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# The enforcement of environmental law: civil or criminal penalties?

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## Introduction

In the United Kingdom, regulatory bodies have traditionally relied on the use of the criminal law to protect the environment. Although the officials employed by these agencies may have regarded it as the 'last resort', prosecution – or at least the threat of prosecution – has always been in the background. 'Civil' or 'administrative' sanctions have rarely been used. This situation may be about to change.

In November 2004 the Department of the Environment, Fisheries and Agriculture (Defra) organized a conference on environmental justice. In a speech Elliot Morley, the Environment Minister, said:

The [civil penalties] approach is more flexible and designed to fit the penalty more to the crime. It frees resources for criminal prosecutions while removing the burden from respectable companies that make a low level breach of regulations and raises the penalties for people who carry out deliberate environmental crimes.<sup>1</sup>

Similar views were expressed by Harriet Harman, the Solicitor General. An Environmental Justice Bill is currently being drafted. This is likely to provide for the increased use of non-criminal penalties. There is growing evidence that civil sanctions are at last being given serious consideration. What are the implications for the environment?

## Criminal law and the environment

In England and Wales, the Environment Agency is the main regulatory body. Each year it records around 50,000 environmental incidents and prosecutes approximately 700 offenders. As most are charged with strict liability offences which do not require proof of fault, conviction is the norm. Convictions generally lead to modest fines. In 2002, the average fine imposed by magistrates was £2730. The average Crown Court fine was £4600. There were a few custodial sentences (1.2 per cent of convictions).<sup>2</sup>

It seems clear that most environmental offenders – the vast majority, in fact – are not prosecuted. When

prosecutions occur, the penalties are unlikely to deter future offending. They usually bear little relation to either the substantial profits that can be made by those who choose to defy the law or to the environmental costs associated with their activities. Fly-posting, commercial fly-tipping, habitat destruction and animal trafficking are obvious examples. Environmental crime often makes good business sense.<sup>3</sup>

Animal trafficking provides a useful case study. The global trade in animals, plants and their by-products seems to be worth around \$160 billion (approximately £85 billion) per annum. About a quarter of trade this appears to be illegal, and has been analysed in major reports commissioned by Traffic and the World Wide Fund for Nature:

Although the scale of the illegal trade is difficult to estimate, it is clear that the rewards it offers to unscrupulous legitimate traders, businesses, organized criminals and major organized crime groups are very high indeed, and probably second only to the drugs trade in terms of the potential levels of profit on offer ... The illegal trade exists because the market demand exists, and there is clear evidence of the UK's increasing role as a key market.<sup>4</sup>

The 'organized crime groups' do not necessarily specialize in animal trafficking. Most seem to be engaged in a range of criminal activities. Similar networks can be used to transport animals, drugs and firearms. Between 1998 and 2002, UK courts imposed 15 fines on offenders convicted of wildlife trade offences. The average fine was £963. Likely sentences:

are not really a deterrent to the dedicated criminal prepared to undertake basic cost-benefit analysis ... The penalties available in the UK ... signally fail to deter wildlife offenders. They are regarded by many as

1 F Harvey 'Environmental Criminals Face Tougher Fines' *Financial Times* 29 November 2004; C Clover 'Pledge to Decriminalise Environmental Offences' *Daily Telegraph* 29 November 2004.

2 C Dupont, P Zakkour 'Trends in Environmental Sentencing in England and Wales' *Environmental Resources Management* (2003) 12.

3 HC Environmental Audit Committee Sixth Report 'Environmental Crime and the Courts' (HC 126 Session 2003–2004); R Malcolm 'Prosecuting for Environmental Crime: Does Crime Pay?' *ELM* 14 [2002] 5 289–95; M Watson 'Offences Against the Environment: the Economics of Crime and Punishment' *ELM* [2004] 16 4 200–04.

4 D Cook, M Roberts and J Lowther *The International Wildlife Trade and Organized Crime: A Review of the Evidence and the Role of the UK* (Regional Research Institute University of Wolverhampton 2002) 31–32. See also J Lowther, D Cook and M Roberts *Crime and Punishment in the Wildlife Trade* (Regional Research Institute University of Wolverhampton 2002); S Oldfield (ed) *The Trade in Wildlife: Regulation for Conservation* (Earthscan London 2002).

derisory and, in any event, the maximum sentence of two years' imprisonment has never been applied for a single offence.<sup>5</sup>

In 1997, for example, the Metropolitan Police seized 138 fine shahtoosh shawls, worth £353,000, from a company called the Renaissance Corporation. The source of the rare wool is the Tibetan antelope – a critically endangered species. As the animals are not domesticated, they must be killed before they are fleeced. Approximately 1000 antelopes were killed to provide the wool for the shawls. The company acknowledged its guilt and was fined.<sup>6</sup>

Not all environmental offenders seek financial gain. Non-commercial fly-tipping occurs largely because individuals wish to avoid the inconvenience of travelling to licensed waste disposal sites. Young people may engage in criminal damage and littering offences in order to gain 'street-credibility' with their peers.<sup>7</sup> So-called 'graffiti-artists' may have similar motives.<sup>8</sup> But a rational system of sentencing must take into account the environmental damage done and the likelihood of prosecution.

In August 2004 a 'graffiti-artist' was convicted of 10 offences at Bath Youth Court after causing damage which would cost an estimated £600,000 to remedy. The unnamed 17-year-old (described in one report as 'Britain's most prolific graffiti vandal') asked for a further 98 offences to be taken into consideration. He was given a 12-month referral order and ordered to pay the local authority £250 in compensation.<sup>9</sup> It is often argued that there should be more prosecutions for environmental offences and that sentencing policy should be toughened. The House of Commons Environmental Audit Committee, for example, has proposed that sentencers should regard damaging the environment as an aggravating factor. The Committee also advocates the increased use of community sentences for environmental offenders.<sup>10</sup> At present, such sentences are only available as an alternative to a custodial sentence. They are not an alternative to a fine. In practical terms, this means that community sentences are not considered by judges and magistrates.

When individuals or companies intentionally or recklessly damage the environment or endanger protected species, prosecution is an appropriate strategy. Kathleen Brickey has argued that the 'decision to criminalize is rooted in the core concepts of harm, culpability and deterrence.'<sup>11</sup> Most traditional crimes exist to deter conduct

which is both blameworthy and socially harmful. The environmental offences mentioned above therefore have much in common with more conventional crimes. Although it is true that environmental offences often create potential dangers rather than actual harm, the same can be said of well-established inchoate crimes (incitement, conspiracy and attempt) and more modern statutory offences (such as dangerous driving).

It is entirely reasonable to prosecute so-called 'graffiti-artists' (especially the more 'mature' ones) for criminal damage. Property developers who deliberately destroy habitats such as bat roosts in order to maximize their profits deserve heavy fines.<sup>12</sup> Commercial fly-tipping is a lucrative business. It is also a business that is dominated by criminal gangs. Successful operators use deception and intimidation to make huge profits. They are real criminals who commit real crimes.<sup>13</sup> Such individuals are unlikely to be deterred by non-custodial sentences.

### Problems with prosecution

In his comparative study of environmental regulation in the UK and the USA, William Wilson writes: 'Apart from the water pollution area, those looking for purpose or design in the way that English law has come to use the criminal law to enforce environmental statutes may look in vain. It has grown up that way piecemeal, and out of habit as much by design.'<sup>14</sup>

The criminal law is used to punish those who deliberately engage in large scale commercial fly-tipping and animal trafficking operations. It is also used to punish those who inadvertently breach licence conditions or accidentally pollute watercourses. These 'strict liability' (or 'regulatory') environmental offences are sometimes said to be 'quasi-criminal'. The leading case concerns the interpretation of the Rivers (Prevention of Pollution) Act 1951; *Alphacell Ltd v Woodward* [1972] 2 All ER 745. According to Viscount Dilhorne: 'This Act is, in my opinion, one of those Acts... which... deals with acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.'<sup>15</sup>

A distinction is often drawn between conduct which is wrong in itself (*mala in se*) and conduct which society chooses to prohibit (*mala prohibita*).<sup>16</sup> The use of the criminal law in such situations is often criticized. According to Wilson:

Problem with Environmental Crime' (1994) 27 *Loyola of Los Angeles Law Review* 867–91.

12 *HC Sixth Report* (n 3) Ev 60. See also <http://www.bats.org.uk/BatCrimeReport.pdf>.

13 B Webb and B Marshall *A Problem-oriented Approach to Fly-tipping* (Jill Dando Institute of Crime Science University College London 2004) <http://www.jdi.ucl.ac.uk/downloads/pdf/JDIFlytippingreport.pdf>; J Vidal 'Crime Gangs Fuel Explosion in Fly-tipping' *The Guardian* 22 September 2004.

14 W Wilson *Making Environmental Laws Work: an Anglo American Comparison* (Hart Publishing Oxford 1999) 110.

15 This statement is based on the words of Wright J in *Sherras v De Rutzen* [1895] 1 QB 918 at 922. The case concerned a publican who inadvertently supplied an alcoholic drink to a constable who was on duty.

16 'Since regulatory offences are directed primarily not to the conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lower degree of culpability than conviction of a true crime'; Tuckey LJ in *Davies v Health and Safety Executive* [2002] EWCA Crim 2949.

5 Cook (n 4) 29.

6 The fine was £1500. Lowther (n 4) 15, 35.

7 For an interesting account of littering offences see 'Teenage Dirt Bag Baby' (Encams 2004) <http://www.encams.org/information/publications/research/teenagedirtbag.pdf>.

8 HC Environmental Audit Committee Ninth Report 'Environmental Crime Fly-tipping, Fly-posting, Litter, Graffiti and Noise' (HC 445 Session 2003–2004).

9 R Savill 'Graffiti Vandal's £600,000 Damage' *Daily Telegraph* 14 August 2004; *Bath Chronicle* 23 July 2004. See also M Watson 'Graffiti: Popular Art, Anti-social Behaviour or Criminal Damage?' (2004) 168 *Justice of the Peace* 668–70.

10 *HC Sixth Report* (n 3) paras 17 and 24.

11 'Environmental Crime at the Crossroads: the Intersection of Environmental and Criminal Law Theory' (1996) 71 *Tulane Law Review* 487–528, at 504. For a different view see RJ Lazarus 'Assimilating Environmental Protection into Legal Rules and the

We may tend to weaken our criminal law by applying it to too many situations where ordinary members of the public would have difficulty recognising criminal behaviour. It is not necessarily right that corporations should face criminal sanctions the basis of which would never be acceptable if applied to individuals.

In support of his argument he cites Nancy Firestone, a former Deputy Assistant Attorney General at the United States Department of Justice: 'You want to make criminal offences serious, or criminality becomes meaningless.'<sup>17</sup> Michael Woods and Richard Macrory have expressed concern about the:

'wholesale' use of strict liability in environmental criminal law ... This can lead to indignation on the part of businesses which are found 'guilty' of offences without having a real sense of moral fault, or an inclination to treat such offences akin to a business overhead because guilt is applied automatically.<sup>18</sup>

It is common for defendants to acknowledge their guilt and concentrate on mitigating factors (such as their lack of fault). This can lead to the trivialization of environmental offences.<sup>19</sup> The problem is compounded by the fact that most judges and magistrates see very few environmental cases. It has been calculated that the average magistrate deals with one case every seven years.<sup>20</sup> Appropriate sentencing is difficult in these circumstances.

There are other problems. An offence falls into the strict liability category if no *mens rea* needs to be proved as to one or more elements of the *actus reus*. It may be essential for the prosecutor to establish *mens rea* in relation to other elements. Strict liability offences are also subject to the criminal burden of proof, that is proof beyond reasonable doubt. This has major implications for the agencies responsible for environmental protection.

Investigations have to be planned, and each element of the criminal offences being investigated has to be capable of strict proof. Investigators must have arrangements, powers and procedures for carrying out any necessary searches, for securing physical evidence, for managing and documenting documentary and other evidence, for conducting interviews under caution, sometimes on tape, for taking witness statements, for reviewing their evidence

and 'plugging gaps', and for ensuring that all of this is carried out in a timely fashion before the evidence goes stale.<sup>21</sup>

The difficulties continue when a case goes to court. Stephen Fineman has produced an interesting and authoritative study of Environment Agency officers. The people he worked with were:

visibly uncomfortable with enforcement and prosecution – a power that was often more symbolic than real ... Gathering detailed legal evidence and appearing in court were uncomfortable experiences for the inspector ... Many of them felt vulnerable, even de-skilled, in litigation settings, despite the support of Agency specialists. Ambiguity in interpreting licence conditions meant that a magistrate or judge could rule against the Agency, or impose just a modest penalty on the firm. 'Failed prosecutions really embarrass us' was a common sentiment.<sup>22</sup>

Agency staff sometimes face more than embarrassment. In 2002/2003 there were 144 recorded incidents of violent and/or threatening behaviour (compared with 105 in 2001/2002).<sup>23</sup> It is hardly surprising that many prefer the threat of prosecution to the reality. The EA inspectors observed by Fineman 'typically wanted to go through the motions of getting tough, without going "the whole way". For them, sabre-rattling was part of the appropriate regulatory ritual, but actual prosecution was not.'<sup>24</sup>

### Civil and administrative sanctions

Many common law and civil law countries use non-criminal sanctions to enforce environmental regulation.<sup>25</sup> In the USA, for example, these civil penalties are far more common than criminal ones. In 1997, 97 per cent of the cases handled by the Environmental and Natural Resources Division of the USA's Department of Justice were civil administrative ones. Only three per cent were criminal cases. Attorneys employed by state regulatory bodies also devote most of their time to administrative enforcement.<sup>26</sup>

Although the terminology differs across jurisdictions, it is useful to distinguish between civil fines and administrative

17 Wilson (n 14) 107, 110.

18 M Woods, R Macrory 'Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach' (Centre for Law and the Environment University College London 2003), 2.8. See also P de Prez 'Beyond Judicial Sanctions: the Negative Impact of Conviction for Environmental Offences' (2000) 2 Environmental Law Review 11–22. This is not a recent development. In the early 19th century the strict liability offence of public nuisance was occasionally used to protect the environment and punish those who endangered public health; *R Medley* [1834] 2 C & P 292.

19 P de Prez 'Excuses, Excuses: the Ritual Trivialization of Environmental Offences' (2000) 12(1) Journal of Environmental Law, 65–77. See also H Croall 'Sentencing the Business Offender' (1991) 30(4) The Howard Journal of Criminal Justice 280–97; J Arlen 'The Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23 Journal of Legal Studies 333–67.

20 HC Sixth Report (n 3) Ev 5.

21 Wilson (n 14) 111.

22 Street-level Bureaucrats and the Social Construction of Environmental Control' (1998) 19(6) Organization Studies 953–74 at 959. See also S Fineman 'Enforcing the Environment: Regulatory Realities' (2000) 9 Business Strategy and the Environment 62–72.

23 'Environmental Regulators Assaulted and Threatened at Home' (2003) ENDS Report 338 10.

24 Fineman (n 22) at 67. This has apparently been the case for many years. See K Hawkins 'Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation' (1983) 5(1) Law and Policy Quarterly 35–73.

25 Wilson (n 14); Woods, Macrory (n 18) ch 4; N Franklin 'Environmental Pollution Control: the Limits of the Criminal Law' (1990) 2 Current Issues in Criminal Law 81–94; Z Lipman and L Roots 'Protecting the Environment through Criminal Sanctions: The Environmental Offences and Penalties Act 1989 (NSW)' (1995) 12 Env and Planning Law Journal 16–36.

26 Twenty-two out of twenty-three in the case of Texas in 1996; Wilson (n 14) 107.

penalties. Civil fines are essentially financial penalties which lack the moral overtones of comparable criminal sentences. Administrative penalties generally involve the suspension or revocation of licences. Although civil fines can be very substantial, the loss of a licence may be catastrophic for an organization. The denial of permission to operate within the law potentially incapacitates it. It is the corporate equivalent of a custodial sentence (or possibly execution). In theory, the aim is to protect the environment rather than to punish a wrongdoer. In reality, the sanction (or the threat of its use) is a major deterrent. It is, in fact, a much more potent economic deterrent than a criminal conviction and a modest fine.<sup>27</sup>

Woods and Macrory believe that these penalties have other significant advantages:

Civil penalties could ... enhance the use of non-criminal sanctions such as warning notices and enforcement notices, by providing a more 'hard-hitting' but not overly harsh means of further recourse in the event of continued non-compliance with a licence or statutory prohibition ... When prospective criminal status is at issue, it seems obvious that any offender will make greater efforts to avoid being found 'guilty', even when there is acknowledgement that some degree of administrative oversight or error has taken place. It could also be anticipated that potential offenders would be less likely to risk non-compliance based on the knowledge that the regulator would be better equipped to take enforcement action without having to resort to criminal proceedings.<sup>28</sup>

From an economic perspective, the imposition of criminal sanctions is generally more expensive than the use of civil and administrative ones.<sup>29</sup> Many local authorities are reluctant to prosecute environmental offenders. A recent survey of 73 authorities revealed that 51 had not prosecuted any fly-tippers between 1998 and 2003. Financial considerations seem to be an important factor.<sup>30</sup>

Civil and administrative sanctions are rarely used to protect Britain's environment. Local authorities are able to impose fixed penalties for certain minor offences such as noise pollution.<sup>31</sup> Licences are rarely suspended or revoked. The Environment Agency was established in 1996. By February 2002 it had revoked six waste management licences.<sup>32</sup> Many Agency inspectors have worked for the industries they now regulate. They understandably have little desire to drive companies out of business. They are also aware that the use of such draconian measures generally leads to complex and time-consuming civil appeals.<sup>33</sup> Although they are reluctant

to prosecute they are even more reluctant to revoke licences to operate.

## Conclusion

The limitations of civil and administrative penalties must be acknowledged. They can complement – but not replace – more traditional criminal sentences. Civil and administrative penalties enable regulators to impose financial costs on individuals and companies that inadvertently or negligently fail to comply with the law. These costs may be linked to the wealth/annual turnover of offenders, their degree of fault, or the extent of the environmental damage resulting from the offender's act or omission.<sup>34</sup> In the USA and elsewhere, the use of such penalties ensures that only the most culpable offenders are prosecuted.<sup>35</sup> When convicted, they generally receive very tough sentences.<sup>36</sup>

If oil leaks from a pipeline owned by a multinational corporation, a civil penalty based on a tariff linked to turnover is (in the absence of fault) likely to be more appropriate (and effective in causing preventative measures) than a criminal conviction and a modest fine. Such penalties are unlikely to be effective against those who intentionally or recklessly damage the environment for financial or personal reasons. A legitimate waste disposal company will seek to retain its operating licences. A business that operates outside the law may have no licences to lose.

Environmental offences are often committed by people who have limited financial resources. A fly-posting campaign may be informally commissioned by a major commercial company, but the fly-posting itself will normally be sub-contracted to individuals who are typically incapable of paying significant fines (civil or criminal). Community sentences and anti-social behaviour orders are likely to have greater deterrent value.

The 'expressive' functions of the criminal law must also be recognized.<sup>37</sup> Conviction of an offence – becoming a 'convict' – involves moral condemnation. Civil penalties – no matter how severe – may be seen as a form of taxation. A property developer may (as a rational economic actor) agree to preserve an important habitat in order to avoid a civil financial penalty. The developer may wish to avoid a criminal conviction for more fundamental reasons.

Proposals to increase the use of civil and administrative sanctions in the United Kingdom are to be welcomed. Environmental regulators in other countries have used these penalties for decades. Their value cannot be denied. But they must not be allowed to obscure the criminal behaviour that often lies behind offences against the environment.

27 A Ogus and C Abbot 'Sanctions for Pollution: Do We Have the Right Regime?' (2002) 14(3) *Journal of Environmental Law* 283–98.

28 Woods, Macrory (n 18) paras 7.9 and 7.10.

29 MA Cohen 'Criminal Law as an Instrument of Environmental Policy: Theory and Empirics' in A Heyes (ed) *The Law and Economics of the Environment* (Edward Elgar Cheltenham 2001) 198–216 at 200.

30 Dupont, Zakkour (n 2) 41.

31 Sections 8 and 9 Noise Act 1996. The fixed penalty is currently £100.

32 Ogus and Abbot (n 27) at 288. There are hundreds of prosecutions for waste offences each year.

33 Fineman (n 22) and Malcolm (n 3) at 295.

34 The calculation of optimal fines for environmental offences is difficult and controversial. It is much easier to apply optimum deterrence theory to companies than to individuals. Compare Cohen (n 29) with S Shavell 'Criminal Law and the Optimal Use of Non-monetary Sanctions as a Deterrent' (1985) *Columbia Law Review* 1232–262.

35 KF Brickey 'Charging Practices in Hazardous Waste Prosecutions' (2001) 62(3) *Ohio State Law Journal* 1077–144.

36 Wilson (n 14) 107.

37 S Hedman 'Expressive Functions of Criminal Sanctions in Environmental