Literature Review of Sentencing of Environmental and Wildlife Crimes

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1. Introduction

This review has been commissioned by the Scottish Sentencing Council to summarise existing academic, legal and statistical work on the sentencing of environmental and wildlife offences. It will inform, support and form a part of the Council's preparatory work for developing sentencing guidelines for use by the Scottish criminal courts in the disposition of environmental and wildlife offences.

The authors have chosen to assess separately the prosecution and sentencing of environmental crimes, on the one hand, and wildlife crimes, on the other hand, in order to reflect properly the distinctive complexity of the latter offences. Accordingly, the environmental offences discussed are mainly those referred to the Crown Office and Procurator Fiscal Service (COPFS) by the Scottish Environment Protection Agency (SEPA) under the latter's waste regime[1], PPC regime[2] , water regime[3] and under section 110 of the Environment Act 1995.[4] However, the review will not consider other enforcement action taken by SEPA such as civil sanctions or action taken under the provisions of the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015.[5] The review will also not consider noise nuisance,[6] odour nuisance[7] or dog fouling.[8]

[1]The Environmental Protection Act 1990 and The Waste Management Licensing Regulations 1994.

[2] Pollution Prevention and Control (Scotland) Regulations 2012.

[3] The Water Environment (Controlled Activities) (Scotland) Regulations 2011.

[4] The Regulatory Reform (Scotland) Act 2014 extended the circumstances to which section 110(1) could apply, to include intentionally assaulting, hindering or obstructing a SEPA officer.

[5] The Regulatory Reform (Scotland) Act 2014 and the 2015 Order provided SEPA with new enforcement measures such as fixed monetary penalties and variable monetary penalties, with a right of appeal against final notices to the Scottish Land Court.

[6] As provided for e.g. in Part 5 of the Antisocial Behaviour etc. (Scotland) Act 2004, as a statutory nuisance in Part 3 of the Environmental Protection Act 1990 and under common law.

[7] As a statutory nuisance in Part 3 of the Environmental Protection Act 1990.

[8]The Dog Fouling (Scotland) Act 2003.

The wildlife offences discussed are those providing against cruelty to wild animals[9], poaching[10], trade in endangered species[11], those providing for animal conservation[12] and those providing for protection and conservation of habitats[13] The review will not consider offences providing against cruelty or neglect of 'protected animals'[14], essentially non-wild animals.

The review of the practice of prosecution and sentencing in Scotland with regard to environmental and wildlife offences, respectively, is structured in a specific order. In the first place, the emergence of these types of offences are discussed in a historical perspective, with reference also to the European and global regulatory context in which they appear. Secondly, the legal definition and classification of the covered offences are then discussed, against the background of a criminological assessment of the associated socio-environmental harms. Finally, empirical data regarding the actual practice of prosecution and sentencing of these offences are discussed against the backdrop of sociological data on the public perception, wherever these are available.

This methodology will then be used to devise an operational definition of environmental and wildlife crimes, as well as an overview over sentencing of environmental and wildlife crimes in Scotland, in subsequent sections of this review.

2. Environmental offences and environmental criminal law in historical perspective

2.1 Origins of environmental criminal law. A comparative perspective

In the broader European context, the emergence of environmental criminal law and, hence, that of the notion of environmental crime, is directly linked to the very appearance of environmental law. In other words, environmental crimes and environmental criminal law were initially by-products of environmental regulation as legislators relied primarily on criminal law for the enforcement of newly established standards of environmental protection.[15] This early and intimate connection between environmental and criminal law is not a uniquely European phenomenon, but existed equally in other Western jurisdictions, such as the United States.[16] Faure highlights two specific features of these early environmental crimes: they only occupied a marginal place in domestic criminal law systems; and, within European continental administrative law traditions with a structural reliance on criminal law for enforcement, environmental crimes were initially limited to penalising non-compliance with administrative obligations (regulatory crimes).[17]

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[9] The Wild Mammals (Protection) Act 1996, the Animal Health and Welfare (Scotland) Act 2006, the Protection of Wild Mammals (Scotland) Act 2002 and the Protection of Badgers Act 1992.

[10]The Deer (Scotland) Act 1996, the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, the Wildlife and Countryside Act 1981 and the Scotland Act 1998 (River Tweed) Order 2006.

[11] Control of Trade in Endangered Species (Enforcement) Regulations 1997.

[12] The Nature Conservation (Scotland) Act 2004, the Wildlife and Natural Environment (Scotland) Act 2011, the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats &c.) Regulations 1994.

[13]The Nature Conservation (Scotland) Act 2004, the Conservation (Natural Habitats &c.) Regulations 1994 and the Marine (Scotland) Act 2010.

[14] Defined by section 17 (1) of the Animal Health and Welfare (Scotland) Act 2006 as *inter alia* 'not living in a wild state'.

[15] M Faure, 'The Development of Environmental Criminal Law in the EU and Its Member States' (2017) 26 Review of European, Comparative & International Environmental Law 139; M Faure, 'The Evolution of Environmental Crime Law in Europe: A Comparative Analysis' in A Farmer, M Faure and GM Vagliasindi (eds), Environmental Crime in Europe (Hart 2017), 267.

[16] DM Uhlmann, 'Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme' (2009) 4 Utah Law Review 1223.

[17] Faure, 'The Development of Environmental Criminal Law in the EU and Its Member States' (n 15), at 140.

This structural reliance on criminal law in order to ensure the smooth operation of administrative law, however, came at a price. First of all, the instrumentality of criminal law for environmental law enforcement led to a piecemeal approach in the definition of specific environmental offences. As a consequence, these would typically appear scattered throughout different pieces of environmental legislation and lacked (at least originally) the systematicity needed for a cohesive enforcement strategy. Secondly, a further aspect worth mentioning is the uneasy position that novel environmental offences were to have within the traditional categories of criminal law. Due to the instrumentality of these offences for the enforcement of environmental standards, crucial definitional elements thereof are frequently contingent upon decisions of administrative authorities (e.g., authorisations that specify environmental standards in a concrete situation). This feature of so-called 'blank' environmental crimes is nevertheless at odds with the strict principle of legality in criminal law. [18] Thirdly, not entirely unrelated to the previous, environmental crimes have commonly been perceived as less serious offences across European jurisdictions. Notwithstanding different perspectives and cultural sensitivities in different countries, environmental crimes have been critically regarded by European prosecutors and judges as difficult to define, identify and use effectively.[19]

Despite the substantial differences of the common law system vis-à-vis the continental systems, the historical origins of environmental crimes and criminal law in the United Kingdom broadly coincide with the previous parameters.[20] While Scotland had no equivalent of the landmark Birmingham Corporation case,[21] taken on the basis of common law nuisance, its environmental legislation developed along the same lines as that in England and Wales, focussing on public health e.g. The Public Health (Scotland) Act 1867 well into the 20th century. Legislation such as the Clean Air Act 1957 and the statutes establishing River Purification Authorities in the 1950s was piecemeal, and enforced by a range of different agencies, principally local authorities. It was only until the 1990s, with the Environmental Protection Act 1990 and the establishment of SEPA in 1996 that environmental enforcement became institutionally centralised.

These legislative developments were also matched with parallel debates in academia. The outlined interactions between criminal law and environmental law enforcement attracted the attention not only from legal scholarship, but also from criminologists. Green criminology emerged as a strand of criminological scholarship over the decade of the 1990s, emphasising more generally 'the importance of engagement with the bio-physical and socio-economic consequences of various sources of threat and damage to the environment'.[22] It advocated for a move from environmental crimes towards environmental harms. Especially critical green criminology contributed to shifting the focus beyond state-based definitions of crime, towards more comprehensive understandings of social and environmental harms deriving from human activities, whether legal or illegal.[23] According to Faure, at least a number of European legislators drew conclusions from the aforementioned experiences.[24] Especially in the 1990s, environmental offences were being gathered in criminal codes or special

[18] ibid, at 141.

[19] M Faure and K Svatikova, 'Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe' (2012) 24 Journal of Environmental Law 253.

[20] E Fasoli, 'Environmental Criminal Law in the United Kingdom' in A Farmer, M Faure and GM Vagliasindi (eds), Environmental Crime in Europe (Hart 2017), 243.

[21] Attorney General v Birmingham Corporation (1858) 4 K&J 528.

[22] N South, 'Environmental Crimes and Harms: A Green Criminology Approach and Socio-Legal Challenges' in T Bergin and E Orlando (eds), *Forging a Socio-Legal Approach to Environmental Harms. Global Perspectives* (Routledge 2017), 20.

[23] R McKie and others, 'Green Criminology and the Prevention of Ecological Destruction' in T Bergin and E Orlando (eds), Forging a Socio-Legal Approach to Environmental Harms. Global Perspectives (Routledge 2017), 38.

[24] Faure, 'The Development of Environmental Criminal Law in the EU and Its Member States' (n 15), at 141-3.

statutes. In addition to regulatory crimes (*mala prohibita*), these new instruments would feature at least some offences giving rise to criminal liability when specific thresholds of environmental harm were reached (*mala in se*), even in the absence of specific administrative obligations.[25] Arguably, environmental offences as *mala in se* have always had a basis in common law in the UK.[26] Moreover, a partial attempt to systematise regulatory environmental offences was made in the Environmental Protection Act 1990 and the Water Resources Act 1991.[27]

At the same time, managerial approaches[28] and law and economics approaches[29] developed within legal scholarship in order to cope with pervasive enforcement deficits of environmental law. These approaches were advocating for a smarter, more nuanced, incremental and effective compliance and enforcement strategy for environmental law, in which criminal law and environmental crimes were to have a much more limited, yet crucial, role as sanctions of last resort.[30] The insights gained from these approaches contributed to a new 'toolbox approach' for environmental law enforcement in many European countries.[31] In the UK, this approach was most prominently implemented in England and Wales through the Regulatory Enforcement and Sanctions Act (2008) and, more recently, through the Regulatory Reform (Scotland) Act 2014 in Scotland.

2.2 The transnational and European dimension of environmental criminal law

This succinct historical overview of the origins of environmental criminal law and associated scholarly debates would not be complete without acknowledging the impact of increasingly complex networked and organised structures of transnational criminality that have brought about an increased trend towards the criminalisation of global enforcement strategies associated to key international treaties regarding environmental protection.[32] Multilateral environmental agreements (MEA) facing pervasive compliance challenges through emerging black markets in environmentally-sensitive commodities have adopted a strategy of coordination and cooperation to increase their respective effectiveness.[33] This process has led to the gradual criminalization of illegal trade and the emergence of the notion of transnational environmental crime.[34] The influence of transnational environmental enforcement networks[35] in this drive towards criminal law has been particularly relevant in the context of the ozone

[25] ibid, at 142.

[26] Supra n 21.

[27] Fasoli (n 20) 244.

[28] A Chayes and A Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Harvard UP 1995).

[29] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992).

[30] R Macrory, 'Regulatory Justice. Making Sanctions Effective.' (2006).

[31] G Pink and M Marshall, 'Sanction Mapping: A Tool for Fine-Tuning Environmental Regulatory Intervention Strategies' in M de Bree and H Ruessink (eds), Innovating Environmental Compliance Assurance (INECE 2015), 85.

[32] Lorraine Elliott, 'Criminal Networks and Illicit Chains of Custody in Transnational Environmental Crime' in Lorraine Elliott and William H Schaedla (eds), *Handbook of Transnational Environmental Crime* (Edward Elgar 2016).

[33] A Cardesa-Salzmann, 'Multilateral Environmental Agreements and Illegality' in Lorraine Elliott and William H Schaedla (eds), Handbook of Transnational Environmental Crime (Edward Elgar 2016).

[34] L Elliott, 'Fighting Transnational Environmental Crime' (2012) 66 Journal of International Affairs 87; L Elliott, 'Cooperation on Transnational Environmental Crime: Institutional Complexity Matters' (2017) 26 Review of European, Comparative & International Environmental Law 107.

[35] G Pink, 'Environmental Enforcement Networks: Theory, Practice and Potential' in M Faure, P De Smet and A Stas (eds), Environmental Enforcement Networks. Concepts, Implementation and Effectiveness (Edward Elgar 2015) 13.

regime.[36] However, their ascendancy has also intensified the degree of the criminal law and justice response to illegal shipments of waste[37] and, above all, illegal wildlife traffic. [38]

In Europe, the first attempt for a coordinated approach towards common standards for common approaches and standards for environmental protection through criminal law were adopted under the aegis of the Council of Europe,[39] with the signature of the 1998 Convention on the Protection of Environment through Criminal Law.[40] The United Kingdom, however, was not among the signatory countries. Moreover, the Convention was eventually overshadowed by the approximation of environmental criminal law within the institutional setting of the EU and failed to gather the required ratifications for its entry into force.[41]

Indeed, regulatory disparity between Member States regarding environmental crimes and the increased international pressure to address transnational environmental criminality triggered EU legislative action. After the Council Framework Decision 2003/80/JHA,[42] which was eventually annulled by the Court of Justice of the European Union,[43] the European Parliament and the Council enacted the 2008 Environmental Crime Directive (ECD).[44] For the purpose of this literature review, two significant aspects of the ECD should be kept in mind:

1) The ECD approximates the laws of the Member States regarding the typical elements of specific environmental offences, but leaves aside the determination of the type and level of associated criminal penalties. It merely states that Member States shall adopt 'effective, proportionate and dissuasive criminal penalties.'[45] This regulatory approach was the result of the CJEU's rulings in the dispute between the Council and the European Commission regarding the legal basis and the extent of the EU's competence in the field of criminal law. At the time, the Court held that the EU lacked the powers to do so.[46] While the latest amendments of the EU treaties provides in principle this kind of competence, no steps have been taken so far in order to harmonise criminal sanctions in the area of environmental offences. [47]

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[36] N Liu, V Somboon and C Middleton, 'Illegal Trade in Ozone Depleting Substances' in L Elliott and W Schaedla (eds), *Handbook of Transnational Environmental Crime* (Edward Elgar 2016); E Clark, 'The Montreal Protocol and OzonAction Networks' in L Elliott and W Schaedla (eds), *Handbook of Transnational Environmental Crime* (Edward Elgar 2016).

[37] L Bisschop, 'Illegal Trade in Hazardous Waste' in L Elliott and W Schaedla (eds), *Handbook of Transnational Environmental Crime* (Edward Elgar 2016).

[38] Rosaleen Duffy, 'The Illegal Wildlife Trade in Global Perspective' in L Elliott and WH Schaedla (eds), *Handbook of Transnational Environmental Crime* (Edward Elgar 2016).

[39] See e.g. Council of Europe, Resolution on the contribution of criminal law to the protection of the environment, CM/Res (77) 28 (Adopted by the Committee of Ministers on 28 September 1977, at the 275th meeting of the Ministers' Deputies).

[40] Convention on the Protection of Environment through Criminal Law (adopted on 4 November 1998, not yet in force) ETS No. 172.

[41] Grazia Maria Vagliasindi, 'The EU Environmental Crime Directive' in Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi (eds), *Environmental Crime in Europe* (Hart 2017) 36.

[42] Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law [2003] OJ L29/55.

[43] CJEU, C-176/03, Commission v Council, [2005] ECLI:EU:C:2005:542.

[44] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L328/28. Hereinafter, ECD.

[45] Art. 5 ECD.

[46] CJEU, C-176/03 *Commission v Council* [2005] ECLI:EU:C:2005:542. CJEU (Grand Chamber), C-440/05 *Commission v Council* [2007] ECLI:EU:C:2007:625.

[47] Art 83 TFEU. See in this regard Giovanni Grasso, 'EU Harmonisation Competences in Criminal Matters and Environmental Crime' in Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi (eds), *Environmental Crime*

2) In view of the UK´s forthcoming withdrawal from the EU will indeed lose its current significance, in terms of regulatory stability and –most importantly – in terms of the hard enforcement edge provided by EU law.[48] Nevertheless, even under the EU (Withdrawal) Act 2018, the ECD will arguably keep some residual relevance, as it has shaped current environmental and wildlife offences in UK legislation and provides benchmarks for the coordinated implementation and compliance with international obligations that the UK has undertaken as Party to several MEAs for combating transnational environmental crime. These international commitments will remain after Brexit.[49]

3. Typology of environmental offences

Environmental criminal law in the UK and, more specifically, in Scotland, is piecemeal and scattered in different statutes, with the ECD providing a minimum common denominator regarding environmental offences. While commonly classified according to sectoral (e.g. waste, water, air pollution offences) or geographical criteria (purely domestic vis-à-vis transnational environmental crimes),[50] environmental crimes remain difficult to typify. In this section we will take the ECD's provisions as a starting point, in order to map out and classify environmental offences in UK and Scottish Law against the background of a criminological assessment of the associated socio-environmental harms. This classification will pave the way for a discussion of the prosecution and sentencing fo the tifferent types of offences in successive sections.

3.1 Environmental offences in the ECD

Under the ECD,[51] environmental offences require an unlawful conduct.[52] This requirement thus precludes purely harm-based offences that would criminalise conducts causing socio-environmental harms regarless of their lawfulness or unlawfulness. Environmental offences further require to have been 'committed intentionally or with at least serious negligence.'[53] Inciting, aiding and abetting the intentional conduct is also to be considered a criminal offence.[54] The minimum requirement of serious negligence seeks to enhance the last resort character of the criminal law response in environmental law enforcement.

Further, article 3 ECD delineates the environmental offences. In so doing, this provision discriminates between a majority of harm-based or concrete endangerment offences and abstract endangerment or purely regulatory offences. As Vagliasindi points out, transnational environmental crimes, i.e., illegal shipments of waste,[55] illegal trade in endangered species[56] and the illegal production

in Europe (Hart 2017); Ludwig Krämer, 'The EU and the Protection of the Environment through Criminal Law' in Tiffany Bergin and Emanuela Orlando (eds), *Forging a Socio-Legal Approach to Environmental Harms. Global Perspectives* (Routledge 2017) 60.

[48] A Cardesa-Salzmann and others, 'The Implications of Brexit for Environmental Law in Scotland' (2016) 3–4.

[49] ibid 7.

[50] Carole Gibbs and Rachel Boratto, *Environmental Crime*, vol 1 (Oxford University Press 2017) 10.

[51] Art 3 ECD.

[52] Art 2(a) ECD defines the meaning of 'unlawful' for the purpose of the directive, which is in essence linked to the infringement of EU environmental legislation or Member State implementing legislative and/or regulatory measures. On the intrinsic shortcomings of this definition and the issues it creates from the perspective of the legality principle, see Krämer (n 47) 61.

[53] Art 3 ECD.

[54] Art 4 ECD.

[55] Art 3(c) ECD.

[56] Art 3(g) ECD. This provision, however, gives leeway in cases 'where the conduct concerns a negligible quantity of … specimens [of protected wild fauna or flora species] and has a negligible impact on the conservation status of the species.'

production, importation, exportation and placing on the market or use of ozone-depleting substances,[57] clearly belong to this latter category.[58] All other offences, in contrast, require the causation (or likelihood thereof) of death or serious injury to persons, or substantial environmental damage. These are defined in article 3 ECD as follows:

> (a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
>
> (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; […]
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> (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
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> (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
>
> (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
>
> (h) any conduct which causes the significant deterioration of a habitat within a protected site;

3.2 Environmental offences in UK and Scottish Law

Overall, the UK has not only fully transposed the ECD into its domestic legal order, but has also gone significantly beyond the requirements of the directive.[59] Environmental offences are nearly always strict liability offences i.e. there is no need for the prosecution to prove *mens rea* or negligence and the accused can often be convicted in circumstances where they are not, in the normal sense of the word, blameworthy.[60] Strict liability is applicable only to statutory offences and is usually applicable in circumstances where the offence is one which society particularly wants to deter and wants to be able to prosecute easily.[61] Strict liability is, however, contrary to basic liberal Rule of Law principles which suggest that a person should only be criminally guilty of an act for which they are responsible,

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[57] Art. 3(i) ECD.

[58] Vagliasindi (n 41) 48.

[59] Fasoli (n 20) 248. Relying also on *Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States, National Report for the United Kingdom* (Ares(2015)5176917–18.11.2015).

[60] However, blameworthiness or lack of it in respect of e.g. general recklessness or negligence, seeking to profit from the offence or immediate remediation of harm may be a factor to be considered both by SEPA and COPFS when exercising their discretion whether or not to prosecute, or by the court when determining sentence when it can act as either a mitigating or aggravating factor. See Neil Parpworth, Katharine Thompson and Brian Jones, 'Environmental Offences: Utilising Civil Penalties' [2005] Journal of Planning & Environment Law 560.

[61] For example, the offence of carrying offensive weapons or bladed/pointed articles in public under ss47 and 49 of the Criminal Law (Consolidation) (Scotland) Act 1995.

in the sense of having intended to carry out the act.[62] However, proponents of the doctrine, as well as emphasising the 'crime control' [63] benefits, would argue that such injustice is negligible, given that, in their view[64], most strict liability offences are regulatory in nature, less serious than common law crimes, attracting less social disapproval and only wrong because a statute has deemed them to be so.[65] This, in turn, has prompted observers over the years to blame this implied status of environmental offences (at least in part) for the way, in their view, that these offences are rationalised, minimised and rendered somehow 'less serious' than other offences dealt with by the criminal justice system, leading to inadequate sentences. [66]

The doctrine, however, is well established in environmental law. The leading English case, Alphacell Ltd v Woodward[67] was followed in Scotland by Lockhart v National Coal Board[68], which held that

> (1) the prosecution must prove simply that the accused carried out an active operation, the natural consequence of which is that pollution occurred
>
> (2) negligence, *mens rea*, or knowledge on the part of the accused need not be established; and
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> (3) in terms of causation, natural forces, the act of a third party or an act of God, may create factual conditions whereby the accused will not be held to have 'caused' the event.

That last point was narrowed somewhat in the English case of Empress Car Company (Abertillery) Ltd v National Rivers Authority[69] when it was held that the defendant had caused pollution when diesel fuel entered controlled waters[70] because an unidentified third party had opened an outlet tap which, crucially, could not be locked and the oil had breached a bund which, again significantly, had been rendered ineffective by the defendant. The opening of the tap was not regarded as a *novus actus interveniens*[71] because the defendant had created the conditions under which a spill could happen and the action of the third party was not an extraordinary one, which had it been so, would have broken the chain of causation and the defendant would not have caused the pollution.[72]

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[62] See Sweet v Parsley [1970] AC 132, which led to subsequent drug laws including a *mens rea* component.

[63] Strict liability is a feature of a legal system under the influence of a 'crime control' model, as opposed to its opposite, a 'due process' model as propounded by Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113 University of Pennsylvania Law Review 1, 9–13. Most would agree that all liberal democratic legal systems exhibit characteristics of both models.

[64] Though this is contestable; driving while under the influence of alcohol is a strict liability offence while socially unacceptable, though this may well be due to changes in society's moral outlook, which strict liability arguably played a part in altering.

[65] Drawing on the traditional division of criminal activity into *mala in se* (actions universally regarded as morally wrong) and *mala prohibita* (actions deemed wrong only by positive, human-made, law and then only for regulatory purposes). See Pamela R Ferguson and Claire McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd ed, Edinburgh University Press 2014) 450–468.

[66] Julie Adshead, 'Doing Justice to the Environment' (2013) 77 The Journal of Criminal Law 215; P De Prez, 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions' (2000) 12 Journal of Environmental Law 65; Parpworth, Thompson and Jones (n 60).

[67] [1972] AC 824.

[68] 1981 SCCR 9 at 15.

[69] [1998] Env LR 396, HL.

[70] Contrary to the Water Resources Act 1991 s85(1).

[71] Literally, 'a new, intervening act' which breaks the causal link between the accused's initial act and the final consequence.

[72] While Empress Car Company would be persuasive on a Scottish court, it may not be binding.

In R. v Milford Haven Port Authority (The Sea Empress) [73], Lord Bingham laid out the rationale of strict liability as follows:

> Parliament creates an offence 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 who does or does not do that thing 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.[74]

Absolute strict liability environmental offences[75] are, however, rare and most offences ameliorate the potential unfairness of strict liability by providing statutory defences.[76] Despite such defences *prima facie* transferring a persuasive burden of proof to the accused, this is often removed or 'read down' either by the application of case law or statute.[77] However, the defences are construed narrowly to avoid negating the very principle of strict liability itself.[78] [79] Despite the absence of fault being irrelevant to establishing whether an offence has been committed, it is however relevant at the sentencing stage,[80] and is regularly pled in mitigation.[81]

In the following, a brief overview of the main environmental offences will be provided, as defined in UK and Scottish law.

3.2.1 Waste

In respect of waste legislation, one of the principal provisions is s33 of the EPA 1990 which prohibits the disposal of controlled waste in any way not permitted by the Act. Section 33 (1) provides that a person shall not:

> (a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence;
>
> (b) treat, keep or dispose of controlled waste, or knowingly cause or knowingly permit controlled waste to be treated, kept or disposed of—
>
> (i) in or on any land, or
>
> (ii) by means of any mobile plant, except under and in accordance with a waste management licence;

[73] R. v Milford Haven Port Authority (The Sea Empress) [2000] Env. L.R. 632.

[74] Ibid, at 644.

[75] For which there are no defences.

[76] For example, by the accused proving they had exercised reasonable precautions and due diligence to avoid committing the offence, as in s33 (7) of the EPA 1990.

[77] R v Lambert [2001] UKHL 37, Criminal Procedure (Scotland) Act 1995, Schedule 3, para 16.

[78] See Durham County Council v Peter O'Connor Industrial Services [1993] Env LR 197 and, less narrowly, Express Ltd (t/a Express Dairies Distribution) v Environment Agency [2003] Env LR 29.

[79] Stuart Bell and others, *Environmental Law* (9th edn, OUP 2017) 275.

[80] Sentencing Council, 'Environmental Offences Guideline. Consultation' (2013); Scottish Environment Protection Agency, 'Consultation on Determining the Amount of Variable Monetary Penalty' (2016).

[81] De Prez (n 66).

(c) keep or manage controlled waste in a manner likely to cause pollution of the environment or harm to human health.

A person who contravenes subsection (1) or any condition of a waste management licence commits an offence under s33 (6).

It shall be a defence under s33 (7) for a person charged with the offence to prove (a) that he had exercised reasonable precautions and due diligence to avoid committing the offence; or (b) that he had acted under his employer's instructions and neither knew nor had reason to suppose that what he did was an offence; or (c) that his action was taken in an emergency to avoid danger to human health and he had taken all reasonably practicable steps for minimising pollution of the environment and harm to human health and that SEPA was subsequently informed as soon as reasonably practicable

3.2.2 Water

The over-arching legislation regulating water pollution in Scotland is the Water Framework Directive of 2000[82] which was transposed into Scots law by Part 1 of the Water Environment and Water Services (Scotland) Act 2003. In turn, The Water Environment (Controlled Activities) (Scotland) Regulations 2011 were made under the 2003 Act[83] and apply amongst others to all activities (controlled activities[84]) likely to pollute the water environment or groundwater and any other activity which, directly or indirectly, has or is likely to have a significant adverse effect on the water environment[85].

However, controlled activities can be authorised by SEPA and can be carried out if in accordance with such authorisation[86], of which there are three types. At the least onerous end of the scale is an authorisation under the Binding Rules, which is deemed to be given if the activity is carried out in accordance with Regulation 6 (1) and Schedule 3 of the 2011 Regulations. A more onerous authorisation is Registration of a controlled activity, which SEPA can tailor by imposing conditions on the registration and the most onerous is Water Use Licensing, which can again be tailored by the imposition of conditions on the licence.

Under regulation 44 (1) it is an offence *inter alia* for a person to:

(a) contravene regulation 4;

(b) fail to comply with or contravene a general binding rule;

(c) fail to comply with or contravene a registration (including any condition imposed);

(d) fail to comply with or contravene a water use licence (including any condition imposed)

It is also an offence to fail to comply with an enforcement notice[87] and there are several other offences in connection *inter alia* with obstruction of SEPA officers and the making of false representations. If

[82] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

[83] Under sections 20 and 36(2) and (3) of the Water Environment and Water Services (Scotland) Act 2003.

[84] The Water Environment (Controlled Activities) (Scotland) Regulations 2011, regulation 2 (1).

[85] Ibid, regulation 3 (1).

[86] Ibid, regulation 4.

[87] Ibid, regulation 44 (1) (j).

an offence is committed by a body corporate[88] and can be attributed to any director, manager, member or partner of that body, that person is also guilty of that offence.[89]

There are defences available to the principal offences[90] under Regulation 44 if they are as a result of or followed by:

> (a)…
>
> > (i) an accident which could not reasonably have been foreseen;
> >
> > (ii) natural causes or force majeure which are exceptional or could not reasonably have been foreseen; or
> >
> > (iii) an act or omission…. that is reasonably necessary to protect people, property or the environment from imminent risk of serious harm;
>
> (b) all practicable steps are taken to prevent deterioration of the water environment
>
> (c) all practicable steps are taken as soon as is reasonably practicable to restore the water environment to its condition prior to the contravention; and
>
> (d) particulars of the contravention are furnished to SEPA as soon as practicable after it occurs.

3.2.3 Integrated Pollution Prevention and Control

The third major framework for the control of environmental damage is the Integrated Pollution Prevention and Control regime, also administered by SEPA. The COPA 1974 and the EPA 1990 represented the first attempts to take an integrated approach to often complex environmental threats. The EPA identified "prescribed processes", almost all industrial processes such as *inter alia* oil refining, cement production, chemical production and metal working, which presented complex regulatory challenges. The current regime is based on the Pollution Prevention and Control Act 1999, and the much more detailed Pollution Prevention and Control (Scotland) Regulations 2012, which also implement the Industrial Emissions Directive of 2010.[91] Any person who operates an installation covered by the Regulations is authorised to do so by a permit granted by SEPA under regulation 11 of the Regulations. The conditions attached to such permits are the main way SEPA minimises the effect of the installation on the environment, along with its power to serve enforcement, revocation and suspension notices on the permit holder.[92]

Under regulation 67 it is an offence *inter alia* for a person:

> (a) to contravene regulation 11,
>
> (b) to fail to comply with or to contravene a condition of a permit,
>
> (c) to fail to comply with regulation 45(1),

[88] Ibid, regulation 45.

[89] Ibid, regulation 45.

[90] Offences in 44 (1), (a)-(d), (j) and (o).

[91] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L 334/17.

[92] Francis McManus, *Environmental Law in Scotland: An Introduction and Guide* (Edinburgh University Press 2016) 248–9.

(d) to fail to comply with the requirements of

(i) an enforcement notice,

(ii) a suspension notice, or

(iii) a closure notice under regulation 18(1) of the Landfill Regulations

Regulation 67 provides for several other offences in connection *inter alia* with the making of false representations. If an offence is committed by a body corporate and can be attributed to any director, manager, member or partner of that body, that person is also guilty of that offence.[93]

3.2.4 Regulatory Reform Scotland Act 2014 s40

Under this legislation it is an offence for a person to act, or permit another person to act, in a way that causes or is likely to cause significant environmental harm[94] Environmental harm is 'significant' if it has or may have serious adverse effects, whether locally, nationally or on a wider scale, or it is caused or may be caused to an area designated in an order by the Scottish Ministers. An offence is committed whether or not the person intended the act to cause, or be likely to cause, significant environmental harm, or knew that, or was reckless or careless as to whether, the act would cause or be likely to cause such harm. It is a defence to show that the act in question was necessary in order to avoid, prevent or reduce an imminent risk of serious adverse effects on human health, provided that the person took all such steps as were reasonably practicable in the circumstances to minimise any environmental harm, and particulars about the act were given to SEPA as soon as practicable after the act. It is also a defence to show that the act was authorised by or in accordance with regulations relating to protecting and improving the environment or another enactment specified by order.

4. Prosecution and sentencing of environmental crimes

This section turns towards the prosecution and sentencing of environmental crimes. It starts with a brief overview of the relevant legal provisions, before assessing empirical data regarding the actual practice of prosecution and sentencing of these offences in Scotland and comparable jurisdictions, against the backdrop of sociological data on the public perception, wherever these are available. In line with the approach taken in previous sections, we will start with an overview of the relevant provisions in the ECD, as these represent the coordinated approach taken with other EU Member States in order to comply especially with international obligations stemming from specific MEAs. Against this backdrop, we will then turn to the law and practice of sentencing environmental crimes in Scotland and comparable jurisdictions.

4.1 Provisions on criminal sanctions and sentencing in the ECD

At the time of the adoption of the ECD, the CJEU had declared that the EU lacked the powers for approximating the laws of Member States regarding the establishment of criminal penalties.[95] Therefore, following the CJEU´s judgment, the ECD restrains itself to require Member states to provide for effective, proportionate and dissuasive criminal penalties for natural persons in response to the environmental offences described in articles 3 and 4.[96] In addition, Member States must also ensure for the liability, as well as effective, proportionate and dissuasive penalties, of legal persons involved in the commission of environmental offences in the terms of articles 6 and 7 ECD. In particular, legal persons are to be held liable for the typified conducts 'where such offences have been committed for

[93] Pollution Prevention and Control (Scotland) Regulations 2012, regulation 67 (4).

[94] Regulatory Reform Scotland Act 2014 s40 (1).

[95] CJEU (Grand Chamber), C-440/05 *Commission v Council* [2007] ECLI:EU:C:2007:625.

[96] Art 5 ECD.

their benefit by any person who has a leading position within [it], acting either individually or as part of an organ of the legal person'. Member States are also to hold legal persons liable where the commission of the offence was made possible due to the lack of supervision or control by any such person in a leading position. In order to hold such a leading position, the natural persons must have either 'a power of representation of the legal person; an authority to take decisions on behalf of the legal person; or an authority to exercise control within the legal person.'

Before the CJEU´s judgment, however, the European Commission´s proposal submitted to the European Parliament and the Council provided specific benchmarks for the criminal sanctions for natural and legal persons attached to the proposed environmental offences.[97] We will briefly outline those sanctions in order to provide a glimpse for what the Commission considered to be 'effective, proportionate and dissuasive' penalties at the time. For natural persons, the proposal envisaged the following range:

- a maximum of at least between 1 and 3 years of imprisonment where the offence is committed with serious negligence and causes substantial environmental damage (article 5(2) Proposal).
- a maximum of at least between 2 and 5 years of imprisonment where the offence is committed either with serious negligence and causes death of or serious injury to a person, or intentionally and causes substantial environmental damage, or is committed in the framework of a criminal organisation (article 5(3) Proposal).
- a maximum of at least between 5 and 10 years of imprisonment where the offence is committed intentionally and causes the death of or serious injury to a person (article 5(4) Proposal).

In addition, these penalties could be complemented with additional sanctions or measures, such as the disqualification from activities requiring official authorisation, or the involvement in any company or foundation where the same kind of criminal activity may be pursued again, the publication of the conviction and associated measures, or the obligation to reinstate the environment (article 5(5) of the proposal).

For legal persons, in turn, the following range of criminal or non-criminal fines was foreseen:

- a maximum of at least between EUR 300,000 and EUR 500,000 in cases where an offence is committed with serious negligence and causes substantial environmental damage (article 7(2)(a) Proposal).
- a maximum of at least between EUR 500,000 and EUR 750,000 in cases where the offence is committed either with serious negligence and causes death of or serious injury to a person, or intentionally and causes substantial environmental damage, or is committed in the framework of a criminal organisation (article 7(2)(b) Proposal).
- a maximum of at least between EUR 750,000 and EUR 1,500,000 in cases where the offence is committed intentionally and causes the death of or serious injury to a person (article 7(2)(c) Proposal).

Within these limits, the Proposal also allowed Member States the adjust and fine-tune any fines in accordance with specific criteria, such as the turnover of the legal person, the financial advantage achieved or envisaged by the commission of the offence, or any other value indicating the financial situation of the legal person (article 7(2) Proposal. Also here, these fines could be complemented with additional sanctions or measures, ranging from the obligation to reinstate the environment, the exclusion from entitlement to public benefits, the disqualification from industrial or commercial

[97] European Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law. COM(2007) 51 final. Brussels, 9 February 2007 (hereinafter, the Proposal).

activities, the placing under judicial supervision or winding-up order, the obligation to adopt specific measures to eliminate the consequences of the penalised conduct, or the publication of the judicial decision and the associated sanctions and measures (article 7(4) Proposal).

Indicative as these proposals may be, however, the Commission eventually dropped them after the CJEU´s judgment in C-440/05. Instead, the ECD gives Member States ample leeway for setting up a system of criminal penalties with the mere requirement of being 'effective, proportionate and dissuasive'. Admittedly, the entry into force of the Lisbon Treaty and the introcution of the new article 83 TFEU open up an opportunity for a revision of the ECD that may also deal with criminal sanctions. In their contribution to the conclusions of the EFFACE Research Project,[98] however, Faure and Philipsen strongly advised against a EU-wide harmonisation of criminal sanctions for environmental offences, akin to that originally included in the 2007 Proposal. Such an approach is dismissed as possibly too rigid, and thus ineffective. Instead, a soft new governance type of mechanism is suggested by which prosecutors and judges from across the EU exchange best practices, set benchmarks and engage in an open method of coordination for a 'bottom-up-harmonisation,[99] as already done to a limited extent through the European Network of Prosecutors for the Environment (ENPE).[100]

4.2 Prosecution and sentencing of environmental crimes under UK and Scottish law

All environmental offence prosecutions are taken by COPFS[101], almost always after referral from SEPA. The capacity of COPFS to deal more effectively with environmental offences has been enhanced since 2013 when a specialist prosecution unit, the Wildlife and Environmental Crime Unit, was established within it to address perceived lack of expertise amongst prosecutors due to the separation of enforcement and prosecution powers[102] and the increasing complexity of environmental and wildlife offences.[103]

The decision as to whether or not to proceed with an environmental or wildlife criminal prosecution lies entirely within the discretion of COPFS and will depend on its assessment of whether there is both sufficient admissible, reliable evidence and sufficient public interest in proceeding.[104] The prosecution is also the 'master of the instance' and therefore decides whether to proceed by way of summary proceedings[105] or solemn proceedings.[106] There is no right to trial by jury on request.

Mirroring the brief overview of environmental offences in UK and Scottish law, this subsection will provide a matching overview of available sentences for those conducts. Against this background, the section then turns to critically discuss the practice of prosecuting and sentencing of environmental crimes in the UK and Scotland.

4.2.1 Waste

A person who commits an offence under s33 shall be liable:

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[98] EFFACE – European Union Action to Fight Environmental Crime. See <efface.eu>, accessed on 1 July 2018.

[99] Michel Faure and Niels Philipsen, 'Contribution to Conclusions and Recommendations on Environmental Crime: System of Sanctions' (2016) 13.

[100] CM Billiet and others, 'Sanctioning Environmental Crime (WG4) - Prosecution and Judicial Practices 2016/17' (2018).

[101] Unlike England and Wales, where the Environment Agency has power to directly bring prosecutions.

[102] Fasoli (n 19), 254.

[103] http://www.copfs.gov.uk/about-us/what-we-do/our-role-in-detail/10-about-us/296-specialist-reporting-agencies accessed 6th June 2018.

[104] Crown Office and Procurator Fiscal Service Prosecution Code 2001.

[105] Before a sheriff but without a jury in the Sheriff Court.

[106] Before a judge and jury, either in the Sheriff Court or the High Court of Justiciary.

(a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding £40,000 or both; and

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both. If the offence is in relation to special waste[107] the person is liable to the same sentences except that the imprisonment term is five years.

If the offence is in relation to household waste from a domestic property within the curtilage of the dwelling the person is liable:

(a) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum[108] or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both.

Another of the principal provisions regulating waste is s34 of the EPA 1990 which imposes a duty of care on any person[109] who imports, produces, keeps or manages controlled waste or otherwise has control of such waste, to ensure prevention of another from breaching s33 or an environmental permit; to prevent the escape of waste; to transfer adequately described waste only to an authorised person and to take reasonable measures to apply the waste hierarchy.[110] It is an offence under s34 (6) to breach the duty of care without reasonable excuse.

A person who commits an offence under s34 shall be liable on summary conviction, to a fine not exceeding the statutory maximum; and on conviction on indictment, to a fine.

4.2.2 Water

A person guilty of an offence under regulation 44(1) is liable:

(a) on summary conviction—

(i) to a fine not exceeding £40,000 or to imprisonment for a term not exceeding 12 months, or to both; and

(ii) in the case of a continuing offence, to a further fine not exceeding £250 for every day during which the offence is continued after conviction;

(b) on conviction on indictment—

(i) to a fine or to imprisonment for a term not exceeding 5 years, or to both; and

(ii) in the case of a continuing offence to a further fine not exceeding £1,000 for every day during which the offence is continued after conviction.

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[107] Under s62 of the EPA 1995, special waste is controlled waste of any kind that is or may be so dangerous or difficult to treat, keep or dispose of that special provision is required for dealing with it.

[108] £10,000 under the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 sections 47 and 48.

[109] The domestic householder is exempt from almost all aspects of the duty- EPA 1990 s34 (2).

[110] Laid out in Directive 2008/98/EC, the waste hierarchy is (in descending order of desirability) firstly, prevention of waste creation, secondly re-use or recycling of waste, thirdly recovery (usually through energy recovery by incineration) and finally, proper disposal through incineration or, as a last resort, landfill. See Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L 312/3.

Additionally, under regulation 49, the court may, in addition to, or instead of, imposing any punishment, order a person convicted of a principal offence to take such steps as may be specified in that order for remedying those matters.

4.2.3 Integrated Pollution Prevention and Control

A person guilty of an offence under regulation 67, paragraph 1, sub-paragraphs (a), (b), (d), (f), (fa) or (j) is liable:

> (a) on summary conviction, to a fine not exceeding £40,000 or to imprisonment for a term not exceeding twelve months, or to both,
>
> (b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding five years, or to both.

A person guilty of an offence under regulation 67, paragraph 1, sub-paragraphs (c), (e), (g), (h), (i) or (k) is liable:

> (a) on summary conviction, to a fine not exceeding the statutory maximum,
>
> (b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years, or to both.

Additionally, under regulation 70, the court may, in addition to, or instead of, imposing any punishment, order a person convicted of an offence under regulation 67 (1) (a), (b) or (d) to take such steps as may be specified in that order for remedying those matters.

4.2.4 Regulatory Reform (Scotland) Act 2014 s40

A person who commits an offence under s40 (1) is liable:

> (a) on summary conviction to— (i) a fine not exceeding £40,000, (ii) imprisonment for a term not exceeding 12 months, or (iii) both,
>
> (b) on conviction on indictment to— (i) a fine, (ii) imprisonment for a term not exceeding 5 years, or (iii) both.

4.3 Practice of environmental crime sentencing in Scotland

One of the defining characteristics of the enforcement of environmental regulation in the UK and Scotland is that its principal aim is to prevent harm to the environment or human health, rather than to detect and punish those who cause such harm, though the latter is obviously still an important aim.[111] Therefore supporting, educating and advising those regulated is a major part of the work of regulators, with detection, punishment and deterrence of those causing harm forming a relatively small proportion of regulators' activities.[112] The criminal law, in turn, is only a part of that detection, punishment and deterrence effort. This approach, termed 'responsive regulation' by Ayres and Braithwaite[113], is an amalgam of the approaches at either end of the enforcement spectrum; an almost wholly persuasive approach to compliance by the regulator and an almost wholly punitive approach,

[111] Bell and others (n 79) 284.

[112]The enforcement outcomes SEPA seeks to achieve are; to secure compliance with regulatory requirements designed to protect and improve the environment and bring the activity under regulatory control and stop offending; to remove financial benefits arising from illegal activity; to stop harm or reduce the risk of harm to an acceptable level; to restore or remediate the harm caused by non-compliance, where appropriate; to deter future non-compliance and re-offending. SEPA-Guidance on the use of enforcement action- June 2016

[113] Ayres and Braithwaite (n 29).

relying mostly on criminal prosecution. 'Responsive regulation' entails using mechanisms of increasing formality and impact, in proportion to the extent that the regulated fail to meet their legal obligations. This approach can be described as forming an 'enforcement pyramid'[114], with most of those regulated complying with regulation and a progressively smaller number requiring the application of increasingly punitive measures to obtain compliance.[115]

> Our effort ranges from providing advice and guidance to help improve compliance, to taking formal enforcement action, such as issuing enforcement notices and final warning letters. We believe regulation is about changing behaviour, to help achieve positive outcomes for the environment, society and the economy. As we know that one approach does not fit all circumstances, the form of action we take to secure compliance will differ depending on the particular nature of the non-compliance, the harm caused and the history of the responsible person in question. We recognise that most of those we regulate respond to our advice and guidance, and many businesses are recognising the benefit of demonstrating good environmental compliance. As such, there will be many occasions where providing advice and guidance is the appropriate level of action we need to take to secure compliance and change behaviour. SEPA Enforcement Report 2016/17

The significance of three aspects of environmental regulation is important in understanding 'responsive regulation'. The first is society's ambivalent attitude to environmental harms generally. A great deal of everyday activities regularly carried out by most of the population cause environmental harm. At a high level, the burning of fossil fuels is both not only polluting and unsustainable in the long term but also essential to the economic and social structure of almost every nation on earth. The environmental damage inherent in the use of, *inter alia*, cars, aircraft, cement, plastics and a way of life predicated on globalised trade, increased economic growth and consumption is often tolerated and, in many cases, encouraged by society at large. The role of modern environmental regulation, since its very inception in the 19th century has therefore been to mitigate the effects of most environmental damage, not to eliminate them, and the tension between economic activity and environmental regulation has existed since then.[116] In essence, environmental harm is accepted by society at large *up to a point* and it is going beyond that point which constitutes non-compliance; in some ways, therefore, the definition of at least some environmental offences is a question of degree[117] and so, especially in less egregious instances of environmental damage, pleas in mitigation that highlight the allegedly unfair restrictions on business imposed by environmental criminal law may well strike a chord with courts, contributing to more lenient eventual sentences.[118]

The second aspect flows from the first: the basis of modern regulation is the issuing of licenses to regulate potentially damaging operations, non-possession of which or breach of the terms of which

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[114] ibid 35–8.

[115] Bell and others (n 79) 285.

[116] s4 of the Rivers Pollution Prevention Act 1876 laid out both the offence and the defence: 'Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall… be deemed to have committed an offence against this Act. Where any such poisonous, noxious, or polluting liquid as aforesaid falls or flows or is carried into any stream… the person causing or knowingly permitting the poisonous, noxious, or polluting liquid so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act if he shows to the satisfaction of the court… that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting liquid so falling or flowing or carried into the stream.'

[117] For example, regulation 3 (g) of The Water Environment (Controlled Activities) (Scotland) Regulations 2011, extends the effect of the Regulations to 'any other activity which directly or indirectly has or is likely to have a *significant* adverse impact on the water environment'. (Emphasis added.)

[118] De Prez (n 66) 6.

constitute a frequent source of non-compliance.[119] In cases of non-possession or breach of the terms of licences, the regulator has significant discretion in terms of what action to take. Actions available to SEPA to address a breach of licence conditions can include advice and guidance, accepting voluntary enforcement undertakings, Fixed Monetary Penalties[120], statutory notices[121], final warning letters and referral of suspected criminal offences to the Crown Office and Procurator Fiscal Service. Licence conditions are therefore the 'nuts and bolts' of the regulatory process and a significant proportion of offences are related to breaches of such conditions.[122] The evidence and factual issues which come before the courts in these cases can be highly technical and the difficulties this poses for triers of fact have been argued by some to contribute to lenient sentencing for environmental offences.[123]

Thirdly, the inherently close relationship between regulator and regulated in 'responsive regulation' is potentially problematic. It was George Stigler in the 1970s who first developed 'capture theory' as a way of explaining a tendency in certain close regulatory relationships for the regulator to uphold the interests of the regulated at the expense of the public interest.[124] The area of environmental regulation is potentially ripe for capture to occur: regulators are in regular close contact with regulated industries, many of which are vigorous campaigners for their interests, while contact with perhaps equally committed campaigners for stricter environmental regulation is less frequent and less integral to their work; experience of industrial processes can be the ideal background for an enforcement officer and *vice versa*, so 'job switching' and blurring of loyalties is likely and socio-economic commonalities between regulators and regulated, with the latter not usually conforming to the 'criminal' stereotype, contribute to further blurring.[125]

The presence together in the regulatory system of aspects of a purely persuasive approach, a persuasive approach backed by administrative action, a civil-based punitive approach and a criminal-based punitive approach creates a pattern of environmental offences whereby only the worst offences, in the view of the regulator, are recommended for prosecution. SEPA's 2016-17 Enforcement Report makes their position clear-

'Whilst we have the ability to refer all offences to COPFS, this option will generally be reserved for offences that are most serious or where there is evidence of wider criminality'.[126]

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[119] Possession of a licence/permit and adherence to its terms is an implicit defence to many environmental offences.

[120] Provided for by The Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 and currently proposed to range from between £200 and £40,000. It is important to note that such Fixed Monetary Penalties are not sanctions available to criminal courts.

[121] Statutory notices are provided for in legislation under various regimes and include: enforcement notices; removal of waste notices; works notices and prohibition notices. Two forms of statutory notices, suspension notices and revocation notices, can be used to suspend or revoke a licence required to operate legally and can thereby have significant impacts on businesses of all sizes, effectively putting them out of business. The very sparing use of these powers by SEPA demonstrate another aspect of the tension between economic/social interests and environmental interests. It is important to note that such suspensions or revocations are not sanctions available to criminal courts.

[122] For example, it is an offence to breach a licence/permit condition under the Environmental Protection Act 1990, The Water Environment (Controlled Activities) (Scotland) Regulations 2011 and the Pollution Prevention and Control (Scotland) Regulations 2012.

[123] De Prez (n 66) 7; Martha Grekos, 'Environmental Fines - All Small Change?' [2004] Journal of Planning and Environment Law 1330.

[124] George Stigler, 'The Theory of Economic Regulation' (1971) 2 Bell Journal of Economics and Management Science 3.

[125] Bell and others (n 79) 287.

[126] Scottish Environment Protection Agency, 'Enforcement Report 2016-2017' (2017) 17.

One would expect, then, that the sentences for environmental offences that result in prosecution would be towards the top end of the available range, but this is not always the case. (See Tables 1 and 2 below) A significant recent development is that SEPA are currently rolling out the introduction of their new civil enforcement measures[127], which include fixed monetary penalties (FMP); enforcement undertakings (EU); variable monetary penalties (VMP) and VMP undertakings. (Together known as 'enforcement measures'). The full implementation of these measures may well have the effect of lowering still further the number of cases referred to COPFS, the number of prosecutions initiated and the number of eventual convictions.

One of these measures, the agreement of an Enforcement Undertaking, results from an offer, made voluntarily by a person in non-compliance and formally accepted by SEPA, to make financial amends for non-compliance and its effects and to prevent recurrence. SEPA encourages offers to include actions that demonstrate preventative longer-term actions. An Enforcement Undertaking provides an opportunity, primarily to otherwise compliant people or businesses, to remedy non-compliance. SEPA has to have reasonable grounds to suspect that a relevant offence has been committed. The responsible person voluntarily offers SEPA a solution to non-compliance. [128] Enforcement undertakings were rolled out in 2017/18 and five undertakings were accepted, entailing financial contribution by the non-compliant persons of £9,000, £14,000, £15,000, £31,869 and £280,000.[129] Though the numbers are very small and therefore impossible to statistically analyse, it may be that the introduction of Enforcement Undertakings in 2017/18 contributed to the reduction in convictions in that year.

Another potentially significant enforcement measure is the Variable Monetary Penalty, not yet rolled out but currently planned to range from £200 to £40,000. This measure enables SEPA to impose a variable monetary penalty on persons whom it is satisfied, on a balance of probabilities, have committed a 'relevant offence'. If implemented as currently planned, VMPs are therefore likely to reinforce the current policy position that only the most serious alleged offences are recommended for prosecution. However, assuming that only less serious breaches[130] will be sanctioned using VMPs, serious discontinuities could arise between sanctions imposed under the VMP regime and the criminal prosecution regime. The former ranges between £200 and £40,000 and, while unlimited fines are possible in solemn cases, the median[131] financial penalty[132] imposed by the criminal courts[133] in Scotland each year for the past five years beginning with 2013/14 have been £9,875, £6,575, £8,000, £3,000 and £9,750.[134] See Table 1 below.

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[127] Under the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 SSI 2015/383.

[128] Scottish Environment Protection Agency, 'Guidance on the Use of Enforcement Action. June 2016' (2016).

[129] https://www.sepa.org.uk/regulations/enforcement/penalties-imposed-and-undertakings-accepted/accessed 28/6/2018

[130] In terms of SEPA's understanding of gravity of offence -see Scottish Environment Protection Agency, 'Enforcement Report 2016-2017' (n 126).

[131] The median is used rather than the mean as a single very large financial penalty will have less of a disproportionately distorting effect on the value of the median than on the value of the mean. The median is the middle value in a list of values listed in numerical order from smallest to largest.

[132] Financial Penalty refers to, where appropriate, the total of both fines and any Confiscation Order made under s92 of the Proceeds of Crime Act 2002.

[133] In both summary and solemn proceedings and including Confiscation Orders where applicable.

[134] Derived from SEPA Enforcement Reports 2014/15, 2015/16, 2016/17 and bi-monthly SEPA Chief Executive Reports during 2016, 2017 and 2018. Scottish Environment Protection Agency, 'SEPA Enforcement Report' (2015); Scottish Environment Protection Agency, 'SEPA Enforcement Report 2015-2016' (2016); Scottish Environment Protection Agency, 'Enforcement Report 2016-2017' (n 126).

Table 1: Financial Penalties for Environmental Offences

	2013-14	2014-15	2015-16	2016-17	2017-18
Median financial penalty	£9 875	£6 575	£8 000	£3 000	£9 750
Range of financial penalties where available	£450 – £64 631	£150 - £195 000	£100- £357,558	£100- £34 000	£1 200 – £40 000
Number of penalties	10	14	9	16	4

Source: **SEPA Enforcement Reports 2014-15, 2015-16 and 2016-17 and SEPA Chief Executive bi-monthly Reports during 2016, 2017 and 2018.**

In terms of absolute numbers, the incidence of breaches of environmental regulation in Scotland is low, due at least partly to the size of the jurisdiction. Given the 'Responsive Regulation' model pursued by the regulator, the absolute number of criminal prosecutions and resulting convictions for environmental crimes are correspondingly low.

In 2016-17, eighteen criminal convictions were secured following recommendations from SEPA to prosecute,[135] of which six were under the waste regime and five under the water regime, with one or two convictions each under other regimes such as PPC. In 2015-16, the corresponding figures were eleven convictions, with six under the waste regime and one or two convictions each under other regimes. In 2014-15, there were nineteen convictions, with eleven under the waste regime and seven under the water regime.[136] A breakdown of the sentences imposed is in Table 2 below.

[135] Scottish Environment Protection Agency, 'Enforcement Report 2016-2017' (n 126) 24.

[136] Scottish Environment Protection Agency, 'SEPA Enforcement Report 2015-2016' (n 134) 12; Scottish Environment Protection Agency, 'SEPA Enforcement Report' (n 134) 11.

Table 2: Sentences for Environmental Offences

	2014-15	2015-16	2016-17*	2017-18*
Number of Convictions	19	11	18^	6
Fine only	13	6	13	2
Fine and Confiscation Order	-	2	-	-
Admonishment and Fine	-	-	1	-
Community Payback Order only	2	1	2	2
Community Payback Order and Confiscation Order	-	-	1	1
Admonishment	1	-	1	-
Community Payback Order and Fine	-	1	-	1
Community Payback Order and Restriction of Liberty Order	1 (four month restriction of liberty)	-	-	-
Restriction of Liberty Order only	1 (six month period)	1 (eight month period)	-	-
Custodial sentence and Fine	1 (23 month custodial sentence and Fine)	-	-	-
^ SEPA Enforcement Report 2016-17 reports 16 cases resulting in convictions. One case resulted in two fines of £300, and another case which resulted in two people receiving community payback orders. These two cases have been reported as four criminal convictions in the table above.				
Source: SEPA Enforcement Reports 2013-14, 2014-15, 2015-16 and 2016-17. * Data taken from both SEPA Enforcement Report 2016-17 and Chief Executive of SEPA bi-monthly Reports. (2016, 2017, and 2018).				

During the period 2013-14 to 2017-18 two people received custodial sentences.[137] One person received a custodial sentence of 9 months and 14 months to run concurrently and the other person a custodial sentence of six months. Restriction of liberty orders have also been used during this period with three people receiving restriction of liberty orders of four, six and eight months respectively.

There were no reported convictions for the offence of causing serious environmental harm under the Regulatory Reform Scotland Act 2014 s40 since it came into force in June 2014.

[137] Under the provisions of s245A of the Criminal Procedure (Scotland) Act 1995.

It is difficult to discern a trend in values of financial penalties. The number of offences in each year where a financial penalty has been imposed varies from four to sixteen making meaningful interpretation extremely difficult.

There have been longstanding criticisms of what is perceived by many as unduly lenient sentences for environmental offences in Scotland. While arguably prosecution has been rendered more effective by the establishment of the Wildlife and Environmental Crime Unit within COPFS, "where the use of criminal law arguably falls down is in the penalties imposed by the courts which have been criticised as not providing a sufficient deterrent".[138] The perception is supported by regular reporting by SEPA in its Enforcement Reports[139] of the consistently higher level of fines in England, fine levels which themselves have been criticised in that jurisdiction.

It is worth noting that there have been a number of particularly large financial penalties not included in the table above.

In 2010, ExxonMobil received a £2,770,000 civil penalty under the The Greenhouse Gas Emissions Trading Scheme Regulations 2005 for failing to report all greenhouse gases emissions from its Fife ethylene plant in 2008. In SEPA's view, the failure to report accurately which gave rise to the penalty was an inadvertent error and had no direct environmental impact, unlike cases for which SEPA would seek prosecution and publicity. ExxonMobil had under-reported 32,966 tons of CO2 emissions and the 2005 regulations empower regulators to impose a levy of €100 per tonne of emissions not covered by allowances or offsets. This remains the largest sum ever levied for an environmental breach in the UK.[140]

There were two cases against the same haulage and waste disposal company and its officers of serious breaches of s33 of the Environmental Protection Act 1990 in 2011 and 2014. In 2011, the company pled guilty in the Sheriff Court to disposing of controlled waste in a manner likely to pollute the environment or harm human health, an offence under section 33(1)(c) of the 1990 Act and was fined £8,000. The Lord Advocate appealed to the Court of Criminal Appeal on the grounds that the sentence was unduly lenient, given the ability of the company to pay a much higher fine. The court upheld the appeal, quashing the original fine and imposing a substitute fine of £90,000.

The court also focussed on the seriousness of the offence and the company's previous record. Lord Clark said- "The conduct in question took place over a period of time and involved a blatant and complacent disregard by the respondents of their responsibilities. That the site in question was in nearby proximity to a residential area compounded the seriousness of the situation. The offence with which we are dealing, has also to be set against a number of analogous previous offences, three of them recent, where fines were imposed on the respondents, which clearly did not have the deterrent effect that is required".[141] The case was seen by commentators as potentially a landmark in Scottish environmental criminal law. Parpworth and Thompson wrote "It is, of course, far too early to determine whether (the case) will come to be seen as a landmark decision in relation to sentencing for environmental offences. To date, there has not been an appeal case in which the decision has received judicial consideration. Nevertheless, when that occasion does arise, as it undoubtedly will, it seems likely that the approach to sentencing which the Appeal Court's decision advocates will be

[138] 'ENVIRONMENT (Reissue) 1. INTRODUCTION (9) ENFORCEMENT OF ENVIRONMENTAL LAW (b) Enforcement Mechanisms and Strategies (114) Prosecution', *The Laws of Scotland. Stair Memorial Encyclopedia* (LexisNexis).

[139] Only discontinued in 2017/18.

[140] https://www.endsreport.com/article/32618/exxonmobil-paid-36m-for-two-eu-ets-errors accessed 29/7/18

[141] Doonin Plant Ltd [2010] HCJAC 80; 2011 S.C.L. 82 at [22].

endorsed, especially since it reflects a greater willingness on the part of the authorities in Scotland to get tough with those who commit environmental crimes."[142]

The next appeal case was an appeal by the same company against a fine of £200,000 and a community payback order of 250 hours for a company officer, imposed by the Sheriff Court for a s33 offence.[143] The appeal was refused, Lord Bracadale saying- "In our opinion this offence represented a serious breach of the 1990 Act. The evidence before the sheriff made it clear that this was a large-scale operation driven by a desire to make profit. The evidence indicated that the products of the waste would be likely to find their way into the surrounding land and groundwater causing harm to the environment. The company had a significant record of analogous convictions. The most recent conviction was of a particularly serious nature…… In all the circumstances we were unable to say that the sentence imposed was excessive and we refused the appeal against sentence."[144]

4.4 Environmental offenders

A practical, operational definition of environmental crime, as an action or omission that directly or indirectly causes harm or poses a risk of harm to the environmental and which is prohibited and punishable by the criminal law,[145] can be relatively easily sketched but environmental criminals are less easily characterised.

The two most common serious environmental crimes in Scotland are breaches of the waste regime and the water regime and it has been argued that offenders perpetrating each of these crimes may have a different mens rea[146] and that this and other factors play a part in the attitudes of regulators and courts to them. Parpworth and Thompson[147] have characterised many serious waste offences as involving something more than a failure to comply with the conditions of a permit. Instead, those who commit them may be seeking to operate entirely outside a regulatory regime, thus avoiding the strictures of a licence or permit and the costs associated with compliance. They argue that, in these cases, the conduct involved may be said to be truly "criminal".[148] Such conduct is not inadvertent or accidental or even negligent, instead representing a deliberate attempt to flout the law. Commercial-scale fly tipping, where it relates to the unregulated, large-scale dumping of waste[149] by persons who have been paid to legally dispose of the material in their capacity as a waste collection business is a prime example. They argue that the deceit involved, the profits made and the potentially harmful consequences to the environment, makes those who commit such offences fully deserving of the most severe punishments, including imprisonment.

Watson argues that companies often have strong economic incentives to break the law. Illegal activities often make good business sense. The assumption behind this is that firms are rational economic actors. Accordingly, businesses generally pursue activities which are likely to lead to economic gains and avoid those which may lead to losses. A business may therefore be tempted to pollute the environment if the expected gain (increased profit or investment postponed) is greater

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[142] Neil Parpworth and Katharine Thompson, 'Environmental Offences: Making the Punishment Fit the Crime' [2012] Juridical Review 69.

[143] This sentence does not appear in the table above as the table does not provide data for 2013-14.

[144] Doonin Plant v HMA [2014] HCJAC 26; 2014 J.C. 207 at [19]

[145] Bell and others (n 79) 268.

[146] As we have seen, this is not relevant to conviction but is often relevant to the decision to prosecute and to sentencing.

[147] Parpworth and Thompson (n 142).

[148] See discussion above regarding *mala in se* and *mala prohibita*.

[149] Thereby avoiding the costs of adhering to the relevant licences and avoiding the payment of Landfill Tax.

than the anticipated loss (fine, confiscation or civil penalty). The likelihood of conviction is an important factor in Watson's view. If the probability of prosecution is small, the likely sentence would have to be very substantial to function as an effective deterrent, otherwise the risk of a financial penalty could simply be regarded as one of the unavoidable costs of doing business[150]

In contrast, serious water regime contraventions, typically releases of silage or manure/slurry effluent by agriculture or release of waste water effluent by Scottish Water may be more easily characterised as inadvertent, careless or negligent. However, while there is no obvious immediate financial gain to be made by committing these offences, the financial gain may well be indirect, related to attempts to contain operating costs or postponement of investment decisions regarding infrastructure or process improvements.[151]

The adversarial nature of the criminal justice system, especially the plea in mitigation before sentencing, also brings out some of the issues inherent in environmental crime. De Prez[152] argues that since the majority of environmental offences do not require the prosecution to prove *mens rea*, this strict liability acts as a cloak for many accused, leaving defence counsel plenty of room to deny culpability in order to mitigate the offence. This strategy often takes the form of trivialising the offence, blaming misfortune and third parties for the offence or asserting that, given that the offence was not deliberate, enforcement was an unreasonable restriction on the right to trade; all drawing on preconceptions of environmental crime as not being real crime and that the balance between encouraging economic development and protection of the environment has swung too far in favour of the latter.

Adshead develops the same themes; she acknowledges that the seriousness of environmental damage is reflected in the high upper limits for fine and sentence in the courts but that lay judges and members of the professional judiciary who do not subscribe to the view that environmental crime is serious and continue to distinguish environmental offences from the activities of 'true criminality' will not consider high penalties to be appropriate. In her view, the strict liability nature of the offences, coupled with the particular approach to causation in environmental cases[153] and accompanying arguments in mitigation from the defence, may also influence the courts in their sentencing.[154]

There has also been criticism in the past of the double exercise of discretion inherent in the process whereby SEPA gathers evidence and, in exercise of its discretion, decides to refer the case to COPFS for prosecution, whereupon COPFS undertakes a second, and definitive, exercise of discretion as to whether or not to proceed.[155] Arguably, however, the same process also applies to all other crimes, only then the police exercise the initial discretion rather than SEPA. Inherent concerns about the regulator's ability to gather usable evidence and prosecutors' ability to deal with often highly technical legislation may have been addressed in the interim by the formation of SEPA and of COPFS's Wildlife and Environmental Crime Unit. However, the nature of the relationship between regulator and regulated in the context of 'responsive regulation' is very different to that between police and suspects of 'mainstream' crime; there is little scope for advice and guidance to offenders or potential offenders or for the creation of a positive relationship between the police and a person who has or is about to breach the law. If indeed there still is increased scope for discretion in the approach to

[150] Michael Watson, 'Environmental Offences: The Reality of Environmental Crime' (2005) 7 Environmental Law Review 190.

[151] Michael Watson, 'Environmental Crime in the United Kingdom' (2005) 14 European Energy and Environmental Law Review 186.

[152] De Prez (n 66) 3.

[153] See Empress Car Company (Abertillery) Ltd v National Rivers Authority [1998] Env LR 396, HL.

[154] Adshead (n 66) 225–6.

[155] Charles Smith, Neil A Collar and Mark Poustie, *Pollution Control: The Law of Scotland* (2nd ed, T & T Clark 1997) 40.

environmental crime compared to others, both regulator and regulated, at least, may view that as constructive.

There has long been a body of opinion that claimed that perceived low sentences for environmental (and wildlife) crimes could at least partly be addressed by the creation of a specialist environmental court in Scotland, with a criminal jurisdiction. The main driver for this view (held in England too)[156] was that the small number of such cases coming before the ordinary criminal courts meant that the judiciary were unable to build up both expertise in the technicalities of the offences and a firm grasp of the seriousness of the harms perpetrated by these crimes. Adshead has written that lay magistrates encounter barely any cases of environmental crime, amongst their routine business. Furthermore, environmental cases can also be extremely complex and technical, often involving evidential material on industrial processes, pollutants and pathways, which, together with their unfamiliarity, cause problems for magistrates.[157]

However, in response to its Developments in Environmental Justice in Scotland Consultation[158], the Scottish Government announced that it would not be taking forward the idea of a specialist environmental and wildlife court. The main reason advanced for the decision was that the numbers of wildlife and environmental crime cases prosecuted in the courts is relatively small compared to crimes such as theft or drug offences so that the number of wildlife or environmental crime cases would not sustain a specialist criminal environmental court. It was also felt that most cases are best heard in a local sheriff court rather than a centralised specialist court, a view which has also received support from commentators concerned that such a move "may give the public and the press the wrong impression that they are not real crimes"[159], once again raising the issue of the extent to which environmental and wildlife crimes are *mala in se*.

4.5 Statistical data on environmental prosecutions in England and Wales

In England and Wales, the sentencing of the criminal convictions secured for environmental offences has long been criticised for perceived lack of severity by politicians, academics and environmental enforcement practitioners.

The Lord Chancellor[160], Lord Irvine, in a speech to magistrates in 1998, said: 'I will not try to hide that there is disquiet in some quarters about the level of sentences which are given by courts in response to environmental offences. The sentences magistrates and judges hand down for damage to the environment should reflect the seriousness of the offences.'[161]

The Environment Agency has also been clear regarding its concerns about the levels of fines for environmental offences in England and Wales. In 2001, the then Agency Chairperson said that, "fines will need to substantially increase for businesses to understand the environment's true value", and that, "the current scale of penalties levied by the courts makes pollution an acceptable risk".[162] There was also parliamentary support for this view. The House of Commons Environmental Audit Committee has stated: "We recommend that the general level at which fines are imposed neither reflects the gravity of environmental crimes, nor deters or punishes adequately those who commit them. This is

[156] Malcolm Grant, *Environmental Court Project: Final Report* (Department of the Environment, Transport and the Regions 2000).

[157] Adshead (n 66) 223.

[158] Scottish Government, 'Developments in Environmental Justice in Scotland. Consultation Analysis and Scottish Government Response' (2017).

[159] Lord Robert Carnwath of Notting Hill CVO, 'Judging the Environment - Back to Basics' (2017) 29 Environmental Law and Management 64.

[160] A role now much reduced in scope but which, in 1998, included head of the judiciary in England and Wales.

[161] Martin Davies, 'Sentencing for Environmental Offences' (2000) 2 Environmental Law Review 195, 196.

[162] (2001) ENDS Report 321, 13.

clearly unsatisfactory."[163] Rosalind Malcolm in 2002 felt that 'The low level of sentences encountered in many cases concerned with pollution law… has become something of a notoriety.'[164]

Despite this, sentences for environmental crimes in England and Wales have traditionally been regarded as more punitive and therefore more appropriate than those in Scotland. Successive SEPA Enforcement Reports have made the point, albeit implicitly, by simply reproducing the figures. The figures are as follows:

	Scotland	England
Average criminal fine 2015-16	£7,600	£44,546
2014-15	£20,314	£18,078
2013-14	£10,965	£10,254
2012-13	£16,188	£7,801
2011-12	£5,926	£9,336

The 2016/17 SEPA Enforcement Report said, in connection with the English 2015/16 figures particularly, '[i]n relation to the dramatic increase in the average level of fines in England, the Environmental Offences Definitive Guideline was introduced by the English Sentencing Council and took effect from 1 July 2014. The prediction at the time these guidelines were introduced, that they would be likely to result in larger fines for serious offences, appears borne out…'

SEPA, of course, pointed out the differences between themselves and the Environment Agency in terms of prosecution process and applicable substantive law. But other factors may operate more decisively to make the differences appear less than they are. For example, because the figures are based on small numbers of convictions in Scotland and furthermore are expressed as averages sensitive to distortion by single values, the two large fines successively imposed on the one company in Scotland in 2011 and 2014 would have had a disproportionate inflationary effect on the Scottish averages in whichever year they were reported as falling in. On the other hand, the effect of a small sample, especially on the Scottish side and the use of averages, rather than medians, could also have had an effect in the other direction. In short, it is not possible to subject these values to the kind of statistical analysis which would allow robust conclusions to be drawn.

Similar difficulties may have affected the assessment of sentence levels in England and Wales generally. While the perceived leniency of environmental sentences in that jurisdiction was a commonplace view, Parpworth points to the lack of reliable data to substantiate the view[165] and that, even in the larger jurisdiction of England and Wales, annual mean fine amounts can be distorted by the imposition of a few large fines in a particular year.

[163] Environmental Crime and the Courts (HC 126, 6th report of session 2003–04), para.16.

[164] Rosalind Malcolm, 'Prosecuting for Environmental Crime: Does Crime Pay?' (2002) 14 Environmental Law and Management 289.

[165] The point is illustrated by SEPA and the Sentencing Council, for example, using financial years and calendar years, respectively, to report mean fines in England and Wales, resulting in two very different figures for 2011-12 (SEPA £9,336) and 2011 (Sentencing Council £6,259).

Year	Mean	Median
2001	£3,412	£2,500
2002	£3,999	£2,250
2003	£4,184	£2,000
2004	£4,245	£2,500
2005	£3,953	£2,000
2006	£4,313	£3,000
2007	£4,219	£2,000
2008	£5,198	£2,000
2009	£2,737	£1,500
2010	£3,445	£2,000
2011	£6,259	£1,500
Average fine amount[171] **Not adjusted for price level (inflation)**		
Source-Environmental Offences Analysis and Research Bulletin Data Tables 2013 https://www.sentencingcouncil.org.uk/publications/item/environmental-offences-analysis-and-research-bulletin/		

The table, published by the Sentencing Council in England and Wales in 2013, shows that the mean figure remained relatively stable between 2001–2007, where it consistently stood in the £3,000-£4,500 range. However, it became rather more erratic between 2008–2011 so that whereas in 2008 it stood at over £5,000, in 2009 it fell to below £3,000. By 2011 it had risen to a level not seen in any of the previous 10 years, i.e. in excess of £6,000. The median figures for environmental offences between 2001–2011 are confined to a narrow range. Nevertheless, they do seem to exhibit an overall "downward trend" from £2,500 in 2001 to £1,500 in 2011[166] and, even if inflation was taken into account, can only be said to be stable, at most.

Another factor contributing to the perception of lenient fines in England and Wales over the period 2000-2010, and arguably evidence in itself that environmental offences were not taken seriously, was the fact that in a number of high profile cases, fines imposed at first instance had been substantially reduced on appeal e.g. R. v. Milford Haven Port Authority (The Sea Empress)[167], where a fine of £4 million was reduced to £750,000 on appeal, R. v Anglian Water Services Ltd[168], where a £200,000 fine was reduced to £60,000, and R. v Cemex Cement Ltd[169], where the Court of Appeal reduced a fine of £400,000 to £50,000.[170]

Two recent initiatives attempted to address the perceived leniency of sentences for environmental crimes in England.[171] The first was that the Regulatory Enforcement and Sanctions Act 2008 gave the

[166] Neil Parpworth, 'Sentencing for Environmental Offences: A New Dawn?' [2013] Journal of Planning & Environment Law 1093.

[167] [2000] Env. L.R. 632 CA.

[168] [2004] Env. L.R. 10.

[169] [2007] EWCA Crim 1759.

[170] Parpworth (n 166).

[171] Since the establishment of Natural Resources Wales in 2013, The Environment Agency has reported figures for England only, not England and Wales combined.

Environment Agency a range of new powers in certain situations to impose civil sanctions, depending on the circumstances of the offence, similar to the powers SEPA is currently rolling out under the Regulatory Reform (Scotland) Act 2014.

The second was the publication in 2014 of the Sentencing Council's Environmental Offences Definitive Guideline for the most serious environmental offences in England and Wales.[172] The Guideline sets out a structured approach to sentences for "organisations"[173] and for individuals convicted of the relevant environmental offences. The Guideline's basis is the assessment of the category of offence, which is done using a scale of both culpability and harm factors.

The culpability factors range from Deliberate, to Reckless, to Negligent, to finally, Low or no culpability. The harm factors range from Category 1, the most serious environmental damage, having "major" effects, down to Category 4 which is the risk (but not manifestation) of Category 3 harm, which is "minor" or "limited" effects on the environment. Combining the two sets of factors enables the offence category to be determined. Since there are four culpability categories and four harm categories, there are 16 potential combinations of offence category. At one end of the sentencing spectrum is the category 1 offence which is adjudged to be Deliberate, while at the other, the category 4 offence which involves either Low or no culpability. For organisation, these offence categories are then applied to four different sizes of entity, ranging from Large to Medium, Small and Micro. This provides 64 offence category/entity size bands ranging from a large entity that has committed a Deliberate category 1 offence to a micro entity that has committed a Low/no culpability category 4 offence. Finally, each one of these 64 bands is allocated a starting point fine and a fine range. So, for a large entity that has committed a Deliberate category 1 offence the starting point is a fine of £1,000,000 and the range £450,000 to £3,000,000 and for a micro entity that has committed a Low/no culpability category 4 offence the starting point is a fine of £200 and the range £100 to £700.

The methodology for individuals is the same in respect of offence category but has no entity size component. Unlike the methodology for organisations, however, that for individuals allows for custodial and other disposals which are not applicable to organisations. Therefore, a Deliberate category 1 offence has a starting point of 18 months' custody and a range of 1-3 years' custody, whereas a Low/no culpability category 4 offence has a starting point of a Band A fine[174] and a range between a Conditional Discharge and a Band A fine.

Two points about the Guideline are worthy of note. Firstly, a point made before, that the Guideline uses factors such as culpability and a differentiation between actual harm and risk of harm that are not generally relevant to questions of guilt but are of relevance to pleas in mitigation and sentencing decisions.

Secondly, the Guideline makes no detailed provision for very large organisations i.e. those with a turnover in excess of £50 million, except to say that, in their case, "it may be necessary to move outside the suggested range to achieve a proportionate sentence".[175] Many multi-national companies and domestic utilities will have turnovers in excess of £50 million and, in the event of the company making correspondingly high profits and being guilty of a serious environmental offence, the Guidelines are of little assistance. This occurred in R v Thames Water[176] in 2015, just after the introduction of the Guideline, when the utility pled guilty to a negligent category 3 offence, for which the fine starting point for a large company in the Guideline was £60,000. In the absence of assistance from the

[172] Sentencing Council, 'Environmental Offences. Definitive Guideline' (2014).

[173] Companies, partnerships, public bodies, health trusts and charities.

[174] A Band A fine has a starting point of 50% of relevant weekly income and a range of 25%-75% of relevant weekly income https://www.sentencingcouncil.org.uk/droppable/item/band-ranges/ accessed 3/7/2018

[175] Sentencing Council, 'Environmental Offences. Definitive Guideline' (n 172).

[176] [2015] EWCA Crim 960.

Guideline, the judge at first instance multiplied the £60,000 by five, based on the utility's turnover and, after discounts for mitigation and early plea, fined Thames Water £250,000 plus victim surcharge and approximately £7000 costs. Thames Water appealed and the appeal was refused in robust fashion. Focussing on the word "may" (in contra-distinction to the word "will") in the above quote from the Guideline regarding very large companies, the Appeal Court held the Guidelines did not apply to very large companies and rejected extrapolations from the Guideline as an appropriate approach in cases such as these. In refusing the appeal, the court held that the sentence of £250,000 was lenient and the court 'would have had no hesitation in upholding a very substantially higher fine'[177], suggesting that in cases of very large repeat offenders (which Thames Water were) 'fines measured in millions of pounds'[178] may result.[179]

The consensus in the recent literature appears to be that the Guideline has had an effect of increasing the levels of fines imposed upon companies in England. Burton writes of a "revolution in sentencing for environmental crime brought about by the combination of shifting judicial attitudes and the Sentencing Guideline"[180] and that R v Thames Water "should have sent a chill through the boardrooms of all high-turnover companies holding environmental permits".[181] Parpworth observes that "the Guideline has had an immediate and significant impact on the sentencing of corporate offenders"[182] because whereas in the six months immediately prior to its implementation, the average fine was £8,800 and the median was £3,500, in the six months after implementation, the mean and median fines increased considerably to £42,700 and £11,200, respectively.[183]

However, the Guideline seems to have had little discernible impact upon either mean fine levels for individual offenders, or the median level of fines. Thus, during the period 2005–2015, the mean fine achieved a highpoint of £1,200 in 2005 and a low point of £590 in 2009. For 2015, it stood at £670 which represented a marginal increase (£40) on the previous year.[184]

Despite the signs of an effect on the sentences for organisations, the caveats regarding small datasets, even in England, still apply and the Sentencing Council itself recognises the "relative paucity"[185] of sentencing data for environmental offences.

5. Wildlife offences in historical perspective

The Biblical notion that non-human animals existed for the use of humans pervaded attitudes towards all animals, wild and non-wild, well into the 1800s in Scotland, England and all other countries where the Christian faith influenced societal values.[186] The Enlightenment, which changed so much else, had little impact on this view; Rene Descartes (1596-1650) held that non-humans were automata that did not possess souls, minds, or the ability to reason. As such, non-humans could not suffer or feel pain.[187] John Locke (1632-1704) and Immanuel Kant (1724-1804) conceded that cruelty to animals was morally

[177] Ibid, para. 46.

[178] Ibid, para. 39.

[179] James Burton, 'Environmental Law: Hot Cases' (2015) 27 Environmental Law and Management 109.

[180] ibid.

[181] ibid.

[182] Neil Parpworth, 'The Impact of the Environmental Offences Sentencing Guideline: An Early Assessment.' [2017] Journal of Planning & Environment Law 11.

[183] ibid.

[184] ibid.

[185] Sentencing Council, 'Final Resource Assessment: Environmental Offences' (2014).para.5.10.

[186] Gareth B. Spark 'Protecting wild animals from unnecessary suffering' Journal of Environmental Law, 2014, 26, 473, 475

[187] Robertson 2015 p55

wrong but only because of its effect on human morality. Kant said that 'he who is cruel to animals becomes hard also in his dealing with men'.[188]

Jeremy Bentham (1748-1832) began the move towards contemporary thinking about animals in philosophy and law.

> The day may come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny… What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps, the faculty for discourse?… the question is not, can they reason? nor, can they talk? but, can they suffer?[189]

Bentham's view that humans have a responsibility to ensure animals do not experience unnecessary suffering continues to be a foundational principle of animal protection law. Bentham ensured that the issue of animal protection would no longer be seen from a solely anthropomorphic point of view but also (at least partly) from a biocentric[190] one which considered the protection of animals for their own sake because of their inherent value.

The Cruel Treatment of Cattle Act 1822 was the first animal protection statute in the UK (and the world) followed by the Cruelty to Animals Act 1849 and the Protection of Animals (Scotland) Act 1912. This, and subsequent legislation, sought to minimise pain and distress suffered by animals, which were from the outset regarded as human property.

This legislation, however, did not apply to wild animals. Well into the 20th century, the need to protect wildlife was not founded on animal welfare; it was perceived (especially by those with wealth) as being essentially economic; preserving game and quarry species, and protecting areas in which to hunt them. Not until 1947, and the publication of the Ritchie Report[191], was a specialist national (UK) nature conservation body established[192] and national habitat protection measures[193] instigated[194]. While no longer being solely economic, the motivation underlying such protection was still firmly anthropocentric, with the scientific importance of conservation to humans at the forefront.

However, as science and modernity's perceived failure to deliver their promise began to affect public opinion in the 1960s and 1970s, protection and conservation of wildlife took on a new rationale; nature began to be valued on aesthetic, cultural, social and wider economic grounds. Events such as the publication of Silent Spring[195] and The Tragedy of the Commons[196], Apollo 8's first pictures of Earth from space[197], the founding of Greenpeace and Friends of the Earth[198] and the UN Conference on the

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[188] Immanuel Kant, *Lectures on Ethics* (Harper and Row 1963) 240.

[189] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (new ed, Clarendon Press 1907) ch 17.

[190] Or theriocentric.

[191] Scottish Wild Life Conservation Committee (1947) National Parks and the Conservation of Nature in Scotland, Cmd 7235. The Huxley Report (1947) was the English equivalent.

[192] The Nature Conservancy.

[193] National Nature Reserves and Sites of Special Scientific Interest, both introduced by the National Parks and Access to the Countryside Act 1949.

[194] Bell and others (n 79) 705–6.

[195] Rachel Carson, *Silent Spring* (Hamish Hamilton 1963).

[196] Garrett Hardin, 'The Tragedy of the Commons.' (1968) 162 Science 1243.

[197] On December 24th, 1968.

[198] In 1969.

Human Environment[199] moved (at least influential) public opinion to take conservation of nature more seriously.[200] Government policy changed accordingly.

Important fruits of that process were two other milestones in the development of Scottish (and UK) wildlife law, emanating from the EU; the Birds Directive in 2009[201] and the Habitats Directive in 1992[202], mostly transposed into Scots law by the Conservation (Natural Habitats &c.) Regulations 1994 and the Wildlife and Countryside Act 1981.

However much the attitude to wildlife in law has evolved its basis, however, is still utilitarian and anthropocentric.

6. Typology of wildlife offences

While not the main thrust of wildlife law, there is some legislation to prevent cruelty or unnecessary suffering to wild animals e.g. the Wild Mammals Protection Act 1996, the Protection of Wild Mammals (Scotland) Act 2002 and the Protection of Badgers Act 1992, all of which explicitly make intentionally inflicting unnecessary suffering (and a number of related actions) on the specified animal a criminal offence. However, the emphasis on conservation and protection at the species level persists. Much of bird and animal conservation legislation has welfare as an incidental outcome e.g. it is an offence to injure a wild bird and many wild animals, while the main thrust is conservation.

6.1 Species and habitat protection

The main legislative protection of wildlife in Scots law, the Wildlife and Countryside Act 1981, protects birds, animals and plants. It is an offence under section 1 (1) and (2) to intentionally kill or injure a wild bird, to intentionally destroy or damage a nest, to intentionally take or destroy eggs or to possess a wild bird or wild bird's egg. Rarer (Schedule 1) birds are afforded greater protection. Animals are only covered if listed in Schedule 5 of the Act but include bats, reptiles, amphibians, some other mammals (e.g. red squirrels), fish, and butterflies. For these protected animals, there is a range of offences similar or analogous to those for wild birds. In respect of plants, it is an offence for anyone other than the owner or occupier of the land to intentionally uproot any wild plant and an offence for anyone to intentionally pick, uproot or destroy any of the rare wild plants in Schedule 8.[203] There are also offences in relation to the mis-use of snares and the introduction of non-native species.

The Conservation (Natural Habitats &c.) Regulations 1994 create further offences in relation to a small number of European protected species, listed in Schedules 2 and 4 and also make it an offence (in Regulation 18) to intentionally or recklessly damage any natural feature by reason of which land is a Special Protection Area or a Special Area of Conservation. These two designations[204] arise from the Birds Directive and the Habitats Directive respectively.

Section 19 of The Nature Conservation (Scotland) Act 2004 makes it an offence for any person to intentionally or recklessly damage any natural feature specified in an SSSI notification[205].

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[199] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (UN Doc A/CONF.48/14/Rev.1).

[200] Bell and others (n 79) 22 and 705.

[201] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7.

[202] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.

[203] Bell and others (n 79) 739–40.

[204] Collectively called Natura 2000 sites.

[205] A SSSI is a Site of Special Scientific Interest, which is a designation over a piece of land because of the interest in a physical feature of the site or the presence of a particular species. It is the foundational conservation

6.2 Protection of salmon fisheries

The right of salmon fishing is not an incident of land ownership, but a legally separate tenement, acquired by express grant from the Crown or by prescription.[206] These property rights are not directly related to the arrangements for protection and conservation of salmon stocks, the first instances of which may have been in the time of David I (1124-1153) and William the Lion (1165-1214).[207]

The basis for modern statutory protection of salmon fishing was provided by a succession of Acts of the UK Parliament in the 19th and 20th centuries, culminating in the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951[208], the Salmon Act 1986 and the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.[209] Together, these statutes provide for a wide range of criminal offences relating to salmon fisheries, the most basic of which is the offence of poaching; fishing for salmon without either the legal right to fish or written permission from a person with such a right.[210] The wide range of other offences, mostly applying to all (including proprietors), include unlawful methods of fishing[211]; fishing out with annual and weekly close times[212]; interfering with or obstructing adult or young salmon[213]; sale, purchase and possession of certain salmon[214] and obstruction of a water bailiff or other enforcing officer in the exercise of their powers.[215] District Salmon Fishery Boards[216] regulate local salmon fisheries and have power to appoint water bailiffs to enforce much of the legislation. Water bailiffs' powers are extensive (including search and apprehension) and are similar to those of police officers in respect of the legislation.[217]

Unlike salmon fishing, a right of trout-fishing is an incident to the right of property.[218] The right of fishing for brown trout in a private river, stream or loch is not a separate feudal estate but pertains to the ownership of the land which borders the water.[219] The regulation of trout fishing is less comprehensive than that of salmon fishing and the offence of poaching can only be committed in very limited circumstances; if a protection order[220] is made in relation to a prescribed catchment area or part thereof of any river and trout is taken without legal right or written permission from the holder

designation upon which others are based. The legal basis for SSSIs in Scotland is the Nature Conservation (Scotland) Act 2004.

[206] 'FISHERIES (Volume 11)', *The Laws of Scotland. Stair Memorial Encyclopedia* (Lexis Nexis).

[207] ibid.

[208] The rivers Tweed, Solway and Esk have their own statutory framework, arising from their relationships to the Scotland-England border.

[209] 'FISHERIES (Volume 11)' (n 206).

[210] Freshwater Fisheries (Protection) (Scotland) Act 1951 Section 1

[211] Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, sections 2, 3 and 4.

[212] Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, sections 13, 14 and 15.

[213] Salmon Fisheries (Scotland) Act 1868, section 15 and Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, section 23.

[214] Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, sections 18, 19 and 20

[215] Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, section 10(6)

[216] Salmon Act 1986, sections 14 and 16

[217] Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, sections 10, 11 and 12

[218] Maxwell v Copland (1868) 7 M 142 at 149, per Lord Neaves.

[219] 'FISHERIES (Volume 11)' (n 206).

[220] Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, section 48 (1)

of the right, an offence is committed.[221] Offences analogous to those in respect of salmon exist for trout regarding illegal fishing methods[222] and the annual close season.[223]

The game laws in Scotland were radically overhauled with the coming into force of the Wildlife and Natural Environment (Scotland) Act 2011 which had the effect of making provision for the protection of game species under the ambit of the Wildlife and Countryside Act 1981.[224] The Act includes provision for*, inter alia*, close seasons and 'poaching offences'.[225] [226]

6.3 Protection of Deer

The Deer (Scotland) Act 1959 was the first piece of legislation to regulate matters relating to deer, including their conservation and control, close seasons, dealing in venison, offences including poaching and enforcement. The relevant legislation is now to be found in the Deer (Scotland) Act 1996.[227]

Under section 5, Scottish Ministers have a duty to set, by order, close seasons for the taking or killing of deer and contravention of such an order is an offence, though several defences are available. Under section 17, any person who, without legal right to take or kill deer or without permission, takes or wilfully kills or injures deer on any land shall be guilty of an offence. Section 22 makes it a specific offence for more than one person to take deer illegally There are several other connected offences such as taking deer at night[228], use of certain firearms[229] and use of vehicles.[230]

6.4 Endangered species

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora[231] has been given effect to in the UK[232] principally by the Endangered Species (Import and Export) Act 1976.

It is an offence for a person to sell, offer or expose for sale, or to have in his possession or transport for the purpose of sale, or display to the public a live or dead animal or certain imported derivatives of endangered species,[233] except under a licence issued by the Secretary of State for Environment, Food and Rural Affairs.

7. Prosecution and sentencing of wildlife offences in Scotland

All wildlife offence prosecutions are taken by COPFS, usually after referral from Police Scotland, though there are over fifty Specialist Reporting Agencies that can report offences, including wildlife

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[221] Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, section 48 (2)

[222] Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, sections 2 and 4

[223] Freshwater Fish (Scotland) Act 1902, section 1

[224] Section 2 of the 1981 Act has been amended so that a 'game bird' now falls within the definition of 'wild bird' in the Act. In 'ANIMALS (2nd Reissue) 6. Game (1) HISTORICAL BACKGROUND TO GAME 254. Introduction', *The Laws of Scotland. Stair Memorial Encyclopedia* (Lexis Nexis).

[225] ibid.

[226] E.g. section 11G which creates poaching offences in respect of hares and rabbits.

[227] 'ANIMALS (2nd Reissue) 6. Game (1) HISTORICAL BACKGROUND TO GAME 254. Introduction' (n 224).

[228] Deer (Scotland) Act 1996, section 18.

[229] ibid, section 21.

[230] ibid, sections 19 and 20.

[231] Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 U.N.T.S. 243 [hereinafter CITES].

[232] Such regulation is a reserved matter- Scotland Act 1998 (c 46), s 30, Sch 5, Pt II, para C5.

[233] Endangered Species (Import and Export) Act 1976, section 4.

offences, to the police[234]. The specialist prosecution unit within COPFS also deals with wildlife offences. Police Scotland have the benefit of support for the collection and coordination of intelligence from specialist police officers of the UK National Wildlife Crime Unit (NWCU). All operational divisions of Police Scotland also have a Wildlife Crime Liaison Officer on their establishment.[235]

7.1 Species and habitat protection

The great majority of offences under the Wildlife and Countryside Act 1981 contain a *mens rea* element and are triable only by summary proceedings. The sanction for those offences is a maximum of six months imprisonment and/or a fine not exceeding Level 5 of the Standard Scale (£5,000). An example of one of the exceptions is that of offences related to non-native species, which are triable both ways and which carry a sanction of 12 months maximum imprisonment and/or a fine not exceeding £40,000 for summary conviction and two years maximum imprisonment and/or an unlimited fine upon conviction on indictment.[236] Additionally, if the summary-only offences are committed in respect of more than one bird, nest, egg, other animal, plant etc., the maximum fine which may be imposed shall be determined as if the person convicted had been convicted of a separate offence in respect of each bird, nest, egg, animal, plant etc. Finally, the court shall order the forfeiture of any bird, nest, egg, other animal, plant or other thing in respect of which the offence was committed; and may also order the forfeiture of any vehicle, animal, weapon etc. which was used to commit the offence. In the case of an offence concerning non-native species, any animal or plant which is of the same kind as that in respect of which the offence was committed and was found in his possession may also be forfeited.

Under the Conservation (Natural Habitats &c.) Regulations 1994 most offences contain a *mens rea* element but only the regulation 18 offence is triable both ways.[237] The sanction for that offence is, on summary conviction, a fine not exceeding level 5 on the standard scale and, on conviction on indictment, an unlimited fine. The sanctions for offences against European protected species on summary conviction is imprisonment for a term not exceeding six months and/or to a fine not exceeding level 5 on the standard scale.

Under s19 of The Nature Conservation (Scotland) Act 2004, the offence of intentionally or recklessly damaging[238] any natural feature specified in an SSSI notification (and related offences) is triable both ways and attracts, on summary conviction, a fine not exceeding £40,000, and, on conviction on indictment, an unlimited fine.

7.2 Protection of salmon fisheries

All offences in this area carry a *mens rea* element. The basic offence of poaching is punishable, on summary conviction, by a fine not exceeding level 3 on the standard scale (£1,000). Most other offences attract fines at level 3 (£1,000) or level 4 (£2,500). Only the offences of poaching with another or others[239] , using prohibited killing methods[240] and possession of illegal salmon[241] are triable both ways and punishable, on summary conviction, by a fine not exceeding £10,000 and/or by

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[234] These include all Scottish local authorities, SSPCA, but not RSPB. http://www.copfs.gov.uk/about-us/what-we-do/our-role-in-detail/10-about-us/296-specialist-reporting-agencies accessed 6th June 2018.

[235] http://www.scotland.police.uk/contact-us/report-wildlife-crime accessed June 6th 2018.

[236] WACA 1981 s21.

[237] The offence of intentionally or recklessly damaging a European site.

[238] Which obviously also contains a *mens rea* element.

[239] Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, s7.

[240] Ibid, s4.

[241] Ibid, s20.

imprisonment for a term not exceeding 3 months and, on conviction on indictment, by an unlimited fine and/or by imprisonment for a term not exceeding 2 years.

7.3 Protection of Deer

All but one of the offences, including the s17 offence, are triable by summary complaint only and most of those offences are punishable by a maximum fine at level 4 (£2,500) on the standard scale or 3 months imprisonment or both. Only the s22 offence of unlawful taking of deer and related offences by more than one person is triable both ways. The punishment on summary conviction is a fine of the statutory maximum (£10,000) in respect of each deer taken or 6 months imprisonment or both. On solemn conviction, the sentence is an unlimited fine or imprisonment for a term not exceeding 2 years or both.

Furthermore, upon conviction for any of the principal offences under the Act the court shall have the power to cancel any firearm or shotgun certificate held by the person and to order the forfeiture of any deer illegally taken and to disqualify him from holding or a licence to deal in venison.[242]

7.4 Endangered species

The principal offences in the 1976 Act are triable both ways and anyone found guilty of an offence shall be liable

(a) on summary conviction, to a fine not exceeding £10,000;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

7.5 Practice of Wildlife Crime Sentencing in Scotland

The criminal law represents a much larger proportion of the enforcement effort in respect of wildlife crime than it does in respect of environmental crime. Responsive regulation and the associated concept of the enforcement pyramid[243] are not major features of wildlife crime enforcement in Scotland[244]. While there have been proposals to institute a systematic framework of civil liability for wildlife crime in England[245], no such proposals have been made in Scotland.

Scottish Natural Heritage, however, do operate a licensing system which reflects aspects of responsive regulation in that many activities which would otherwise be an offence against protected species are permitted under licence for certain specific purposes.[246] Two important areas of activity which are regulated in this way are the killing of game and the killing of wild birds[247].

The killing of game by a person, which would otherwise be an offence (i.e. poaching), is permitted if the person holds permission from the owner of the property right relating to the taking of the salmon, trout or deer.

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[242] Deer (Scotland) Act 1996, section 31.

[243] See nn 114 and 115 above.

[244] However, see below use of limited powers by Scottish Natural Heritage in Raeshaw Farms Ltd v Scottish Natural Heritage.

[245] Law Commission, 'Wildlife Law. Volume 1: Report (Law Com No 362)' (2015) para 10.124.

[246] As well as species discussed here, licences are available e.g. in respect of bats, badgers, freshwater pearl mussels, otters and pine martens- https://www.nature.scot/professional-advice/safeguarding-protected-areas-and-species/licensing/species-licensing-z-guide -accessed August 3rd 2018.

[247] General deer authorisations are also issued for specific purposes defined in legislation, to undertake activities that would otherwise constitute an offence such as culling deer outside the legal season and shooting deer at night. Individuals must be registered with SNH on a Fit and Competent register to operate under a specific authorisation and must meet minimum criteria to be eligible for registration.Scottish Government, 'Wildlife Crime in Scotland. 2016 Annual Report' (2017) 21.

The killing of wild birds, which would otherwise be an offence under Section 1(1) of the Wildlife and Countryside Act 1985, is permitted under s.16 of the Act, which exempts from s.1 anything done in accordance with the terms of a licence granted by Scottish Natural Heritage. General Licences are a "light touch" regulatory instrument granted by SNH, most commonly for the purposes of conservation of other bird species or to prevent serious agricultural damage or to protect public health. These licences are known collectively as General Licences 01, 02 and 03. There is no application process, and no significant registration or reporting requirements is attached to the use of such General Licences. The "Authorised Person" is the owner or occupier of the land in question or their agents and the licence usually applies to named species.[248] Activity that cannot be regulated by General Licences can sometimes be regulated by Specific Licences[249] which are more onerous in respect of the application process, conditions and reporting requirements.

In 2014 SNH published a framework for implementing restrictions on the use of General Licences 01, 02 and 03 which was part of a package of measures aimed at tackling raptor persecution. The core principle was that the granting of General Licences would not be appropriate where there has been a loss of confidence, particularly in situations where there has been evidence to show that crimes against wild birds and breaches of the General License had taken place in areas subject to such licences. Those not granted General licences in these circumstances would have to apply for the more onerous Specific Licences. The framework was challenged by judicial review in the Court of Session in 2017[250] where, despite losing on one point, the legality of SNH's policy was upheld overall. The judgement now enables SNH to continue, and possibly expand into other areas, the policy which, crucially, makes possible the exercise of a limited degree of discretion, for some sanctions to be applied to those breaching licence conditions without having to immediately resort to the expense (and evidential challenges) associated with recommending criminal prosecution.

The ambivalences that can be seen to be inherent in attitudes to environmental crime are, to some extent, apparent in attitudes to wildlife crime. Much of what would otherwise be criminal is rendered otherwise by societal norms (hunting of game and fishing) or by exceptions related to economic or other human necessities (destruction of pests or vermin) so the tension between economic pressure and wildlife law to some extent mirrors that between economic pressure and environmental law. Other sources of ambivalence are, however, less apparent in respect of wildlife crime. Because of the largely enforcement-driven approach to wildlife crime there is much less scope for the exercise of discretion, notwithstanding the recent incremental changes. There may also be less chance of "capture" taking place of those enforcing the law, as is potentially the case with environmental legislation. There has been no research into the phenomenon in respect of wildlife enforcement in Scotland[251] but it may be reasonable to surmise that, not only is there less day to day contact between enforcement officials and potential wildlife offenders than is the case in the environmental arena, but also that "job-switching" and resultant blurring of loyalties is less prevalent in the wildlife arena.

All wildlife offence prosecutions are taken by COPFS, usually after referral from Police Scotland, though there are over fifty Specialist Reporting Agencies that can report offences, including wildlife offences, to the police[252]. The specialist prosecution unit within COPFS also deals with wildlife offences. Police Scotland have the benefit of support for the collection and coordination of intelligence

[248] https://www.nature.scot/general-licences-birds- accessed August 3rd, 2018

[249] Though, formally, they are simply termed "Licences" by SNH, in contra-distinction to General Licences.

[250] Raeshaw Farms Ltd v Scottish Natural Heritage [2017] CSOH 50; 2017 S.L.T. 683 (OH).

[251] Though there has been in Sweden, where elements of "capture" of enforcement agencies were identified. Helena Du Rées, 'Can Criminal Law Protect the Environment?' (2001) 2 Journal of Scandinavian Studies in Criminology and Crime Prevention 109.

[252] These include all Scottish local authorities, SSPCA, but not RSPB. http://www.copfs.gov.uk/about-us/what-we-do/our-role-in-detail/10-about-us/296-specialist-reporting-agencies accessed 6th June 2018.

from specialist police officers of the UK National Wildlife Crime Unit (NWCU). All operational divisions of Police Scotland also have a Wildlife Crime Liaison Officer on their establishment.[253]

As with an environmental prosecution, the decision as to whether or not to proceed with a wildlife criminal prosecution lies entirely within the discretion of COPFS and will depend on its assessment of whether there is both sufficient admissible, reliable evidence and sufficient public interest in proceeding.[254] The prosecution is also the 'master of the instance' in respect of wildlife crime and therefore decides whether to proceed by way of summary proceedings[255] or solemn proceedings.[256] There is no right to trial by jury on request.

One significant feature of Scots wildlife law is the vicarious liability offence under section 24 of the Wildlife and Natural Environment (Scotland) Act 2011. Under that provision, landowners (or managers) can be found criminally liable for the actions of employees which cause death or injury to wild birds or cause interference to their nests. Landowners must show that as well as being unaware of the offence being committed, they had taken "all reasonable steps and due diligence" to prevent offences being committed on their land. This was enacted largely in response to public pressure, often through wildlife charities and pressure groups, to take action against the perceived persecution of raptors by large commercial shooting estates.

Complex attitudes to animals persist in the UK and Scotland, where animals are generally protected by law, but are still reared specifically for shooting or catching and where resistance to legislation to control field sports continues. The debate around the Hunting Act 2004 was often characterised as 'town versus country', with the former (affluent, socially advantaged) sections of society allegedly seeking to impose their will on the latter (less affluent, less socially advantaged) sections of society. Non-Governmental Organisations (NGOs) (almost all charities) play an influential role in shaping policy involved in wildlife crime in the UK and some are large professional organisations, comparable with medium to large businesses, rather than being grass roots or 'activists' movements.[257]

The resources available, for example, to the Royal Society for the Protection of Birds (RSPB) for charitable purposes in 2017/18 was £101m and its membership numbered over 1,219,000[258]. The Royal Society for the Prevention of Cruelty to Animals (RSPCA) had an expenditure of over £129m in 2017.[259] Both the RSPCA and the RSPB are both incorporated under Royal Charter which grants them significant legitimacy within civil society. This, and the public support for these organisations, together with the resources available for campaigning and political lobbying, allows the main environmental NGOs to take a lead in promoting wildlife crime as an issue of importance. It also places the organisations in a position to employ expertise, for example, specialist investigators and political lobbyists, to promote their policy objectives and adopt a position of being expert in their chosen field, while their socio-economic position allows them to exploit that perceived expertise[260].

Another significant influence on the debate round wildlife crime is the campaigning blogs and websites facilitated by the ubiquity, cost-effectiveness and ease of digital communication. These digital

[253] http://www.scotland.police.uk/contact-us/report-wildlife-crime accessed June 6th, 2018.

[254] Crown Office and Procurator Fiscal Service Prosecution Code 2001.

[255] Before a sheriff but without a jury in the Sheriff Court.

[256] Before a judge and jury, either in the Sheriff Court or the High Court of Justiciary.

[257] Angus Nurse, 'Repainting the Thin Green Line: The Enforcement of UK Wildlife Law' [2012] Internet Journal of Criminology 1, 7.

[258] Royal Society for the Protection of Birds, 'Annual Review 2017-2018' (2018).

[259] Royal Society for the Protection and Care of Animals, 'Trustees' Reports and Accounts' (2017). The RSPCA operates in England and Wales. Its Scottish counterpart, the Scottish Society for the Protection of Cruelty to Animals is smaller, the Consolidated Financial Statements for 2017 indicating expenditure of £14m in 2017.

[260] Nurse (n 257) 8.

platforms (most prominently focussing on raptor persecution) can be more agile and responsive than traditional lobbyists to perceived failings in the enforcement of wildlife criminal law and are less constrained by considerations of mass memberships and socio-political standing, enabling more trenchant critiques of these perceived failings than those made by their traditional counterparts.

As with environmental crimes, there is a perception amongst a wide range of campaigners and pressure groups that the current prosecution and sentencing of wildlife crime is inadequate and that not only should tougher sentences be handed down on conviction but also prosecutor and judicial approaches to wildlife crime need to more clearly reflect the harm done to wildlife and society by wildlife crime.[261]

Many of the themes above are reflected in the 2017 controversy over the decision by the Wildlife and Environmental Crime Unit (WECU) in the Crown Office and Procurator Fiscal Service not to proceed with criminal proceedings in cases of alleged offences against birds protected by virtue of the Wildlife and Countryside Act 1981 s.1 and Sch.1. There was deep frustration and anger expressed by voluntary wildlife activists regarding the decision[262] and the matter was taken up by the Scottish Parliament's Environment, Climate Change and Land Reform Committee. In a letter to the Committee[263], the WECU explained that important video evidence obtained covertly by the RSPB on private land was judged by prosecutors to be irregularly obtained and, in the circumstances, therefore inadmissible under the common law doctrine established in Lawrie v Muir 1950 JC 19[264]. The circumstances were that the WECU decided that the RSPB had no statutory access rights under section 1 of the Land Reform (Scotland) Act 2003 nor had powers to carry out covert surveillance under the Regulation of Investigatory Powers (Scotland) Act 2000, meaning that the irregularity could not be excused. Academic comment has tended to support WECU's position[265] and one author has also suggested that a way of making such evidence admissible in the future would be to amend s.8 of the Regulation of Investigatory Powers (Scotland) Act 2000 to designate the RSPB as a "relevant public authority"[266].

7.6 Wildlife offenders

In respect of environmental offending, most authors see offenders as rational economic actors[267]. However, the situation in respect of wildlife offending is more complex. While rational economic factors are relevant to some extent, other factors have been suggested as also being in play. This is particularly of interest given the focus on a deterrence model which mostly uses the criminal law to regulate wildlife crime rather than the responsive regulation model associated with environmental crime. The assumption underpinning the deterrence model is that offenders are rational, responsible

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[261] Scottish Environment LINK, 'Natural Injustice: A Review of the Enforcement of Wildlife Protection Legislation in Scotland.' (2015) 3. Scottish Environment LINK is the umbrella body for 35 of Scotland's voluntary environment organisations.

[262] https://raptorpersecutionscotland.wordpress.com/2017/06/06/crown-office-drops-5th-case-of-alleged-wildlife-crime/ accessed August 7th 2018.

[263] From Sara Shaw, Head of WECU, to Graeme Dey, MSP Convener of the Environment, Climate Change and Land Reform Committee, 30th May 2017.

[264] In Lawrie, the High Court of Justiciary held that an irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible. Lord Cooper observed: "Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed".

[265] Professor Peter Duff https://www.abdn.ac.uk/law/blog/the-law-of-evidence-video-footage-and-wildlife-conservation-did-copfs-make-the-correct-decisions/ accessed August 18th 2018.

[266] Philip Glover, 'The Admissibility of Covert Video Data Evidence in Wildlife Crime Proceedings: A "Public Authority" Issue?' [2017] Juridical Review 269, 277.

[267] Watson (n 150).

individuals who calculate the risks associated with crime before deciding whether to commit an offence[268] It is this assumption that has been challenged by some, many of the challenges displaying "a healthy scepticism about the effectiveness of deterrence through prosecution and sentencing."[269]

Firstly, however, there can obviously be clear rational economic motivations for wildlife crime. For example, game poaching can be lucrative and, if re-sale of game is not the motive, access to the sporting challenge by legal means is often prohibitively expensive; economic damage to agricultural enterprise resulting from sea-eagles or geese can be significant; the economic advantage in using protected habitats in contravention of the law can be determinative or the illegal protection of very high value resources such as driven game birds can be too great a temptation.

The work focussing on wildlife offending as rational, instrumental behaviour has highlighted three main factors which render the deterrent model relatively ineffective; under-resourcing of enforcers at all levels, attitudes to wildlife crime and lack of deterrent effect on potential offenders.[270]

Under-resourcing is a familiar element in the perceived ineffectiveness of the deterrence model. Critics point to insufficient numbers of personnel amongst SNH, Police Scotland and the prosecution service, despite the creation of the UK police staffed National Wildlife Crime Unit and the Wildlife and Environmental Crime Unit (WECU) in the Crown Office and Procurator Fiscal Service. A lack of basic material resources, such as vehicles and other necessary equipment is perceived, leading to lack of data collection and sharing tools, access to forensic analysis and more advanced assistive technology (such as surveillance equipment). Under-resourcing can also manifest as insufficient training for enforcement agents, prosecutors and the judiciary thus reducing their capacity to effectively enforce legislation and sentence appropriately.[271]

Equally familiar is the perception that policy makers and the judiciary do not take wildlife crime seriously, that numbers of prosecutions are low, numbers of convictions are even lower, initiating a vicious circle which is closed by low sentencing and then perpetuated.[272]

The above factors combine to suggest that the elements of successful deterrence do not exist for wildlife crimes. There is little perceived certainty of being detected and convicted (especially in wild, sparsely populated and remote locations, subject to extreme environmental conditions) and the severity of the punishments given to those few offenders who are convicted is often considered low in relation to the harm caused and/ or the rewards gained.[273] Wellsmith has written that

> decades of criminological research suggest that reductivist sentencing based on deterrence is unsuccessful in reducing crime rates. This same research suggests that certainty of punishment is more important than severity in achieving deterrence, yet certainty is the most difficult element to control. Further, people are more deterred by the sanctions of a personally relevant collective, than they are by the sanctions of the criminal justice system to their actions.[274]

This last issue points to the other motivations, other than economically rational ones, that can lead to wildlife crime. Meanwhile, the argument that persistent and damaging wildlife crime is a consequence

[268] Nurse (n 257) 12.

[269] Melanie Wellsmith, 'Wildlife Crime: The Problems of Enforcement' (2011) 17 European Journal on Criminal Policy and Research 126.

[270] ibid 135.

[271] ibid.

[272] ibid 137.

[273] ibid 139.

[274] ibid 140.

of weak legislation and ineffective sentencing reflects the 'common sense' approach to crime and arguably represents an easy 'sell' to the public and policy makers.[275] Angus Nurse writes:

> … investigators regularly encounter the same offender over and over again and evidence exists that even those offenders who are repeatedly caught convicted and fined are not deterred. Egg collector Colin Watson for example was caught and convicted six times; had paid fines of thousands of pounds and had his collection of eggs confiscated. Despite the fact that he was known to police and staff involved in protecting rare birds' nests he was suspected of still being involved in an egg collecting expedition when he fell to his death in May 2006.[276]

Much of the work looking behind the traditional economic rationality approach to wildlife crime can be traced back to Sykes and Matza's[277] work on theories of delinquency in the 1950s where "neutralisation techniques" were identified that served to justify and rationalise offenders' behaviour. In this approach to wildlife crime, its drivers are normative and social, rather than the cost-benefit rational choices discussed above. Wildlife crime may therefore make sense within communities that are e.g. especially protective of their local landscape and culture, usurped by new values or for new agendas, protective of conservative agrarian values, that are able to "drift"[278] toward rationalizations that neutralize their deviance, particularly to affinity groups in their own communities. In this way, while wildlife crime can be understood as rational, the full picture behind the crime is attained only once we move away from seeing it as solely instrumental and begin to see it as expressive of a more complex interplay of law, legitimacy (and perceived legitimacy) and morality in rural communities[279].

Von Essen and Nurse summarise the position well:

> … wildlife is no longer a 'private good', inasmuch as it ever was – indeed, for most of history the public has objected to the privatization, enclosure and appropriation of res nullius … Conservation directives have explicitly redefined wildlife as a public good for future generations. It is no longer the local …. community's …. resource to govern autonomously, but it is seen to be of shared value—indeed even a commodity—to a global community, and often also to command intrinsic value… The result is that hunters, farmers, ranchers, shepherds and rural residents now experience their local wildlife appropriated by supranational conservation agendas or national directives where states consider the wider public good in protecting wildlife against the local interests and 'rights' of particular groups. Accordingly, (these rural residents) may find that they can no longer hunt or manage populations of protected species without oversight of law enforcement, ENGOs and the public and that what they may perceive as traditional rights and cultural practices have now become tightly regulated.[280]

Enticott's 2011 study of wildlife crime in England and Wales, focusses on the illegal culling of badgers (strongly implicated in the spread of the economically damaging disease of bovine TB (bTB)) by

[275] Nurse (n 257) 16.

[276] ibid 12.

[277] Gresham M Sykes and David Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 American Sociological Review 664.

[278] In the sense used by Matza to suggest individuals subject to the same norms and values as society but nevertheless, in certain circumstances, susceptible to a 'shadow', deviant value system. David Matza, *Delinquency and Drift* (Transaction Publishers 1990).

[279] Erica von Essen and Angus Nurse, 'Illegal Hunting Special Issue' (2017) 67 Crime, Law and Social Change 377, 378.

[280] ibid.

farmers. It illustrates the above motivations and "neutralisations"[281] and highlights four particularly relevant ones.

The first is what Enticott calls "the defence of necessity", which focussed on the economic viability of individual farms and which was perceived to be at risk because of the presence of bTB-carrying badgers; a common theme was that "it was either the business or the badger".[282]

The second is termed "denial of necessity for the law", which involves advocating the right of offenders to usurp the law because of the offenders' knowledge and experience of nature and the countryside, especially the local area. In taking this position, farmers claimed their own expertise (rather than that of outsider scientists) as the most legitimate source of knowledge with which to inform policy towards badgers. There was no need for the law because locals were better placed to look after the countryside. A common theme was "people that know about wildlife…they're the ones that need to be listened to".[283]

Thirdly, Enticott identified what he called the "appeal to higher loyalties", which prioritised individuals' relationships with the local community above those with society at large and which also placed more value on local people and their way of life than on the lives of individual animals.[284]

Finally, there was what Enticott termed "condemnation of the condemners", most of which focussed on scientists and policy makers on one hand and campaigning badger conservation groups on the other. Both groups were perceived as interfering and ignorant of the countryside and, further, of having a deficient moral compass regarding animals and their welfare because of *inter alia* pursuing one-species policies that disrupted the balance of nature, advocating that bTB-infected badgers be left to die and prioritising the welfare of badgers over the welfare of farm livestock.

The criminology of wildlife crime (at least in the first-world context) is in its relative infancy but variations on the same theme can be discerned in research on community responses to protection and/or re-wilding policies in respect of gray wolves (in Denmark[285] and Norway[286]) and sea eagles (in the Republic of Ireland[287]).

7.7 Statistical data on wildlife offences in Scotland

There are two principle sources of published data regarding wildlife crime and sentencing in Scotland: the Wildlife Crime Penalties Review Group Report of 2015[288] and the Scottish Government Wildlife Crime in Scotland Annual Reports[289]. Scotland is a small jurisdiction and, while there are perceptions

[281] Gareth Enticott, 'Techniques of Neutralising Wildlife Crime in Rural England and Wales' (2011) 27 Journal of Rural Studies 200.

[282] ibid 203.

[283] ibid 204.

[284] ibid 205.

[285] Peter Lyhne Højberg, Martin Reinhardt Nielsen and Jette Bredahl Jacobsen, 'Fear, Economic Consequences, Hunting Competition, and Distrust of Authorities Determine Preferences for Illegal Lethal Actions against Gray Wolves (Canis Lupus): A Choice Experiment among Landowners in Jutland, Denmark' (2017) 67 Crime, Law and Social Change 461.

[286] Olve Krange and Ketil Skogen, 'When the Lads Go Hunting: The "Hammertown Mechanism" and the Conflict over Wolves in Norway' (2011) 12 Ethnography 466.

[287] Eileen O'Rourke, 'The Reintroduction of the White-Tailed Sea Eagle to Ireland: People and Wildlife' (2014) 38 Land Use Policy 129.

[288] Scottish Government, 'Wildlife Crime Penalties Review Group Report' (2015). Often referred to as "The Poustie Report" in recognition of the Review Group's Convenor, Professor Mark Poustie.

[289] Published every year since 2012, as provided for in Section 26B of the Wildlife and Countryside Act 1981.

amongst many that wildlife crime is under-reported, the low number of convictions and disposals makes analysis of the data difficult.

The Poustie Report of 2015 examined data about convictions and sentences for wildlife crime from 2009-10 to 2013-14. The Scottish Government Wildlife Crime in Scotland Annual Reports provides data on convictions and sentences for wildlife crime from 2011-12 to 2015-16. The Poustie Report noted that the number of convictions during the five years from 2009-10 to 2013-14 had risen from 24 to 60, but then there were 35 convictions in 2014-15 and by 2015-16 the number of convictions had fallen to 20. By far the most common disposal was a monetary fine. See Table 3.

Table 3: People with a conviction for wildlife offences in Scottish Courts, by main penalty, 2009-10 to 2015-16, where wildlife offence is main offence

	2009-10*	2010-11*	2011-12	2012-13	2013-14	2014-15	2015-16
People proceeded against	*	*	71	77	80	51	25
People with a conviction	24	37	48	56	60	35	20
Of which received:							
Custody	1		1	1	1	1	1
Community Sentence			7	8	4	2	4
Monetary	18	33	37	33	43	28	11
Other	5	4	3	14	12	4	4

Source: Scottish Government Wildlife Crime in Scotland Annual Report 2016. The Wildlife Crime Penalties Review Group 2015. *Data for 2009-10 and 2010-11 has been extracted and collated from The Wildlife Crime Penalties Review Group Report which does not contain data on the number of people proceeded against.

Between 2005-06 and 2015-16, six people received a custodial sentence in Scottish courts where a wildlife offence was the main offence. There were no custodial sentences imposed in 2006-07, 2007-08, 2009-10 or 2010-11. Whilst this is a very small number of custodial sentences and care must be taken in interpreting this data, it is worth noting that the three longest sentences were given during the last five years. See Table 4.

Table 4: People receiving custodial sentence in Scottish Courts for Wildlife offences by length of sentence

		2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Bird, offences involving	number of people							1	1		1	
	sentence in days							91	182		121	
Cruelty to wild animals	number of people				1							
	sentence in days				80							
Hunting with dogs	number of people	1								1		
	sentence in days	60								182		
Sources: Wildlife Crime Penalties Review Group Report 2015, data from RSPB Bird Crime Reports 2011-16 and Scottish Government Wildlife Crime in Scotland Annual Reports 2014, 2015 and 2016.												

The Poustie Report provided information on average fines per year stating there was 'no evidence of a trend in average fines: although average fines decreased from £637 (based on 18 fines imposed) to £402 (based on 43 fines imposed), the figures in 2009-10 were skewed by 2 averages fines of £2150 for offences involving badgers, omitting which reduces the average to £448.' See Table 3.

Poustie further noted; 'However, taking a much longer perspective on the data available (from 1989/90 to 2013/14), it is nonetheless fair to say that average fines are rising against a background of what appears to be lower levels of convictions', though the Report also observed that the increase in fine levels from £141 in 1989/90 to £402 in 2013/14 could persuasively be attributed to inflation.

It is not possible to examine average fines for 2014-15 and 2015-16 as the Scottish Government Wildlife Crime Report does not provide annual averages for fines but five-year averages.

Table 5: Sentence - Average Fine

		2009-10	2010-11	2011-12	2012-13	2013-14
Total Fines	**Number**	**18**	**33**	**37**	**33**	**43**
	Average(£)	**637**	**308**	**462**	**389**	**402**
Badgers	Number	2	3	1		6
	Av (£)	2150	367	400		967
Birds	Number	3	3	10	9	4
	Av (£)	417	417	439	473	1375
Other Conservation offences	Number	1		1		
	Av (£)	1000		480		
Cruelty to wild animals	Number	1	1	3	4	1
	Av (£)	450	170	450	261	500
Deer	Number		3	2	1	3
	Av (£)		717	300	750	583
Possession of salmon or trout unlawfully obtained	Number		1	1	2	
	Av (£)		866	50	900	
Salmon and freshwater fisheries offences	Number	2	15	11	10	27
	Av (£)	125	194	278	278	236
Hunting with dogs	Number	6	3		2	4
	Av (£)	467	417		300	348
Poaching and game laws	Number	3	3	3		
	Av (£)	473	93	213		
Other wildlife offences	Number			5	5	4
	Av (£)			1227	320	438
Source: The Wildlife Crime Penalties Review Group.						

Data from the Scottish Government Wildlife Crime Annual Reports is reproduced below:

Table 6: Five Year Average Fines

	2009-10 to 2013-14 Average Fine (£)	2010-11 to 2014-15 Average Fine (£)	2011-12 to 2015-16 Average Fine (£)
Offences relating to:			
Badgers	967	967	400
Birds	574	598	684
Conservation (protected sites)	335	390	480
Cruelty to wild animals	583	535	417
Deer	403	416	457
Fish Poaching	260	260	257
Hunting with dogs	263	253	378
Poaching and game laws	740	740	213
Other wildlife offences	678	515	623
Overall Average	420	411	428
Source: Scottish Government Wildlife Crime in Scotland Annual Reports 2014, 2015 and 2016.			

Interpretation from five-year averages makes trends in fine amounts imposed very difficult to discern. It is therefore not possible to comment of this data in a meaningful way. There is some further data available from RSPB Annual Bird Crime Reports on sentences imposed for offences involving wild birds. See Table 7.

Table 7: Sentences imposed for offences involving wild birds

	2011	2012	2013	2014	2015	2016
Custodial		182 days		121 days		
Monetary	Fines ranged from £250 to £1500	Fines ranged from £350 to £1500.	Fines ranged from £500 to £2450	One fine of £675	Fines ranged from £60 to £3200	One fine of £4200
Community Sentence		Ranged from 100 hours to 180 hours	One of 220 hours		One of 240 hours	
Other		Admonished				
Source: RSPB Wild Bird Crime Reports, 2011, 2012, 2013, 2014, 2015 and 2016.						

The number of convictions is small, making interpretation of the dataset difficult. However, the maximum fine is generally following an increasing trend. The number of community sentences is very small and it is not possible to comment on any trend.

There are some difficulties in evaluating the available data. The numbers of convictions are very low, particularly recently, making any inferences from the data unreliable. The Scottish Government Criminal Proceedings Database does not report wildlife crime as a discrete category, including it presumably in the Other Crime category. The reporting of fine levels as averages can be misleading as an average, especially of a small number, can be influenced significantly by a single figure. Five-year average reporting makes the discerning of medium term trends difficult. Finally, the two major data sources displayed some inconsistencies in reporting methodology.

Accordingly, only limited conclusions can be drawn from this data. One is that monetary fines are by far the most frequent disposition upon conviction. It is difficult to discern a trend in the number of convictions for wildlife offences between 2009/10 and 2015/16; the numbers rose from 24 to 60 and back to 24 during the period. It may be possible to say that fine levels are rising on a long-term basis but that may well be attributable to inflation alone. Unfortunately, it is not possible to draw any conclusions from the six custodial sentences imposed between 2005/06 and 2015/16.

8. Summary and conclusions

The previous review has mapped out environmental and wildlife offences under Scottish criminal law and reviewed their prosecution and sentencing by Scottish courts. It has shown that the historical roots of specific types of offences reach far back in time, especially as regards the protection of wildlife. In so doing, it reflects how the evolution of the cultural and moral foundations of the human society with its natural environment have permeated Scottish law and sentencing practices. In essence, the regulatory rationale for the protection of wildlife through criminal law has evolved considerably over time from the utilitarian management of specific species from over-hunting or harvesting for commercial purposes, to a more comprehensive and sustainable management of autochthonous biodiversity under an ecosystem approach. International and, especially EU environmental law, have considerably influenced this evolution with the transposition of the Birds and Habitats Directives

into the UK and Scottish legal orders. Equally, the ratification by the UK of the 1973 CITES led to the introduction of offences related to illegal trade in endangered species into the UK statute book. Eventually, the definition of wildlife offences was loosely harmonised across all EU Member States through the ECD.[290]

Environmental crimes, as opposed to wildlife crimes, encompass a diverse typology of offences that aim at protecting a heterogeneous set of interests related to the protection of the environment in the context of sustainable development governance. The common denominator to all of these offences is, however, their nature of regulatory crimes. The specific definition of environmental offences, whether they relate to the management and disposal of wastes, water management or industrial emissions, is the criminalisation of particularly severe infractions of environmental regulations. Also in this context, environmental crimes were loosely harmonised through the ECD at European level in order to ensure a level playing field across all Member States.[291] Despite the fact that the UK and Scotland have significantly gone beyond the requirements of the ECD in its transposition, this has not prevented, however, a somewhat scattered, piecemeal and patchwork legislation regarding both wildlife and environmental crimes.

Ever since the emergence of environmental law as a specialised area of public law with a discrete set of principles and rules, criminal law has been seen as a legitimate tool for environmental law enforcement. Over time, however, in the broader context of environmental regulation criminal law is increasingly conceived and used as a last resort category, as the 'hardest' tool in the broader enforcement toolkit. This review compiles and assesses statistical data about the sentencing of environmental and wildlife crimes by Scottish courts against the backdrop of other comparable jurisdictions, most notably England and Wales. It reveals that criminal law is very prudently used in Scotland for the enforcement of environmental regulations. While the review has sought not to make any qualitative judgment in the assessment of the compiled statistical data, the authors cautiously advance that statistical data suggest a varying degree of ambivalence in the sentencing of the different types of environmental and wildlife crimes that have been reviewed. This ambivalence seems to suggest that a combination of technical factors (such as the nature of regulatory offences of environmental and wildlife crimes), but also other subjective factors (not least the personal moral beliefs and world views of individual judges), contribute to the aforementioned ambivalence in the sentencing process.

The future sentencing guidelines for environmental and wildlife crimes in Scotland should therefore provide clearest possible guidance as to sentencing criteria and the degree of discretion that judges ought to have in the sentencing of environmental and wildlife crimes.

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