

STRATEGIES IN THE PROSECUTION OF ENVIRONMENTAL CASES

By

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• What Is Environmental Law

- “**Environmental Law**” is not particularly well defined like criminal law, public law, contract, torts, land law and equity;
- Consider aspects of **pollution control (air, water, land, contamination)** with topics such as natural resources depletion, pesticides, genetically modified organisms (periphery of the subject);
- Issues with “**definition**”
 - ❖ Lack of focus and precision hinders development of definition;
 - ❖ Clash of the “subjective” and the “objective”;
 - ❖ The distinction between “fact” and “values” (values of wilderness to a natural resources exploiter and indigenous peoples);
 - ❖ Anthropocentrism v. Ecocentrism;
 - ❖ “Environment” as a relational concept
- Set of principles and concepts have developed over time
 - ❖ Polluter Pays Principle; Precautionary Principle; Preventative Principle

• Why Environmental Legislation

- Overwhelming ecological necessity – rising waste production, climate change etc;
- Big challenge for environmental protection:
 - ❖ Balancing economic, political and social considerations;
 - ❖ People's priorities differ.
- Law is central to management of the complex inter-relationships.

- **History of Environmental Legislation**
 - Either “**exploitative**” or “**protective**” or both;
 - Formative years (prior to the 1970s):
 - ❖ Localized problems of health and welfare;
 - ❖ Development/Resource Exploitation or Environmental Protection and Conservation.
 - Modern trend (Beginning from the 1970s).
 - ❖ Environmental planning (impact assessment in resource development).

• Classification of Environmental Legislation

- Environmental legislation can be classified into three broad/functional categories:
 - ❖ Environmental planning and protection (the now repealed FEPA Act, NESREA Act, Impact Assessment Act, Waste Disposal Laws, Hazardous Substance Legislation etc).
 - ❖ Conservation of natural and cultural resources – (forestry laws etc).
 - ❖ Resource allocation and Development (Land Use Act, Water Resources Act, Town and Country Planning Laws etc).
(Note that above classification is not always exclusive)

- **Legislative Approaches and Tools**

- *Administrative Regulation (Command & Control Regulation)*
 - denotes a coherent system of control in which the regulatory body sets a framework for activities on an ongoing basis, with a view to conditioning and policing behaviour, as well as laying down straight rules.
 - ❖ is able to provide uniformity, rationality, and fairness between those regulated.
 - ❖ having a public body responsible for regulation enables a coherent link to be made with related policies.

• Ingredients of Administrative Regulation

- Establish general policies on the environment;
- Set standards or specific policies in relation to the environmental issue concerned;
- Application of the standards or policies through some sort of licensing system;
- Enforcing the standards and permission through administrative and criminal sanctions; (Evidence show that informal methods of enforcement such as adoption of “*compliance strategy*” are often preferred than a “*sanctioning strategy*” by regulators);
- Provide information about the environment and the regulatory process itself (publication of information on how the system works);
- Use mechanisms to monitor the regulatory system (must be responsive to practical operational experience and changes in technology, specific and public opinion through a feedback mechanism).

• Types of Administrative Regulatory Mechanisms

– Anticipatory Controls:

Measures imposed on an activity at its commencement in order to forestall potential environmental problems. The objective is to prevent the activity unless certain requirements of licensing/ registration/ authorization/ consent /permitting conditions are met. It will be complemented by a combination of criminal and administrative sanctions if the activity starts without requisite permission.

- ❖ One-off permissions that results in permanent rights;
- ❖ One-off permissions with provisions for variation or revocation in the light of future circumstances.

– Continuing Controls:

These are measures by which the carrying out of an activity is controlled on a continuing basis. The difference between anticipatory control and continuing control is that the former relates to whether an activity should be carried on in the first place while the latter relates to how it is to be carried on once it has started.

– Adaptive Controls:

This is the “*learning by doing*” approach. It combines anticipatory and continuing controls in a way that continually keep impacts under review, and, where necessary, look afresh at initial regulatory authorization. Adaptive controls will be appropriate where permission or consent can be given on trial basis (e.g. use of genetically modified crops), but, inappropriate for permission in respect of construction of nuclear power station etc.

- **Environmental Protection and Criminal Law**
 - Criminal law supports environmental protection by:
 - ❖ Providing direct criminal sanctions for environmental harm, damage or injury; and
 - ❖ In a subsidiary role underpinning regulatory systems of control.
 - The context of criminal law and environmental wrongs (*mens rea, actus reus*).

- **Concerns in Relation to Environmental Justice in Criminal Law**
 - Prosecution is costly;
 - Many crimes go unpunished;
 - Crimes prosecuted are not punished severely enough;
 - Deterrent nature of environmental crimes is ineffective and that it is often cheaper to pollute and pay a fine than comply with regulation;
 - Environmental crime is not codified and incorporated into a single Act or Legislative framework.

- **Uniqueness of Environmental Crime**

- **Similarities**

- ❖ motivation may often be based on financial gain;
- ❖ lack of respect for the society/rights of others.

- **Differences**

- ❖ impact of any given incident can affect a wide population of people, wildlife and habitats;
- ❖ impact on intra-generational and inter-generational equity;
- ❖ harm done may be irreparable;
- ❖ no victim!!!

- **Categories of Environmental Crime**
- Offences can fall into the following categories:
 - ❖ Causing pollution;
 - ❖ Knowingly permitting pollution;
 - ❖ Breach of licence conditions;
 - ❖ Failure to comply with notices;
 - ❖ Breach of statutory duty;
 - ❖ Contravention of prohibitions.

- **Key Principles of Environmental Crime**

- Strict Liability;

- Corporate Liability – “**person**” includes a body of persons incorporated or unincorporated;

- Company Directors and Managers;

- Vicarious Liability

- ❖ general rule is that criminal liability is personal not vicarious (exceptions to this may happen with strict liability offences)

- Offence Due to Another’s Fault

- ❖ where commission of the offence is due to the act or default of some other person, that other person may be charged.

- **What Strategies?**

- Focus on significant past, ongoing or potential act.
 - ❖ (falsification of documentations, information submitted to regulatory agencies).
- Do nothing/Education;
- Formally caution the alleged offender;
- Issue a reprimand or warning (Juvenile Offenders);
- Flexible enforcement mechanisms (“***climb the ladder up***” / ***apply penalties administratively***”);
- Prosecution as pressure point to compel compliance;

Prosecute.

- **Enforcement Policies – The Slippery Slope**
- Evidence:
 - ❖ to sustain prove beyond reasonable doubt;
 - ❖ document evidence, photographs etc.
- Problem of prove of causation;
- Evidence of the extent of environmental harm;
- Witnesses – Expect Witnesses.

Thank You