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ENVIRONMENTAL REGULATION: EFFECTIVE OR DEFECTIVE?

ASSESSING WHETHER CRIMINAL SANCTIONS PROVIDE ADEQUATE PROTECTION OF THE ENVIRONMENT

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Abstract

Issues, such as climate change and global warming, have seen environmental protection grow in the global consciousness into something worthy and in need of regulation. In response, a number of laws have been enacted which make certain environmental actions criminal offences, enforced through the criminal justice system. These environmental crimes are enforced using the same mechanisms and must satisfy the same procedural safeguards as 'traditional' criminal offences in order to secure conviction. This discussion looks at elements of the current system and whether it provides an effective system for protecting the environment. An examination of the alternatives is also made to establish if different enforcement mechanisms would facilitate better environmental regulation.

Keywords: environmental crime, enforcement, sanctions, Regulatory Enforcement and Sanctions Act 2008

Introduction

In the context of legal regulation environmental law is 'basically 'virgin law'² as previously environmental protection 'was not generally a priority for law-makers and the courts.'³ An even more recent development in environmental regulation has been the criminalisation of environmental wrongs,⁴ through the creation of specific environmental crimes, allowing the weight of the criminal justice system to be used to protect the environment. This article examines the issues surrounding criminal environmental regulation and whether a solution to the perceived problems could be found in an alternative enforcement mechanism.

¹ Pictured with from left to right Steven Hudson, Gary Whitaker and Michael Prout.

² Grekos, M., 'Environmental Fines – All Small Change?' (2004) *Journal of Planning and Environmental Law*, p.1332.

³ Watson, M., 'Wildlife Crime – Old and New,' (2005), 23, *Justice of the Peace*, p.433.

⁴ Situ, Y., and Emmons, D., *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, (2000, Sage), p.xiii.

Environmental crime has been described as a 'growing social evil',⁵ with 'harm to ecological and/or biological systems [for] ...business or personal advantage'⁶ as well as 'abandoned shopping trolleys and noise nuisance'⁷ falling within its remit. This potentially wide application means that there is no coherent definition, with both direct and indirect acts under 'the umbrella of environmental crime'⁸ causing application problems for a system which ultimately relies on certainty as an underlying requirement.

Criminal law sets its own rules, carries with it a social stigma and is described as a 'method of social control [and] a framework specifying the parameters of acceptable behaviour.'⁹ However, environmental crimes do not overtly threaten social stability in the same way as other crimes, but arguably threaten the 'survival of society itself.'¹⁰ Environmental crimes also have two victims, the individual (including their property), as with other crimes, and the environment,¹¹ which may be said to involve 'common property.' This unique nature challenges many of the traditional concepts of criminal law and its accepted norms.

In recent years a number of reports have looked at the issues surrounding environmental crime. The Hampton Report¹² and Macrory Review¹³ both examined the sanctioning powers while the Environmental Audit Committee conducted a review into *Environmental Crime and the Courts*.¹⁴ They both reported problems with criminal environmental regulation including the range, level and appropriateness of the sentences, the reliance on criminal sanctions when they are not always appropriate and the lack of deterrent.¹⁵ The impact of these problems will be examined to determine the relative success or otherwise of current environmental regulation.

⁵ Samuels, A., 'Punishment for Environmental Crime,' (1994) *Journal of Planning and Environmental Law* p.412.

⁶ Bell, S., and McGillivray D., *Environmental Law*, (2008, 7th edn. OUP), p.277.

⁷ *Ibid.*

⁸ House of Commons Environmental Audit Committee, *Environmental Crime and the Courts*, Sixth Report of Session 2003-04, (Published 12th May 2004), p.6.

⁹ *Ibid.*

¹⁰ Grekos, M., 'Environmental Fines – All Small Change?' p.1338.

¹¹ Situ and Emmons, *Environmental Crime*, p.4.

¹² Hampton, P., *Reducing Administrative Burdens: Effective Inspection and Enforcement*, The Final Review, HM Treasury, March 2005.

¹³ Macrory, R., *Macrory Review – Regulatory Justice: Making Sanctions Effective*, Final Report, November 2006.

¹⁴ HC Environmental Audit Committee, *Environmental Crime and the Courts*.

¹⁵ *Ibid.* pp.10-14 and Macrory, *Macrory Review*, pp.6-7 (Executive Summary).

1 Prosecuting Environmental Crime

The Environment Agency's stated aims for prosecutions are 'to punish wrongdoing, to avoid a recurrence and to act as a deterrent to others.'¹⁶ However, with environmental crimes being committed by a 'diverse range of individuals and corporate bodies'¹⁷ it is argued that these aims are not being met. The criminal legal framework, when dealing with *traditional* crimes, generally only deals with individuals and will rarely, if ever, deal with companies. Therefore, when individuals commit environmental crimes criminal law has the mechanisms to deal with them: however, 'whilst many environmental crimes are caused by lazy, negligent or malicious individuals, some of the worst instances of such crimes are the responsibility of companies.'¹⁸ This can make the imposition of liability problematic.

Due to company structures and the responsibilities held at each level, it is difficult to identify those responsible from behind the corporate structure. Companies frequently also seek to blame third parties or categorise harm as an 'unavoidable accident'¹⁹ in an attempt to 'capitalise on the relative absence of conceptualisations of collective fault in our law'²⁰ Despite this, there has been some success with corporate liability. In *Express Ltd v Environment Agency* [2005]²¹ the convictions of both the licensee and the company owner were upheld when cream, spilt by the licensee, entered controlled waters.²²

Some environmental offences apply directly to companies although many will be committed by employees from which liability will ensue vicariously. Previously, companies could only be prosecuted if an employee was 'of sufficient seniority to act as the 'controlling mind' of the company.'²³ This, however, defeated the statutory

¹⁶ Environment Agency Enforcement and Prosecution Policy, Policy EAS/8001/1/1, Issued 07/08/08, Version 2, <http://www.environment-agency.gov.uk/static/documents/enforcement-policy.pdf>, at para. 20.

¹⁷ Bell and McGillivray, *Environmental Law*, p.264.

¹⁸ HC Environmental Audit Committee, *Environmental Crime and the Courts*, p.15.

¹⁹ de Prez, P., 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecution,' (2000), 12(1) *Journal of Environmental Law*, pp.68-69.

²⁰ *Ibid.* p.69.

²¹ *Express Ltd (t/a Express Dairies Distribution) v Environment Agency* [2005] Env.L.R. 7.

²² *Ibid.* at p.98. The licensee was guilty under ss.85(1) and (6) Water Resources Act 1991 and the company director under s.217(3) Water Resources Act 1991.

²³ Bell and McGillivray, *Environmental Law*, p.265 as in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

purpose of these offences and so companies can now be liable for all employees,²⁴ not only because of their 'capacity to educate and control'²⁵ but also because:

to make [an] offence an effective weapon in the defence of environmental protection a company must by necessary implication be criminally liable for the acts or omissions of its servants or agents during activities being done for the company.²⁶

In *NRA v Alfred McAlpine Homes East Ltd* [1994]²⁷ the company were acquitted at first instance for causing water pollution on the grounds that the employees who caused the incident were not of sufficiently high seniority.²⁸ On appeal, however, they were found liable as Morland J held that the purpose of the Water Resources Act 1991 was to prevent water pollution and this could only be achieved if, by implication, the company were liable for all employees.²⁹ Other provisions, such as section 217 Water Resources Act 1991,³⁰ provide that a 'director, manager, secretary, or other similar officer of a corporate body' can be prosecuted for an environmental offence where they consented, participated or caused the offence by their negligence. A successful conviction was brought under section 217(3) in *Express Ltd v Environment Agency* [2005]³¹ although such convictions are rare.

Private Prosecutions

As a principle of English Law, 'every citizen still has the right ...to invoke the aid of courts of criminal jurisdiction for the enforcement of the criminal law.'³² The right to bring a private prosecution, including for environmental offences, is upheld by section 6(1) Prosecution of Offences Act 1985, save where Parliament has expressly excluded it, such as under section 216 Water Resources Act 1991,³³ although there are often 'significant hurdles' to overcome which ensures 'that all but the most committed will be deterred from having recourse to the criminal courts.'³⁴

²⁴ *Ibid.*

²⁵ de Prez, 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecution,' p.69.

²⁶ *National Rivers Authority (Southern Region) v Alfred McAlpine Homes East Ltd* [1994] Env.LR. 198 per Morland J at pp.211-212.

²⁷ *Ibid.*

²⁸ Bell and McGillivray, *Environmental Law*, p.265.

²⁹ *Ibid.*

³⁰ Also see s.157 Environmental Protection Act 1990.

³¹ *Express Ltd (t/a Express Dairies Distribution) v Environment Agency* [2005] Env.LR 7.

³² *Gouriet v Union of Post Office Workers and Others Respondents* [1977] 3 WLR 300, [1978] AC 435, per Lord Diplock at pp.497-498.

³³ It provides that a prosecution can only be brought by the Environment Agency or with the consent of the Director of Public Prosecutions (the DPP).

³⁴ Parpworth, N., 'Enforcing Environmental Laws: The Role of the Private Prosecution,' (2007) *Journal of Planning and Environmental Law* pp.331-2.

This does not mean that private prosecutions are never brought.³⁵ In *R v Anglian Water Services Ltd* [2004] a successful private prosecution was brought for gross water pollution which resulted in a £200,000 fine (reduced to £60,000 on appeal).³⁶ Pressure groups, such as Greenpeace who brought the first private prosecution under the Water Act 1989, in *Greenpeace v Albright and Wilson* [1991], have also brought successful private prosecutions. The threat of private prosecution can also be enough, as happened following the 'running aground of the *Sea Empress* off the coast of Milford Haven.'³⁷ The Campaign Director at Friends of the Earth said:

If justice is to be done, then we must have proper enforcement of environmental law. The public has waited patiently ...but still the Environment Agency won't say who is to blame. We are putting them on notice that if they won't prosecute, then Friends of the Earth will.³⁸

This resulted in a prosecution by the Environment Agency.³⁹ However, while private prosecutions can play a major role in highlighting environmental issues they are the 'exception rather than the rule.'⁴⁰

Private prosecutions also partly underpin the aims of the Aarhus Convention,⁴¹ to which the UK is a signatory. Based on Principle 10 of the Rio Declaration,⁴² the Convention provides, as one of the three pillars of participation in environmental matters, that there should be access to justice in environmental matters.⁴³ Under Article 9(2):

Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

- (a) Having a sufficient interest, or, alternatively,
- (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

³⁵ It has been said that private prosecutions 'are still important' despite their infrequency: Bell, and McGillivray, *Environmental Law*, p.271.

³⁶ *R v Anglian Water Services Ltd* [2004] Env.LR 10.

³⁷ *Greenpeace v Albright and Wilson* [1991] 3 LME LR 170.

³⁸ Parpworth, N., 'Enforcing Environmental Laws,' p.333.

³⁹ In the case of *Environment Agency v Milford Haven Port Authority and Andrews* [1999] 1 Lloyd's LR 673.

⁴⁰ Bell and McGillivray, *Environmental Law*, p.271.

⁴¹ The Aarhus Convention, United Nations Economic Commission for Europe (UNECE): Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25th June 1998. Came into force 30 October 2001. The UK and EC became full parties in early 2005.

⁴² Principle 10, Rio Declaration on Environment and Development, The United Nations Conference on Environment and Development, Rio de Janeiro, 3 to 14 June 1992, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

⁴³ Bell and McGillivray, *Environmental Law*, p.294.

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission.⁴⁴

These provisions 'should provide adequate and effective remedies...and be fair, equitable, timely and not prohibitively expensive.'⁴⁵ However, while provisions are provided at law, the problems surrounding private prosecutions means the Convention is mainly upheld at face value.

Being part of the European Community (EC) has also impacted on environmental protection.⁴⁶ While the European Treaty provides that Member States have an automatic right to challenge Community measures⁴⁷ the rights of third parties are restricted as 'traditionally citizens' suits...have not been recognised in the European Community legal order.'⁴⁸ Article 230/EC allows third parties to make a challenge if the matter is 'of direct and individual concern.'⁴⁹ The European Court of Justice (ECJ) has, however, taken a restrictive interpretation of this, requiring the applicant to prove that their legal right is affected in a way that is different from all others. In an environmental context:

this has led to the perverse consequence that the wider and more extensive the environmental implications of a Community measure, the more difficult it is for any individual third party to challenge its legality directly before the ECJ.⁵⁰

Greenpeace and Others v European Commission (1998)⁵¹ concerned a challenge to the construction of two coal-fired power plants in the Canary Islands. The Court of

⁴⁴ Article 9(2), Aarhus Convention.

⁴⁵ Article 9(4).

⁴⁶ There has been some attempt by the EC to impose criminal penalties for certain intentional environmental activities. In *European Commission v Council* [2005] 3 CMLR 20 (C-176/03, European Court of Justice (Grand Chamber), 13 September 2005) the ECJ annulled the Council Framework Decision 2003/80 on the protection of the environment through criminal law following an argument as to the correct legal basis for such measures. The decision did, however, state that while criminal law and procedure were not part of the EC's competences, they can take measures relating to the criminal law if they are necessary to ensure measures of environmental protection are effective. See 'Case Comment: Legislation under Community Pillar can insist on Criminal Sanctions,' (2005), 174, *EU Focus*, pp.2-3.

⁴⁷ Macrory, R., 'Case Commentary: Case Highlights ECJ's Hard Line on Standing,' *The ENDS Report*, (2008), 403, p.62.

⁴⁸ Sands, P., 'Rethinking Environmental Rights – Climate Change, Conservation and the European Court of Justice,' (2008), 20(3), *Environmental Law and Management*, p.118.

⁴⁹ Article 230 Treaty Establishing the European Community (EC Treaty) (Nice Consolidated Version), Part 5, Title 1, Chapter 1, Section 4, (OJ C325, 24.12.2002, p.126).

⁵⁰ Macrory, 'Case Commentary: Case Highlights ECJ's Hard Line,' p.62.

⁵¹ *Stichting Greenpeace Council (Greenpeace International) and Others v The European Commission* [1998] 3 CMLR 1, (Case C-321/95 P, Judgment of the Court of 2 April 1998, ECR I 6151).

First Instance (CFI) said that none of the applicants had standing as they were not directly concerned, despite one of them living next to the plant. On appeal, this was upheld, saying they were ‘part of a general class, so not individually concerned.’⁵² This arguably has the effect of excluding everyone ‘because where the environment is concerned there will not be circumstances in which one group of individuals or NGOs could be said to be more individually affected.’⁵³ The case of *Região Autónoma dos Açores v Council of the European Union* [2008]⁵⁴ saw a challenge by the Azores Government against the EC Fisheries Regulation rejected by the ECJ because of insufficient standing demonstrating the ‘ECJ’s strict approach to standing requirements for parties who wish to directly challenge the legality of Community law and actions’.⁵⁵

The EC are also signatories to the Aarhus Convention⁵⁶ which creates the obligation to provide access to environmental justice. In *WWF-UK Ltd v Council of the European Union* (2008)⁵⁷ the WWF sought to challenge the decision on the allocation of cod stocks in the North Sea. The CFI said the case was inadmissible as the WWF had no standing and ‘the Aarhus Convention does not change the situation . . . because “any entitlements which [the WWF] may derive from the Aarhus Convention and [the implementing Regulation] are granted to it as a member of the public”’⁵⁸ giving them no individuality.

It was also argued in *Região Autónoma dos Açores v Council of the European Union* [2008] that a new approach to standing was required because of the Aarhus Convention. However, this argument fell on ‘deaf ears.’⁵⁹ The ECJ relied on Article 9(3) which, while granting a right to access, makes it conditional to ‘where [the

⁵² Sands, ‘Rethinking Environmental Rights,’ p.119.

⁵³ *Ibid.*

⁵⁴ *Região Autónoma dos Açores v Council of the European Union* [2008] 3 CMLR 30 (Case T-37/04 Court of First Instance, European Court of Justice, 1 July 2008).

⁵⁵ Macrory, ‘Case Commentary: Case Highlights ECJ’s Hard Line,’ p.62.

⁵⁶ The EC made a decision on the conclusion of the Aarhus Convention, adopted 17 February 2005, Decision 2005/370/EC approving the Aarhus Convention. The Convention has been implemented into EC law – Regulation EC No 1367/2006 (OJ L 264, 25.9.2006, p.13). The Aarhus Convention is also implemented through Directives e.g. Directive 2008/1/EC (IPPC) (OJ. L 24, 29.1.2008, p.8). It is expressly mentioned in the preamble (at (26)). See Europa, <http://ec.europa.eu/environment/aarhus/index.htm> and De Abreu Ferreira, S., ‘Case Comment: The Fundamental Right of Access to Environmental Information in the EC: A Critical Analysis of WWF-EPO v Council,’ (2007), 19(3), *Journal of Environmental Law*, pp.399-408.

⁵⁷ *WWF-UK Ltd v Council of the European Union* (2008), (Case T-91/07, Order of the Court of First Instance (Eighth Chamber), 2 June 2008).

⁵⁸ Sands, ‘Rethinking Environmental Rights,’ p.121.

⁵⁹ Macrory, ‘Case Commentary: Case Highlights ECJ’s Hard Line on Standing,’ p.62.

applicants] meet the criteria, if any, laid down in its national law.⁶⁰ As such the case noted that there is access to the ECJ providing the conditions of 'direct and individual concern'⁶¹ test are met. The court also expressly stated that for this to change Member States would have to amend the Treaty. However, they seem unwilling to do so with Article 264 of the Lisbon Treaty simply reiterating the 'direct and individual concern' test.⁶²

2 Strict Liability

Environmental protection in the UK relies heavily on strict liability offences⁶³ whereby the 'prosecution are relieved of the necessity of proving *mens rea* [the guilty mind] in relation to one or more elements of the *actus reus*.'⁶⁴ The archetypal strict liability environmental offence is section 85(1) Water Resources Act 1991 which makes it an offence to 'cause ...any poisonous, noxious or polluting matter or any waste matter to enter any controlled waters.'⁶⁵ In assessing the nature of liability under this section Lord Hoffman, in *Environment Agency v Empress Car Co. Ltd* [1999], stated:

It is immediately clear that the liability imposed by the subsection is strict: it does not require *mens rea* in the sense of intention or negligence. Strict liability is imposed in the interests of protecting controlled waters from pollution⁶⁶

The classic application of this was in *Alphacell Ltd v Woodward* [1972]⁶⁷ where a company manufacturing paper appealed against their conviction under section 2(1) Rivers (Prevention of Pollution) Act 1951.⁶⁸ The basis of the appeal was that there

⁶⁰ Article 9(3) The Aarhus Convention. However, the Aarhus Compliance Committee held that this provision could not be used to impose criteria so strict so as to effectively bar all or most challenges – see Macrory, 'Case Commentary: Case Highlights ECJ's Hard Line,' p.63.

⁶¹ Article 230 Treaty Establishing the European Community (EC Treaty) as amended by the Treaty of Amsterdam, Part 5, Title 1, Chapter 1, Section 4, (OJ C325, 24.12.2002, p.126).

⁶² Macrory, 'Case Commentary: Case Highlights ECJ's Hard Line,' p.63.

⁶³ Macrory, R., and Woods, M., *Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach*, (2003), Centre for Law and the Environment (UCL), www.ucl.ac.uk/laws/environment/civil-penalty/docs/ECPreport.pdf, p.9.

⁶⁴ Clarkson, C., et al., *Clarkson and Keating Criminal Law: Text and Materials*, (2007, Thomson) p.206.

⁶⁵ Section 85(1) Water Resources Act 1991 – This section also creates an offence of 'knowingly permits any poisonous, noxious or polluting matter or any waste matter to enter any controlled waters.' However, 'knowingly permits' requires knowledge.

⁶⁶ *Environment Agency (Formerly National Rivers Authority) v Empress Car Co. (Abertillery) Ltd*. [1999] 2 AC 22. at p.32

⁶⁷ *Alphacell Ltd v Woodward* [1972] AC 824.

⁶⁸ s.2(1) provides that 'a person commits an offence punishable under this section - (a) if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter.' s.2(1) Rivers (Prevention of Pollution) Act 1951 is the corresponding offence to that found in s.85(1) Water Resources Act 1991.

had been no knowledge or negligence on their part but the conviction was upheld and the House of Lords confirmed that the offence was one of strict liability.⁶⁹ In *R v Milford Haven Port Authority* [2000] it was said that Parliament creates offences of strict liability:

because it regards the doing or not doing of a particular thing as itself so undesirable as to merit the imposition of criminal punishment on anyone ...irrespective of that party's knowledge, state of mind, belief or intention. This involves a departure from the prevailing canons of the criminal law because of the importance which is attached to achieving the result which Parliament seeks to achieve.⁷⁰

Environmental offences, it is argued, attract strict liability because the danger they pose is 'so potentially devastating, so far-reaching and so costly to rectify'⁷¹ that criminal liability is imposed in the absence of blameworthiness to ensure that everything possible is done to prevent environmental harm.⁷² However, there is no clear relationship between strict liability and the seriousness of the offence as 'both triviality and gravity have been used as an argument in favour of strict liability.'⁷³ For trivial offences, strict liability is justified by the lack of stigma warranting no court time or expenditure being wasted in an attempt to prove fault.⁷⁴ Conversely, the seriousness of an offence also justifies strict liability as a prevention mechanism. Abbot has observed that environmental harm can be:

catastrophic, extend across geographical boundaries and potentially affect future generations, thereby making remediation ...difficult, costly and maybe even impossible, means criminal environment offences need to be defined in terms of the risks they create, not simply in terms of the immediate harm they cause⁷⁵

These consequences thus show the potential seriousness of environmental harm. Strict liability offences, therefore, arguably seek to deter environmental criminals and

⁶⁹ *Alphacell Ltd v Woodward* 824.

⁷⁰ *R v Milford Haven Port Authority (The Sea Empress)* [2000] Env.LR. 632 per Lord Bingham at p.644

⁷¹ *Ibid.*

⁷² In such instances merely taking 'reasonable steps' to prevent harm is not seen as enough, see Herring, J., *Criminal Law: Text, Cases and Materials*, (2008. 3rd edn. OUP) p.225.

⁷³ Benson, W., et al., 'The Effectiveness of Enforcement of Environmental Legislation,' DEFRA Report 7208/14420-0, September 2006, www.defra.gov.uk/environment/enforcement/pdf/envleg-enforce-wrcreport.pdf, Appendix B: Strict Liability and Environmental Offences, p.86.

⁷⁴ *Ibid.*

⁷⁵ Abbot, C., 'Friend or Foe? Strict Liability in English Environmental Licensing Regimes,' (2004), 16(2), *Environmental Law and Management* p.69.

reflect the polluter pays principle.⁷⁶ Strict liability is also seen as 'efficient'⁷⁷ with the relative ease of securing conviction being an immediate advantage. As has been judicially observed, if the prosecution had:

the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred...⁷⁸

The relative simplicity of proving strict liability offences has the potential to bolster compliance and act as a deterrent. Such offences also facilitate criminalising the behaviour of corporate offenders, where '*mens rea* offences pose a more conceptual challenge.'⁷⁹ In this sense, strict liability offences are 'efficient' as the evidence of an environmental breach is usually behind the company boundary, under their exclusive control, and not easily accessible to the regulator.⁸⁰

The 'one size fits all approach,'⁸¹ however, equates an unintentional breach with a deliberate act meaning even exemplary behaviour can result in criminal conviction, as in *CPC (UK) Ltd v NRA* [1995],⁸² because there is 'no necessary correspondence between a criminal conviction and any morally blameworthy conduct.'⁸³ It also arguably reduces the impact of the criminal law. If those who are not morally blameworthy are liable, the social stigma is weakened. For this reason many have argued it is inappropriate to punish defendants who lack *mens rea*⁸⁴ as:

'using the criminal law entails particular procedural safeguards and outcomes which can seem inappropriate and heavy handed where the harm caused is perhaps not truly 'criminal' in intent.'⁸⁵

⁷⁶ Bell and McGillivray, *Environmental Law*, p.260; 'the polluter should bear the expenses of carrying out ...pollution prevention and control measures...to ensure that the environment is in an acceptable state.' Set out in the 1974 OECD Recommendation on the Implementation of the Polluter Pays Principle (C(74) 223) referenced in *Environmental Principles and Concepts*, Organisation for Economic Co-Operation and Development, Paris 1995, www.oecd.org/dataoecd/18/18/39918312.pdf.

⁷⁷ de Prez, 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecution,' p.70.

⁷⁸ *Alphacell Ltd v Woodward* per Lord Salmon at p.848.

⁷⁹ Abbot, 'Friend or Foe? p.70.

⁸⁰ de Prez, 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecution,' p.70.

⁸¹ Macrory and Woods, *Environmental Civil Penalties*, p.6.

⁸² In *CPC (UK) Ltd v National Rivers Authority* [1995] Env.LR. 131 the factory operator's conviction was upheld on appeal despite the pollution incident being caused by a defective pipe which had been installed by a sub-contractor nine months before the company brought the factory. (See *CPC (UK) Ltd v National Rivers Authority* [1995] Env.LR. 131 at pp.131-133 and Bell and McGillivray, *Environmental Law*, p.610).

⁸³ Benson et al., 'The Effectiveness of Enforcement of Environmental Legislation,' p.90.

⁸⁴ Watson, M., 'Civil Fines for Environmental Crimes?' *Justice of the Peace*, (2005), 8, p.128.

⁸⁵ Macrory and Woods, *Environmental Civil Penalties*, p.6.

This is especially true for environmental offences, where prosecutions are meant to be a last resort. It is, therefore, suggested that those who are not blameworthy should be dealt with by alternative mechanisms; the criminal courts only being used for those who are blameworthy. Such prosecutions would fit into the rigid criminal law structure and could be dealt with by the norms of criminal enforcement. Strict liability does, however, allow environmental enforcement to be carried out against a 'backdrop of criminal law and the implied threat of invocation.'⁸⁶ Macrory has argued that:

'without the existence of criminal offences which are reasonably easy to prove, the regulator's power to advise and warn...would be seriously jeopardised.'⁸⁷

Thus such offences underpin environmental enforcement to ensure a sufficient threat of prosecution and to achieve compliance in a wider context. However, the implications, especially in criminalising behaviour that is not blameworthy, can be seen in the mitigating factors and defences advanced to avoid liability.

Defences

The severity of imposing liability where it is not substantiated with the relevant *mens rea* is mitigated as culpability is considered when deciding whether to prosecute and in sentencing,⁸⁸ despite it not being expressly required. The presence of fault is highly influential in enforcement bodies' decision to prosecute and has meant they are reluctant to prosecute difficult cases.⁸⁹ The public mindset of associating criminal conviction with blameworthiness also influences the decision to prosecute. However, if prosecutions are only brought when there is culpable behaviour, the underpinning ideals of strict liability are arguably being ignored. Their aim is to facilitate both a wider public interest goal and environmental protection, but this is being diminished by the enforcement agencies' belief in the need to adhere to the procedural structure of criminal enforcement and factor in the culpability of the defendant in order to legitimise their prosecution.

⁸⁶ Macrory, R., *Regulatory Justice: Sanctioning in the Post-Hampton World*, A Consultation Document, 2006, Annex D, para.D5, in Clarkson, *Clarkson and Keating Criminal Law*, p.222.

⁸⁷ *Ibid.*

⁸⁸ Abbot, 'Friend or Foe?' p.67.

⁸⁹ Macrory and Woods, *Environmental Civil Penalties*, p.4.

A number of statutory defences are also available including acting in accordance with consent⁹⁰ or in an emergency.⁹¹ Other defences include due diligence and having a reasonable excuse.⁹² In practice, however, these are construed very narrowly 'in order to protect the underlying aims of environmental legislation.'⁹³ This was illustrated in *Durham County Council v Peter Connors Industrial Services Ltd.* [1993]⁹⁴ where the court said reasonable care was not the same as due diligence, as this would negate the strictness of liability. As well as the availability of defences, it has also been observed that:

'strict liability acts as a cloak for many defendants, for as the prosecution is not required to prove 'fault' this leaves the defence counsel plenty of room to deny culpability in order to attract the sympathy of the bench.'⁹⁵

Defendants often try to invoke sympathy by claiming it was an accident or blaming a third party. In previous water pollution cases⁹⁶ many defendants were found not guilty due to acts of a third party. However, in overturning this line of authority, and returning to the strict *Alphacell Ltd v Woodward* stance, the House of Lords in *Environment Agency v Empress Car Co. Ltd* [1999] held that only 'extraordinary' occurrences would relieve a defendant of liability.⁹⁷

While there seems to be a shift away from allowing mitigation and defences, there is still 'routine trivialisation of environmental offences'⁹⁸ in the lower courts, through the lack of understanding of environmental issues. Such trivialisation is arguably 'most detrimental to the ideological role of the criminal prosecution'⁹⁹ and is seriously impeding efforts to protect the environment.

⁹⁰ For example, s.88(1) Water Resources Act 1991 creates a defence to the main water offence under s.85(1).

⁹¹ In *Express Ltd (t/a Express Dairies Distribution) v Environment Agency* [2003] Env.LR 29 it was held that the emergency defence applied where milk entered controlled waters following the blow out of a tyre. s.89(1)(a) Water Resources Act 1991 provides a defence 'in an emergency ...to avoid danger to life or health.'

⁹² Under s.33(7)(a) Environmental Protection Act 1990 it is a defence to the s.33(1)(a) offence if the person 'took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.'

⁹³ Bell and McGillivray, *Environmental Law*, p.263.

⁹⁴ *Durham County Council v Peter Connors Industrial Services Ltd.* [1993] Env.LR 197.

⁹⁵ de Prez, 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecution,' pp.67-68.

⁹⁶ *Ibid.*

⁹⁷ *Environment Agency (Formerly National Rivers Authority) v Empress Car Co. (Abertillery) Ltd.* [1999] 2 AC 22 (*Empress Car Co (Abertillery) Ltd v National Rivers Authority*) at p.22.

⁹⁸ de Prez, 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecution,' p.66.

⁹⁹ *Ibid.* p.72.

Social Stigma

Judicial attitudes to environmental matters reinforce the social view that environmental offences are not truly criminal and not deserving of condemnation.¹⁰⁰ In *Alphacell Ltd v Woodward* Lord Salmon supported the view that the strict liability offences under the Water Resources Act 1991 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.'¹⁰¹ This attitude reflects 'the paradox of strict liability' according to Benson: thus 'the law is seeking to impose criminal penalties for actions which, even the most senior judges have acknowledged, are not properly regarded as *criminal*.'¹⁰²

There has been a subsequent departure from Lord Salmon's comments, with some judges openly denying the 'non-criminal'¹⁰³ stance. However, more is needed to change attitudes than judges distancing themselves from previous comments: rather, a conscious move to demonstrate the application of criminal law in an environmental context in the manner it was intended it to be used. The weakening of the stigma attached to criminal convictions has also led to the distinction between criminal and civil law being blurred.¹⁰⁴ While the main justification for imposing criminal penalties for environmental offences is public protection, it is the public themselves, ably assisted by the judiciary, who are undermining environmental protection.

Alternatives

In response to the criticisms, suggestions have been advanced to change environmental enforcement practices. While it has been argued that it would be more difficult to secure a conviction in the absence of strict liability, many believe fault based liability would raise the status of environmental offences.¹⁰⁵ Macrory suggests that strict liability should be the basis for environmental offences. However, to address the lack of *mens rea*, he suggests that 'where there is no deliberate or reckless or repeated flouting of the law' a more appropriate course of action would be a Monetary Administrative Penalty. This would allow the regulator to impose a fixed

¹⁰⁰ Ibid. p.75.

¹⁰¹ [1972] AC 824 at p.848 based on a view set out in *Sherras v De Rutzen* [1895] 1 QB 918 per Wright J. at p.922

¹⁰² Benson, 'The Effectiveness of Enforcement of Environmental Legislation,' p.87.

¹⁰³ *R v Anglian Water Services Ltd* [2004] Env.LR. 10 per Scott Baker LJ at para.13: 'We would not categorise breaches of s.85(3) [Water Resources Act 1991] of the nature that occurred in this case as being of a non-criminal character, albeit the offence is one of strict liability.'

¹⁰⁴ Herring, *Criminal Law: Text, Cases and Materials*, p.226.

¹⁰⁵ Ibid. p.29

or variable monetary penalty in place of criminal conviction, similar to the 'hybrid' models used in Germany and the USA.¹⁰⁶

Alternatively, Benson suggest that environmental offences should depend on proof of negligence. In this sense negligence would mean 'an objective failure to observe the environmental protection standards and practices that would generally be regarded as reasonable.' A model for negligence based liability is found in the waste management offences in section 33(1) Environmental Protection Act 1990.¹⁰⁷ The prosecution must prove, beyond reasonable doubt, that the defendant deposited 'controlled waste, or knowingly cause[d] or knowingly permit[ed] controlled waste to be deposited in or on any land.'¹⁰⁸ However, under section 33(7), it is a defence, on a balance of probabilities, if the defendant 'took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.' This situation could be equally applied to other environmental offences.

While it has been suggested that this would increase the burden of proof, in practice, it would not cause significant problems. With the current discretionary enforcement policy requiring an 'evidential test and relevant public interest factors'¹⁰⁹ to be taken into account, proving negligence would not exclude many cases from being effectively prosecuted.¹¹⁰ Some jurisdictions, such as Germany and Austria, do not have a concept of strict liability¹¹¹ thereby suggesting that environmental protection could be set against a backdrop of fault based liability.

3 Sentencing

For the majority of environmental crimes the starting point for sentencing is usually a fine and for the most serious offences, a custodial sentence, although the latter are rarely imposed. It is also a constant theme of environmental crimes that the likelihood of being caught is slim and in the relatively few cases prosecuted, the sentences imposed are seldom satisfactory¹¹². Given the breadth of environmental offences and

¹⁰⁶ Macrory, *Regulatory Justice*, in *Clarkson and Keating Criminal Law*, pp.222,229.

¹⁰⁷ Benson, 'The Effectiveness of Enforcement of Environmental Legislation,' pp.29-30.

¹⁰⁸ s.33(1)(a).

¹⁰⁹ Malcolm, R., 'Prosecuting for Environmental Crime: Does Crime Pay?' (2002),14(5), *Environmental Law and Management* p.293.

¹¹⁰ See Benson, 'The Effectiveness of Enforcement of Environmental Legislation,' p.30.

¹¹¹ Macrory, R., 'Case Commentary: Criminal Liability for Environmental Offences Committed by Clubs,' *The ENDS Report*, (2008), October, Issue 405, p.51.

¹¹² House of Commons Environmental Audit Committee, *Corporate Environmental Crime*, Second Report of Session 2004-05, (Published 8 February 2005), p.18.

their unique nature, the restricted choice of substantive sentences is seen, by many, as a major barrier to effective environmental regulation.¹¹³

Fines

Given that 'for the vast majority of current environmental crimes, the only option open to a court [is] to fine,'¹¹⁴ suggests a need to consider the adequacy of their level. Benson argues that they are inadequate, leading to the view that environmental crime 'pays.' While this presumes that the motivation behind the offences is financial, this is not always the case. However, to the extent that such crimes are financially motivated, the fines imposed should reflect this and take into account any profit made by breaking the law.¹¹⁵ Despite this, the financial aspects of the defendant's crime 'form too little a part in the decision as to the size of the fine or sentence.'¹¹⁶ Even with an increased maximum sentence of £20,000 available in the magistrates' court, and some exceptional upper limits of £50,000 and £250,000,¹¹⁷ the fines imposed rarely exceed £5,000 and are often much less. Similarly, Crown Court fines can be unlimited, but rarely top £10,000.¹¹⁸ If the fines do not bear some correlation to the financial incentives and the offender is not required to pay substantially more than they have gained, there will no deterrent in the sentence imposed¹¹⁹.

The Proceeds of Crime Act 2002 allows the Crown Court to make an order to recover profit gained from criminal offences.¹²⁰ This can equally be applied to environmental offences although as over 90%¹²¹ of environmental cases are heard in the magistrates' court, this provision will not be available in the majority of cases. The problem with sentencing environmental crimes is that often the offence charged is just the 'tip of the iceberg'¹²² in relation to the criminal activity undertaken, but the law cannot deal with offences in a wider context. A typical example is where a defendant carries out an operation without the necessary licence and the fine imposed reflects

¹¹³ HC Environmental Audit Committee, *Environmental Crime and the Courts*, p.15.

¹¹⁴ *Ibid.* p.11.

¹¹⁵ Benson, 'The Effectiveness of Enforcement of Environmental Legislation,' p.34.

¹¹⁶ HC Environmental Audit Committee, *Environmental Crime and the Courts*, p.3.

¹¹⁷ Select Committee on Environmental Audit, Minutes of Evidence, Memorandum from the Home Office, February 2004, for House of Commons Environmental Audit Committee, *Environmental Crime and the Courts*, Sixth Report of Session 2003-04, (Published 12 May 2004), Ev.47.

¹¹⁸ Malcolm, 'Prosecuting for Environmental Crime: Does Crime Pay?' p.289.

¹¹⁹ SC Environmental Audit Committee, *Government Responses*, p.3.

¹²⁰ ss.6(1)-(8) Proceeds of Crime Act 2002.

¹²¹ DuPont, C. and Zakkow, P., *Trends in Environmental Sentencing in England and Wales*, (DEFRA, 2003), p.1.

¹²² Benson, 'The Effectiveness of Enforcement of Environmental Legislation,' p.35.

the cost of that licence for one year even though the offence may have been ongoing for many years.¹²³ This 'snapshot in time'¹²⁴ approach is not conducive to accurately reflecting the harm caused or the benefit gained.

In *Environment Agency v Milford Haven Port Authority (The Sea Empress)* the Court of Appeal reduced a fine of £4 million following the spillage of 72,000 tons of crude oil, damaging 38 Sites of Special Scientific Interest (SSSIs), to £750,000. The clean-up cost, however, was estimated at between £49 and £50 million.¹²⁵ The fine, therefore, went no way to reflecting the harm caused or the cost of rectifying it. The disparity between fines and the actual costs involved also arguably plays into the hands of unscrupulous businesses who view fine payments as a compliance option 'and even set aside funds for this purpose.'¹²⁶ Hampton gives the example of a waste company who failed to register for a waste disposal licence for two years and were fined £25,000, despite making a saving of £250,000. Removing a company's ability for economic gain from environmental crimes is essential to ensure a level playing field in business, yet, in the current system, a company is working to its economic advantage and is one step ahead of its competitors by breaking the law.¹²⁷ The use of fines for environmental offences favours the offender to the extent that they are almost detrimental to the environment. The fines do not act as a deterrent but rather encourage and promote non-compliance as the cheaper option. This is especially problematic given the fact that fines are the main sanctioning tool.

Custodial Sentences

Although fines make up the bulk of environmental sentences, they are by no means the only sentencing option available. As with other criminal offences, substantive environmental offences also carry the possibility of custodial sentences. The magistrates' court has the power to impose a custodial sentence for a maximum of 6 months for a single offence and 12 months in aggregate.¹²⁸ The Crown Court maximum is 2 years, although certain offences carry a higher maximum.¹²⁹

¹²³ Ibid. p.34.

¹²⁴ de Prez, 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions,' p.66.

¹²⁵ Environmental Law Foundation, World Wide Fund for Nature and Leigh, Day & Co Solicitors (co-produced), *Environmental Justice Report*, March 2004, <http://www.ukela.org/content/doclib/116.pdf>, p.80.

¹²⁶ *Corporate Environmental Crime*, p.20.

¹²⁷ Hampton, *Reducing Administrative Burdens*, pp.39-40.

¹²⁸ DuPont and Zakkow, *Trends in Environmental Sentencing in England and Wales*, p.1.

¹²⁹ HC Environmental Audit Committee, *Environmental Crime and the Courts*. A maximum custodial sentence of 5 years is available in the case of 'special' waste and for certain

The courts' approach to imposing custodial sentences was considered in *R v O'Brien and Enkel* [2000]. The defendants unlawfully disposed of 2,000 lorry tyres and, following conviction, they were sentenced to eight months imprisonment. They appealed on the grounds that this was inappropriate and the appeal was upheld on the basis that the offence did not warrant a custodial sentence as it did 'not pass the custody threshold.'¹³⁰ The Court of Appeal, in their judgment, set out the factors to be taken into account when imposing a custodial sentence. These include where the offences committed are

repeated and/or blatant and/or committed by companies and/or expose the public to hazardous substances, for example explosives, acids and so on and/or committed in a public location.¹³¹

This ensures that custodial sentences are imposed in only the most serious cases.

The defendant in *R v Tapscott* [2007] was convicted of three counts of depositing controlled waste, without a waste management licence.¹³² When imposing a sentence of 16 months imprisonment, the judge referred to the aggravating factors in the Sentencing Advisory Panel's advice on environmental crime and stated that a custodial sentence was appropriate given the 'the serious nature of these offences, aggravated as they were by the applicant's total disregard for the law and other people'.¹³³ The judge also used section 147 Powers of Criminal Courts (Sentencing) Act 2000¹³⁴ to disqualify the defendant from driving for two years. While this was reduced on appeal to one year's disqualification it illustrates that fines and custodial sentences are not the only available sentences, and in this instance, disqualification from driving may be a more practical means of preventing the defendant from reoffending.

In *R v Kelleher* [2008] the defendant appealed against his 14 month custodial sentence for conspiracy to deposit controlled waste contrary to section 33 Environmental Protection Act 1990 following, during an 18 month period, a 'wide

offences under the Control of Trade in Endangered Species (Enforcement) Regulations (COTES) 1997.

¹³⁰ *R v O'Brien and Enkel* [2000] Env.LR 653.

¹³¹ *Ibid* per Goldring J at p.655.

¹³² *R v John Tapscott* [2007] EWCA Crim 1787 per Judge Rogers at [1].

¹³³ *Ibid* at [12].

¹³⁴ Which allows the court to disqualify a person from driving where a vehicle has been used for the purposes of committing a crime if, under s.147(1)(a), the defendant has been convicted before the Crown Court of an offence punishable on indictment with imprisonment for a term of two years or more.

scale operation [to] unlawfully deposit controlled waste material.¹³⁵ His co-accused was sentenced to 22 months imprisonment, the maximum available at the time being 2 years.¹³⁶ At first instance the judge felt that imprisonment was necessary for what he described as 'such flagrant, eyes open wrongdoing.'¹³⁷ In considering the appeal the court noted there were very 'few sentencing examples available to Crown Court Judges who are called upon to sentence'¹³⁸ such cases, although they did make reference to *Tapscott and O'Brien and Enkel*.

The court stated that a 'custodial sentence may be appropriate if (as here) the breach or breaches concerned were deliberate, repeated, large scale, highly organised, financially motivated and highly profitable or combined any of these features.'¹³⁹ The appeal was, therefore, dismissed as it was a 'very serious case of its type.'¹⁴⁰

Despite the ability to impose custodial sentences, the courts generally only use them in exceptional circumstances and they account for, on average, 1.2% of environmental sentences imposed in England and Wales.¹⁴¹ The negligible use of custodial sentences focuses the attention back on other sentencing methods such as community sentences, which are also scarcely used, accounting for less than 10% of all sentences,¹⁴² or fines, which are not adequate in achieving the aims of environmental protection.

Sentencing Guidelines

Many have suggested that the solution to sentencing problems may be the availability of effective guidelines. With the vast majority of environmental offences heard in the lower courts, there is not enough authority in the decisions to create any meaningful precedent.¹⁴³ Sentences therefore vary greatly and lead to the inconsistent consideration of different factors. Despite this, the Court of Appeal has refused to issue guidance on environmental sentencing.

¹³⁵ *R v James Gerard Kelleher* [2008] EWCA Crim 3055 per Swift J at [3].

¹³⁶ *Ibid.* It was noted at [14] how the Clean Neighbourhoods and Environment Act 2005 has increased the maximum penalties for waste that is not 'special waste' to 5 years and an unlimited fine or both on indictment. However, the defendants fell under the provisions of the 1990 Act.

¹³⁷ *Ibid.* at [8].

¹³⁸ at [26].

¹³⁹ at [32].

¹⁴⁰ at [33].

¹⁴¹ DuPont and Zakkow, *Trends in Environmental Sentencing*, p.12.

¹⁴² Bell and McGillivray, *Environmental Law*, p.305.

¹⁴³ Lowther, J., et al., *Crime and Punishment in the Wildlife Trade*, a WWF/TRAFFIC Report, 8 May 2002, Regional Research Institute, University of Wolverhampton, p.28.

In 1999 the Sentencing Advisory Panel issued proposals to the Court of Appeal upon which sentencing guidelines for environmental offences could be framed. However, in *R v Milford Haven Port Authority* the Court of Appeal refused to produce formal guidelines deciding that each case should be decided on its own facts, saying 'we do not conclude that we can usefully do more than draw attention to the factors relevant to sentence.'¹⁴⁴ In coming to their decision, the court made reference to five cases, four of which involved health and safety offences that had resulted in many deaths, to give them assistance. They concluded that the cases turned

very much on their own facts and circumstances. None of them provides anything approaching an exact analogy. They do not in our judgment enable us to indicate an appropriate level of fine in such cases as the present.¹⁴⁵

The Court of Appeal, instead, had regard to the guidelines, they had themselves set, in *R v F. Howe & Son (Engineers) Ltd* [1999].¹⁴⁶ The opportunity to formalise environmental sentencing guidelines was missed. Instead, the Court of Appeal chose to borrow guidelines applicable to health and safety offences, where liability is not strict and the outcomes are often very different to environmental harm, which have a very limited scope in an environmental context.¹⁴⁷

R v Anglian Water Services Ltd [2004] concerned the discharge of pollutants into a river which resulted in a £200,000 fine being reduced to £60,000 on appeal. The Court of Appeal were invited by the Environment Agency to suggest a tariff for sentences, based on that adopted by the Agency for prosecutions. They declined and reaffirmed that each case should be decided on its own facts, as no two cases are the same.¹⁴⁸

In *R v Cemex Cement Ltd* [2008], again, the Court of Appeal reduced a fine imposed by the Crown Court. The company had been fined £400,000 for committing an offence contrary to reg.32(1)(b) Pollution Prevention and Control (England and Wales) Regulations 2000, which was reduced to £50,000.¹⁴⁹ It is suggested that such

¹⁴⁴ [2000] Env.LR. 632 per the LCJ at p.640

¹⁴⁵ Ibid. p.643.

¹⁴⁶ *R v F. Howe & Son (Engineers) Ltd* [1999] 2 CrAppR(S) 37.

¹⁴⁷ Parpworth, N., 'Environmental Offences: The Need for Sentencing Guidelines in the Crown Court,' (2008), 1, *Journal of Planning and Environmental Law*, p.28.

¹⁴⁸ *R v Anglian Water Services Ltd* [2004] Env.LR 10 per Scott Baker LJ at [27].

¹⁴⁹ *R v Cemex Cement Ltd* [2008] Env.LR 6 at p.11.

a significant reduction is of considerable concern either because the Court of Appeal are too lenient or more worryingly because the Crown Court cannot impose adequate sentences.¹⁵⁰ The gulf in opinion between the two as to appropriate sentences clearly suggests the need for guidance to remove the inconsistencies and uncertainties, which have no place in criminal law.

Despite the situation in the higher courts, there has been guidance issued for the magistrates' court. In 2001 the Magistrates' Association issued *Fining of Companies for Environmental and Health and Safety Offences*¹⁵¹ which the Court of Appeal in *Anglian Water Services Ltd* said contained 'helpful advice, which we endorse.'¹⁵² In 2003 they also issued *Costing the Earth: Guidance for Sentencers*¹⁵³ with the aim of assisting magistrates by ensuring they have the necessary tools to make the criminal justice system work effectively in sentencing environmental crimes.¹⁵⁴ However, while this guidance has been of some use, it does not cover all offences or apply to the Crown Court and so its effect is limited.

4 Alternatives and Reforms

Over-reliance on the criminal law is not without consequence according to commentators who have considered its procedural rigidity.¹⁵⁵ An alternative regulatory system may, however, bring environmental crimes into line with the objectives of environmental protection. Despite extensive criticism of the 'heavy reliance on criminal sanctions as a formal response to regulatory non-compliance',¹⁵⁶ regulatory systems do not have to depend on criminal sanctions to be effective¹⁵⁷. The Environment Agency already has at its disposal more draconian penalties¹⁵⁸ outside the criminal justice system. Environmental regulation largely operates on a licensing system, whereby a licence is needed to carry out certain, potentially harmful, environmental activities. This system is now governed largely by

¹⁵⁰ Parpworth, 'Environmental Offences: The Need for Sentencing Guidelines in the Crown Court,' p.28.

¹⁵¹ Magistrates Association, *Fining of Companies for Environmental and Health and Safety Offences*, (Published May 2001).

¹⁵² [2004] Env.LR 10 per Scott Baker LJ at [21].

¹⁵³ Environmental Law Foundation and the Magistrates Association, *Costing the Earth: Guidance for Sentencers*, (Published October 2003, revised edition). The Magistrates Association also published, in November 2002, guidelines for *Sentencing for Wildlife Trade and Conservation Offences*.

¹⁵⁴ *Ibid* p.7.

¹⁵⁵ *Ibid* p.4.

¹⁵⁶ Macrory, *Macrory Review- Regulatory Justice*, p.15.

¹⁵⁷ Watson, M., 'Environmental Offences: The Reality of Environmental Crime,' (2005), 7(3), *Environmental Law Review*, p.193.

¹⁵⁸ Watson, M., 'Civil Fines for Environmental Crimes?' p.129.

overarching rules,¹⁵⁹ set out in the Environmental Permitting (England and Wales) Regulations 2007,¹⁶⁰ which provide a standardised process for obtaining a licence and a common set of enforcement powers.¹⁶¹

The Environment Agency has the power to vary, suspend or revoke licences, the effect being to deprive businesses or individuals of the ability to continue their operations within the law.¹⁶² This is potentially a very powerful sanction, as while many companies see fines as 'little more than operational costs,' they are 'unlikely to regard the prospect of corporate incapacitation with equanimity.'¹⁶³ Administrative sanctions are at the top of the 'enforcement pyramid,'¹⁶⁴ being seen as more serious than criminal sentences, especially for companies, where the suspension or revocation of a licence is the most serious sanction available, seen as equivalent to a custodial sentence imposed on an individual. In practice, however, administrative powers of this nature are rarely used with only six waste management licences revoked between 1996 and 2001 despite hundreds of prosecutions every year.¹⁶⁵ This unwillingness is put down to the lengthy and costly appeals although this ultimately negates the deterrent they pose.

Civil Penalties

Civil penalties, as 'discretionary monetary sum[s] ...imposed flexibly under the civil law rather than the criminal law, in order to achieve deterrence and reparation,'¹⁶⁶ have also been suggested as an alternative. This would allow environmental enforcement without the 'moral "baggage" associated with criminal prosecutions.'¹⁶⁷ The use of civil penalties for environmental offences is a prevalent feature of many European countries, as well as Australia.¹⁶⁸ In Germany, civil penalties or 'Ordnungswidrigkeiten' handle minor offences as the '35,000 environmental offences

¹⁵⁹ It replaces Waste Management Licensing in Part II Environmental Protection Act 1990 and the Waste Management Licensing Regulations 1994 (SI 1994/1056), and the permit system in the Pollution Prevention and Control (England and Wales) Regulations 2000 (SI 2000/1973). It does not include water consents. See Bell and McGillivray p.478 and Update, *Environmental Law Review*, (2008), 10(2), p.155.

¹⁶⁰ Environmental Permitting (England and Wales) Regulations 2007 (SI 2007/3538). The Regulations come into force on 6 April 2008.

¹⁶¹ Update, *Environmental Law Review*, p.155.

¹⁶² Watson, 'Civil Fines for Environmental Crimes?' p.129.

¹⁶³ Watson, 'Environmental Offences: The Reality of Environmental Crime,' p.193.

¹⁶⁴ Bell and McGillivray, *Environmental Law*, p.304.

¹⁶⁵ Watson, 'Environmental Offences: The Reality of Environmental Crime,' p.193.

¹⁶⁶ Macrory and Woods, *Environmental Civil Penalties*, p.11.

¹⁶⁷ Watson, 'Civil Fines for Environmental Crimes?' p.129.

¹⁶⁸ HC Environmental Audit Committee, *Environmental Crime and the Courts*, p.22.

were apparently “clogging up” the system.¹⁶⁹ The main sanctions used are ‘Geldbuße,’ whereby the maximum penalty is €500,000¹⁷⁰ and are described as ‘the most coherent and comprehensive system of regulatory enforcement.’¹⁷¹ Australia, a common law jurisdiction, also uses civil penalties, carrying a maximum AUS\$550,000 for an individual and AUS\$5.5 million for companies.¹⁷²

The Environment Agency have suggested that civil penalties ‘would provide a useful additional tool for dealing with non-intentional and less serious offending’ although they would like to reserve the right to use criminal prosecutions when appropriate.¹⁷³ This would allow a fairer distinction to be made¹⁷⁴ between intentional offenders, who could still be prosecuted through the criminal law, and those who unintentionally commit an environmental crime, who, if appropriate, could receive a civil penalty. It is hoped that this ‘will recriminalize the criminal law, so that it’s used effectively as the ultimate sanction against real environmental criminals.’¹⁷⁵ This would allow environmental crimes to be dealt with in the appropriate manner as ‘what is paramount to tackling these crimes is what works and not any necessary recourse to the courts.’¹⁷⁶

Despite the advantages of civil penalties, to be effective the penalties imposed would need to be of significant severity to be effective. Given the low fines imposed, it is debatable whether the civil penalties would be significantly greater or used in a more robust and effective manner. Civil penalties are also, on the face of it, barely distinguishable from criminal fines, blurring the lines between two separate systems of law. Civil penalties may also necessitate a more thorough explanation of the damage caused, to ensure the penalty reflects this. Embedding civil jurisdiction into the enforcement regime of environmental crimes also appears to confirm the widely held perception that they are not real crimes, which will go no way to improving environmental protection.

¹⁶⁹ Watson, ‘Civil Fines for Environmental Crimes?’ p.129.

¹⁷⁰ Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement*, p.40.

¹⁷¹ Abbot, C., and Ogus, A., ‘Sanctions for Pollution: Do We Have the Right Regime?’ (2002), 14(3), *Journal of Environmental Law*, p.297.

¹⁷² Macrory and Woods, *Environmental Civil Penalties*, p.20.

¹⁷³ HC Environmental Audit Committee, *Environmental Crime and the Courts*, p.22.

¹⁷⁴ The Department for Environment, Food and Rural Affairs, Environmental Protection – Enforcement, www.defra.gov.uk/environment/enforcement/index.htm.

¹⁷⁵ Schoon, N., ‘Civil Sanctions for Offences Against Nature,’ *The ENDS Report*, (2008), October, Issue 405, p.35.

¹⁷⁶ HC Environmental Audit Committee, *Environmental Crime and the Courts*, p.22.

Directive 2004/35/EC on Environmental Liability¹⁷⁷ introduces civil liability to prevent and remedy environmental damage¹⁷⁸ based on the “polluter-pays” principle.¹⁷⁹ The emphasis is on remediation and any damages awarded have to be spent on environmental restoration.¹⁸⁰ However, environmental damage is narrowly defined¹⁸¹ and liability is only for future harm. The requirement that an operator must take ‘all practical steps’¹⁸² to limit or prevent further harm following environmental damage also shows that complete remediation is not required.¹⁸³ The Directive was meant to be transposed into national law by 30th April 2007.¹⁸⁴ However, it was not until the 1st March 2009, when the Environmental Damage (Prevention and Remediation) Regulations 2009¹⁸⁵ came into force, that the Directive was transposed into English law¹⁸⁶ (the delay resulting in a successful enforcement action brought by the Commission¹⁸⁷). As such the Directive’s success is not known but the delay suggests reluctance towards such measures.

The recently enacted Regulatory Enforcement and Sanctions Act 2008 does however introduce a new ‘punishment toolkit’ enabling regulators to impose a range of civil sanctions without using the criminal courts.¹⁸⁸ Regulators will be able to levy fines of up to £5,000 for minor breaches and will have discretion as to sentence imposed for more serious breaches, allowing them to not only punish but to also ensure future compliance and restitution of the environment.¹⁸⁹ They will also be able to stop companies from continuing operations which cause harm, or threaten to cause harm, to the environment. Under section 36, powers are conferred on a ‘Minister of the Crown’ to make orders providing for civil sanctions through the enactment of

¹⁷⁷ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage, Official Journal L143, 30/04/2004.

¹⁷⁸ Krämer, L., ‘Directive 2004/35/EC on Environmental Liability,’ (2004),16(1), *Environmental Law and Management*, p.5.

¹⁷⁹ Article 1, Directive 2004/35/EC.

¹⁸⁰ Bell and McGillivray, *Environmental Law*, p.364

¹⁸¹ Article 2(1) Directive 2004/35/EC defines environmental damage’ as (a) damage to protected species and natural habitats (b) water damage, as defined in Directive 2000/60/EC, and (c) land damage.

¹⁸² Article 6(1)(a) Directive 2004/35/EC.

¹⁸³ Krämer, ‘Directive 2004/35/EC on Environmental Liability,’ p.6.

¹⁸⁴ Article 19(1), Directive 2004/35/EC.

¹⁸⁵ SI 2009/153.

¹⁸⁶ Explanatory Note to the Environmental Damage (Prevention and Remediation) Regulations 2009 – ‘These Regulations implement Directive 2004/35/EC.

¹⁸⁷ Case C-417/08, *Commission v UK* (ECJ), 18 June 2009

¹⁸⁸ Schoon, ‘Civil Sanctions for Offences Against Nature,’ p.34.

¹⁸⁹ *Ibid* p.37.

secondary legislation, and these sanctions include fixed and variable monetary penalties, stop notices and enforcement undertakings.¹⁹⁰

The Department for Environment, Food and Rural Affairs (Defra) is also currently undertaking consultation into its 'proposals for fairer and better environmental enforcement.'¹⁹¹ The Draft Environmental Civil Sanctions Order 2010 seek to achieve 'more transparent, proportionate, consistent and effective environmental enforcement in England and Wales'¹⁹² through civil sanctions and the strengthening of the criminal sentencing powers for the worst cases, which would continue to be dealt with through the criminal courts. Civil powers are being introduced as a key tool of environmental enforcement although as it is unlikely that the full complement of powers will be available until 2011, the success of civil penalties in improving environmental compliance and protecting the environment remains to be seen.

Conclusion

The current enforcement of environmental crimes attempts to 'shoe-horn' environmental crime into the constraints and formalities of 'traditional' criminal enforcement, which has resulted in environmental enforcement becoming parasitic on a system and structure which is ultimately incompatible.¹⁹³ Environmental offences are looked upon with limited vision,¹⁹⁴ failing to consider the reasons for non-compliance, the damage caused and the wider impacts, both in terms of global effect and future harm.

Harm to the environment is in no sense labelled as a 'criminal' activity, both by the public, who see it as morally acceptable, and the judiciary, who have perpetuated its 'trivialisation'¹⁹⁵ as something not worth criminal protection. Environmental crimes are so 'demonstrably unlike'¹⁹⁶ other criminal offences that the current system is not flexible or imaginative enough to deal with the vast array of offences that fall under its

¹⁹⁰ The general right is conferred under section 36 Regulatory Enforcement and Sanctions Act 2008, with the more specific provisions detailed in ss. 39, 42, 46 and 50.

¹⁹¹ DEFRA, Joint consultation with the Welsh Assembly Government, Consultation on Proposals for Fairer and Better Environmental Enforcement, <http://www.defra.gov.uk/corporate/consult/env-enforcement/>.

¹⁹² Ibid.

¹⁹³ de Prez, P., 'An Environmental Court: The Case for Inclusion of a Criminal Law Jurisdiction,' 2000, 2(5), *Environmental Law and Management*, p.195.

¹⁹⁴ Woolf, H., 'Are the Judiciary Environmentally Myopic?' (1992), 1(4), *Journal of Environmental Law*, p.14.

¹⁹⁵ de Prez, P., 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecution,' p.65.

¹⁹⁶ Ibid.

scope or to understand the effect such offences have¹⁹⁷. With problems experienced at every stage, the current system is not as effective as it could be in protecting the environment and as environmental law continues to develop, even heavier reliance will be placed on an already overburdened system¹⁹⁸.

Environmental protection for the planet's future requires a new level of strong legal underpinning coupled with increased public and judicial condemnation. Until environmental harm is seen as an activity worthy of legal regulation and punishment, no system can properly facilitate the needs of the environment or afford it the protection it requires.

¹⁹⁷ Ibid.

¹⁹⁸ Woolf, 'Are the Judiciary Environmentally Myopic?' p.14.