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# PENAL PROTECTION OF THE ENVIRONMENT AS CONSTITUTIONAL HUMAN RIGHT

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## ABSTRACT

The environment, today consecrated doctrinally as human right of third generation and covered with constitutional provisions that elevate the status of fundamental rights in the context of different countries, it is legal right able to be effectively supervised by the penal law, however, lacks changes in its secular individualist dogmatic to defend a right that is at once individual and diffuse. The text includes, under the logical-deductive reasoning and literature, the guarantee of the environment through penal law and makes proposals for better environmental protection, corresponding to them, in addition to [fitness] more appropriate penal standards, the establishment of a Court competent international for penal demands related to environment and assumption of penal liability of legal persons. It is recognized, environmentally, a true constitutional strain assurance, not only diffuse, but also individual as directly related to the quality of life of each being and that triggered, in recent decades, the consecration of international and constitutional documents effective protection.

**Keywords:** Environment; penal protection; fundamental human right.

*CRIMINAL PROTECTION OF THE ENVIRONMENT  
AS HUMAN RIGHT CONSTITUTIONAL*

**RESUMO**

*O meio ambiente, hoje consagrado doutrinariamente como direito humano de terceira geração e contemplado com disposições constitucionais que o elevam à condição de direito fundamental no âmbito de diversos países, é bem jurídico apto a ser efetivamente tutelado pelo direito penal que, todavia, carece de modificações em sua dogmática individualista secular para a defesa de um direito que é, a um só tempo, individual e difuso. O texto contempla, sob o raciocínio lógico-dedutivo e com pesquisa bibliográfica, a garantia do meio ambiente pelo direito penal e apresenta propostas para a melhor tutela ambiental, correspondendo elas, para além da aptidão de normas penais mais adequadas, à criação de um Tribunal Internacional competente para as demandas penais relacionadas ao meio ambiente e à assunção da responsabilidade penal das pessoas jurídicas. Reconhece-se, no ambiente, uma verdadeira garantia de estirpe constitucional, não apenas difusa, mas também individual já que diretamente relacionado à qualidade de vida de cada um dos seres e que desencadeou, nas últimas décadas, a consagração de documentos internacionais e constitucionais de efetiva tutela.*

**Palavras-chave:** *Meio ambiente; proteção penal; direito humano fundamental.*

## INTRODUCTION

The multiple reasons why men and companies attack the environment have guided the reasoning of a text that, considering the ecologically balanced environment as essential to the lives of the present and future generations, claims for penal intervention for the protection of the legal good of such magnitude.

The *ultima ratio* character of the penal law means that its object of protection are only the juridical assets of the highest value, those that due to their legal dignity claim not only for the legal protection, but also the legal-penal protection.

Thus, the construction begins by supporting the reasons why the environment is a juridical asset that deserves the legal penal protection. As a human right that integrates the third generation of rights, it was stated that the environment, which is now so debased, is considered fundamental right by a large part of modern constitutions, even when not expressly provided for in the constitutional texts, recognized as such by the Supreme Courts, as in Italy.

From this point on, the reasoning that leads to seeing the environment as a human right worth of penal law protection goes through the analysis of the notion of the legal good, its relation to the Constitution and the promotion of the environment to the condition of relevant juridical good, deserving the penal law guarantee and protection not only because it is a diffuse right belonging to all, but also because of its importance for the man considered in its individuality, which makes its condition as an object of protection both of individual and diffuse guarantee at the same time .

However, it is known that the secular penal dogmatic is individualist and, therefore, requires adaptations for the protection of a legal good of such a huge peculiarity. After all, on the basis of the secular penal law foundations there are rules and principles for the guarantee of individual legal rights, which demand a new view of the treatment of a peculiar property that, with legal and constitutional dignity, requires protection by the penal law.

The study begins with the treatment of fundamental rights and human rights in order to approach concepts, differences and historical construction which nevertheless respected the limitations of the approach of such a broad subject according to the text proposal .

With the established conceptual assumptions, the reasons for

which the environment is a constitutional human right were then discussed, so that, in the following topics, the reasoning would be turned to the environment guarantee by the penal law as a result of its importance as an authentic human right, peculiar, individual and diffuse, not only in the transnational sphere (as a human right), but also within the limits established by each country's legal system (as a fundamental right).

However, the text, does not keep away from exposing the difficulties of the penal protection of such a peculiar juridical good; nevertheless, in addition to setting out the challenges, it also sets out the perspectives of a penal law that will serve life itself and which is, therefore, also, prepared for the good protection of the environment.

It can be seen, therefore, that in the thematic horizon of individual guarantees in the modern constitutions, the environment has been seen with the dignity it deserves, that is, as an individual and diffuse right at the same time consecrated in international treaties and in the internal order of each country, whether expressly by the Constitutions or by the recognition of its relevance by the Higher Courts. Thus, once set the premises, proceeded the considerations about the penal law treatment regarding the environmental protection.

Therefore, regarding the question whether the environment, due its relevance and peculiarity, must be protected by the penal Law, there is a hypothesis that its importance means that the penal law, even if it is devoted to the protection of individual rights, must be adapted adapt; after all, it is the dogmatic that should serve the life and the man, not the other way around.

The research used consistent primary and secondary data from the analysis of legislative texts, doctrine and judgments, and the deductive reasoning to support the synthesis that the environment deserves the penal Law protection, starting from the thesis of its highest relevance as fundamental human right internationally consecrated and, simultaneously, in the modern Constitutions .

## **1 FUNDAMENTAL RIGHTS AND HUMAN RIGHTS**

Conditioned to the historic time when were contemplated such values which aroused the interest of the legal protection, the fundamental rights are those currently catalogued in constitutional texts and concerning the man's basic rights. Adopted the formal concept under Ferrajoli view,

## fundamental rights are those

subjective rights that universally concern ‘all’ human beings as endowed with the status of person, or citizen or person capable of acting. I understand by ‘subjective right’ any positive expectation (the benefit) or negative expectation (non-injury) linked to a subject by a legal norm, and by *status* the condition of a subject this also foreseen by a positive juridical norm which assumes its suitability to be the holder of legal situations and / or author of the acts that are in exercise. FERRAJOLI, 2011, p. 8)

However, the way as was exposed above the concept of the fundamental rights does not make the matter free from great discussions and controversies, starting from the terminology, as the used terms such as “natural rights”, “inalienable rights”, “civil rights”, “individual rights”, “personal rights”, and others. (SAMPAIO, 2010)

Alexy, in his theory of the fundamental rights, stated that ,

it is possible to formulate theories of the most varied species. Historical theories, which explain the development of fundamental rights, philosophical theories, which strive to clarify their foundations, and sociological theories, on the function of fundamental rights in the social system, are but three examples. It is difficult to have a discipline within the human sciences that, from its perspective and with its methods, is not in a position to contribute to the discussion about fundamental rights (ALEXY, 2014, 31)

There fore, it is seen that the space for the discussion on fundamental rights involves a series of studies that would demand pages and pages of exposition. Therefore, the approach, according to the purpose of the text, will fall on the subject in modern constitutional texts, so as to make it clear that fundamental rights arise from the affirmation of individual freedoms and the dignity of the human being beyond philosophy, currently in the constitutions.

Although the fundamental rights are so entitled as they refer to the basic rights of the man as a person, it is important to distinguish them, as a positive manifestation of the law, with the capacity to produce legal effects, of human rights, which are located “[...] in a suprapositive dimension, deontically different from that in which the legal norms are situated - especially those of domestic law “(GUERRA FILHO, 1997,

p.12). In this sense, although there may be, for many, semantic and content identity,

fundamental rights must be considered as those recognized by the State, in the internal order, as necessary to the dignity of the human person. Nevertheless, then, human rights and fundamental rights have definitions based on the need of their recognition as a way of guaranteeing the human person dignity, they differ in the sense that not always there will be coincidence between the two, as in addition of being common that, in the States intern plan, not all human rights consecrated in the international plan are a recognized, it is also common that some rights are recognized as fundamental only in some or few States. (BRITO FILHO, 2008, p. 38)

Such understanding is common to Borges, Mello and Oliveira (2010), to whom the difference between human rights and fundamental rights is in the transnational dimension of those ones and the national dimension of these ones. According to the authors, the fundamental rights present features not restrict to the local realities, while the “fundamental rights are those human rights consecrated and positive in the Constitution of each country, result from then characteristic ideology of each Sovereign State” (BORGES; MELLO; OLIVEIRA, 2010, p. 194).

Thus, it was with the Universal Declaration of Human Rights, document approved by 48 States, in 10 December 1948, in the United Nations General Assembly, that the human person rights gained cross-border dimension, no longer dedicated to such and such States citizens, but actually to all human beings. And, then, this began the process of effective positivation of human rights, as according to Bobbio, it,

sets in motion a process in the end of which the rights of man should be no longer only proclaimed or only ideally recognized, but effectively protected even against the State that has violated them. At the end of this process, the rights of the citizen have, in fact, been positively transformed into human rights. Or, at least, will be the rights of the citizen of that city that has no borders, because it comprises all the humanity; or, in other words, the rights of man as the rights of the citizen of the world. (BOBBIO, 2004, p 19).

From then on, the modern Constitutions in the so called contemporary constitutionalism started to dedicate specific chapters for the

effective affirmation of the rights, no longer sought from the Cartas and specific documents to determined citizens, such as the Magna Charta of 1215, as example of medieval constitutionalism, or even, already in terms of modern constitutionalism, the Bill of Rights (1688), the Mayflower Pact (New Plymouth, 1620), the Declaration of the Rights of the Good People of Virginia and Independence of the 13 Colonies (1776), the Federal Constitution of the United States of America (signed by the last Cologne in 1787) and documents which erupted after the French Revolution (1789), such as the Declaration of the Rights of Man and the Citizen of 1791.

As an instrument for regional human rights systematization, the European Convention on Human Rights was signed in Europe on 4 November 1950, by Ministers of fifteen countries, meeting in Rome, which represented a milestone in the international law, as well as an important precedent in affirming the protection and development of human rights and fundamental freedoms. The Convention initially limited itself to protecting individual rights and individual freedoms and was followed by protocols which set forth other social, economic and cultural rights arising mainly from the Social Charter held in Turin on 18 October 1961.

In the national sphere there are several constitutional documents that declare the fundamental human rights and which reveal the characteristics of contemporary constitutionalism in the sense of a greater affirmation of human rights, including against the very authority of the State.

The Italian Constitution of 1948, in its article 2, states, verbatim, the recognition and guarantee of the inviolable rights of man, either as an isolated individual or as a social being. However, despite the open wording of the article that raises questions about its imperative (permitting or recognizing command), permissive or constitutive character (GUASTINI, 2009), it lists, in articles 13 to 28, as well as the German Constitution of 1949, in the articles 1 to 19, the list of the rights related to the personal freedom, freedom of movement and residence, assembly, association, expression, press and religious freedom, as well as the right to health, to work, to education, to the inviolability of domicile and correspondence, and against the authority of the State itself.

In France, the constitutional history is of positivation of the fundamental rights that had influence on the other modern constitutions, among which those regarding the respect to life, freedom, equality and solidarity, and highlighting the preamble of the 1958 Constitution

the French people renew their commitment to human rights and the principles of national sovereignty proclaimed in the Declaration of 1789 and confirmed and complemented by the Preamble of the Constitution of 1946 and the rights and duties established in the Charter of the Environment 2004. There is also the consecration of the principles of self-determination of peoples and the international commitment to freedom, equality, fraternity and the democratic development

In Portugal and Spain, in the 1976 and 1978 Constitutions, respectively, the framework of freedoms set out therein is extensive and covers, in addition to the freedoms traditionally provided for in the constitutions of European countries, the protection of personal data, the right to personal and family intimacy, and the elderly and disabled.

Moreover, in Latin America, as in Europe, the “regionalized” systematization of the fundamental rights of the person was enshrined in the American Convention on Human Rights, adopted on November 22, 1969. With a focus on the judicial guarantees of man, the Convention, known as the Pact of San Jose of Costa Rica, contains 82 articles, being one of the most extensive Letters on the provision of human rights currently foreseen.

In this international paradigm, Brazil, which has one of the most advanced Constitutions in the world in this area, elected human dignity as a principle and paramount parameter to the entire legal system in the 1988 Federal Constitution.

With regard to fundamental rights and guarantees, Title II of the 1988 Charter includes individual rights and guarantees (Chapter I), social rights (Chapter II) and political rights (Chapter IV), in a wide range of rights that unfold in others so as to make it clear that the fundamental rights of the human person were a matter of great concern on the part of the Constituent Assembly, which, however, did not confer on them an absolute character in favor of the fundamental rights which could, in certain cases, give the appearance of conflict. In this sense, the Brazilian Constitutional Court, the Federal Supreme Court, in a decision on this matter and that for a long time have reflected the constitutional hermeneutics on the subject and has been reference in several Court decisions :

Individual rights and guarantees are not absolute. There are no rights or guarantees in the Brazilian constitutional system that are absolute, even though reasons of a



relevant public interest or requirements derived from the principle of coexistence of liberties legitimize, even exceptionally, the adoption, by state organs, of Measures restricting individual or collective prerogatives, provided that the terms established by the Constitution itself are respected. The constitutional status of the public freedoms, when delineating the legal regime to which they are subject and considering the ethical substrate that informs them, allows legal limitations on them to protect the integrity of the social interest and, on the other hand to ensure the harmonious coexistence of freedoms, since no right or guarantee can be exercised to the detriment of public order or in breach of the rights and guarantees of others. “(MS 23452, Judge rapporteur Ms. Celso de Mello, judgment On 16-9-1999, Plenary, DJ of 12-5-2000.) See: HC 103.236, min. Gilmar Mendes, judgment on 14-6-2010, Second Class, DJE of 3-9-2010.

In Argentina, the first part of the 1994 Constitution, which is divided into two chapters, is intended, in the first, to “declarations, rights and guarantees”, and it is worth pointing out, as regards the object of study, that it ensures to those who inhabit the Argentina soil, the right to work and trade, the right to petition to the authorities, to enter, to stay, to transit and to leave, as well as freedom of property, worship and intimacy, as well as social rights pertaining to work and association. In turn, the second chapter, also in the first part of the Constitution, deals with new rights, of which political rights and the right to the healthy balanced environment stand out, fit for human development, so that productive activities can satisfy the needs of the present generations without compromising the future.

In general, as in Brazil and Argentina, it is seen, particularly in the constitutions of South-American countries, highlighting Uruguay and Paraguay, that the declaration of rights and guarantees follow the enumeration of these rights and guarantees contained in international treaties, especially regarding the fundamental rights legal protection, with the power of instruments apt to the protection of the rights consecrated in the National Charts.

Therefore, it is fact that the scope of human rights in the States constitutional order has grown considerably, so that in any of their generations or dimensions they have been considered as fundamental by constitutions, which from now on will be developed by reason of the acceptance of the environment as fundamental human right

## **2 RIGHT TO A BALANCED ENVIRONMENT AS FUNDAMENTAL**

## HUMAN RIGHT

The doctrinal meaning of the terminology of the dimension or generation of human rights is commonplace, which could, in a critical bias, sound as the evolution of human rights generations would replace, in the evolutionary process, the previous generations, as if, in fact, there was no perspective of accumulation or strengthening of human rights, but rather a fragmented or atomized idea, as if particularly the rights belonging to previous generations had expired. This realistic perspective is consistent with the current relevance regarding the affirmation of rights, is thus outlined by Antônio Augusto Cançado Trindade:

The phenomenon we witness now is not that of succession, but rather of an expansion, accumulation and strengthening of the consecrated human rights, according to a necessarily integrated vision of all human rights. The historical-ideological reasons for compartmentalization have long since disappeared. Today we can see clearly that the advances in public freedoms in so many countries in recent years must necessarily be accompanied by non-retrogression - as has been the case in many countries - but by parallel advances in the economic and social domain. (TRINDADE, 1997, p.390).

Following the warning, the dimensions of human rights complied with a historical evolution which, first, was based on the need to affirm individual rights against the absolute power of the State. As a result of the French and North American liberal revolutions and affirmed in the eighteenth and nineteenth centuries, the rights related to the so-called individual freedoms, which demanded from the State an abstention, not a provision, and therefore had a negative connotation for the Man, its holder. They concerned, basically, to life, to freedom, including free expression and religion, to political participation and to property.

With the Industrial Revolution and the social struggles arising from the economic and social transformations of the late nineteenth century and the beginning of the twentieth century, there was a new dimensional era in the affirmation of socially based human rights such as health and education, economic rights, such as the rights to food and work, and social security, and cultural, consisting of the participation of all in the community wealth. As characteristics and beyond the possessive individualism and social darwinism, they all demand from the State the promoting role of creating and realizing these rights through public services. These are the

so-called positive liberties, evidenced in the Mexican Constitution of 1917, the Weimar Constitution of 1919 and the ideals of the Russian Revolution in 1918.

With the techno-scientific revolution and the means of communication and transportation, at the end of the 20th century come out demands for the so-called collective or diffuse rights, not specifically aimed at the protection of individual interests or of a particular group of people. Consecrated by the principles of solidarity and fraternity, those are related to the development, the environment, to peace, to international cooperation, among others related to humanism and universality.

However, apart from Karel Vasak's (1982) classification of the International Institute for Human Rights, in Strasbourg in 1979, and because the law system is guided by human yearnings and human needs, it is also spoken of fourth and fifth generation rights, the first being the ones turned to the patrimony and genetic engineering, in Bobbio (2004) understanding, besides those directed to the healthy life and the balanced environment (SAMPAIO, 2010). The fifth generation, in Tehrarian's view (2007), would be those focused on love and peace.

It is therefore observed that, consistent with the above explained and affirmed on the human rights third generation or dimension, the balanced environment was developed, due to its peculiarity as a legal asset necessary for the permanent life of present and future generations, in the sphere of the fourth rights generation, according to the Earth Charter or the 1992 Rio Declaration, which was repeated in the Tenerife Manifest and in various Meetings and Conventions around the world, and has recently been widely discussed in the COP 21, held in Paris. This is because, as Sampaio (2010) maintains, the content of the rights gained diversity both in relation to their holders, and in relation to the new protection intentions among which the

solidaristic projection, also known as rights of fraternity or collective rights, which demand a joint action by all members of society, whether national or international, such as the right to an ecologically balanced environment, self-determination, peace, economic and social development or to the international distributive justice, to the sovereignty over natural resources, rights to biodiversity [... ] (SAMPAIO, 2010, page 228).

However, as Teixeira points out (2008), the healthy environment

as a human right did not figure in the agenda of human and social concerns at the time of the struggles that resulted in the attainment of civil and political rights later declared, nor of the acquisitions of social and economic rights as a result of social movements, being recognized until the mid-twentieth century as mere aggregate of property rights. Yet,

accelerated and intense pace of human actions against natural assets and the consequent scalding growth of environmental devastation has awakened the perception of the risks and dangers that such interventions could cause to the environment and thus to the space indispensable to a decent and healthy life for the humans, with the possible compromise of future generations. [...] This fostered the ideal of defense and protection of this right, which, being indispensable to man, deserved to be raised to the level of fundamental right. (TEIXEIRA, 2008, page 227).

Thus, confirmed as human right, the balanced environment deserved to stand out, in face of the relevance above highlighted for the life of the present and future generations, as fundamental right included in the diverse Constitutional Charts of various countries.

In Brazil, the article 225 of the 1988 Federal Constitution, deals with the matter in the way as follows: “all have the right to the ecologically balanced environment, good of common use of the people and essential to the healthy quality of life, imposing to the Public Power and to the collectivity the duty to defend and preserve it for the present and future generations”. Thus, it is seen that the Constitution consolidated the balanced environment as fundamental right (constitutional right of all), being imperative to point out, even by the enforceability of the right against the aggressors, natural or legal person, public or private, that it deals of a right of each and every one, being subjective, individual, and at the same time diffuse.

The Portuguese Constitution of 1976, in article 66, Parte I, that treat “Of the fundamental rights and duties”, that

- 1) Everyone has the right to a human, healthy and environmentally-balanced living environment and the duty to defend it.
2. In order to ensure the right to the environment, in the context of sustainable development, it is the responsibility of the State, through its own organs and with the involvement and participation of the citizens: a) Prevent and control pollution and its effects and harmful forms of erosion; B) Order and promote land use

planning, with a view to the correct location of activities, a balanced socio-economic development and the appreciation of the landscape; C) To create and develop natural and recreational reserves and parks, as well as to classify and protect landscapes and sites, in order to guarantee the conservation of nature and the preservation of cultural values of historical or artistic interest; D) Promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability, with respect for the principle of solidarity between generations; E) promote, in cooperation with local authorities, the environmental quality of towns and urban life, in particular the architectural design and the protection of historic areas; F) Promote the integration of environmental objectives in the various sector policies; G) Promote environmental education and respect for environmental values; H) Ensure that fiscal policy harmonizes development with protection of the environment and quality of life.

Thus, in Portugal as in Brazil, there is the constitutional consecration of the environment as fundamental right, and therefore, Canotilho, given the relevance lent to him by the constituent, even qualified the Portuguese Constitution as the “Green Chart” / “Carta Verde” (2000, p. 227).

In Spain, the Environment is treated, in the Constitution, in the article 45, which composes the “First Title”, exactly the one that deals with “The Fundamental Rights and Duties”, which reveals the importance attributed to it, Environment, as a fundamental right. This is the writing of the article:

1. Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it.
2. The public authorities shall ensure the rational use of all natural resources, in order to protect and improve the quality of life and to defend and restore the environment, based on indispensable collective solidarity.
3. For those who violate the provisions of the previous section, under the terms established by law, penal or administrative sanctions will be established, as well as the obligation to repair the damage cause

In Italy, although there is not an Express provision regarding the protection of the environment in the constitution, it is treated, moreover in face of the right to life and to health, in the context of the Italian Constitutional Court, as a fundamental right, as can be seen from the report

prepared at the meeting of the delegation of the Italian Constitutional Court with the Constitutional Court of the Republic of Poland in March 2006 in the Polish capita :

Nell'evoluzione della giurisprudenza costituzionale il diritto alla salute si estende inoltre fino a configurarsi, nel suo collegamento con l'art. 9 della Costituzione, anche come diritto ad un ambiente salubre.

Il riconoscimento di un diritto soggettivo individuale all'ambiente, tutelato quale diritto fondamentale, muove da un concetto di 'salute' come situazione giuridica generale di benessere dell'individuo derivante anche, se non soprattutto, dal godimento di un ambiente salubre.

Secondo la corte infatti "l'ambiente é protetto come elemento determinativo della qualità della vita": 'la sua protezione non persegue astratte finalità naturalistiche o estetizzanti, ma esprime l'esigenza di un habitat naturale nel quale l'uomo vive ed agisce e che è necessario alla collettività e, per essa, ai cittadini, secondo valori largamente sentiti; è imposta anzitutto da precetti costituzionali ( artt. 9 e 32 Cost.), per cui esso assurge a valore primario ed assoluto" (sentenze n. 210 e n. 641 del 1987).

Il bene dell'ambiente come diritto fondamentale della persona (oltre che come interesse fondamentale della collettività) 'comprende la conservazione, la razionale gestione ed il miglioramento delle condizioni naturali (aria, acque, suolo e territorio in tutte le sue componenti), la esistenza e la preservazione dei patrimoni genetici terrestri e marini, di tutte le specie animali e vegetali che in esso vivono allo stato naturale ed in definitiva la persona umana in tutte le sue estrinsecazioni" (sentenza n. 210 del 1987). (2006, *online*).

In the evolution of constitutional jurisprudence, the right to health also extends to forming itself, in connection with art. 9 of the Constitution, also as a right to a healthy environment.

The recognition of an individual right to the environment, protected as a fundamental right, moves from a concept of 'health' to the general legal well-being of the individual, deriving not least from the enjoyment of a healthy environment.

According to the court, "The environment is protected as a decisive element of the quality of life": 'Its protection does not pursue abstract naturalistic or aesthetic purposes but expresses the need for a natural habitat in which man lives and acts and it is necessary for all collectivity and, for it, avengers, according to widely felt values; Constitutes, first of all, constitutional precepts (Articles 9 and 32 of the Covenant), which is the result of absolute and absolute value "(judgments Nos 210

and 641 of 1987).

The good of the environment as a fundamental right of the person (as well as a fundamental interest of the community) includes conservation, rational management and improvement of natural conditions (air, water, soil and territory in all its components) And the preservation of terrestrial and marine genetic resources, of all animal and plant species that live in it naturally and ultimately the human person in all its extinctions “(judgment No 210 of 1987). (2006, online).

In France, in 2005, the Environment Charter (French Environmental Code) was published through Law n. 2005-205, which declared the environment a fundamental right and brought, in the preamble, the reference that was being incorporated into the Constitution of 1958, so that the environment came to be considered fundamental constitutional right, with the same extent of the other fundamental rights that were already in it.

Thus, it is seen that the environment, in the condition of third generation human right and that has developed to the purpose of preservation of life in the earth, in the human rights fourth generation, is declared as fundamental right in the Constitutional scene in several countries. Even when not expressly, as in Italy, it is treated with the *status* of fundamentality, due its relevance for the survival of the current and the future generations. After all

the right to life conditions all other rights, but the access to this right of defense is closely linked to the environment, which must be protected from serious environmental risks to life. The environment must also be protected as the right to defense of life, or rather as the fundamental place for the development of the human personality (COSTA, 2010, p 117).

It in this context of fundamental right and, therefore, as juridical good of the highest relevance, that the environment will be approached henceforth, as an object of protection of the penal law, being considered, in sequence, the legal relationship / Constitution and then the difficulties and challenges related to the penal protection.

### **3 PENAL LAW, JURIDICAL ASSET AND CONSTITUTION**

As a premise of the relationship established between the penal law, the legal right and the Constitution, it must first be established that the

penal law is governed by the principle of minimum intervention, that is, it must be called upon to intervene only when it deals of the case of relevant offense to legal good that has sufficient dignity to be protected by it.

In this context, the relevance in the election of juridical goods entitled of penal protection should be based on what the Constitution of the various countries consider as fundamental goods, even though the most important assets have, as a rule, a constitutional seat. It is not ignored that among the contemporary theories on the legal good, the sociological theory is the one that identifies the content of the legal good with arguments of social damage; however, constitutional theories work valuation judgments on which all sectors of law are subordinate, such as legal-constitutional recognition for the property to have a minimum support of juridical dignity.

Since Birnbaum, in 1834, who, in contrast to Feuerbach, who had understood the crime as a violation of a subjective right (1804)<sup>1</sup>, coined a naturalistic and pre-judicial concept of juridical good, derived from the nature or from the necessities of the social life and that, thus, would therefore bind the legislator to penalize conducts that caused damages to goods such as life, integrity, freedom, property, etc., the concept of legal interest has been the subject of several formulations over the years, notably with regard to the definition of its content and its nature. What the history shows, however, is that the evolution of the theory of legal-penal good refers to the criteria of definition and delimitation of the goods and values that should be object of protection through penal sanction, that is, the difficult balance between limiting the scope of penal action - *ius puniendi* - and the protection of assets by means of maximum state sanction.

The development of the theories of juridical good led, as already said and since the sociological conceptions that have identified the damage to the juridical good with the idea of social damage, to the constitutional theories, that infer the concept of legal-penal good of the Constitution. The material content of crime is outlined by the constitutional order, based on social values and fundamental principles to the dignity and freedom of the individual and the society.

The ordinary penal legislator considers the Constitution as the source of the legal-penal property and finds in it the limits for the selection of what is entitled to penal protection, using, therefore, penal-constitutional principles such as human dignity, legality, minimum intervention,

<sup>1</sup> Nesse sentido, a crítica de Birnbaum a Feuerbach que, na concepção daquele, não transmitia, de fato, por sua teoria, qual era o objeto de lesão penalizado pelo Estado



fragmentation, guilt, individualization of punishment, offensiveness, among others, drawing from the constitutional basis the importance of the appropriate selection of legal assets with dignity so that they are subject to penal protection<sup>2</sup>.

Thus, not everything that is constitutionally consecrated must necessarily be protected by penal law, but only what the legislator, in the face of social desires, elect as entitled of it - in the face of the greater importance - of it. After all, as says Fernandes,

[...] the Constitution, as a *norma mater*, provides a framework to be clearly taken into account in the definition and selection of that catalog of goods (necessarily *fragmentary*, since not all legal goods are protected) over which penal law exists - to lay down their protective mantle, elevating them to the category of juridically-relevant legal goods. (FERNANDES, 2001, p.83)

Although not safe from criticism, in the sense of the authoritative doctrine, the understanding of the legally protected goods involves those described as

Indispensable prerequisites for a peaceful and free coexistence within the State, in which fundamental rights are respected. Legal goods are therefore life, physical integrity, personal liberty, sexual self-determination, but also, for example, the correct functioning of justice or protection against counterfeiting. Because a free, secure social life depends on these (and many other) goods being protected from damage from alien attacks. The reverse of this view is that conducts that are only contrary to morals (such as actions contrary to the good manners that adult persons carry out with reciprocal consent), as well as acts of self-harm and cooperation with them cannot be penalized without More, because where everyone is in agreement no one is injured, and human coexistence is not impaired. For this reason, the protection

<sup>2</sup> Hence the reason for which the juridical good is so important for the penal dogmatic itself, being able to be summarized its most diverse functions of the doctrine of Nile Baptist: "The legal good fulfills, in the penal law, five functions: 1 axiomatic (indicative of the valuations Who presided over the selection of the legislator); 2nd systematic-classificatory (as an important principle of the foundation of the construction of a system for the science of penal law and as the most prestigious criterion for grouping crimes, adopted by our penal code); The third exegetical (although not circumscribed to it, it is undeniable that the legal good, as Anibal Bruno said, is 'the central element of the precept', constituting an important methodological instrument in the interpretation of the legal-penal norms); 4<sup>a</sup>, dogmatic (in many moments, legal good offers itself as an epistemological wedge for crime theory: think of the concepts of result, attempt, damage / danger, etc.); In addition to legal generalizations, it is possible to verify the concrete options and aims of the legislator, creating, in Bustos's words, an opportunity for 'the critical participation of citizens in their fixation and revision'. (BATISTA, 2004, pp. 96-97).

of mere taboos and 'symbolic' penal precepts lacking a concrete legal protection effect are also inadmissible (ROXIN, 2013, p.290)

The constitutional framework of human rights has been a constant in the so-called contemporary constitutionalism that, for this reason, has positivated the most expensive rights of the human person as fundamental rights. Hence it can be said, without any exaggeration, that the legal positions governing the life of the citizen are stamped in the Constitution..

In this scenario, the approximation of penal law with the Constitution is evident, since it is the most aggressive means of social pacification, since it is capable of blocking even the people's freedom, it is subject to the limiting rules of state power that are included in the Constitution.

Therefore, it is not conceivable that penal law can, with its aggressiveness, protect legal goods that are not in the level of the penalty that can be applied, and it is therefore pertinent to consider that assets protected by penal law should, in a manner directly or indirectly, to find support in the Constitution itself.

This is the reason for which Palazzo supports that the penal Law "potrebbe munire legittimamente di tutela solo i beni costituzionalmente rilevanti, mentre per tutti gli altri il legislatore dovrebbe invece utilizzare strumenti di tutela extrapenale, amministrativa o civile, ecc" (PALAZZO, 2008, p. 70). Not that such an interpretation is safe from criticism of the idea that the legal right, in a strict and closed sense, could dictate the rules of what should or should not be penalized, or even that it should bind the penal legislator solely by its nature. However, it represents, at least in the specific case "[...] the critical standard with which it must be verified the legitimacy of the penal Law [...]" (BECHARA, 2009, p. 4).

As a segment of law, penal law, as well as civil law, commercial law, labor law, finally, aims to ensure individuals' harmonious coexistence in the society<sup>3</sup>. If the right in a broad sense aims to prevent or even resolve the conflicts that arose between the individuals that make up the social body, each segment of it does not cease to possess this connotation. It is necessary to establish, then, the differentiating nature of penal law, which

<sup>3</sup> In this sense, emphasizes Paulo Queiroz: "The function of criminal law is something much less ambitious: to enable social coexistence through the peaceful ordering of conflicts. As WELZEL points out, it is not the State's role to intervene in the performance of justice, regardless of whether it is necessary for its own existence as a legal community, since the State does not punish for justice in the world, but for legality in the life of the Community "(QUEIROZ, 2008, p 28-29).

is given by reason of its sanctioning nature, by means of the penal sanction.

Jescheck (1981), attentive to the penal law sanctioning character, explain that it provides a protective function to the society. It also shows that it fulfills its mission through repressive functions, by punishing infractions already committed by means of punishment, and by preventive measures, following a concept of special prevention that it adopts, that the sentence must contribute to strengthening the respect for the law, in the person of the condemned (JESCHECK, 1981, p. 4-5).

In this context, it emphasizes, denoting the importance of penal law and its regulatory task, that “penal law ensures the unbreakability of the legal order through state coercion” (1981, p.4). However, it does not stop there: later, it provides that penal law aims to protect the essential assets for life in society and, when incorporated into the legal order, become legal goods that are submitted, if they are highly relevant to the penal protection – hence deriving the fragmentary nature of the penal law. (1981, pp. 9-11).

In the way of the fact that the penal law really serves to the protection of juridical assets, asserts Assis Toledo:

The immediate task of the penal law is thus of an eminently juridical nature and, as such, it comes down to the protection of juridical goods. In this, moreover, the entire legal system is committed. And here we show the subsidiary character of the criminal order; Where protection of other branches of law may be absent, fail or prove to be insufficient, if the injury or exposure to danger of the protected legal interest presents a certain seriousness, until then the mantle of criminal protection should be extended, as *ultima ratio regum*. Not beyond that. (TOLEDO, 1994, pp. 13-14).<sup>4</sup>

The immediate task of the penal law is thus of an eminently juridical nature and, as such, it comes down to the protection of juridical goods. In this, moreover, the entire legal system is committed. And here we show the subsidiary character of the criminal order; Where protection of other branches of law may be absent, fail or prove to be insufficient, if the injury or exposure to danger of the protected legal interest presents a certain seriousness, until then the mantle of criminal protection should be extended, as *ultima ratio regum*. Not beyond that. (TOLEDO, 1994, pp. 13-14).

4 In the same book, on pages 6 and 7, the author cites Bettiol’s position on the mission of criminal law - protection of assets, values and interests -, Engisch and Welzel’s positions - protection of ethical and social values - Wessels - protection of the elementary values of community life and maintenance of social peace - and that of Jescheck..

It should be noted, therefore, that the protection of the legal good is predominantly the field chosen by the doctrine to work on the idea of the function of penal law. In fact, penal law is eminently typical and, because it is a product of the evaluation of the social body, it translates, in the process of formation of type, the yearnings of a society at a given time and place. From this, it is pointed out, first, that the penal law proves to be, by its sanctioning character, a guarantee of preservation to the goods that it seeks to safeguard and, also, computer of human social relations.

Thus, it prevails in the doctrine the understanding that the penal Law mission is the protection of juridical goods counted in the Constitution<sup>5</sup>, whether because in this one must be found the differential value adequate to seek what must be to punished, or because the interpreter must have in sight that it cannot be said crime what regards to facts that, even endowed of apparent type, configurate the exercise of the fundamental rights themselves. Hence the limit and guarantee of the juridical good, even because, according to Hassemer,

The prohibition of a conduct by means of the criminal threat when a legal right cannot be invoked would be state terror. It would be no more than an interference in the freedom of action of the individual, in respect of which the interfering State cannot say what the interference is. This 'end' is the point traditionally contributes to the concept of legal good. Interference with freedom of action would not have a legitimating object from which its meaning could be derived.

To that extent, the question as to whether there may be punishable facts that do not relate to the suffering of a criminal legal right is rhetorical. For the legal good it is the necessary and constitutional basis both for the conception of a duty of protection and for the determination of a barrier to interference and its weighting in the particular (HASSEMER, 2005: 74).

The selection, therefore, of a legal-criminal good means a positive valuation of a given good or value, recognition of its relevance to the human being and to the society. After all, "the material conceptualization of legal good implies the recognition that the legislator elevates to the category of juridical good, what already in the social reality shows itself as a value. [...] It does not create the values to which it refers, but merely proclaims them [...]" (PRADO, 2013, p. 98).

<sup>5</sup> Although many understandings are contrary, in the sense that the notion of legal good is pre-constitutional and, therefore, "according to the Constitution, criminal rules are not subject to any requirement that may arise from the theory of legal good in matters penal". (BURCHARD, 2013, p. 35)

This way, the first judgment value on the legal good is carried out by the constituent who, according to the social reality, guides the second filter of the ordinary penal legislator, reaching the legal-penal good.

That is why, in view of the constitutional paradigm and the social demands of contemporary society, the juridical-criminal good can be of an individual or transindividual order, of diffuse ownership, collective character, and which affects all members of the community indistinctly .

In modern times, the social complexity of society raises metaindividual juridical goods, which results in the emergence of transindividual juridical-criminal goods, which, according to Luís Greco, “facilitates the life of the legislator” (2012, p. That “... justifies criminal charges and penalties that would not be *prima facie* justifiable if we had only the individual legal right.” (2012, p. 352-353).

As Hassemer observes:

The complex liability thus engendered, densified and perceived, as well as the interest of the “risk society” in minimizing insecurity and in the overall control of complex processes, reached not only criminal policy but also the theory of criminal law and the theory of legal good (HASSEMER, 2008, p. 226).

The collective legal good has been accepted by the doctrine through the personal theory of legal good, which considers it legitimate since it has as reference the individual. This theory can be conceived in two meanings: a radical, supported mainly by Zaffaroni and Ferrajoli, and another moderate, defended mainly by Hassemer (GRECO, 2012).

According to the radical personalist theory, collective juridical good will only be penally legitimate if it has as direct reference the individual, from the contact with the interests or rights of the people, which, in a certain way, proclaims a bias of divisibility of the collective good.

The moderate personalist position also understands that the collective juridical–penal good must have a relation with the individual, but in an indirect way, that is, it cannot be parceled out for imputation to the individuals (GRECO, 2012).

The fact is, however, that such theories end up limiting the dignity of the transindividual legal good, a reality that today cannot be ignored. After all, in the words of the professor of Coimbra, such theses seem incompatible

with the recognition of true collective juridical goods. These must be accepted beforehand, without misrepresentation, as authentic universal, transpersonal, or supra-individual legal goods. That this category of juridical goods may also ultimately be brought to bear on the legitimate interests of the person, which is not a right to answer. The supra-individual character of the juridical good certainly does not exclude the existence of individual interests that converge with it: if all the members of the community are harmed by potentially life-destroying behaviors, each of them does not leave it alone individually as well. Have a legitimate interest in preserving vital conditions. (DIAS, 2003, p.52).

Regarding the environment, treated as a transindividual legal right, it will be dedicated the following lines, which will analyze the peculiarities of its penal protection as a claim of modern society and, why not to say, also the constitutional desire of modern countries.

#### **4 A PENAL PROTECTION OF THE ENVIRONMENT**

The question of the protection of the environment, even before any dogmatic consideration of how to carry it out, concerns the very life of people. This is because, as Figueiredo Dias (2003) points out, “the very subsistence of life on the planet is concerned and, if we are to offer a reasonable chance for future generations, humanity must become the common subject of responsibility for life” ( DIAS, 2003, p.46). It is therefore a property whose diffuse tutelage is claimed by all, but also by each one, even though the essentiality of the environment for life is in fact an individual need, whose peculiarity of protection is also claimed as a Right, or guarantee for their own survival, of each one.

From now on, environmental considerations will be considered as a legal assets of penal relevance and the peculiarities of the protection in this branch of law.

##### **4.1 The environment juridical-penal good**

Referring to the contemporary society, Bauman reveals that, nowadays,

the ground on which our life prospects are supposed to be based is admittedly unstable - as are our jobs and the companies that offer them, our partners and our networks of friendship, the position we enjoy in the wider society, and self-esteem

and Self-confidence. 'Progress', once the most extreme manifestation of radical optimism and a universally shared and permanent promise of happiness, has wholly moved away from the opposing, dystopian and fatalistic pole of anticipation: it now represents the threat of inexorable and inescapable change. Which, instead of auguring peace and quiet, presages only the crisis and the tension and prevents a moment of rest. (BAUMAN, 2007, p.16)

It is emphasized that the uncertainty and volatility not only of capital, but of the relationships between people themselves, is a characteristic feature of society nowadays. We do not mean here to say that life in the past produced, in itself, the security as to the atmosphere of destiny; what we see now, however, is a great shortening, a greater narrowing of man's contact with the risks imposed by the new globalized way of life, which puts human life itself to test.

Thus, the nuances of modern or postmodern life are demands that are imposed on states as apt to be regulated in view of the very maintenance of social pacification, which cannot escape the field of action of new penal policies, even though it is recognized that the granary for the production of penal norms has traditionally taken into account the eminently individualist anthropocentric paradigm.

The protection of the most expensive legal goods to society, the basis on which the minimum intervention of criminal law is defended, is, *par excellence*, the starting point for the understanding of what should or should not be the subject of the protection of this branch of law. And it is in this context of the relevance of the good to be protected that a role cannot be ignored in the penal law in matters that concern the very subsistence of the planet life, which also justifies the fact that the goods, essential for subsistence of man himself, cannot fall outside the scope of the penal law.

In this perspective, the environment, because of its indispensability for the survival of present and future generations, arises not only as a property whose protection is claimed by the law as a whole, but also by penal law in particular.

The suitability of the juridical-penal good is directly linked to its social-constitutional value. As a result of criminal law protecting the most expensive legal assets against society from the most serious forms of injury or threat of injury, it is understood, as a rule, as already highlighted in the previous topic, that the constitutional guarantee of these juridical goods is imperative, which, within the framework of the modern constitutions,

has received great attention from the most diverse countries, including the mandate of penalization.

In Brazil, the 1988 Federal Constitution established the mandate of penalization related to the environment in the §3º of art. 225:

Article 225. Everyone has the right to an ecologically balanced environment, Public Power and the community the duty to defend and preserve it for the present and future generations.

[...]

Paragraph 3 – The conduct and activities considered harmful to the environment shall subject the offenders, individuals or legal persons, to penal and administrative sanctions, regardless of the obligation to repair the damages caused.

According to second topic, Portugal, Spain, France and Italy, whether in the constitutional sphere or even by recognition of the High Courts, also consider the Environment as fundamental right, therefore, even for its importance for the life, entitled of the most varied sources of protection, included penal law.

In this sense, the assertion of the right to the environment as a human and fundamental right sounds like an international voice, deserving it, even though the penal sciences have treated it under the bias of individual rights, their secular dogmatic, a concern of the legislator regarding the incriminating penal types and more appropriate penalties to the diffuse characteristic of the protected good.

However, it should be pointed out that the difficulty in accepting that the diffused legal good may be subject to penal protection does not concern its assumption as a material object of human conduct. In addition, many of the world's penal codes in the last century already provided, as example, the fire and epidemic crimes, as criminal offenses, entitled of protection to the society and individuals interests<sup>6</sup>. The idea that self-regulation can solve the questions concerning the post modernity is a theme that has been overcome, even though it would mean asking “the market - in fact, the most authentic producer of the difficulties and despair of the industrial technical society - the remedy for the disease which itself has inoculated “(DIAS, 2003: 47), which would lead to the renunciation of a” model of life that has made consumption its own engine and the increased

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6 In the Brazilian case, since the 40's of the last century, the Penal Code already had the figures of fire (article 250) and epidemic (article 267) as an example of the so-called crimes against public safety.



production the guiding element of almost all knowledge” (DIAS, 2003, p. 47).

The great question concerns the fact that the magnitude of the diffuse legal good calls for prognostic and non-retrospective actions, which means that criminal law must renounce the idea of lesivity as a basic principle calling for effective harm - and thus, past tense - the legal right protected. This is the challenge to be overcome, since, traditionally, criminal law goes back to the past, which led Cornelius Prittwitz to argue in Congress on globalization, risk and the environment held in Granada, Spain, that “Criminal Law is The only branch of law that knows no sentences explicitly directed to the future “(2013, 63). However, as Figueiredo Dias maintains, it is up to the penal dogmatic to adjust to the new of life, not the other way around. At the end,

there will be no more room for a thought which, like the owl, rises only at dusk, that leaves things happen and then tries to remedy them and whose intervention is therefore by retrospective and non-prospective in essence, conservative and non-propelling, annihilating, and not protective of the victims of the system, that we all are (DIAS, 2003, p. 47).

However, it is not a simple task, as the individualistic tradition of protection of the juridical good engenders the criminal dogmatic in such a way as to contemplate the subjective penal responsibility as that which, without exception, must be adopted by the penal law. It is necessary, however, not to ignore that man is a social being and that the viability, as much as possible, of systems of collective protection before the postmodern demands of life in a globalized society, guide the necessity of a new penal policy.

The penal protection of legal goods of a diffuse nature, therefore, concerns the very life of the penal law, which has, as a branch of law, a primary function of social pacification in a society that increasingly sees the existence of conflicts involving collective and diffuse legal goods, such as those involving aggression to the environment.

Thus, it is not given to the penal law the privilege of ignoring the existence of new juridical good that, in a fragmentary and subsidiary way, should be subject to penal protection. Hence it can even be argued that new interests, thus considered by Sánchez (2011), lead to a new penal policy that should lead to the protection of collective juridical goods. At the end,

Criminal law is a qualified instrument for the protection of particularly important legal rights. With this in mind, it seems necessary to take into account the possibility that its expansion may be due, at least in part, to the emergence of new legal interests - new interests or new pre-existing interests' valuations - and to the increase in value experienced by some those that existed before, that could legitimize their protection through the penal law. The causes of the probable existence of new legal-criminal property are surely different. On the one hand, it is possible to consider the conformation or generalization of new realities that previously did not exist - or not with the same incidence - and in the context of which the person must live, which is influenced by an alteration of them (SÁNCHEZ, 2011, P.11).

If, as an example, the environment, as a diffuse legal good whose balance is now claimed as a condition of human survival itself, of present and future generations, could not be protected by the penal law, as it could be argued that this branch of law that it is, was an instrument of social pacification and, more especially, of defense of the most important juridical goods for society?

There is no doubt, therefore, that, because of its supreme relevance, the environment must be protected by the penal law as a diffuse right, which also concerns to man as a person. This has been the point, as has been said, of the legal systems of the most diverse countries. However, if environmental protection is to be dealt with by the penal law, the major difficulty is to establish how it should be done to make the results effective and justified.

#### **4.2 The penal protection: peculiarities and perspectives**

The penal law, as a discipline consecrating subjective responsibility and filled with principles and rules that enshrine a secular dogma, faces, in modernity, challenges arising from imprecise and oscillating social stimuli, which propagate in discontinuous rational movements. The juridicization of the ecological phenomenon, as well as the exaltation of legal goods of diffuse nature project this indeterminate spectrum to the Penal Law, which must meet the social demands through a safe punitive system, delimited by precise material and procedural guarantees.

Mathematics, the science-matrix of civilization, deals with

uncertainty as an atavistic phenomenon, that is, of a natural nature, innate to human perception. Aristotle, quoting Zeno, already struck the premise that “if things are many, existing things are infinite, for there are always things between existing things and, again, other things among these others. Thus, existing things are infinite “ (CARVALHO, 2010, p. 59-60).

From the notion of “infinity,” one gains the imprecision of human perception, which fosters fallibility. The social commitment to normalize is naturally linked to what we are aware of. From this observation, it is inferred that only what one knows can be legally ruled, even if this knowledge derives from ignorance or no-knowledge itself.

It is the reason for the lack of knowledge, the perspectives of the so-called *ex ante* punishment, the peculiarity of the diffuse legal good for the purpose of reaching the criminal responsibility of the enemy of the environment and of the very making of the penal norm, which nourish the challenges faced by the legislator in order to guarantee The protection of a legal asset that, at the same time, is diffuse and individual.

The criminal law, of secular individualistic tradition, sees itself in the task of directing its field of action for the protection of juridical goods that go beyond the human person, although they are directly related to her.

From this follows a series of consequences, the traditional difficulties of the traditional-secular penal dogma, which relate to the very transformation of penal types into administrative types, with a high incidence of elementary ones that go back to administrative law, penal types that require complementing of other laws or administrative acts, precisely because they require, in more open normative commands (blank criminal norms), a discipline housed in other normative diplomas, whether originated, or not, from the Legislative Power. But this is not all, because the nature of the law under study does not imply that the damage occurs so that the penal law is only and merely retrospective, as it is important here the effective protection of the environment and that does not match the damage as a presumption of protection. Hence the occurrence of crimes that have a relation between the conduct and the offense to the relatively weak juridical good, but which become imperative so that the Law, specially the penal Law, have the time and voice in the defense of a society that also thinks and acts prospectively.

On the other hand, one cannot ignore the natural difficulties concerning the penal responsibility of the juridical person, precisely the

one that most threatens or damages the environment, but which, in the light of the criminal response itself, cannot have restriction to its freedom and that, for many, due to its only juridical nature, does not have the capacity of the subjective liability as they do not express their will for themselves, and do not have capacity of culpability

With regard to the penal norm apt to the protection of the environment, the great demand for the penal intervention, markedly in the face of the society of objective insecurity, characterized by Sanchez (2011, p. 37), reveals, in the form of the law, a certain escape from the secular characteristic of taxability and a consequent greater permissiveness to the elaboration of more open norms with prohibitive contents, subjected to the administrative accessory highlighted in view of the diffuse character of the protected juridical good. The greater demand for penal law ends up providing an expansionist movement in Spain in 1995 and which was the subject of the following considerations by the Iberian authors :

Such an expansion is undoubtedly an undeniable feature of the Spanish Penal Code of 1995, and the positive valuation that important doctrinal sectors have carried out on it makes clear how the topical (selective) escape from the Penal Law is not only a problem of superficial and frivolous legislators, but that begins to have an ideological coverage of which it lacked until little time. In any case, the 1995 legislature could not, in fact, escape even an express - albeit partial recognition - of this phenomenon, when alluding in the Explanatory Memorandum of the legal text to the existence of an antinomy between the principle Minimum intervention and the growing need for protection in an increasingly complex society ‘, an antinomy that would be solved in the text, according to the legislator,’ giving a prudent welcome to new forms of delinquency, while eliminating delinquent figures that Lost their reason for being ‘(SÁNCHEZ, 2011, 28).

In Italy, despite the existing superabundance of provisions related to the environment, in the penal field, we see that:

The theme of the environment and its protection, long ignored by the criminal doctrine, has only been dealt with in the last few decades with the well-deserved attention that has finally allowed the discovery of a notion of reference and of the most correct pattern of indictment to be used In criminal proceedings.

In Italian law, the criminal protection of the environment has never found a systematic reference, there is an indeterminate series of rules introduced in special laws, each

in order to suppress the aggression of the essential elements of the environment, such as, for example, Water, air, soil, subsoil and landscape: it becomes even more difficult to research if it is to find a norm that expressly addresses the protection of the environment in its generic and unity. (COLOMBINO, 2012, online).

### And else:

In the criminal law of the environment in force in Italy, the individual cases very rarely type directly the effects of altering the ecological balance<sup>94</sup>, preferring, instead, forms of re-constitution of the requirement of non-compliance with administrative precepts to which respect is subordinated are carrying out of activities considered dangerous, for which the administrative power establishes rules of conduct, claiming qualifying licenses, concessional or merely authorizations. [...] It is still community law which requires a change in discipline by adopting Directive 2008/99 / EC. It was (and is) largely shared in the doctrine the idea that the implementation of the directive could result in a significant improvement in the level of effectiveness of our criminal system. At the moment, the ideas of reform suggested by European intervention have found only partial feedback. The internal implementation of the European provisions is still at an early stage: in particular, the Act of 4 June 2010, no. 96 of 2010 led to the adoption of the (first?) Legislative Decree of July 7, 2011, no. 121, of which short. (GUCCIONE, 2013, p. 45

In Brazil also the expansionist movement was not free from criticisms, usually called the Environmental Crimes Law (Law 9.605/98) of prolix, casuistic and technically imperfect (PRADO, 2013). After all, it deals of a law full of penal types that demand complementation from the administrative organ, for the improvement of the conduct penally censored. This is the case of the articles 29, § 4º, I and IV; 34, *caput* and sole paragraph I and II, 35, I and II, 36, 37, IV, 38, 45, 50, 42, 56, 62, I, all in the Law 9.605/98.

Thus, is observed that it is the case of problems related to the penal law as a discipline of world-wide dogmatic construction, and not a typical problem of this or that country. They are, therefore, macro-spectrum challenges, of a cross-border nature, and which call for the construction of a particularized dogmatism capable of effectively protecting the juridical good of a diffuse nature.

However, the warning that the transformations required of a

penal law that promotes the protection of the well-diffused environment does not necessarily involve the multiplication of penal laws, as if such penal law was a true panacea, capable of managing all the problems of the contemporary world. It is a fact that, immediately, the direct effect of legislative production in penal matters in the risk society (BECK, 2010) produces an apparently reassuring effect on a collectivity which, in SÁNCHEZ's (2011) words, is nowadays increasingly consumerist of criminal intervention. However, the penal law cannot be merely symbolic, but rather guarantee, in the most effective way possible and within the limits of permissiveness of intervention, the protection of the most significant juridical goods, individual and collective rights and guarantees, since, in the words of Queiroz (2008), which reports to García-Pablos de Molina,

A symbolic criminal law lacks all legitimacy because it manipulates the fear of crime and insecurity, reacts with unnecessary and disproportionate rigor and is concerned exclusively with certain offenses and offenders, introduces an endless number of exceptional provisions, regardless of their ineffectiveness or impossible and in the medium term it discredits the order itself, undermining the intimidating power of its prescriptions. (Queiroz, 2008: 52).

It should be pointed out, however, that, given the diffuse peculiarity of the juridical protected interest, the challenge lies in the use of the legislative technique, which, at the same time, must contemplate environmental protection (and, in this respect, there is no escape of the appeal to the administrative law) and, because it is a penal norm, does not escape its traditional, secular postulates. How to define the precise limits of balance is not, however, an easy task. However, Figueiredo Dias emphasizes that the Penal Law has a special function in the new social demands, in which the defense of the environment is inserted. After all, as an outsider, the respected teacher of Coimbra states

the multiplicity of dangerous conducts for the fundamental conditions of life of the future generations, in the complexity they can assume and in the constant changes they are submitted, by the technological evolution, effectively lead to collective crimes, whatever they are constructed definitively, they can be subjected to a clause of administrative accessory. What means that the integral content of the illicit only can be revealed, in the best analysis, also due to norms with no penal dignity. The administrative accessory calls to the juridical-penal dogmatic, that is true, to a wide

range of problems, but also at this point it would be healthy starting to base on an old good truth: that it is not to the political-criminal valuations that must be submitted to the labor dogmatic (and to the difficulties and the limits in each historical moment), as mere constructive-instrument means, to serve the political-criminal propositions and suit them (DIAS, 2003, p. 55-56).

As observed above, it deals of a hard task, as beyond the norm peculiarity concerning the administrative accessory, the fragmentary and subsidiary features of the penal Law must be present in view of the penal Law concept of *ultima ratio*. In the Brazilian case, as an example because there is specific Law about the environmental protection (Lei 9.605/98), it is clearly seen that the crimes prodigality that reflect the peculiarity of the environmental rules, but that, however, could find adequate answer in the penal sphere. In this sense:

For the time being, its highly punitive nature is based on the fact that it creates a great deal of behavior in the category of crime, which, strictly speaking, should not be a mere administrative infraction or, at most, a criminal offense, in total dissonance with the principles of minimal intervention and insignificance (eg articles 32, 33, III, 34, 42, 44, 29, 52, 55, 60, etc.). (PRADO, 2013, p.164).

The challenges, therefore, concern not only the defense of the penal environment protection, but also and especially as, in the light of the peculiarity of the diffuse human environmental right, effectively protect it with adequate laws and that contemplate, respecting the degree of determinability of the environment, the possibility of *ex ante* punishment so that the sometimes irreversible damage is avoided.

On the other hand, it cannot be ignored that the various segments of law, and consequently penal law itself, are nowadays required to respond to the dangers and damages of the most unpredictable and not entirely classified known coordinates of time and space. In addition, the supranational character of the legal good ends up with demands related to globalization and supranational integration in the defense of a good that does not belong to an individual and not to a particular State, but to the whole community, which demands more adequate parameters of punishment, as many times as necessary for the very punishment of the business activity, the one that most harms the environment, mainly because, to a large extent, aggression to the environment matches the spurious interests of a particular

company.

It is therefore urgent to rethink, within the scope of perspectives for a penal law that effectively meets the demands of environmental protection as a human right enshrined, in most of the legal systems, as a fundamental right ,

The problem of responsibility, that is, to assume that the issue of penal responsibility can not only pass through the admission of individual responsibility, and if it is true that in industrial society this problem has already been posed the responsibility of collective bodies, but also a more efficient link between this responsibility and the responsibility for acting on behalf of others, as well as other forms of responsibility that may be declared appropriate, in order to avoid the impunity of true offenders.

Hence, it is necessary to reflect on the whole problem inherent in the imputation, the authorship, but also the guilt, especially here as regards the distinction between fraud and negligence, as well as omission, which will certainly gain more relevance and, above all, risk as an indissociable category of risk.

It will also be important to reflect on the legal good. It seems evident to us that the traditional juridical good, of individual and liberal nature, cannot meet the requirements imposed by harmful or dangerous actions which can create diffuse, collective, supra-individual or even multi-individual damages or dangers at one and the same time (Individual root, but multiplied by several individuals) (FERNANDES, 2001, pp. 27-28

Thus, the complains are about a penal law that effectively protects the most important juridical assets and if the environment, a human right considered fundamental in most countries, is entitled to this protection, one has, as a premise and before the perspective of the penal law that has time and voice in the future and of an environment that is effectively protected by it, the use of efforts capable of, on a global level, to enable penal dogmatic to the new challenges of protection and prevention of the collective juridical good.

It is necessary, in the face of the breakdown of national paradigms, to create specific International Courts for the protection of the environment in the penal sphere and, without any order of misrepresentation, to allow, with the necessary dogmatic adaptations that become cogent, the liability of a juridical person, the one who, without a shadow of doubt, is the one who attacks the environment the most, not only in view of the lucrative



corporate scope, but also because it is the one most well endowed with the resources to carry out its purposes. .

If, with regards to norms, administrative clauses are necessary, which allows, as *conditio sine qua non* of optimization of the penal protection, offenses that are complemented by administrative precepts, this, of course, respecting the need for the penal protection, specificity of the penal protection and the minimum characters of determinability of the illicit so that it does not put to waste the whole range of rules and principles that ensure the security that the penal doctrine, for centuries, has managed to construct.

That the classic paradigms be broken with responsibility, in the name of better protection of a juridical asset that concerns the very lives of the beings of present and future generations and that therefore requires penal law as an effective guarantee, mostly constitutional, of a right that presents itself at once as individual and diffuse...

## FINAL CONSIDERATIONS

As essential for the lives of the present and future generations, the environment is treated in important international documents and, doctrinally speaking, classified as a third generation human right.

Although it did not deserve the due attention of the countries, currently, due to the concern with the scarcity of natural resources before the unbridled exploitation by the man, the modern Constitutions already dispose on the protection of the environment, where it is usually considered fundamental right, if not expressly, by the interpretation given to them by the High Courts..

Considered, therefore, for its relevance as a human and fundamental right, the environment is legal, with dignity enough to be protected by the penal law. However, it is a very peculiar thing, since it is at one and the same time an individual and diffuse right, because it is directly related to the life of each one and, at the same time, of all, of the present and even of the future generations.

However, this peculiarity of the juridical environment makes the penal law, accustomed by secular dogmatic to the protection of the juridical property of individualized ownership, to receive the influxes of the new, in order to consecrate a typical structure turned to the *ex ante* protection, of conducts that put in abstract danger of damage the juridical good, and to

be contemplated by complements from the administrative Law. .

Although having to be adapted to the efficient environmental protection, the dogmatic modification ends up generating, as a dangerous side effect, the greater penal expansionism before the demands for more penal intervention, which sometimes causes unnecessary legislative inflation, which culminates in reason for non-observance of the fragmentary and subsidiary nature of the penal law, with the criminalization of conducts whose protection would be sufficient by other branches of law, as occurred in Brazil with the so-called environmental crimes law (Lei 9.605/98).

In view of this, a responsible criminal intervention is defended, capable of transforming it into a constitutional instrument for the defense of the environment, without detracting the ultimate nature of penal law, which is proposed to be established at the international level with the creation of International Courts that punish environmental crimes against actions across borders, including juridical persons, precisely those that, for the fulfillment of their contractual desiderata and because they have more robust financial resources, are the ones that cause most damage to the environment.

It is therefore proposed that, as an instrument of guaranteeing a right of individual and diffuse importance, the environment should be largely protected by the penal law, a constitutional instrument to defend more important legal assets. It is nevertheless argued that the intervention is responsible and that it is limited to what is actually necessary.

*(dulcefragaalvares/14.08.2017)*

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