ENVIRONMENTAL CRIME AND JUSTICE

ALSO

Albie Sachs and Andrew Coyle on prisoner voting
Interview with former Cabinet Secretary for Justice Kenny MacAskill MSP
ALTHOUGH not generally seen as a traditional area of crime and criminal justice, the impact of environmental harms is enormous and they are increasingly viewed as important areas for criminal justice intervention. As our contributions indicate they involve serious issues of health, safety and fraud. As is the case with many other forms of white collar and corporate crime however, their nature makes them less likely to be seen in the same light as assault, robbery or theft. They lack an immediate face to face confrontation between offender and victim, victims are often unaware of any crime being perpetrated, and it is very often difficult, particularly where large organisations are involved, to pinpoint a ‘guilty’ individual. The concept of victim extends from individual citizens to non-human animals and to the environment itself.

Offenders also differ from traditional images of ‘criminals’: while the concept of white collar and corporate crime has gained some recognition, environmental offenders are more likely to be dressed in Wellington boots, or indeed deerstalkers or oilskins. While there are, as in the growing illegal market in waste, more traditional villains involved along with a host of small farmers, fishermen and fly by night tippers, other serious offenders include some of our largest corporations, involved for example in oil, whisky, and defence (Croall, 2015). It is also worth noting that at the root of many environmental harms lies the perennial problem of prioritising profitability, efficiency and exploiting natural resources over the interests of safety, communities and the environment in general. As some of our contributors illustrate, it is costly to dispose of contaminated waste or to prevent pollution, and effective enforcement also requires resources which may be difficult to obtain in a period of austerity, particularly if it is seen as unnecessary ‘red tape’.

There is also need to incorporate, within notions of justice, issues of environmental justice and human rights. Access to justice and the rights of the public to participate in environmental decisions affecting their community are important elements. Environmental injustice is seen when considering the impact of environmental harms. While many may be relatively indiscriminate (all UK citizens for example risk contracting food poisoning, suffer from pollution and are endangered by breaches of nuclear safety), others have their most adverse effect in the poorest areas and globally citizens in less developed nations suffer when waste is exported or hazardous forms of production are sited there.

As environmental ‘harms’ are not always seen as ‘crimes’, the way in which we deal with them also differs from so called conventional crime. In general terms we refer to ‘regulation’ rather than ‘policing’, ‘sanctions’ rather than ‘punishment’, and the area known generally as regulatory crime is often characterised by a relatively low rate of prosecution or enforcement. Recent years have seen a preference for administrative sanctions, seen as more cost effective. When prosecuted, offenders tend to receive sentences widely seen as lenient, with even large fines for corporations being low, particularly in relation to a large company’s turnover.

Complex issues are involved in these discussions. On the one hand it could be argued that those responsible for causing harm should be ‘named and shamed’ and subject to the full force of the criminal law and that and that this can in turn act as an important deterrent and express disapproval of the activities in question. On the other hand, there are limits to how
far a company for example can be fined: this is the so called
deterrence trap whereby too high a fine can threaten prices,
employment and have a spillover effect on local communities.
Furthermore, there is a contradiction in arguing, as many
do, for a reduced use of imprisonment for conventional
offenders while at the same time advocating more custody for
corporate and environmental offenders. Rob Edwards makes
this point in relation to gamekeepers for example. There
have long been calls for seriously considering an alternative
range of sanctions including for example, restorative justice
or community payback, whereby polluters may be required to
undertake environmental projects.

Many of these themes are illustrated by our contributors.
Nigel South starts by outlining the importance of
environmental justice and different strategies involving civil
and criminal law required for regulating environmental harms,
the ultimate victim of which, he argues, is the planet itself. The
Aarhus Convention, the subject of the contribution by Mary
Church from Friends of the Earth, deals with requirements
to provide the public with information and opportunities
to participate in decision making about environmental
issues, and she stresses the importance of implementing
this in Scotland, through for example, the provision of an
Environmental Tribunal.

Other contributions deal with a range of harms and
aspects of the criminal justice response. In a wide ranging
interview based on his experience of reporting Environmental
matters, Rob Edwards talks of the many changes, largely
positive, in relation to regulation, and to the increased
transparency occasioned by the Freedom of Information
Act. There is however still much to be done and in particular
he highlights the importance of transparent and efficient
regulation in relation to the nuclear industry.

Rob Smith outlines the different ways in which farmers are
involved as environmental criminals, engaging in acts such
as fly tipping, illegal dumping and poisoning wildlife. This in
turn carries a message for rural policing. Sir Hugh Pennington,
on the basis of his extensive experience of dealing with, often
fatal, outbreaks of E.coli O157, outlines the significance of
HACCP (Hazard Analysis and Critical Control Point System)
and considers the role of public inquiries, stressing the
importance of implementing their recommendations. Andrew
Watterston examines the many public health issues and the
death toll associated with air, water, soil and food pollutants
many of which have an adverse effect on those living in areas
of multiple deprivation. He also explores regulatory issues
particularly arguing that there is a need to have sufficiently
resourced agencies and the ability to impose tough penalties
particularly for large companies. Ian Thompson from RSPB
explores the difficulties of estimating the extent of killings
of birds of prey and the difficulties of obtaining evidence for
convictions. He outlines two recent prosecutions one of which
uses the new laws in relation to vicarious liability. Problems
of obtaining evidence both in respect of the scale of the
problem and the prosecution of offenders are also seen in the
issue of ‘gear conflict’ in relation to fishing, well described by
Nick Underdown. This, which can have a devastating impact
on local communities, is rooted in the inshore fishing industry.

There are signs of a tougher approach, particularly towards
waste crime, an increasingly lucrative illegal business which
also involves organised crime. Gayle Howard from the Scottish
Environmental Protection Agency (SEPA) outlines SEPA’s
response to this including the work of its waste crime unit
and the creation of the Scottish Government’s Environmental
Crime Taskforce (ECTF). Environmental harms are global in
nature, and international initiatives are vital and she outlines
the international nature of SEPA’s work. In our international
contribution, Lieselot Bisschop describes this international trade
and outlines its damaging impact on third world populations.

It is important to recognise that the environment can also be
involved in rehabilitation and other initiatives for conventional
criminals, and Caroline Matheson outlines the work of Care
farming in Scotland. Hannah Gordon and her colleagues explore
a project in Tasmania utilising environmental projects for ex-
offenders.

Given the international nature of much environmental crime,
what is the potential contribution of a Scottish Government?
As Edwards points out there is scope, within the UK, for the
Scottish Government to take radical action and there are signs
of a toughening approach to some forms of environmental
crime. At the time of writing, we await the report of the
Scottish Government’s Wildlife Crime Penalties Review Group
and, in a speech to the first conference of the Environmental
Crime Taskforce in November 2014, the Lord Advocate made
several suggestions for strategies which could send a “huge
and powerful message” about the seriousness of this area of
criminal law. The creation of a specialist environmental court
was one strategy along with a specialised Sheriff or Judge for
environmental crime, bespoke penalties for polluters, clean-
up orders where the polluter is responsible for paying the cost
of restoration and publicity orders in which adverts could be
placed in newspapers upon conviction and sentence. He further
mooted orders preventing directors of companies convicted for
environmental crime becoming directors of companies doing
environmental work, and giving the courts power to withdraw
licenses for operating an environmental business where they
are breached. These suggestions were ‘thrown out there’ for
“consideration as to how to increase the risk of getting caught to
make environmental breaches really unattractive.” They are to
be discussed this year which underlines the timely nature of this
dition of Scottish Justice Matters.

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Robertson A (2014) Lord Advocate lends backing to environmental court.

Croall, H (2015) forthcoming ‘Crimes of the Powerful in Scotland’ in Croall, H.,
Mooney, G. and Munro, M Crime, Justice and Society in Scotland Routledge.

http://www.gov.scot/Topics/Environment/Wildlife-Habits/paw-scotland/about/groups/penalties-review