeguarding the institutional prerogatives of the Public Administration and upholding the principles of legality and culpability.¹⁹

During the parliamentary process for the approval of Law No 68 of 2015, several interesting proposals were put forward. These proposals suggested that the power of the criminal judge to review the legitimacy of administrative activity should not be inhibited but should be circumscribed within strict limits. For example, one proposal limited the punishment to the violation of specific regulatory provisions rather than generic administrative acts or provisions. Another proposal restricted the use of disappication to cases of illicit authorization, rather than illegitimate authorization.

However, the final text of Articles 452 *bis* ff did not incorporate any of these suggestions. It has, in fact, disappointed expectations and further muddled the boundaries within which the criminal court can review administrative discretion. The new Title VI *bis* of the Criminal Code does not address or resolve the issue, while the new environmental crime provisions rely on broad illegality clauses that allow the judge significant freedom in assessing the work of the public administration. The expressions ‘illegally’ and ‘illegitimately’ used in these provisions, rather than defining clear limits for the criminal judge’s scrutiny of environmental governance, create more uncertainty and manipulability.

These broad clauses, due to their conceptual breadth, can be applied to a wide range of infractions or irregularities. This allows the judge (and the prosecutor) to deem any violation, even those unrelated to environmental protection, as abusive or

developed between the Judiciary and the Public Administration, with ‘clamorous’ implications of an institutional type as well: see for a summary of this complex affair Antonio Picillo, ‘Tra le ragioni della vita e le esigenze della produzione: l’intervento penale e il caso Ilva di Taranto’ (2013) Arch pen <[https://archiviopenale.it/fascicolo-n-2—maggio-agosto-2013-\(web\)/fascicoli-archivio/134](https://archiviopenale.it/fascicolo-n-2—maggio-agosto-2013-(web)/fascicoli-archivio/134)> accessed 3 November 2023.

¹⁹ In this regard, allow me to refer to the considerations expressed in the hearing at the Justice Committee of the Chamber of Deputies on 6 November 2013. The stenographic record and the closed-circuit footage of the hearing are available online.

illegitimate if it is somehow accompanied by an environmental pollution event. On the other hand, these clauses do not select the norms against which the authorization activity of the Public Administration should be evaluated. Instead, they leave room for the consideration of constitutional principles or other principles and guidelines, which lack specific prescriptive content and could be interpreted to imply a review of the merits of environmental governance choices (for example, when a regularly issued authorization measure is deemed insufficient in addressing alleged health risks, contravening Article 32 of the Constitution).

While considering that such broad clauses in environmental protection, prone to vagueness, are constitutionally illegitimate may seem excessive,²⁰ it is evident that the reform carried out with Law No 68 of 2015 has failed to meet expectations. Instead of providing a clear demarcation line between environmental governance and pollution repression, it has contributed to further confusion and uncertainty. This lays the groundwork for more challenging relations between the judiciary and public administration in environmental matters.

In conclusion, addressing these complexities requires an inescapable task of reorganization and rationalization. It calls for a careful balance between the control of environmental governance and the effective prosecution of pollution offenses, while upholding legal principles and preventing abuse of administrative power.

²⁰ This is what happened in Germany in the aftermath of the introduction of crimes against the environment in the Criminal Code: the affair described in Catenacci, *La tutela penale dell'ambiente* (n 4) 223 ff. Considerations on the point however in Licia Siracusa, 'La legge 22 maggio 2015, n. 68 sugli "ecodelitti": una svolta "quasi" epocale per il diritto penale dell'ambiente' (2015) *Dir pen contemp* <<https://archivioldpc.dirittopenaleuomo.org/d/4050-la-legge-22-maggio-2015-n-68-sugli-ecodelitti-una-svolta-quasi-epocale-per-il-diritto-penale-dell-a>> accessed 3 November 2023.
