

Precautionary Principle as a Criterion of Accusation in the Criminal Liability of Crimes against the Environment¹

Principio de Precaución como Criterio de Imputación en la Responsabilidad Penal de Delitos Contra el Medioambiente

[Artículos]

Daniel Felipe Taboada Velásquez²
Alejandro Gómez Jaramillo³

Received: 05/20/2023

Accepted: 06/06/2023

How to cite:

Taboada Velásquez, D. F., & Gómez Jaramillo, A. (2023). Principio de Precaución como Criterio de Imputación en la Responsabilidad Penal de Delitos Contra el Medioambiente. *Via Inveniendi Et Iudicandi*, 18(2), 35–54. <https://doi.org/10.15332/19090528.9729>



Abstract

This research involves a documentary review regarding different theoretical and doctrinal postulates, according to which the affinity and interference of the precautionary principle as a criterion for imputing criminal liability for environmental damage in Colombia are gauged. In order to elaborate on this topic, it was necessary to make a theoretical assessment of a risk society and how the legal doctrine has valued risk as a criterion of criminal accusation.

In this research, we provided a description and legal analysis of the precautionary principle in environmental matters and defined the parameters under which this principle is

¹ This paperwork is a producto of the investigation: PRECAUTIONARY PRINCIPLE AS A CRITERION OF ACCUSATION IN THE CRIMINAL LIABILITY OF CRIMES AGAINST THE ENVIRONMENT, developed under the program "maestría en Derecho Penal de la Universidad Santo Tomás, sede principal (Bogotá – Colombia)".

² Lawyer and specialist in administrative law from Universidad Del Rosario (Colombia) and Criminal Science from Universidad Externado (Colombia). Master in Criminal Law from Universidad Santo Tomás (Colombia). Partner and director of TABOADA & ABOGADOS S.A.S. Email: dtaboada@danieltaboada.com; ORCID: <https://orcid.org/0009-0008-5855-810X>

³ Doctor en Sociology. Dean of Law School Universidad Santo Tomás, sede principal. Email: alejandrogomezjaramillo@yahoo.com.mx; ORCID: <http://orcid.org/0000-0003-4095-168X>

measured. In addition, the development and configuration of the environment as a protected legal right, its classification as a fundamental right, and its interference with the right to life and personal integrity are briefly described.

In short, it was necessary to assess and question the scope of malice and its components within the accusation of criminal titles in the scenarios of a risk society and its link with the environmental precautionary principle. All these issues were addressed using descriptive and bibliographic research with a qualitative approach. The criminal liability of those who transgress the principle described above and put the protected legal assets related to the environment at potential risk was analyzed from an objective legal point of view. Likewise, we conducted an in-depth evaluation of the constitutional environmental protection category and the state duties concerning this constitutional mandate.

Keywords: criminal liability, environmental damage, precautionary principle, prevention principle, criminal law

Resumen

En esta investigación se realiza una revisión documental frente a los diferentes postulados teóricos y doctrinales según los cuales se valora la afinidad e injerencia del principio de precaución como criterio de imputación de responsabilidad penal por daños ambientales en Colombia. Para desarrollar este tema, fue necesario realizar una valoración teórica acerca de la sociedad del riesgo y la forma como desde la doctrina jurídica se ha valorado el riesgo como criterio de imputación penal.

En este sentido, se realizó una descripción y análisis jurídico del principio de precaución en materia ambiental y se definieron los parámetros bajo los cuales se define este principio, su contenido y su alcance. Además, se realizó una breve descripción del desarrollo y configuración que ha tenido el medio ambiente como bien jurídico tutelado, su catalogación como derecho fundamental y su injerencia con el derecho a la vida e integridad personal.

En suma, fue necesario valorar y cuestionar el alcance del dolo y sus componentes dentro de la imputación de títulos penales en los escenarios propios de la sociedad del riesgo y su vinculación con el principio de precaución ambiental. Todos estos temas fueron abordados dentro de una investigación de tipo descriptivo y bibliográfico con enfoque cualitativo, en la que se analizaron desde una óptica jurídica objetiva la responsabilidad penal de quienes transgredan el principio ante descrito y pongan en potencial riesgo los bienes jurídicos tutelados relacionados al medio ambiente. Asimismo, se profundizó en la valoración de la categoría constitucional de la protección del medio ambiente y los deberes Estatales respecto a este mandato constitucional.

Palabras Claves: Responsabilidad Penal, daño ambiental, principio de precaución, principio de prevención, derecho penal

Introduction

Postmodern society, due to its technological and industrial developments, has brought a series of advances in aspects such as the social production of wealth, the development of science, the population's longer life expectancy, and the interconnectivity of people, among other benefits. However, all these advances create modern scenarios translated into new and complex risks for environmental settings, including, but not limited to, nuclear, computer, atomic, and residual risks. As such, each historical process has had different advances that have produced effects in different knowledge domains, be it sociology, psychology, medicine, and, of course, the field of law.

In fact, since the Industrial Revolution, a tremendous economic, technological, social, and demographic evolution has brought important changes in the structure and traditional ways of life, mainly because of a massive trend of moving from the countryside to urban centers and the industrialization and modernization of human activity, means of transport, and commerce development (Ruiz Morales, 2019).

According to Ruiz Morales (2019), although these changes brought important benefits in the manufacture of products, access to food, assets, public services, and hygiene products, the truth is that these transformations imply a serious problem for environmental conservation. Rodríguez and Quintanilla (2019) have recognized that human development tends to satisfy human needs and improve living conditions at the cost of environmental losses, hence more frequent climate changes, water scarcity, natural disasters, desertification, loss of fauna, flora, and biodiversity, soil erosion, global warming, and among others.

Against this backdrop, it is evident that the evolution of human activity has had severe consequences for environmental conservation, which is why the environmental reality in the world, especially in countries like Colombia, is worrisome. This situation has created intense debates in which it has been necessary to weigh and evaluate environmental realities and how they affect the population's individual and collective rights. In this regard, Munévar Quintero and Gómez Giraldo (2016) have recognized that environmental damage has been defined and redefined by legal doctrine from the Colombian civil, environmental, and criminal spheres. So, it is common to confuse the different components of environmental damage, its characteristics, the applicable liability regimes, and, worse still, the scope and application of the legal principles and rules applicable to environmental matters, including prevention and precautionary principles.

The Colombian Constitution defines the environment as an element of special protection. For this reason, it assigns the State the constitutional duty to conserve and preserve areas of

special and relevant environmental importance and impose legal sanctions and reparations for damages caused to these areas (Sections 8 and 80).

In this vein, the environment as a legal asset of special protection has occupied a leading role in the last decade of the 20th century. Therefore, the global population is increasingly aware of the importance of environmental conservation to ensure the survival of future generations. In fact, authors such as Ochoa Figueroa (2014) have described these changes as the transition from an anthropocentric conception of the environment, according to which it should serve the interests of the human being, to an eco-centric conception in which nature has assumed a further value associated with human dignity without losing its independence as an element of special prevalence.

Accordingly, it is worth mentioning four fundamental aspects regarding the research topic:

1. In order to be pragmatic in the actual application of criminal law in Colombia, it must be assumed that the primary function of criminal law is the subsidiary protection of legal assets, understood as

“Given circumstances or purposes that are useful for the individual and their free development within a global social system structured on the basis of that conception of purposes or for the functioning of the system itself. (Roxin, 1997, p. 56).

This means that the norms and values accepted by our society are essential to guarantee the achievement of the Social and Democratic Rule of Law (Castro Cuenca, 2017);

2. It is important to accept that society is in an era of risk, which has been conceived by Beck (1998) as one in which developed societies that have gone through an advanced process of modernization face certain latent secondary effects that are risky and dangerous for human beings, nature, and everything that surrounds them;
3. We must recognize that criminal law has incorporated some complex and relevant issues in terms of environmental liability. To delimit this investigation, it will focus on the discussion of whether environmental offenses should fall under the jurisdiction of criminal law or administrative sanctioning law; whether the precaution category corresponds to a rule, guideline, or principle; whether the precautionary principle should be an exclusive matter of environmental law, or whether it should be accepted as a criterion of criminal law;

4. In this vein, the environmental precautionary principle is a concept that has grounded Criminal Law. It has been incorporated in the dogmatic field through endangerment crimes and in the procedural area with the flexibility of principles and safeguards.

Therefore, this research intends to conduct a descriptive and bibliographical analysis regarding criminal liability for environmental damage and how the precautionary principle has been established and defined as an imputation criterion. For this purpose, the different dimensions of environmental damage and the legal scope of the aforementioned principle will be assessed. We will also study the prevalence and importance of the conservation, care, and preservation of environmental surroundings, as well as their establishment as protected legal assets within the framework of criminal law and the special duties of public and private authorities toward this legal construct.

Research Problem

The environmental precautionary principle is a concept inherent to the legal analysis of behaviors threatening the environment and natural resources. This principle is based on the fact that when there are well-founded suspicions that some activity or product may constitute a risk of severe or irreversible damage, even when there is a lack of definitive certainty of such risk, uncertainty cannot be used as a sufficient reason to allow effective measures against the production of damage not to be adopted (Forero Ramírez, 2018).

The criminal legal doctrine has adopted it as a structuring element at the time of the dogmatic analysis of the unjust. The problematic aspect of applying this concept arises in determining whether the transgression of these principles implies a criminal accusation as negligence with or without representation or direct or eventual intent.

The issue of criminal liability for environmental damage becomes increasingly complex when aspects such as transgression of the precautionary principle are assessed, and the line and notions whereby malice is configured within a risk society are increasingly blurred. Although environmental damage must be legally attributed for redress and compensation, other components and elements to assign responsibility should not be ignored, where criteria such as equity, equality, solidarity, and justice are valued.

Therefore, there is a general lack of knowledge regarding whether the accusation of environmental damages must necessarily respond to the configuration of damages or if there is unlawfulness and malice in potential risks. The problematization framework of this article is gathered within this point and, therefore, requires the compilation and review of the main doctrinal and regulatory postulates about environmental damage, responsibility for such, and validity of the assessment of precautionary and prevention criteria in the accusation of criminal liability. The purpose of all this is not only to establish a descriptive

framework regarding environmental damage and its anti-jurisdiction but also to determine the scope of environmental risk in the postulation of criminal liability.

Research Hypothesis

The central thesis of this investigation is that the transgression of the environmental precautionary principle should not necessarily lead to a legal consequence, such as the accusation of direct or eventual malice in crimes against the environment and natural resources.

The foundation of this approach derives from the fact that, according to the cognitive conception of malice,

For it to be possible to speak of malice, the perpetrator must act with such knowledge that he retains control over what he is doing; that is, at least partially, the malice ends up becoming a question of an objective type: The perpetrator must consciously create a risk of such a dimension that the production of the result can be considered something that he controls. (...) In conclusion, malice is the knowledge that the occurrence of an event is somewhat probable. (Greco, 2017, p. 30-31)

Thus, although the precautionary principle has different aspects or conceptions, some are weaker and others stronger. The truth is that whatever the conception adopted, some common criteria are the following: i) The existence of a potential risk that entails severe and irreversible damage, generally against human health or the environment; (ii) the determination of scientific uncertainty concerning the risk; and (iii) types of precautionary measures that can be implemented. (Forero Ramírez, 2018)

On the other hand, within the scope of a risk society, the difference between prevention and precautionary principles must be clearly understood. Forero Ramírez (2018) states, “When there is certainty about the effects produced by an activity, the prevention principle is applied; while when we are faced with uncertainty regarding these, the precautionary principle operates.”

Uncertainty or scientific doubt, in its most basic meaning, is the complete opposite of qualified knowledge that allows mastery over the activity carried out by the agent. Therefore, it would not be entirely coherent from a systematic point of view to base criminal liability on a direct willful modality when the agent transgresses a principle that is based on the existence of uncertainty or scientific doubt.

It would make perfect sense to attribute criminal liability by way of malice to one who, knowing to a degree of certainty the effects of the activity he is carrying out, decides to continue with it.

Methodological Aspects

Descriptive and bibliographical research will be used for this work in accordance with the research topic and the proposed objectives. For Vásquez (2011), it allows the study, analysis, categorization, and understanding of the phenomenon addressed in its natural context and without the direct intervention of the researcher, which will be very useful in exploring criminal liability for environmental damage and the interference of the precautionary and prevention principles in determining this responsibility. On the other hand, Belloso Chasín (2004) has emphasized that documentary research allows for the study and understanding of a phenomenon by collecting and analyzing information contained in documentary sources.

Similarly, it is essential to frame the investigative work within the parameters, methods, and strategies of the qualitative approach, which includes the analysis of phenomena and reality without the need to resort to data that requires a measurement or numerical assessment (Hernández Sampieri et al., 1991). This implies using research techniques and instruments such as heuristics, legal hermeneutics, indirect observation, documentary analysis, and logical analysis. Thus, through this approach, the precautionary principle can be studied as a criterion for accusing criminal liability of environmental damage.

With that in mind, it is pertinent to start from the description of the defining aspects of a risk society, criminal policy, and criminal law to go on then to analyze and study the aspects related to environmental damage and criminal liability regarding these and the role and prominence assumed by the precautionary principles in the determination and attribution of responsibility. Subsequently, the environmental crisis will be studied in different legal scenarios for a holistic and globalized vision of the research problem. Finally, all the data and results obtained will be specified, including how Colombian criminal law has been solving environmental damage and under what parameters the aforementioned principle has been defined as a criterion for accusing criminal liability.

Chapter I: Risk Society, Criminal Policy, and Criminal Law

According to Jiménez Díaz (2014), a risk society has some defining aspects, such as the change in the potential of current dangers compared to other times. The risks and threats of other times are mainly linked to natural disasters, while current dangers are linked to human

activity and the risks involved in human decisions. Consequently, the danger is of a great dimension to the extent that they can affect an indeterminate and enormous number of people.

This situation means that risks are difficult to anticipate and are usually based on failures in knowledge or management of new technical capabilities. Thus, causal interconnections in a risk society increase, making responsibility increasingly blurred. That is why there are growing difficulties in attributing risk responsibility to single or collective individuals. Risk activities intertwine, so risk control not only escapes the domain of one person, but it is also unclear in whose hands it is (Jiménez Díaz, 2014).

Furthermore, Jiménez Díaz (2014) states that another aspect of a risk society is a constant feeling of subjective insecurity. So, even though the dangers are not real, this lingering feeling exists. As a result, citizens demand more from the State, more security provisions, and risk prevention. The situation is such that the media strengthens the coverage of dangerous or harmful events, which helps to create this perception of reduced collective solidarity.

It is important to recognize that criminal policy then tries to provide answers to these characteristics of a risk society based on four broad features:

1. An expansion of the social spheres that are the subject to criminal intervention so that criminal policy seeks to address new social problems or existing social realities but whose vulnerability would have been enhanced. Examples are the manufacturing and distribution of products, the environment, nuclear, computer, and genetic issues, criminal organizations, and drug trafficking.
2. A transformation of the approach of the new criminal policy, which focuses its efforts on prosecuting the criminality of the powerful. There is a conception that this social sector has the capacity to develop criminal behaviors and that it is difficult to be liable to criminal justice. This response has the endorsement of organizations that protect the social interests that have emerged in recent times, such as environmentalists and the programs of the political left wing that associate victims with the abuses of the socially privileged.
3. A preponderance given to criminal intervention to the detriment of other instruments of social control. The forcefulness and severity of criminal law are considered the most effective instruments in preventing such behaviors compared to other economic or social policy measures. For this reason, criminal law prefers that such interventions be carried out by other legal sectors, such as civil or administrative, which calls into question the principle of penal subsidiarity.

4. There is a need to accommodate the contents of criminal law and criminal procedural law to the particular difficulties posed by the prosecution of the new crime. This leads to a more flexible system of accusation of liability and individual safeguards, which must be done based on the political-criminal need to improve the effectiveness of criminal prosecution (Mendoza & Silva, 2001).

As such, the anti-expansionist criminal law reacts to the guidelines demanded by criminal policy. Some hypotheses stand out within this topic, such as that of Winfried (1999), who maintained a position of resistance to implementing the expansionism suggested by criminal policy in criminal law. According to the author, new social realities that should be subject to intervention by criminal law should not be recognized, so classic criminal law should be left intact. This assumes that addressing the problem of a risk society by criminal law would make it lose its identity and lead to distorting the thesis according to which the legal rights protected by criminal law are those of individual ownership and, in a very exceptional and specific way, social and state interests can be protected in the face of serious and evident risks.

The same author points out that supporting a rigid liability attribution system rich in individual safeguards is necessary to address the problems derived from a risk society; the ideal concept would be to create a new category of law with rules of accusation and less strict criminal and procedural safeguards in exchange for less severe sanctions than those of criminal law. All this will converge in creating a category of intermediate law between criminal law and administrative sanctioning law (Winfried, 1999).

An intermediate position is found in Silva Sánchez (2002), who accepts the existence of new social demands, new forms of crime, and the protection of new legal rights but seeks to limit the impact of criminal law on the new political-criminal demands. According to his position, the struggle to redirect most of the new objectives of social control to administrative sanctioning law arises from a risk society. However, he accepts that, given the current conditions, this claim is almost impossible. Meanwhile, this author proposes to structure criminal law into two classes: (a) a classic criminal law, protector of traditional legal assets with rigorous accusation criteria, and (b) a second-rate criminal law that would take care of those modern conflicts such as those of a risk society.

A third position is found in Jiménez Díaz (2014), who states that more than constructing and interpreting new legal concepts, it is in charge of questioning the work of criminal law in the face of this modernization. The author concludes that, in practice, it is rare for effective criminal interventions to take place in relation to new risks.

A fourth safeguarding resistance position does not accept assignments or intermediate criminal or para-criminal intervention levels. He believes that the modernizing proposals exchange safeguards for efficiency but that it is an illusion because, in practice, with a proper application of the subsidiarity principle, it is clear that administrative law, whether it is sanctioning or other types of legal interventions, is more efficient (Velázquez, 2014, p. 200-205).

Whatever the conception or academic position taken, it is indisputable that the legal reality derived from the criminal policy that meets citizens' demands has specific characteristics that must be assumed, such as:

- a) Creating new legal rights of a collective nature for criminalizing behaviors;
- b) Using criminal types of danger (concrete and abstract), blank criminal laws, and referral to extra-criminal issues. There is a tendency to lag criminal law, which requires harmful results;
- c) Advancing the protection barriers, understood as an anticipation of the moment in which criminal law takes part. In other words, behaviors previously sanctioned through administrative or civil law are now subject to criminal sanctions.
- d) Modifying the liability attribution system regarding criminal and procedural safeguards (Triana Cita, 2013).

Based on the above, it is important to refer to the modalities of qualification of crimes in a risk society, mainly because one of the legal assets where this situation is most apparent is the criminal types that protect the environment and natural resources.

Chapter II: Endangerment Crimes (Abstract and Concrete) and Blank Criminal Regulations

It could be said that there are as many qualifications for crimes as there are doctrinaires. For example, criminal types are qualified according to the content, the subject who performs the conduct, the legal property protected, the structure, and the time, among other factors.

Although all the qualifications of criminal types are valid, they are understood to outline the learning of the theory of crime. One of the classifications that best accommodates criminal reality is that of Mendoza Perdomo (2016), who states that crimes must be classified according to the action and harmfulness. In turn, the crimes of action can be divided into (a) result crimes and (b) crimes of mere conduct and crimes versus their harmfulness in (a) crimes of injury and (b) endangerment crimes.

This classification is very accurate since it affirms that result crimes produce substantial injury to the legal asset, while those of mere conduct generate danger to the legal asset. At

this point, it is important to refer to endangerment crimes and blank criminal types since this is one of the greatest criticisms received by the landing of a risk society in criminal law.

The traditional conception, deeply rooted in the proximity of the injury to the legal right, teaches that, in crimes of concrete endangerment, the danger is an element contained in the type. With this, it is necessary to demonstrate the harmful potential of the action from an ex-ante perspective, with the eventual result that has been sought to be avoided through criminal law. Meanwhile, in the case of crimes of abstract endangerment, the situation is different since the legislator, based on his experience, selects the behaviors that are typically dangerous for legal assets without the imperative of evaluating a concrete endangerment of the protected object in the particular situation (Triana Cita, 2013).

In other words, it is pertinent to point out that a crime of concrete endangerment is committed when the criminalized action has as a characteristic the effective possibility of damaging a specific legal right. Such possibility of injury must be examined from an ex-ante perspective, and it becomes the actual and concrete endangerment of a protected interest. On the other hand, a crime of abstract endangerment is committed when, in the criminalized action, it is not necessary to verify the dangerous potentiality of injury, but rather, it is presumed that it can occur if the conduct that has been undertaken is not stopped; an infraction of due care is enough for the endangerment crime to be fully configured (Triana Cita, 2013).

The classic example in the legal literature of the crime of concrete endangerment is the precept contained in Section 350 of Colombian criminal law or reckless driving stipulated in Section 380 of the Spanish Criminal Code. Both typical behaviors penalize life, personal integrity, or property being put at risk in a specific way.

For their part, the examples of criminal offenses involving abstract endangerment are more prolific. To mention recent norms, it is evident how the Citizen Security Act introduced a new criminal type of abstract endangerment to Colombian criminal law, Section 397C of the Colombian Criminal Code, titled illegal carrying of a knife, which reads: “Whoever carries a sharp, cutting, pointed or blunt element that has lethal potential during a massive event or massive scenario open to the public shall be imprisoned...”.

However, blank criminal regulations or types are also recognized as laws in need of a complement. They are defined by Professor Souto (2016) as those criminal precepts that contemplate the penalty, sanction, or legal consequence without thoroughly or exhaustively expressing the assumption of fact or the normative ingredients of the criminal conduct but instead refer to other norms that are not of a criminal nature, and that may be of the same or lower legal rank.

According to Velázquez (2020), this type of norm is characterized by the fact that the factual assumption containing the prohibited or demanded conduct and its result (if required) is wholly or partially enshrined in a non-criminal norm. In any case, the truth is that this normative structure for the definition of criminal conduct is accepted in the Colombian legal system. However, it can never be overlooked that we are in a social State governed by the rule of law where the principle of strict legality cannot be disregarded, and no matter how modern criminal law is, it cannot transgress substantive and procedural safeguards. That *ius puniendi* must always be limited as much as possible.

For the above reasons, it is specified that for blank criminal norms or types, the pre-existence of the norm also applies to forwarding (Velázquez, 2020). At the same time, the referral must be clear and unequivocal, allowing the interpreter to clearly understand the scope of the penalized conduct and its sanction (Cristancho Ariza, 2019).

The legislator has notably increased the use of endangerment crime mechanisms and blank criminal offenses to criminalize behaviors. This situation is easy to observe in some areas, such as the environment, financial, corporate, and tax matters, and state contracting, among many others. In terms of crimes against the environment, it is enough to study the recently issued law on crimes against natural resources and the environment (Law 2111/2021) to verify how this method of criminalization swarms in Section 328 et seq. of Law 599/2000.

Almost all the sanctioned conducts of this title XI are described as follows: “Those without permission from the competent authority or in breach of existing regulations (...)”. Therefore, it is illustrative and tangible how extra-penal norms are constantly referenced, and the existence of criminal conduct is conditioned on the authorization or denial of an administrative authority external to the criminal jurisdiction.

Chapter III: Assessment of the Precautionary Principle

Before defining precisely how the precautionary principle contributes to determining and imputing criminal liability for environmental damage, a doctrinal and jurisprudential review of these principles’ definition, content, and scope is necessary.

Prevention and Precautionary Principles

Authors such as López Becerra and García Urueña (2022) identify these principles as legal tools to mitigate the risks of environmental damage. According to these authors, the precautionary principle constitutes an essential pillar of international law concerning the special protection of the environment and, consequently, of other human rights such as life and personal integrity.

In this regard, Buitrago Dangond (2018) stated that, according to Colombian regulations, this principle does enjoy a constitutional rank and category, although not expressly defined and enshrined in the Constitution. Through a systematic and extensive interpretation, these principles are supported by international norms and by the configuration of collective rights and the environment contained in Sections 78, 79, and 80, whereby the duty imposed on all authorities to protect and preserve natural wealth and the environment is defined.

Thereon, the Inter-American Court of Human Rights (2017) ruled that, under the principles of prevention and precaution, states should act diligently to guarantee life, integrity, and protection of the environment so that they must prevent any impact on these rights and legal assets. This implies that states must refrain from carrying out any activity that may cause severe and irreversible damage to the environment, life, or personal integrity. This implies that all authorities must act with caution to prevent or avoid any risk that threatens potential damage to environmental settings so that, even in the absence of scientific certainty regarding possible environmental damage, all those measures that are most effective in preventing or avoiding such damage should be adopted (Advisory Opinion OC-23/17 dated November 15, 2017).

In fact, López Becerra and García Urueña (2022) acknowledge that it is not enough to repair environmental damage but that the focus of attention should be on the prevention and precautionary principles, according to which it is even more critical to avoid any action that may endanger or put at risk the environment and, therefore, it is essential to place a strong emphasis on the adoption of preventive measures to avoid causing this type of damage.

However, when assessing this principle (precaution) as a criterion for accusing criminal liability of environmental damage, it is necessary to recognize in advance that, according to Silva Sánchez (2001), criminal law must adapt to new social realities. Therefore, it cannot and should not be ignored that the social reality of the 21st century is different from that of classic criminal law, that human activity has created new risks, and that there are legal assets that deserve protection with punitive measures for the current community.

Nevertheless, this is not synonymous with accepting an expansion of criminal law in which protection barriers are excessively advanced, all types of collective legal assets are included, and an indiscriminate typification of criminal types of danger is allowed. Therefore, Silva Sánchez's (2002) approach makes sense when he states that it is necessary to start from the impossibility of returning to a nuclear criminal law and protector of very personal legal assets in the face of the expansion of criminal law. It is a reality; in that sense, proposing a criminal law with a rationalizing vocation is possible.

Silva Sánchez (2002) states that not every legal system, sanction or criminal law, must have the same safeguards. Therefore, the core problem does not arise so much from the

expansion of criminal law itself but from the criminal law of the custodial sentence. In this sense, the key to the matter lies in admitting gradualness in the accusation rules and safeguards in exchange for accepting less intense penalties and not accepting prison sentences.

Based on the preceding, there are different kinds of criminal law, with accusation rules and differentiated substantial and procedural safeguards: a hard-core criminal law, which admits prison sentences of considerable length and which, in return, must preserve the maximum safeguards about legality, proportionality, harmfulness, and evidence, and a criminal law that accepts a relativization of the safeguards but, in exchange, only admits non-custodial sentences.

In this differentiated criminal law, with which we agree, the criminal law of the environment and natural resources is of singular importance. The study of this juridical asset is one in which almost everything written here is put forth in evidence. Meanwhile, in environmental crimes, the problems of the expansion of criminal law, the criminal law of a risk society, the classification of endangerment crimes, the relativization of the standards of safeguards, and even the criminal liability of the legal person are intertwined.

Chapter IV: Brief Mention of the Environmental Legal Asset in Colombia

When assessing the environment's configuration as a protected legal asset, conducting a retrospective analysis of the criminal provisions is necessary. Namely, the first preserved criminal record relates to the drafting commission (1973) and the preliminary project (1974) of the Criminal Code 1980. On this occasion, a reference to the criminal protection of the environment was made under the title of crimes against the economic order (Ferreira, 2006).

According to Ferreira (2006), this commission delved into the importance of the damage suffered by natural resources. Sections from the El Salvador Criminal Code were taken and later introduced in the chapter on crimes against the economic order (1978). Namely, the drafting committee of the preliminary bill delved into its importance. It brought it together in a separate chapter called Offenses against Natural Resources (Title VII, Chapter II of Decree-Law 100/ 1980).

Although the chapter was titled Crimes against Natural Resources, the legal assets protected were the social and economic order. From this perspective, what took place was a formal but not material protection of the environment (Robayo, 2016).

Subsequently, in Law 491/1999, these norms were given the title of social right specially protected by the Criminal Law and the current Criminal Code with some novel figures that

compiled them in an autonomous title called Crimes against Natural Resources and the Environment in its Title XI Book II (Ferreira, 2006).

Law 599/2000 has been subject to amendments that have varied the punitive quantum. These are Law 890/2004 and Law 1453/2011; the latter included two new criminal types: the illicit handling of species and environmental contamination by hazardous solid waste.

Law 2111/2021 was recently issued, which meant a paradigmatic change in the criminal sanction of the environment. The aforementioned law replaced the previous legislation and implemented an entirely new chapter on crimes against natural resources and the environment.

At the constitutional level, we have Chapter III of Title II of the Colombian Constitution as a reference, which refers to Collective and Environmental Rights. It states that all people have the right to enjoy a healthy environment and that the State must protect the diversity and integrity of the environment (Section 79).

The State takes the issue of the environment and natural resources seriously and goes beyond protection by stating that,

The state will plan the management and use of natural resources to guarantee sustainable development, conservation, restoration, or replacement. In addition, it must prevent and control the factors of environmental deterioration, impose legal sanctions, and demand reparation for the damage caused (...) (Colombian Constitution, Section 80).

This shows that the environment is a legal asset that has been safeguarded and protected not only by criminal legislation but also by the Constitution. However, this does not imply that it is necessarily protected only by criminal law but also by constitutional, disciplinary, and administrative regulations. Thus, since it is a fundamental right that corresponds to a particular obligation of all authorities, it can be protected by a guardianship action, popular action, annulment action, direct reparation, etc.

Chapter V: Precautionary Principle and Prevention Principle as Domination Criteria of Prohibited Conduct for Criminal Law

It is vital to start by reiterating that Criminal Law has accepted the entry of the precautionary principle in criminal law. Rivers of ink can be written concerning the precautionary principle on its conception in international law, European community law, the United States of America, the United Kingdom, etc. Much can also be explained about the differences between a risk society and the precautionary principle versus criminal law or citizen security. The apparent difference is that the criminal law that accepts a risk society does so with the understanding of the search for criminal protection due to the emergence of new sources of risk.

These new sources of risk are related to the use of scientific knowledge, technology, and the interconnection of markets. Contrario sensu occurs with criminal security law or citizen security, which focuses on super-criminalizing behaviors that threaten and injure classic legal rights such as life and personal integrity, sexual freedom, and economic heritage.

As mentioned above, transferring the precautionary principle to criminal law is accepted. Acceptance is given more by assuming reality than by considering that it should be so dogmatically. In Silva Sánchez's (2002) words, to apply them to this case, it is important to accept with resignation the introduction of this concept in the criminal law of a risk society.

Thus, Romeo Casabona (2004) probably accepts a greater immersion of the precautionary principle in criminal law. The main reasons offered by the author are the following:

1. As a criterion for determining the dangerousness of conduct in endangerment crimes.
2. As a determining factor in objective due care and risk allowing for reckless crimes.
3. As a factor to dispense with the demonstration of causality or contribute to its verification.
4. To determine the responsibility for decision-making (both public officials and individuals).
5. As an instrument of criminal policy for the legislator.

For his part, Mendoza Buergo (2001) raises a very interesting idea. He argues that the concept of permitted risk fits in the field of industrial society but is not adequate for the functioning of a risk society. He proposes replacing the postulate of allowed risk with potential risks mediated by uncertainty.

This author clearly states that precaution should not correspond to criminal law and that criminal applications of precaution should be exceptional and limited. They would only be acceptable for criminal law in cases where precautionary measures are violated when extra-penal norms determining patterns of conduct are particularly seriously violated.

In any case, it is important to emphasize that authors such as Guaranda Mendoza (2010) state that criminal liability for environmental damage is closely subject to prevention and precautionary principles. Hence, these constitute an obligation for public and private authorities to demonstrate the existence of environmental risks or damage, considering that the affected communities generally do not have the resources or technical means to do so. Besides, the author clarifies that, by these principles, environmental responsibility extends to all those scenarios in which damage to the environment is caused due to a lack of diligence or adequate control of public policies or due to negligence and omission without being able to mitigate responsibility in any case.

One point to emphasize is that, according to Munévar Quintero and Gómez Giraldo (2016), in environmental matters, repairing the damage should not be made subject to the concepts of unlawfulness and legal accusation. According to these authors, this would be imprecise and unfair at best due to the subjective nature of this legal right and the monopolization of the damage assessment criteria limited to state spheres and that, in most cases, ignores the social and differential contexts of each territory.

On this understanding, the author points out that the reparation of environmental damages is independent of the accusation of responsibilities for them, since according to the evaluation of the different criteria, one can be or not be responsible for certain environmental damages, but, in any case, regardless of liability, all environmental damage must be repaired. This means that the transgression of the prevention and precautionary principles is enough to make it necessary to deploy all those alternatives to mitigate and repair the damage without necessarily implying the imputation of criminal liability.

Conclusion

In short, it was possible to recognize the prevalence and importance of environmental protection as part of a fundamental individual and collective right and as part of human rights as it is closely linked to life and personal integrity. Thus, it became evident that much has been said and questioned about this right and the obligation of states and their agents to avoid and prevent any situation that could potentially jeopardize or threaten these rights since they constitute not only a legal asset of special protection but also the object of constitutional duty and obligation of the State.

The precautionary principle must be applied within this context, which is an essential pillar in environmental matters. Attention should not be directed at repairing environmental damage, which is no less important. What is fundamental and ideal is that all people avoid and take all necessary precautions, measures, and alternatives to avoid endangering, risking, or undermining the integrity of the environmental surroundings and, consequently, associates' lives and personal integrity.

In any case, from a critical perspective, the entry of the environmental precautionary principle into the field of criminal law is accepted with resignation. However, it is important to make a caveat: the charge should not be admitted on the grounds of malice when the principle of environmental precaution is transgressed in crimes against the environment and natural resources.

This is because the precautionary environmental principle has different meanings since it can be understood as legal rules, programmatic principles, or standards of behavior.

Whichever definition of the precautionary principle is adopted, the truth is that its structuring elements are risk and uncertainty, which is why, for legal discourse, the precautionary and prevention principle promotes the adoption of measures for the protection and mitigation of environmental risks even though there is no compelling scientific evidence to demonstrate the existence of such risk. Then, in theory, applying these principles raises the existence of a temporal relationship between the decision or action and knowledge, where the common element is the possibility that they may exist or incur errors that affect the environment (Briceño Chaves, 2021).

Therefore, in the implementation of these principles, there is not always concrete knowledge of the potential risks; instead, there are well-founded suspicions that an activity or product may cause a risk of severe or irreversible damage. This implies that, in a logical reasoning against malice as a determining element of criminal liability, the transgression of these principles is not enough.

In fact, beyond the discussion of the volitional and cognitive theories of malice, traditionally, it has been understood that malice is knowing (knowledge) and wanting (will) to carry out the objective type of criminal conduct. Despite this, modern crime theory has emphasized that malice is predominantly knowledge over will. Even authors such as Greco (2017) have recognized that malice is only knowledge and not will:

Knowledge is the fundamental subjective factor for the perpetrator to be considered to have acted with dominion or control over what he was in charge of carrying out. Knowledge means dominion. He who knows what he is doing and what may result from his actions controls, in a certain sense, what he is doing and what may result from it. Knowledge is necessary for the existence of dominion over the performance of the act.

Another premise is that, for a behavior to be classified as intentional, the perpetrator must know in the psychological sense because only this generates dominion over the commission of the act. Thus, it could be affirmed that when an agent violates the environmental precautionary principle with his behavior, he said transgression with an active and omissive behavior (which is based on the uncertainty of the creation of a risk), it would be a contradiction in terms to consider it feasible to attribute or impute liability on the grounds of malice. The main element for doing so is lacking knowledge of the activity that generates a risk.

References

- Beck, U. (1998). *La Sociedad de Riesgo (Hacia una Nueva Modernidad)*. Paidós Editorial.
- Belloso Chacín, R. (2004). *Marco Metodológico*. <https://virtual.urbe.edu/tesispub/0094328/cap03.pdf>

- Briceño Chaves, A. M. (2021, July 21). Breves apuntes acerca del principio de precaución. *Ámbito Jurídico*. <https://www.ambitojuridico.com/noticias/especiales/breves-apuntes-acerca-del-principio-de-precaucion>
- Buitrago Dangond, E. (2018). El Principio de Precaución en la Jurisprudencia Constitucional. *Derectum*, 3(2). <https://doi.org/10.18041/2538-9505/derectum.2.2018.5213>
- Castro Cuenca, C. G. (2017). *Manual de Teoría del Delito*. Universidad del Rosario Editorial. <https://doi.org/10.2307/j.ctt1zxsm1k>
- Cristancho Ariza, M. (2019). *El delito fiscal* (1st Ed.). Temis Editorial.
- Ferreira, F. J. (2006). *Derecho Penal Especial* (Vol. II). Temis Editorial.
- Forero Ramírez, J. C. (2018). *Principio De Precaución, Estudio Aproximativo De Su Ingreso Al Derecho Penal*. Tirant Lo Blanch Editorial – Universidad Del Rosario.
- Greco, L. (2017). Dolo Sin Voluntad. *Revista Nuevo Foro Penal*, 13(88), 10–38. <https://doi.org/10.17230/nfp.13.88.1>
- Guaranda Mendoza, W. (2010). *Acciones Jurídicas Para Establecer Responsabilidades Por Daño Ambiental En El Ecuador*. Fundación Regional de Asesoría en Derechos Humanos INREDH. ISBN: 9978-980-23. https://inredh.org/archivos/libros/acciones_juridicas.pdf
- Hernández Sampieri, R., Fernández Collado, C., & Baptista Lucio, P. (1991). *Metodología de la investigación*. McGraw-Hill. https://docs.google.com/viewer?url=https%3A%2F%2Fwww.uv.mx%2Fpersonal%2Fcbustamante%2Ffiles%2F2011%2F06%2Fmetodologia-de-la-Investigaci%25C3%2583%25C2%25B3n_Sampieri.pdf
- Inter-American Court of Human Rights. (2017, November 15). *Advisory Opinion OC-23/17*.
- Jiménez Díaz, M. J. (2014). Sociedad Del Riesgo E Intervención Penal. *Revista Electrónica de Ciencia Penal y Criminología*, (16-08).
- López Becerra, D. L., & García Urueña, M. (2022). *El Principio De Precaución Ambiental Como Fundamento De La Responsabilidad Del Estado Colombiano: Reflexiones a propósito del Bloque de Constitucionalidad* (Master's thesis, Universidad Libre de Colombia). <https://repository.unilibre.edu.co/bitstream/handle/10901/23094/TESIS%20DE%20MAESTR%C3%84%20DOCUMENTO%20FINAL%20REPOSITORIO%20.pdf?sequence=2&isAllowed=y>
- Mendoza Buergo, B. (2001). *El Derecho Penal En La Sociedad Del Riesgo*. Civitas.
- Mendoza Perdomo, J. F. (2016). *Derecho penal, vigilancia y control social*. Editorial Group Ibáñez. <https://doi.org/10.15332/li.lib.2016.00020>
- Munévar Quintero, C. A., & Gómez Giraldo, L. M. (2016). Criterios de imputación al Estado por daños jurídicos en materia ambiental. *Advocatus*, 14(27), 35–49. <https://doi.org/10.18041/0124-0102/advocatus.27.916>
- Ochoa Figueroa, A. (2014) Medioambiente como bien jurídico protegido, ¿visión antropocéntrica o ecocéntrica? *Revista de Derecho Penal y Criminología*, 3a época(11), 253–294. http://e-spacio.uned.es/fez/eserv/bibliuned:revistaDerechoPenalyCriminologia-2014-11-5030/Ochoa_Figueroa.pdf
- Robayo, M. (2003). *AA.DD. Lecciones de Derecho Penal Parte Especial* (1st Ed.). Ed. Universidad Externado de Colombia.
- Rodríguez, E., & Quintanilla, A. L. (2019). Relación ser humano-naturaleza: Desarrollo, adaptabilidad y posicionamiento hacia la búsqueda de bienestar subjetivo. *Avances en Investigación Agropecuaria*, 23(3), 7–22. <https://www.redalyc.org/journal/837/83762317002/html/>

- Romeo Casabona, C. M. (Ed.). (2004). *Principio de precaución, Biotecnología y Derecho*. Editorial Comares.
- Roxin, C. (1997). *Derecho penal. Parte General. Tomo I. Fundamentos. La estructura de la teoría del delito* (1st Ed.). Civitas.
- Ruiz Morales, M. (2019). La corrupción como delito del pensamiento en el siglo XIX. Un esbozo de su formación jurídico-penal en la historia desde la filosofía. *Estudios Socio-Jurídicos*, 21(2), 331–356. <https://doi.org/10.12804/revistas.urosario.edu.co/sociojuridicos/a.7853>
- Silva Sánchez, J. (2001). *La Expansión Del Derecho Penal* (2nd Ed.). Civitas.
- Silva Sánchez, J. (2002). El retorno de la inocuización: El caso de las reacciones jurídico-penales frente a los delinquentes sexuales violentos en derecho comparado. In S. Redondo (Coord.), *Delincuencia sexual y sociedad*. Ariel. <https://doi.org/10.22199/S07189753.2001.0001.00009>
- Souto, M. A. (2016). Las leyes penales en blanco. *Nuevo Foro Penal*, 12(68), 13–30. <http://publicaciones.eafit.edu.co/index.php/nuevo-foro-penal/article/view/3798>
- Triana Cita, R. (2013). *Delitos de peligro abstracto en el derecho penal colombiano Crítica a la construcción dogmática y a la aplicación práctica* (1st Ed.). Editorial Universidad Católica de Colombia. <https://publicaciones.ucatolica.edu.co/pdf/delitos-de-peligro-abstracto-en-el-derecho-penal-colombiano-digital.pdf>
- Vásquez, L. (2011). *Investigación Y Tipo De Investigación* (Webinar). <https://es.slideshare.net/Lili369/Investigacin-Y-Tipos-De-Investigacin>
- Velásquez Velásquez, F. (2004). Globalización y derecho penal. In M. G. Losano & F. Muñoz Conde (Coords), *El Derecho Ante La Globalización y el Terrorismo*. Tirant lo Blanch. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi09c7uj8L8AhWrSDABHTLyCZUQFnoECAsQAQ&url=https%3A%2F%2Fperso.unifr.ch%2Fderechopenal%2Fassets%2Ffiles%2Farticulos%2Fa_20090316_01.pdf&usq=AOvVaw3tKJe7y0uSIPTRvNJvoLjC
- Velásquez Velásquez, F. (2020). *Fundamentos De Derecho Penal Parte General* (3rd Ed.). Tirant lo Blanch.