

**“CORPORATE ENVIRONMENTAL CRIMINAL LIABILITY IN SPAIN  
AND THE PARTICIPATION OF THE ENVIRONMENTAL NON-  
GOVERNMENTAL ORGANIZATIONS (ENGOS)”**

**“RESPONSABILIDAD PENAL MEDIO AMBIENTAL EMPRESARIAL EN  
ESPAÑA Y LA PARTICIPACIÓN DE ORGANIZACIONES NO  
GUBERNAMENTALES MEDIO AMBIENTALES (ONGMA)”**

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**Abstract:**

This paper has the aim of pointing out the environmental enterprises' criminal liability in Spain. Considering this, it proposes an environmental criminal policy based in two main ideas: the participation of the Environmental Non-Governmental Organizations in the elaboration of criminal compliance programmes in a framework where the self-enforcement is common and the access to environmental justice of this organizations.

**Resumen:**

Este documento pretende analizar la responsabilidad penal medio ambiental de las empresas en España. A su vez, propone una política criminal medio ambiental fundamentada en dos ideas principales: por un lado, la participación de Organizaciones No Gubernamentales Medio Ambientales en la elaboración de programas de cumplimiento penal en un contexto donde la autorregulación es comúnmente aceptada y, por otro lado, el acceso a la justicia de estas organizaciones ambientales.

**Keywords:** Spanish Enterprises Criminal Liability. ENGO. Compliance Programmes. Environmental Justice. Participation Rights.

**Palabras clave:** Responsabilidad Penal Empresarial Española. ONGM. Programas de Cumplimiento. Justicia Medio Ambiental. Derechos de Participación.

**Summary:**

- 1. Introduction**
- 2. Environment: State of the art**
- 3. Corporate criminal policy and its enforcement: Arts. 31 bis of the Spanish Criminal Code**
- 4. Arts. 325 and 328 Spanish Criminal Code**
- 5. Fundamental requirements of Compliance Programmes**
- 6. Law Enforcement: The Participation of Environmental Non-Governmental Organisations**
- 7. Conclusions**
- 8. References**

**Sumario:**

- 1. Introducción**
- 2. Medio Ambiente: Estado de la cuestión**
- 3. Política Criminal Empresarial y su aplicación Arts. 31 bis del Código Penal Español**
- 4. Arts. 325 y 328 Código Penal Español**
- 5. Características Principales de los Programas de Cumplimiento.**
- 6. Aplicación de la ley: la participación de la Organizaciones No Gubernamentales Medio Ambientales**
- 7. Conclusiones**
- 8. Bibliografía**

**1. INTRODUCTION**

When attempting to protect the environment, many international and national organisations maintain the human being at the heart of their legal texts: this focus is exclusive and disregards the role and relevance of our environment.

Environmental damage (well-illustrated by the dramatic consequences of climate change i.e. droughts, floods, desertification, etc.) is embedded in our age of globalisation, a context not only of new threats but also of commodification and privatisation of natural resources.

In parallel, society demands certainty in the face of threats posed by technological changes. Yet the criminal justice system's legal guarantees and fundamental rights have been reduced: its weakest members (who suffer the main consequences of natural disasters) are prosecuted for less serious crimes while the most powerful individuals are not pursued for crimes against the collective good or public finances.

In this paper, we analyse Spain’s criminal environmental policy targeting corporate firms. First, we give a brief account of the relationship between human beings and the environment as well as the implications of the market-based anthropocentric model of decision-making.

Subsequently, article 31 bis of Spanish Criminal Law regulating the two means by which corporate criminal liability can be generated, is examined. More specifically, we appraise articles 325 and 328 of Spanish Criminal law to understand the Spain’s criminal law for the protection of the environment. The requirements to exonerate enterprises from any kind of criminal liability included in the compliance programme are also studied.

Third, the participation of Non-Governmental Environmental Organisations in the elaboration of criminal compliance programmes are analysed in addition to these organisations’ access to environmental justice.

Finally, possible solutions to the issues mentioned above regarding enterprises’ environmental criminal liability are discussed.

## 2. ENVIRONMENT: STATE OF THE ART

Whereas research in the area of natural sciences provides the keys to understanding the dimension and effect of human activity on nature, the origin of environmental offences and the parties concerned are studied on an individual basis as part of a socioeconomic framework. Thus, since human behaviour has an impact on ecosystems and their wildlife, it is important to pay attention to lifestyle or habits, among other aspects.

Regarding the socioeconomic framework, there are four main ingredients that should be remarked to understand the link between the current economic system and the environmental state of the art: commodification, privatisation of goods, massification and globalisation<sup>1</sup>.

The first of such components, commodification, draws from Adam Smith’s *laissez-faire* approach. In other words, the concentration of goods becomes a biological necessity to survive and, therefore, any type of activity that cannot be measured is not worthy of protection, since, nowadays, all kinds of natural resources are commodified as securities, goods and rights<sup>2</sup>.

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<sup>1</sup> Rob White and Diane Heckenberg, *Green Criminology. An introduction to the study of environmental harm* (London: Routledge, 1<sup>st</sup> edition, 2014) 32.

<sup>2</sup> Michael J. Lynch and Paul B. Stretesky, “Global warming, global crime: a green criminological perspective”, in *Global Environmental Harm. Criminological Perspectives*, ed. Rob White (Devon: Willan Publishing, 2010, 1<sup>st</sup> ed.) 65 and Ute Collier, “The environmental dimensions of

The second aspect to be emphasized is the privatisation of natural resources. When natural resources become economic goods moving in the free market and are no longer owned by the state, they become privately managed private resources and, as a result, citizens develop into clients<sup>3</sup>.

The third feature linked to the environment is massification. This element of the system is a consequence of commodification and technological and scientific progress, which have led not only to the industrialization of farming or the growing importance of branches of science such as nanotech and biotechnology, but also to a deterioration in working conditions in both developed and developing countries<sup>4</sup>.

The last ingredient, globalization, is one of the most significant trends of the last thirty years. It is a rather complex term that refers to the monopolization of the production of goods by large companies and multinationals, involving changes in the production and consumption of goods at the local and global levels and, therefore, leading to the disappearance of small farmers<sup>5</sup>.

In short, human beings, technology, financial capitalism and, finally, large enterprises could all be considered accountable for environmental harm.

First, although technological gadgets *per se* are not a danger to the environment, whether they prove helpful or harmful depends on the use people put them to. Moreover, apart from capitalism, attention should be drawn to the large number of environmental crimes that are committed, either because companies and their managers are unaware of the different environmental protection regulations, or because of the fact that environmental crimes are not taken as seriously as others.

The conclusion that could be drawn, therefore, is that the current economic system, among whose characteristics are overconsumption and overexploitation of natural resources, is indeed one of the main contributors to environmental pollution.

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deregulation: an introduction”, in *Deregulation in the European Union. Environmental Perspectives*, ed. Ute Collier (2<sup>nd</sup> ed., London: Routledge, 1999) 7.

<sup>3</sup> Rob White, “Environmental issues and the criminological imagination”, *Theoretical Criminology* 7, n. 4 (2003): 487 – 489 and the same author in *Environmental Harm: An eco justice perspective* (Bristol: Policy Press, 2013) 84.

<sup>4</sup> Rob White, *Crimes against nature. Environmental criminology and ecological justice* (Devon: Willan Publishing, 2010, 2<sup>nd</sup> ed.), 147 – 149; Rob White, *Environmental Harm: An eco justice perspective*, 84; Rob White, and Diane Heckenberg, *Green Criminology. An introduction to the study of environmental harm*, 31 and Ana Isabel Pérez Cepeda, *La seguridad como fundamento de la deriva del Derecho Penal Postmoderno* (Madrid: Iustel, 2007), 45 – 47.

<sup>5</sup> Ana Isabel Pérez Cepeda, *La seguridad como fundamento de la deriva del Derecho Penal Postmoderno*, 45 – 47.

### 3. CORPORATE CRIMINAL POLICY AND ITS ENFORCEMENT: ARTS. 31 BIS OF THE SPANISH CRIMINAL CODE

Understanding corporate environmental criminal policy in Spain not only requires awareness of the general framework where the crimes concerned are committed, but also of the evolution of corporate crime prevention policies in Spain over the last fifty years. For decades, “*Societas delinquere non potest*” has been acknowledged as the legal principle of Spanish criminal policy, so that the only procedural measures that could be implemented when a company was involved in a crime were accessory, a sort of judicial actions to prevent the commission of crimes by a natural person working for a business company. Nonetheless, the amendment of the Spanish Criminal Code – hereafter SCC – that was implemented in 2010<sup>6</sup> led to a dramatical change in the legislative landscape, integrating corporate criminal liability into the Spanish legislative system, which was further amended in 2015<sup>7</sup>.

It could be argued that the Spanish legal system draws from Italian law, namely from Legislative Decree n. 231 of 08/06/2001, but mention in this regard should also be made of the US regulation on corporate criminal liability, specifically of the «*United States Sentencing Commission*». The main purpose of these guidelines is to establish general and specific precautionary functions within companies to prevent, detect and avoid the commission of crimes<sup>8</sup>.

Concerning the legal framework of the European Union – hereafter EU – and the Member States, the EU implemented corporate social responsibility without any binding effect through the numerous directives and regulations that address European criminal policy. In this regard, the EU’s legal principle of unique personality, temporary obstacles, economic costs and the burden of proof makes it quite complicated to demand companies before Member States’ courts<sup>9</sup>.

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<sup>6</sup> Organic Law 5/2010 of 22 June that modifies Organic Law 10/1995, of 23-11-1995 of Criminal Code (Spanish Official Journal n. 152 of 23/06/2010).

<sup>7</sup> Organic Law 1/2015, of 30 de March that modifies Organic Law 10/1995, of 23 November, of Criminal Code (Spanish Official Journal n. 77 of 31/03/2015).

<sup>8</sup> Jose Ignacio Gallego Soler, “Criminal Compliance y Proceso Penal: Reflexiones iniciales”, in *Responsabilidad de la Empresa y Compliance. Programas de prevención, detección y reacción penal*, Dirs. Santiago Mir Puig, Mirentxu Corcoy Bidasolo and Victor Gómez Martín (Madrid: Edisofer, 2014) 199 – 201; Helena Regina Lobo Da Costa and Marina Pinhao Coelho Araujo, “Compliance e o julgamento da APn 470”, *Revista Brasileira de Ciências Criminais* (2016): 216; Gonzalo Quintero Olivares, “La reforma del régimen de responsabilidad penal de las personas jurídicas”, *Comentario a la Reforma Penal de 2015*, Dir. Gonzalo Quintero Olivares (Pamplona: Aranzadi, 2015) 84 and Pedro Crespo Barquero, *La reforma del Código Penal operada por L.O. 1/2015, de 30 de marzo: Responsabilidad penal de las personas jurídicas* (Publicaciones de la Fiscalía) 2016, 12.

<sup>9</sup> Christiane Gerstetter, Cristoph Stefes et al, *Environmental Crime and the EU. Synthesis of the Research Project European Union Action to fight Environmental Crime* (EFFACE) (Brussels, 2016) 41

Spanish law has a self-enforcing system to prevent corporate crime; namely, companies are required to introduce internal regulations to prevent and detect criminal offences. That said, corporate criminal liability in Spain is limited to a specific number of crimes that can be committed by companies. Hence, there are only a few types of crimes that can be perpetrated by legal entities, crimes against the environment being addressed in Article 328 of the SCC.

Regarding corporate criminal liability, articles 129 and 31 bis.5 reflect that criminal liability of legal entities will not apply to the State, public administrations or regulatory bodies.

Moreover, Article 31 bis paragraph 1 of the SCC gathers the two ways in which a company may be held criminally liable: on the one hand, letter A refers to line managers who act on behalf and account of the entity and also in its direct or indirect benefit, i.e., legal agents, managers, senior management subordinated to managers, or employees who hold power that has been delegated to them by virtue of the management board<sup>10</sup>; on the other hand, letter B refers to employees subject to the authority of the managers mentioned in letter A. The behaviour concerned must take place while performing corporate activities on behalf and account of the entity when its managers have failed to comply with their duties of supervision, surveillance and control<sup>11</sup>.

One of the fundamental updates in the SCC that has been in force since 01/07/2015 is the preclusion of criminal liability when the entity's management has implemented a criminal compliance program that could prevent the commission of a crime.

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and Antonio Vercher Norguera, "[La persona jurídica y el sistema de Compliance en el Código Penal. Su aplicación en el contexto ambiental](#)", *Diario la Ley*, n. 8833 (2016) 5 – 6.

<sup>10</sup> Ruling of the Provincial Court of Cáceres 203/2015, Section 2, 08/05/2015, La Ley 57186/2015, opinion delivered by judge Tena Aragón, María Félix, Legal Foundation n. 5 and Bernardo Feijoo Sánchez, *El delito corporativo en el Código Penal Español. Cumplimiento normativo y fundamento de la responsabilidad penal de las empresas* (2<sup>nd</sup> ed., Cizur Menor: Aranzadi, 2016), 116 – 117 also Fiscalía General del Estado, Circular 1/2016, *sobre la Responsabilidad Penal de las Personas Jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica 1/2015*, 14.

<sup>11</sup> To grasp the idea of these different concepts I should stress that “on behalf and account of the enterprise or in the exercise of corporate activities” means that the crime has been committed in relation to specific powers held by the enterprise and in the exercise of such competences; likewise, “direct or indirect benefits” not only refers to economic benefits, but such benefits may also involve power over other legal entities, costs saving, social image improvement or the prevention of corporate economic damages see in Bernardo Feijoo Sánchez, *El delito corporativo en el Código Penal Español. Cumplimiento normativo y fundamento de la responsabilidad penal de las empresas*, 119-120 and 123-125; Pedro Crespo Barquero, *La reforma del Código Penal operada por L.O. 1/2015, de 30 de marzo: Responsabilidad penal de las personas jurídicas*, 28 and Fiscalía General Del Estado, Circular 1/2016, *sobre la Responsabilidad Penal de las Personas Jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica 1/2015*, 14.

According to article 31 bis of the SCC, legal entities may be exempted from criminal liability under certain circumstances. First, when, before the commission of the crime by a manager, the management board has implemented and effectively enforced a compliance program that includes suitable measures to prevent and detect such crimes; secondly, when the supervision of the performance and enforcement of such compliance program has been commended to an independent governing body of the company; thirdly, when the organizational and management models have been evaded by individual perpetrators; and finally, when the independent governing body has not neglected its obligations of supervision, surveillance and control.

On the other hand, when the crime is perpetrated by subordinate workers, the company may be exempted from criminal liability provided that, before the crime, there was already an efficiently enforced compliance program to prevent such type of crimes.

It should also be noted that legal entities have been granted the same fundamental rights and procedural guarantees in trials as those enjoyed by natural persons<sup>12</sup>, for example, the presumption of innocence, meaning that the task of proving an enterprise guilty falls to the private or public prosecutor.

Hence, the private or public prosecutor should be able to prove the organizational management’s fault plus the commission of the crime, whereas the legal entity need only prove that it has an appropriate compliance culture. In other words, all the legal entity has to prove is that it has behaved as a *loyal citizen*. With regard to proving the mentioned compliance culture, lawyers invoke the regulations and standards for international organizations (IOs) and expert evidence<sup>13</sup>.

The aforementioned can lead to the privatisation of justice insofar as self-regulatory international and national entities determine the necessary features for corporate liability.

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<sup>12</sup> Adán Nieto Martín, «Cumplimiento normativo, criminología y responsabilidad penal de las Personas Jurídicas», in A. Nieto Martín (Dir.), *Manual de Cumplimiento Penal en la Empresa*, Valencia, Tirant lo Blanch, 2015, p. 107. In this regard, see Ruling of the Supreme Court 514/2015, Second Chamber, 02/09/2015, VLEX-583483758, Manuel Marchena Gómez, Legal Foundation 3º, Ruling of Supreme Court 154/2016, Second Chamber, 29/02/2016, 10011/2015P, José Manuel Maza Martín, Legal Foundation 8º and Ruling of the Provincial Court of Zaragoza 112/2016, Department 6, 27/05/2016, La Ley 231395/2016, Ballestín Miguel, Alfonso, Legal Foundation 10º.

<sup>13</sup> Carlos Gómez Jara Díez, «La culpabilidad de la Persona Jurídica», pp. 216 – 219 and «El injusto típico de la persona jurídica (Tipicidad)», op. cit., in Bajo Fernández, M. / Feijoo Sánchez, B.J. / Gómez Jara Díez, C., *Tratado de Responsabilidad Penal de las Personas Jurídicas*, Cizur Menor, Civitas, 2<sup>nd</sup> ed., 2016, pp. 130 – 134 and the same author in «Compliance y delito corporativo: a propósito del Auto de 11 de mayo de 2017 del juzgado central de instrucción número cuatro (Caso Bankia)», in *Diario La Ley*, nº 9018, 2017, pp. 3 – 6 y 10 – 11.

In addition, whereas legal entities have the fundamental right to refuse self-incrimination, there is a substantial difference in the interpretation of the law: on the one hand, the European Court of Human Rights and the Spanish Constitutional Court outline the right to not incriminate oneself against the duty of cooperation with prosecution authorities; on the other hand, the Court of Justice of the European Union stresses the predominance of such duty of cooperation with the prosecution authorities<sup>14</sup>.

#### 4. ARTS. 325 AND 328 SPANISH CRIMINAL CODE

European Directives 2008/99/EC and 2009/123/EC<sup>15</sup> have greatly influenced the legal drafting of Spanish environmental crimes, i.e. in the use of vague terms such as substantial damage or negligible quantity, among others and in the inclusion of illegal administrative behaviour as an element of environmental crime.

Spanish 325 Article includes a number of essential elements. First, it requires the breaching of European, state, autonomous and local law and regulations that protect the environment, on the basis that these regulations and laws arise from legislative and executive powers.

Second, a basic environmental crime must damage the quality of air, soil, water or wildlife (1<sup>st</sup> paragraph of Article 325) and pose a hypothetical danger (1<sup>st</sup> and 2<sup>nd</sup> paragraphs of Article 325) i.e., its polluting behaviour should be enough to endanger the environment. In this respect, a polluting act is capable of generating pollution based on the composition of the chemicals discharged, the amounts of the release and the duration and effects of such act<sup>16</sup>.

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<sup>14</sup> Torras Coll, J. M., «Aspectos procesales de la responsabilidad penal de la persona jurídica. Valoración del programa compliance», en *La Ley Penal*, n. 130, 2018, p. 11 and Bajo Fernández, M. and Gómez-Jara Díez, C., «Derechos procesales fundamentales de la persona jurídica», in Bajo Fernández, M. / Feijoo Sánchez, B.J. / Gómez Jara Díez, C., *Tratado de Responsabilidad Penal de las Personas Jurídicas*, Cizur Menor, Civitas, 2<sup>nd</sup> ed., 2016, pp. 323 – 327.

<sup>15</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Text with EEA relevance) (European Official Journal L 328 of 6/12/2008) y Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (Text with EEA relevance) (European Official Journal L 280 of 27/10/2009).

<sup>16</sup> Francisco Muñoz Conde, Carmen López Peregrín and Pastora García Álvarez, *Manual de Derecho Penal Ambiental* (Valencia: Tirant lo Blanch, 2<sup>nd</sup> ed., 2015), 170–173.

It should be noted that the principles and standards used by judges and courts to assess an action’s polluting potential are as follows: the extent to which people’s health is endangered, whether they are a danger to ecosystems’ natural conditions, the characteristics of the discharge and the threat to plant and animal life conditions<sup>17</sup>.

Third, environmental damage should be serious, but not be qualified as irreversible and devastating (an aggravating circumstance according to Article 326 of the SCC). Additionally, this damage should go beyond substantial damage as stipulated in European Directive 2008/99/EC.

Besides, when the polluting action is carried out, it should produce natural physical results such as emissions, discharges, radiation, extractions, digging, siltation, injections, vibrations, deposits or water abstractions. The most widespread crime committed by entities tried before Provincial Courts is noise pollution.

The polluting action should affect aspects of nature such as the atmosphere, soil, subsoil, inland and underground waters or high seas. The latter of these involves the inclusion in criminal codes of the definition it is given by court jurisdiction. It should also be mentioned that cross-border areas can be added to the list of natural sights alongside open sea areas.

In these cases, two associations should be checked: on the one hand, the behaviour or action must be the source of the discharge or emission; and, on the other hand, whether the polluting action results in environmental damage that seriously harms nature’s balance must be established based on expert opinion (2<sup>nd</sup> paragraph of Article 325). In the same way, the first paragraph of Article 325 states that the discharge must have the capacity to cause or is causing harm to a natural resource or to wildlife<sup>18</sup>.

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<sup>17</sup> Luz María Puente Aba, “Arts. 325 y 326”, in *Ordenación del territorio, patrimonio histórico y medio ambiente en el Código penal y la legislación especial*, ed. Patricia Faraldo Cabana (Valencia: Tirant lo Blanch, 2011), 235 and 250.

<sup>18</sup> Carlos Martínez Buján Pérez, *Derecho Penal Económico y de la Empresa. Parte Especial* (Valencia: Tirant lo Blanch, 5<sup>th</sup> ed., 2015), 945–946; Nuria Matellanes Rodríguez, *Derecho Penal del Medio Ambiente* (Madrid: Iustel, 2008), 61; Jesús María Silva Sánchez and Raquel Montaner Fernández, *Los delitos contra el medio ambiente Reforma Legal y Aplicación Judicial* (Barcelona: Atelier, 2012), 34-36 and Elena Gorrioz Royo, *Delitos contra los recursos naturales y el medio ambiente* (Valencia: Tirant lo Blanch, 2015), 54.

Finally, it should be noted that the fact that such crimes can be committed by companies has led to dogmatic discussions on how the subjective elements of criminal liability might be adapted to enterprises<sup>19</sup>.

The subjective nature of corporate crimes is also acknowledged in the prevailing Spanish Criminal Doctrine. Under the terms of Article 331 of the SCC, legal entities can commit crimes wilfully or recklessly, so that an environmental crime may be perpetrated not only intentionally, but also through serious negligence.

## 5. FUNDAMENTAL REQUIREMENTS OF COMPLIANCE PROGRAMMES

Criminal Compliance Programmes can be defined as a group of procedures to implement a crime prevention policy by means of internal controls, staff training, and the effective enforcement of all these procedures.

In other words, embedding a criminal compliance programme is geared towards adopting a compliance culture, reducing the commission of crimes, considering that the development of entrepreneurial activity always carries environmental risk, and avoiding the criminal prosecution of managers in addition to the enterprise<sup>20</sup>. Regulations drawn up by the IOS and the Spanish Organization for Standardization [UNE] have set out the key requirements of a compliance programme in greater depth, since the SCC only summarizes the stipulations of a criminal compliance programme in vague general terms.

The SCC points out six minimum requirements: first, the identification of activities wherein preventable crimes might be committed, which involves analysing environmental risks; second, the establishment of protocols or procedures to infer

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<sup>19</sup> Certain sectors within the scope of this doctrine claim that when a company wilfully perpetrates a crime, it is aware that it is causing damage and being reckless, implying that it is fully conscious of its actions. On the other hand, other authors argue that the subjective component of criminal liability should not be understood as it is with natural persons but should be inferred from the severity of the enterprise's organisational fault. As a result, the greater the organisational fault, the more wilful the company's behaviour, and the smaller the organisational fault, the more reckless the behaviour. See Adán Nieto Martín, *La Responsabilidad Penal de las Personas Jurídicas: Un modelo legislativo* (Madrid: Iustel, 2008), 160 – 162.

<sup>20</sup> Marcius Tadeu Maciel Nahur and Eduardo Luis Santos Cabette, *Criminal compliance e ética empresarial. Novos desafios do Direito Penal Econômico* (Porto Alegre: Nuria Fabris, 2013), 15; Victor Hugo Dos Santos and Fabio Andre Guaragni, "Compliance e erro no Direito Penal", in *Compliance e Direito Penal*, ed. Fabio Andre Guaragni and Paulo Cesar Busato (Sao Paulo: Editora Atlas Ltda, 2015), 97-98 and Carlos Gómez Jara Díez, "Fundamentos de la responsabilidad penal de las personas jurídicas", in *Tratado de Responsabilidad Penal de las Personas Jurídicas*, ed. Miguel Bajo Fernández, Bernardo Feijoo Sánchez and Carlos Gómez Jara Díez (Cizur Menor: Civitas, 2016. 1<sup>st</sup> ed.), 88.

corporate intent, and to establish the way in which legal entities adopt and implement i.e. protocols to ensure adequate environmental policy; third, a suitable model of financial management to avoid the commission of preventable crimes; fourth, the compliance officer or compliance committee’s duty to report potential risks and misdemeanours, with appropriate reporting channels where the rights of whistle blowers are protected; fifth, the implementation of an effective sanctioning system when the compliance programme is not fulfilled, in other words, there must be disciplinary measures in place, similar to health and safety penalties, which are imposed by the manager; sixth, and finally, the crime prevention model and any amendments made to it must be checked regularly, and specifically when major infringements are committed or when changes occur within the organization, its controlling structure, bearing in mind that some private entities certify the legitimacy of these programmes, but that is it fundamental that judges are also brought in to assess compliance programmes for themselves.

## 6. LAW ENFORCEMENT: THE PARTICIPATION OF ENVIRONMENTAL NON-GOVERNMENTAL ORGANISATIONS

In accordance with Spanish regulations governing the criminal liability of enterprises, environmental self-enforcement is not only an administrative matter, but also a criminal one, and has been since 2015. However, currently, only the enterprises themselves are involved in the development of internal rules or standards, whereas environmental groups should also be participating in this matter.

One of the best models to enable third parties to become involved in drawing up criminal compliance programmes could be *tripartism* as defined by Braithwaite and Ayres, through the participation of Administration, legal entities and shareholders<sup>21</sup>, in this latter case participating in the development and audit self-regulatory rules and standards.

The conceptual framework of this model can be found in a persuasive criminal system that develops self-regulation; namely, a justice system that addresses criminal and administrative legal compliance through trust in the judicial system. One of the most important features of this model is knowing whether the public authority has enough legitimacy to make rules. The legitimacy of the legal and judicial system is based on the notion that it is in the interest of members of society for the legislative power to make rules governing the appropriate behaviour of people<sup>22</sup>.

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<sup>21</sup> Rob White, *Crimes against nature. Environmental criminology and ecological justice*, 218 – 219.

<sup>22</sup> Paolo Campana, Michel Hough, Elena Vaccari, Stefano Maffei, “The intended and unintended consequences of deterrence & inclusive crime control strategies”, in *FIDUCIA. NEW*

This persuasive criminal justice model adapts to different kinds of enterprises, avoiding criminal liability and promoting cooperation among the different parties. It is also possible to trade security standards to avoid environmental risks, but this model is complemented by a pyramidal system of criminal sanctions where the State increasingly applies such sanctions. As a consequence, the State not only monitors the self-regulation system but also establishes a criminal sanctioning system when there is a serious breach of the law<sup>23</sup>.

Concerning the negative criticism levelled against *tripartism* and the persuasive model, such as the incentivization of major corporations to enforce such policies and the economic benefits thereof<sup>24</sup>, it should be pointed out that a system of access to environmental justice, which could involve stakeholders, should complement this self-regulatory system of rule-making. Indeed, the existence of this administrative environmental self-regulation system should be completed by the legal principle of *ultima ratio* wherein the State, when environmental crimes have been committed, should impose criminal sanctions according to this pyramidal system and through the involvement of stakeholders in environmental justice.

In this respect, there are International, European and national legal agreements in place, such as the Aarhus Convention<sup>25</sup>; the transposition to European Law of this International agreement by means of Regulation 1367/2006<sup>26</sup> as well as

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*EUROPEAN CRIMES AND TRUST-BASED POLICY*, vol. 1, 2013, 57 and Margarita Dobrynina, Evaldas Visockas, Judita Žukauskaitė, “Literature review on fear of crime & public attitudes towards crime, justice and punishment”, in *FIDUCIA. NEW EUROPEAN CRIMES AND TRUST-BASED POLICY*, vol. 1, 2013, 113 and 117 – 118.

<sup>23</sup> Ian Ayres and John Braithwaite, *Responsive Regulation. Transcending the Deregulation Debate* (New York: Oxford University Press, 1992), 56 – 58; John Braithwaite, *Restorative Justice & Responsive Regulation* (Nueva York: Oxford University Press, 2002), 230 – 231 and Adan Nieto Martin, A., *La Responsabilidad Penal de las Personas Jurídicas: Un modelo legislativo*, 236 – 238.

<sup>24</sup> Rob White, *Crimes against nature. Environmental criminology and ecological justice*, 219.

<sup>25</sup> Convention on access to information, public participation in decision-making and access to justice in environmental matters, held in Aarhus, Denmark, on 25 June 1998. The Convention was signed at the IV European Environment Ministers Conference held on 25/06/1998 in Denmark and came into effect on 30/10/2001 see in Noemi Pino Miklavec, *La tutela judicial administrativa de los intereses ambientales: (estudio comparativo de los ordenamientos español y argentino)*, 1<sup>st</sup> ed. (Cizur Menor: Thomson Reuters Aranzadi, 2013), 125.

<sup>26</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (Official Journal of European Union L 264, 25.9.2006, p. 13–19).

Directives<sup>27</sup> 2003/4/EC<sup>28</sup> and 2003/35/EC<sup>29</sup>; and finally, Spanish Legislative Act 27/2006<sup>30</sup>.

All these legal texts, some of them more far-reaching than others, address the environmental rights of information, participation and access to justice. They are also supplemented by the Code of Criminal Procedure<sup>31</sup>, which provides for class action lawsuits to defend the environment.

In short, the main proposal of this paper will be to widen the scope where the afore mentioned environmental rights could be exercised. In other words, it proposes that environmental non-governmental organizations [ENGO] should be kept properly informed, should be able to participate in drawing up these compliance programmes, and should monitor compliance with these programmes.

In relation to this last idea, firstly, ENGOs should work together internationally with State governments and businesses to develop rules that establish the main characteristics of compliance programmes. Currently, the standards set out established in compliance programmes have been established in ISO rules with only the participation of business associations and no kind of State or democratic control. States governments, businesses and International ENGOs should work together to draw up rules that set out the minimum requirements of compliance

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<sup>27</sup> Antoni Peñalver I Cabré, “Novedades en el acceso a la justicia y a la tutela administrativa en asuntos medio ambientales”, in *Acceso a la información, participación pública y acceso a la justicia en materia de medio ambiente: diez años del Convenio de Aarhus*, ed. Antoni Pigrau I Solé (Barcelona, Atelier, 2009), 352; Noemi Pino Miklavec, *La tutela judicial administrativa de los intereses ambientales: (estudio comparativo de los ordenamientos español y argentino)*, op. cit., p. 125 and Antonino Ali, “The EU and the compliance mechanisms of multilateral environmental agreements: the case of the Aarhus Convention”, in *The External Environmental Policy of the European Union. EU and International Law Perspectives*, ed. E. Morgera (New York: Cambridge University Press, 2012), 290.

<sup>28</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (Official Journal L 041, 14/02/2003 P. 0026 – 0032).

<sup>29</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC - Statement by the Commission (Official Journal L 156 , 25/06/2003 P. 0017 – 0025).

<sup>30</sup> Legislative Act 27/2006, of 18 July, on access to information, public participation in decision-making and access to justice in environmental matters (incorporating Directives 2003/4/EC and 2003/35/EC) (Spanish Official Journal n. 171, of 19 July on 2006, pp. 27109 to 27123). Antoni Peñalver I Cabré, “Novedades en el acceso a la justicia y a la tutela administrativa en asuntos medio ambientales”, 355 – 356.

<sup>31</sup> Royal Decree of 14/09/1882 adopting the new Criminal Procedure Act, Spanish Official Journal 1892 n. 260.

programmes, in order to give greater legitimacy to these rules. For instance, it would be advisable to organize United Nations conferences or European conferences in a similar way to the Seville Process draw up criminal compliance standards<sup>32</sup>.

Secondly, the basic provisions of the SCC Article 31 bis, paragraph 5 need to be amended in order to reflect greater accuracy in their legal wording. Similarly, the International and European laws mentioned previously should be agreed by the Spanish legislative chamber according to articles 94 and 95 of the Spanish Constitution, to ensure that compliance rules have formal and material legitimacy.

This new law should also address the need for compliance programmes to be ratified by the Public Administration as well as recognize the right of ENGOs to make statements about these programmes when they are ratified by the Administration.

That is to say, along the same lines as the Italian legal system, where the Ministry of Justice ratifies compliance programmes, Spain's Public Administration should ratify corporate compliance programmes, and the opinions of ENGOs should be heard in this ratification procedure.

This latter idea would involve making a legal amendment to Legislative Act 27/2006, Articles 3.2, 16, 17 and 18, recognizing this new right among others, i.e. the right to participate in integrated environmental authorisation, genetically modified organisms and the Environmental Impact Assessment.

Thirdly, and finally, this *checks and balances* legal system involving ENGOs should be complemented by access to environmental justice to prevent environmental offences and crimes.

Regarding administrative environmental law, articles 22 and 23 of Legislative Act 27/2006 focus on one of the powers held by ENGOs, provided they meet a set of requirements<sup>33</sup>: to object to any Public Administration acts and omissions<sup>34</sup> that

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<sup>32</sup> This Process was hosted by the Forum for Exchange of Information comprising the representatives of member states as well as NGOs and technical groups from every industrial sector. This forum created the *BAT Reference Documents (BREF)* which were approved and published by the European Commission using Decisions that contain the "Conclusions of Best Available Technologies" see in Blanca Lozano Cutanda and Juan Cruz Alli Turrillas, *Administración y Legislación Ambiental. Adaptado al EEEs* (Madrid: Dykinson, 9th ed., 2016), 281 – 284; Andrés Betancor Rodríguez, *Derecho Ambiental* (Madrid: La Ley, 1st ed., 2014), 1325.

<sup>33</sup> The legal provisions are as follows: the aim and purpose of the ENGO must be to protect the Environment or one of its elements; it must have been operating for at least two years; it must

violate the environmental rules set out in Article 18.1 of Legislative Act 27/2006<sup>35</sup>. This legal power is a kind of “class action”<sup>36</sup>.

In Spain, the legal defence of the environment<sup>37</sup> by ENGOs<sup>38</sup> with regard to criminal courts cases is addressed in Articles 7.3 and 19.1 of the Organic Law on the Judiciary (OLJ)<sup>39</sup>, and it is also recognized in Articles 101, 270, 280 and 281 of the Code of Criminal Procedure<sup>40</sup>.

In the context of the protection of the environment by these associations, when an environmental crime is committed, class actions lawsuits are frequently brought, often by people who are not the victim of the crime, which is possible as long as they have submitted a grievance and paid the corresponding legal expenses.

Regarding the legal ability of legal entities to use class actions lawsuits in criminal proceedings, we must refer to two Rulings issued by the Spain’s Constitutional Court: 34/1994<sup>41</sup> and 40/1994<sup>42</sup>. The first of these rulings deemed that criminal action may be brought a part of the right to legal protection (Article 24(1) Spanish

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be operational with regard to its main objectives; and, finally, its sphere of operations must encompass the place affected by the Authority’s decision.

<sup>34</sup> Legislative Act 27/2006 does not include all the acts and omissions attributable to natural or legal person that has borne public responsibilities or provide public services related to the environment.

<sup>35</sup> Water Acts, Pollution legislation, Environmental Impact Assessment, Biotechnology, among others as well as the elements incorporated by Spain’s Self-Governing Communities.

<sup>36</sup> Antoni Peñalver I Cabré, “Novedades en el acceso a la justicia y a la tutela administrativa en asuntos medio ambientales”, 355 – 356; Fé Sanchis Moreno, *Guía sobre el Acceso a la Justicia Ambiental CONVENIO DE AARHUS*, ASOCIACIÓN PARA LA JUSTICIA AMBIENTAL - ELAW ESPAÑA, 2007, 29 and Julia Ortega Bernardo, “[¿Quién ha apostado por la efectiva implantación del derecho de acceso a la justicia a favor de las organizaciones no gubernamentales en defensa del medio ambiente?](#)”, *Actualidad Jurídica Ambiental* 3 (2011), 7,. One example of this legitimization can be found in Supreme Court Ruling 332/2012, Third Chamber, 30/06/2014, TOL4.394.357, Campos Sánchez Bordona, Manuel, reporting judge, Legal Basis 2.

<sup>37</sup> It should be note that the Public Prosecutor, who defends legality, citizens’ rights and public interest, can take legal action in criminal proceedings in Spain; secondly, popular prosecution or class action lawsuits can take legal action in all crimes where there is no private interest represented and it is seen to be a breakdown of the law; and finally, private prosecution can take legal action in the case of persons who have been offended by the crime.

<sup>38</sup> For instance, Spanish Supreme Court Ruling 903/2009, 2<sup>nd</sup> Chamber [2009], 2<sup>nd</sup> Legal Basis.

<sup>39</sup> *The Courts and Tribunals protect legitimate rights and interests, both individual and collective, which cannot under any circumstances be left defenceless. For the defence of the latter, the legitimacy of corporations, associations and groups that are affected or legally qualified for their defence and promotion will be recognised.* Organic Law on the Judiciary, SOJ 1985 n. 157.

<sup>40</sup> Raquel Castillejo Manzanares, “El ejercicio de la acción penal”, *Hacia un nuevo proceso penal. Cambios necesarios* (Madrid: Editorial La Ley, 2010), 6 – 7 and Raúl Sánchez Gómez, “[El ejercicio de la acción popular a tenor de la jurisprudencia del Tribunal Supremo](#)”, *Revista Jurídica de los Derechos Sociales. Lex Social* 6, n. 1 (2016),.

<sup>41</sup> Spanish Constitutional Court Ruling 34/1994, 2<sup>nd</sup> Chamber [1994], VLEX-15355907..

<sup>42</sup> Spanish Constitutional Court Ruling 40/1994, 1<sup>st</sup> Chamber [1994], VLEX-15355902.

Constitution) and that the legal grounds for this can be found in Article 125 of the Spanish Constitution. Moreover, in public crimes, criminal action can also be exercised by means of a class action lawsuit<sup>43</sup>. The class action, based on the interpretation of Articles 270, 280 and 281 of the Spanish Criminal Procedure Code, requires a grievance to be submitted and the relevant legal or judicial expenses to be paid<sup>44</sup>.

Class action lawsuits are not only brought by individuals but also by legal entities in Spain, since the meaning of citizen is so broad:

*As the Public Prosecutor has pointed out, it is clear that an association for the defence of nature and the animal world has a legitimate and personal interest in ensuring the proper exercise of administrative power, in this case with respect to the revocation of the sanction imposed on a hunter who had shot a bustard<sup>45</sup>.*

Mention should also be made of the Spanish Supreme Court Rulings 1047/2007 (“Botín Judicial Case”) and 54/2008<sup>46</sup> (“Atutxa Judicial Case”) if we wish to offer a good interpretation of the correct exercising of class action lawsuits to protect the environment in Spain. According to Ruling 1047/2007, in the case of a fast track procedure<sup>47</sup>, it is not possible to start the trial with just the request for a class action lawsuit if the General Prosecutor and private prosecutor request the dismissal of the case. This is because the criminal prosecution of a citizen is only justified if it is based on a public interest alleged by the General Prosecutor on a private interest alleged by a private prosecutor<sup>48</sup>.

Subsequently, Spanish Supreme Court Ruling 54/2008 made a clarification and, referring to the case it was analysing at that time (the “Atutxa Case”), the Court stated that in the “Botín Case” both the General Prosecutor and the private prosecutor sought to dismiss the case; however, the analysed case was an exceptional situation (outlawing of a political party).

The Court continued by stating that this exceptional situation was based on the fact that, when the severity of the crime is substantial or there is no private prosecutor and only the Public Prosecutor and the class action lawsuit have

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<sup>43</sup> Spanish Constitutional Court Ruling 40/1994, 1<sup>st</sup> Chamber [1994], VLEX-15355902, 2<sup>nd</sup> and 3<sup>rd</sup> Legal Basis.

<sup>44</sup> Spanish Constitutional Court Ruling 34/1994, 2<sup>nd</sup> Chamber [1994], VLEX-15355907, 2<sup>nd</sup> Legal Basis.

<sup>45</sup> Spanish Constitutional Court Ruling 34/1994, 2<sup>nd</sup> Chamber [1994], VLEX-15355907, 3<sup>rd</sup> Legal Basis.

<sup>46</sup> Spanish Constitutional Court Ruling 54/2008, 2<sup>nd</sup> Chamber [2008], VLEX-38466214.

<sup>47</sup> This procedure is regulated in Article 782 of the Spanish Criminal Procedure Code and is applied to crimes that carry a prison sentence of less than nine years; in other words, all environmental and wildlife crimes.

<sup>48</sup> Raquel Castillejo Manzanares, “El ejercicio de la acción penal”, 288.

exercised their actions<sup>49</sup>, the protection of the public interest/good does not end with the action of the Public Prosecutor<sup>50</sup>.

According to CASTILLEJO MANZANARES and some of the separate opinions set out in Ruling 54/2008, it is possible to conclude that the exercise of a class action lawsuit should not rely on the exercise of criminal action by the General Prosecutor and much less on the defence of supra individual interests. Moreover, although in both Rulings the will of the lawmaker is used to substantiate the court's decision, it should not be understood that the Criminal Procedure Code aims to differentiate between the participation of the public prosecutor in a fast track procedure and in an ordinary procedure<sup>51</sup>.

Despite these two rulings, Spain's Constitutional Court and Provincial Courts recognized the right of NGOs to bring a class action lawsuit.

When environmental crimes are committed, the collective good is affected. First and foremost, it is up to the Public Administration to defend the collective good, so we are dealing with undefined collective interests, which should also be defended by environmental associations that seek above all to defend nature and wildlife.

In short, considering Article 45 of the Spanish Constitution, environmental associations with different concerns from those of Public Administration should be allowed to bring class action lawsuits<sup>52</sup>.

## 7. CONCLUSIONS

The legal texts of many international, European and national organisations have adopted a market-based anthropocentric model of decision-making in relation to the environment. As a consequence, the way of defining of environmental harm or environmental crime centres on the human being or economic advantages. Therefore, the difference between legal and illegal harms is, and always has been, defined in quantitative terms. However, the most common environmental crimes are perpetrated by States and large companies.

The existing Spanish Criminal Liability System is based on self-regulation: thus, enterprises commit offences, such as the offences enclosed in articles 325 and 328

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<sup>49</sup> Spanish Supreme Court Ruling 54/2008, 2<sup>nd</sup> Chamber [2008], VLEX-38466214, 1<sup>st</sup> Legal Basis, para. 2<sup>nd</sup>.

<sup>50</sup> Raquel Castillejo Manzanares, “El ejercicio de la acción penal”, 8 – 9.

<sup>51</sup> *Ibidem*, 10 – 11.

<sup>52</sup> Raquel Castillejo Manzanares, “El ejercicio de la acción penal”, 16 – 19.

of the Spanish Criminal Code, due to poor self-regulation; their guilt derives from the inadequacy of their corporate culture.

The legal technique that is used and should be used is incomplete criminal law; this blank criminal law should be completed by European, national, autonomous governments and local laws and acts, because administrative law can adapt to technological and scientific changes.

Environmental crime should contain a hypothetical danger since environmental damage must be prevented. Enterprise behaviour should therefore be understood as capable of presenting a danger to the environment. Regarding this latter point, causal links should be verified: on the one hand, the causal link between an enterprise's specific behaviour and its material consequences; on the other hand, the link of accountability between the material consequence and a serious threat to the balance of nature.

The criminal liability proposed above should represent a locking system of the existing regulated self-regulation in the field of environmental law. As a consequence, this system should be legitimised by the participation of non-governmental organisations, the Administration and corporate firms in the drafting and implementing of compliance programmes. But not only. It should also be legitimised by the adoption of these programmes by the Administration's adoption of these programmes and by establishing minimum requirements within these programmes in the Criminal Code. These requirements should be developed in another legislative act which should also regulate the Administration's mandatory approval of the compliance programmes and NGOs rights to participate in this issue.

The regulated self-regulation should rely on the participation of these NGOs and be completed with a pyramidal system of private and public penalties, e.g. administrative and criminal penalties.

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