THIRD STUDY COMMISSION

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ENVIRONMENTAL POLLUTION: IS CRIMINAL LAW A GOOD INSTRUMENT?
A FURTHER EVALUATION.

Question 1.
As a result of the questionnaire of last year;

1.1. Could you further elaborate on the functions of specialised agencies set up to investigate and indentify violation of environmental laws, if these agencies exist in your country.

The Irish Environmental Protection Agency (EPA) came into being in 1993 following the enactment of the Environmental Protection Agency Act, 1992. It was established as an independent body tasked with a wide range of key environmental protection duties. It is at the front line of environmental protection and policing and ensures that Ireland’s environment is protected, and also monitors changes in environmental trends to detect early warning signs of neglect or deterioration. During its lifetime, the standing, duties and budget of the Agency have been considerably expanded in response to a number of factors including the following: intensified legislative activity by the European Union (EU) concerning the environment; a transformation in the pressures being imposed on the environment; and growing public demand for effective government action to protect the environment.

Where pollution does occur the EPA aims to seek redress for environmental pollution and avoid a recurrence. Where the circumstances warrant it, immediate prosecution is pursued. Within
the EPA, there is an office dedicated to the implementation and enforcement of environmental legislation in Ireland. This is the Office of Environmental Enforcement and its main functions are to:

- Improve overall compliance with environmental protection legislation;
- Raise awareness about the importance of enforcement of environmental protection legislation;
- Enforce Integrated Pollution Prevention and Control licences, waste licences and Urban Waste Water Discharge licences;
- Audit and report on the performance of local authorities in their environmental protection functions, including enforcement in respect of breaches of waste permits, taking action on illegal dumping, implementation of waste collection permits, and enforcing producer responsibility initiatives in areas such as packaging waste;
- Take action against local authorities that are not discharging their environmental protection functions properly.
- Prosecute, or assist local authorities to prosecute, significant breaches of environmental protection legislation, in a timely manner;
- Assist local authorities to improve their environmental protection performance on a case by case basis, through establishing an enforcement network to promote information exchange and best practice, and by providing guidance.

1.2. If not, do you think it would be useful to create these sorts of agencies?

See 1.1 above.

Question 2.

2.1. Could you elaborate on the cooperation between Police, Customs and Prosecution when it comes to violation of environmental laws.

As advised previously, the Environmental Protection Agency is tasked with pursuing prosecutions though the Irish Courts. However, Customs also has a vital role in detecting violations of environmental law and the Irish police force, An Garda Síochána also play a part in detecting these violations.

The Office of Environmental Enforcement (OEE) established an enforcement network involving various public bodies with
enforcement responsibilities and they also monitor compliance by public authorities with their environmental enforcement obligations.

The OEE has built on the Environmental Protection Agency’s existing relationship with local authorities. It works with local authorities to bring about an overall improvement in the level and consistency of enforcement of environmental protection legislation in Ireland. It also audits local authorities’ performance in enforcing this legislation, which includes giving directions to local authorities when necessary and to prosecute if directions are not complied with. They also work, where relevant, with various other agencies such as the National Bureau of Criminal Investigation, the Criminal Assets Bureau, Office of the Director of Corporate Enforcement and other public sector bodies involved in enforcement activities.

Where a Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (please see 2.2.a below for full explanation) licence, permit or certificate which is necessary to export or import animals or animals goods etc. is presented to Customs, officers must:

- ensure that the licence presented is valid and that it relates to the specific species being imported / exported / re-exported;
- endorse the licence with the official station stamp;
- return the licence to the importer/exporter where it has not been exhausted, and
- retain the licence, where it has been exhausted, and return it to The National Parks and Wildlife Service.

If a customs officer suspects that goods are being exported or imported in contravention of CITES, the consignment should be detained and staff should contact the national CITES liaison officer.

2.2. What are the possibilities in your country with regard to:

a. import/export of protected animals?

Ireland became a CITES Party in 2002. CITES is the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The aim of the Convention is to regulate and monitor the international trade in certain species of animals and plants, and to ensure that trade does not threaten their survival in the wild. CITES works by subjecting international trade in specimens of selected species to certain controls. All import, export, re-export and introduction from the sea of species covered by the Convention has to be authorized through a licensing
system. In the EU, CITES is implemented through Regulations known as the Wildlife Trade Regulations which provide the necessary legal framework for the enforcement of the Convention. These regulations are directly applicable in all EU Member States.

CITES regulation and control of international trade in various endangered species is based on a system of licences, authorisations and permits. In this regard, the competent authority issues permits, certificates or licences for the import, export or re-export of the species in question. These documents must then be presented to customs before consignments can be imported, exported or re-exported. Each Party is required to designate a Management Authority competent to grant CITES permits and certificates, and a Scientific Authority responsible for advising the Management Authority on scientific aspects of implementation and monitoring of national trade. In Ireland, the National Parks and Wildlife Service (NPWS) are the Management and Scientific authorities.

b.import/export of skins of animals?

In accordance with EU-wide controls to protect human and animal health, all animals and animal products (including live fish, gametes and fish products) being imported into the EU must be presented for veterinary inspection at an EU approved Border Inspection Post (BIP). BIPs in Ireland are located at:

- Dublin Seaport (animal products only),
- Dublin Airport (live equines only)
- Shannon Airport (animal products and live equines - excludes live fish but can accept gametes).

c.import/export of ivory of elephants, rhino, walrus?

See a above.

d.import/export of other parts of mammals, birds, reptiles?

See a above.
Question 3.
3.1 A number of countries see – speaking in general terms - a decline of nature.

Is this true for your country?

A high quality environment is essential for a good quality of life and is a key component of sustainable development. There is an increasing awareness of the importance of over exploitation of resources, inappropriate afforestation, water quality, limiting CO2 emissions, air quality, waste, planning, and climate change. One area of the environment in Ireland which has experienced some difficulties is in the area of drinking water.

Several factors can affect the quality of drinking water sources. If there is high rainfall extra organic material may be washed into rivers and streams. Water treatment plants need to be able to deal with this. If rainfall is low, these sources can dry up altogether. Other factors affecting water sources include agricultural practices and the type of soil and underlying ground.

Factors affecting treated drinking water include breakdown in the treatment process; lack of disinfection and filtration; problems with equipment; power outages or dirt in distribution pipes. Sometimes, poor quality is due to the water being drawn from an unsuitable source.

Climate Change is recognised as the most serious and threatening global environmental problem. While natural variation in climate over time is normal, humans are contributing to climate change through the emission of substantial amounts of greenhouse gases. To run cars and provide heat for our homes, business and industries, fossil fuels such as petrol, diesel, oil, coal, peat and gas are burned. This leads to emissions of carbon dioxide (CO2 – the main greenhouse gas) being released into the atmosphere. Other gases are released as a result of activities in the agricultural, industrial and waste sectors. This is an issue which is of particular concern to Ireland as an island owing to the threat of rising sea levels.

The Irish climate is changing in line with global and regional trends. Adaptation and mitigation are essential elements in addressing the challenges and opportunities of climate change. Mitigation refers to efforts to limit the human induced causes of climate change, while adaptation addresses the impacts and opportunities resulting from climate change.

Even if the world succeeds in limiting and then reducing GHG emissions, our planet will take time to recover from the greenhouse gases already in the atmosphere. We will therefore still be faced with the impacts of climate change.
3.2. Do you have specific areas where this decline is visible? For instance the deforestation of the tropical rainforests in a number of countries? The decline of water resources? Competition between water resources for recreational use as opposed to agricultural use?

Water quality in Ireland compares favourably with that in other EU countries. However, similar to many other EU countries, Ireland still faces considerable challenges to meet the objectives of the Water Framework Directive within the required timeframes. The three main challenges for water quality management are to eliminate serious pollution associated with point sources; to tackle diffuse pollution; and to use the full range of legislative measures in an integrated way to achieve better water quality. A key aspect is that focusing measures on rivers, where monitoring has identified particular causes of pollution, will help reduce pollutant loading to lakes and coastal waters as well as improving river quality.

Emissions from transport were 127% higher in 2007 than in 1990 but decreased by 20% since 2007, primarily because of the economic recession and progressive changes in the taxing system that favour lower-emission vehicles. That is still a 100% increase over 1990. With any economic recovery, if people and goods continue to move by cars and trucks, then transport emissions will likely rise once again.

3.3 In some places, the use of water for agriculture and the building of structures on certain land may threaten the extinction of some small fish, birds or other creatures. In your country, are laws used to protect animal rights over the rights of humans?

The Animal Health and Welfare Act, 2013, includes provision for increased powers for authorised officers to investigate complaints of animal cruelty, and stricter penalties on convictions. It provides for the protection of animal welfare in prohibiting the unnecessary suffering or neglect of animals. Prior to the introduction of the 2013 Act animal welfare was subject to old legislation from 1911 and 1965. For the purposes of the Act “animal” means a member of the kingdom animalae other than a human being.

New penalties for convictions include powers granted to a judge to ban a person from owning an animal and a maximum five-year prison sentence.

Ireland has a wide diversity of habitats for its small size including 16 priority habitats as designated under the EU Habitats Directive (92/43/EEC). Habitats of particular significance because of their scarcity in both Ireland and the rest of Europe include limestone pavements, turloughs, active peatlands, species rich grasslands and intact dune and machair systems.
Ireland has unique juxtapositions of Mediterranean species with species of colder climates. It also holds important numbers of bird species that are in decline or rare elsewhere and is an important destination for many migratory birds of international significance. Irish marine waters are amongst Europe’s richest for cetaceans, and the west coast maerl beds are of particular note, supporting a diverse array of associated fauna.

Ireland’s aquatic systems and wetlands support internationally significant populations of threatened species such as the Atlantic salmon *Salmo salar*, white-clawed crayfish *Austropotamobius pallipes*, freshwater pearl mussel *Margaritifera margaritifera*, and marsh fritillary butterfly *Euphydryas aurinia*. Ireland is also particularly rich in bryophytes, lichens and algae and supports internationally important populations of non-marine molluscs and water beetles.

3.4. Do you feel that criminal law could or should be an effective instrument to safeguard nature? Is civil law sufficient? If not, why not?

Irish environmental legislation provides for a number of remedies where a breach of the legislation occurs. A list of some of the main formal remedies is summarised in the Law Society Practice Guide on Environmental Law as follows:

- (a) Fines
- (b) Imprisonment
- (c) General damages for damage to property/person
- (d) Restitution egg restocking of fish spawning grounds
- (e) Clean-up costs: a public authority can recover the costs of clean up of a polluted site
- (f) Expert Costs
- (g) Laboratory/technician costs
- (h) Legal costs

One common feature of some of these main remedies is that they are dependant on the matter being pursued by the appropriate enforcement agency or individual as the case may be through the courts.

There is a wide range of environmental criminal offences from breaches of environmental permits and licences through industrial activity, accidental emissions to water and air to illegal dumping etc. Typically in many environmental crimes, the prohibited activity may be inchoate, requiring no
specific harm to be proven but rather contemplating the possibility of such a risk being present. “Traditional” crimes such as assault and murder are clearly distinguishable from activities which breach environmental regulations but nonetheless, environmental legislation provides that criminal law is applied to breaches of these regulations whether serious or minor.

Whether neglect or inadvertence resulting in an emission of waste from a factory to the neighbouring stream should be categorised as a crime in the same way as deliberate illegal dumping is open to debate.

Failure to comply with health and safety obligations gives rise to potential fines of up to EUR3 million per offence and imprisonment of up to two years.

Environmental legislation distinguishes between minor breaches which are recognised as summary offences and more serious breaches being categorised as indictable offences and for the most part, we see that the prosecutions when taken are for summary offences. Whether the enforcement of minor offences is effective in achieving compliance, particularly in view of the level of fine that can be imposed, is questionable however and would these minor offences be more appropriately dealt with under civil law, reserving the criminal law for serious offences.

Question 4.

4.1. Do in your country the responsible authorities develop incentives to report pollution on a voluntary basis?

Certain local authorities have put in place procedures for making complaints concerning environmental protection matters. An example of this is the Clare Local Authority which has an environmental complaint form which is available online and can be filled in by a member of the public with particular environmental concerns. Similarly, Kilkenny County Council provides an environmental complaint form for matters such as litter, signage, illegal dumping, illegal waster collector, water pollution, bituminous coal, air, odour, and noise pollution.

An individual can bring legal action against a polluter, owner or occupier in relation to air pollution, water pollution, waste, noise or other adverse impact in so far as it affects them or their property. Individuals can make an application for an injunction requiring that a polluting activity cease and any pollution be remediated under various provisions of noise, waste, water and International Plant Protection Convention legislation. Individuals can also seek either compensation or an injunction under common law, if they can establish nuisance, trespass, negligence or breach of statutory duty.
4.2. If yes, how do they develop these incentives?

There is a national Environmental Complaints Line available on a 24 hour basis. Local authorities may be contacted where problems relate to matters such as littering, backyard burning, water pollution, noise, dust and smells. There is guidance provided for making a complaint on the website of the Environmental Protection Agency. Greater public awareness of this resource could encourage people to report incidents of pollution.

The Water Framework Directive includes a provision for Member States to take account of recovery of the costs of water services, and requires that, where implemented, water pricing policies should provide adequate incentives for users to use water efficiently. Behavioural incentives such as this at a European level could also be used in domestic law to encourage reporting of polluters.

4.3. Do you think that there are possibilities left unused? What is your personal idea?

It is important that there is protection for persons who complain to the authorities about pollution. Therefore, where a person acts as a whistleblower e.g. a person working in a company might reveal to local authorities that the company is infringing certain environmental laws. In such circumstances it is extremely important that the whistleblower is provided with protection and is not victimised by the company. A person should feel safe in coming forward to make a complaint or to reveal information to the authorities.

Articles 4 and 5 of the Aarhus Convention concern environmental information. Members of the public are entitled to request environmental information from public bodies and these bodies are obliged to maintain this information. This includes information on the state of the environment, policies and measures taken, or on the state of human health and safety, where this can be affected by the state of the environment. Some information is exempt from release, for example where the disclosure would adversely affect international relations, national defence, public security, the course of justice, commercial confidentiality or the confidentiality of personal data. Information may also be withheld if its release could harm the environment, such as the breeding sites of rare species. The Access to Information pillar has been implemented in the EU Directive 2003/4/EC on Public Access to Environmental Information and in Ireland by the European Communities (Access to Information on the Environment) Regulations 2007-2011.

If there was greater public awareness of this environmental information resource perhaps there would be a greater awareness of the environmental
responsibilities of different bodies and of the circumstances in which those responsibilities have not been complied with. Access to such information combined with whistleblower protections would be of benefit in the enforcement of environmental law.

4.4. Could you elaborate on the possibilities to enlarge the possibilities of restitution instead of punishment?

It would certainly be appropriate in certain cases for restitution rather than punishment to be used. This may be particularly so in cases in which a person is prosecuted for e.g. littering. An appreciative restorative penalty may be that such a person would be required to clean up litter in a particular area. This principle could also be used in seeking restitution from companies who commit acts of pollution. Therefore, those responsible could assist in cleaning up a particular area. This may be a more appropriate penalty than a fine.

It is an offence to hold, transport, recover or dispose of waste in a manner that causes or is likely to cause environmental pollution. It is not possible to dispose or recover waste except under and in accordance with an applicable licence or waste facility permit. Strict controls apply to the transfer and surrender of waste licences.

Offences are punishable by a fine of between EUR 3,000 and EUR 15 million per offence and imprisonment of up to ten years. In addition, clean-up orders can be imposed. The penalties apply to any person guilty of an offence. Where offences are committed by a corporate body, individual directors, managers and secretaries can be found criminally liable, if it is demonstrated that they did, or failed to do, something that led to the offence.

The EPA and all local authorities and/or fisheries boards can require a polluter to clean up following a water pollution incident.

Such clean-ups can include the:

- Replacement of fish stocks.
- Removal of polluting matter from waters.
- Water treatment.
- Repair or replacement of treatment equipment.
- Provision of alternative water supplies.

Where a civil clean-up order has been made and that order has not been complied with, the entity or person against whom the order was made can be prosecuted for contempt and imprisoned for breach of the court order.
The law in Ireland is fragmented and there is no specific legislation which addresses contaminated land. In general, the liability of contamination to land lies with the owner or occupier of the land. The “polluter pays” principle applies to water and air where liability lies with the person who caused or permitted the pollution. Liability for waste management lies with the original waste producer, and the current and/or previous waste holders. Environmental clean up is mandatory where a party breaches the provisions of the EPA Acts, the Waste Management Acts (WMA) and the Water Services Act 2007 as amended. Sections 55 to 58 of the WMA are particularly relevant and may require that a person who is holding recovering or disposing of waste be liable for the costs of clean up and any costs incurred by the EPA or local authority in investigating an incident.

A person found guilty of an offence under the WMA, the EPA Acts or the Water Services Act may face criminal prosecution. In addition to the common law obligations, there is a statutory civil liability where water or air contamination causes injury, loss or damage to a person or a person’s property. Larger installations are likely to be subject to the IPPC licensing regime. Where a development is proposed on contaminated land, the authority may make remediation of the site a condition to the grant of planning permission. There are also powers under legislation regarding derelict sites. With regard to historic contamination of soil, unless the contamination is at risk of moving off site, there would generally be no obligation to disclose this or to do anything with the site.

**Question 5.**

We all know that our world is full of forms of legal pollution (air pollution, water pollution, huge masses of plastic in the oceans).

5.1. Can the Judiciary be more active in their verdicts to urge the politicians to really have interest in solving the existing problems.

Ireland is a constitutional democracy based on the separation of powers. The Oireachtas or legislature makes the laws. Article 15. 2. 1° of the Constitution provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas and no other legislative authority has power to make laws for the State. Article 28.2 provides that the Executive power of the State “shall be exercised by or on the authority of the Government”. Therefore the Government is the executive organ of the State and collectively responsible for all the Departments of the State which are administered by individual members of the Government.
The function of the courts is to interpret the law. Article 34.1 requires that justice shall be administered in courts established by law by judges appointed in the manner provided by the Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public. With this in mind, it would not be appropriate for the judiciary of Ireland to explicitly urge democratically elected politicians to take an interest in solving environmental problems in the course of their judgments.

5.2. Could organizations as Greenpeace or World Wildlife Fund be more active. Do activists from such environmental organizations as Greenpeace go too far. Should they be punished if their activities harm or endanger people?

It does not appear that activists from these organisations have ever engaged in such activities in Ireland. However, if they did engage in activities that harm or endanger others they would be subject to domestic criminal legislation and may be arrested.

Question 6.

The International Court of Justice (ICJ) in The Hague (Holland) gave a decision in March this year which forbids Japan to hunt whales in the Southern seas. (see the activities of the Sea Shepard). Still Iceland and Norway will continue to hunt whales. Will there be more whales for Iceland and Norway to hunt if Japan is forbidden to hunt? Who wins in such a situation?

Judgments delivered by the International Court of Justice (or by one of its Chambers) in disputes between States are binding upon the parties concerned, in this case Japan and Australia. Article 94 of the United Nations Charter lays down that "each Member of the United Nations undertakes to comply with the decision of [the Court] in any case to which it is a party". Thus, the judgment of the ICJ will not have any binding effect on the hunting policies of Iceland and Norway.

It is important to note that whaling is regulated by the 1946 International Convention for the Regulation of Whaling ("ICRW"). This is an international environmental agreement signed in 1946 in order to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry". In 1982 the International Whaling Commission adopted a "moratorium" on whaling for commercial purposes. The judgment of the ICJ concerned the interpretation of whaling
for the “purposes of scientific research” which is exempted from the moratorium on whaling. Iceland and Norway no longer claim to be carrying out research but hunt whale meat for commercial purposes, the judgement has no immediate consequences for them.

Norway lodged an objection to the moratorium when it was first introduced by the IWC. Iceland withdrew from the IWC after the moratorium but later re-joined and at that time asserted a ‘reservation’ to the moratorium.

6.1. Do you think that more countries should address the ICJ in order to settle disputes arising with regard to environment?

Yes. The jurisprudence of the ICJ has contributed substantially to the development of international environmental law and will continue to do so if cases are referred to it for resolution.

Question 7.

What are your ideas about finding a balance between the economic interests and environmental harm that can be a result of an economic activity.

It is important to strike a balance between economic growth and environmental protection. Different people will naturally have different ideas of where this balance should be struck. It is important then to have regard to all available scientific knowledge and consensus, to the extent that such exists. It is also important not to lose site of the fact that the global population is increasing and is expected to rise dramatically in this century. The protection of the environment and ensuring the security of food supplies and agricultural capacity must be considered in the light of this fact. It is accepted scientific understanding that any significant increase in the planet’s temperature could have massive and potentially detrimental effects on global food security. Although less pressing politically, these considerations are far more important than the returns for shareholders of energy companies or airlines, and it is important not to lose sight of this fact.

7.1. Do you for instance think that criminal law could have as a form of punishment the obligation to the industry to work on the “cradle to cradle principle? That means that all the raw materials used to make a product have to be reused at the end of the lifetime of such a product.

The use of criminal sanctions is taken very seriously in the Irish legal system and there are several important principles, with their origins in both the common law and the Irish Constitution, which govern the issuing of criminal
sanctions. These include requirements that fair procedures be adhered to; that any legislation which prescribes a criminal offence is sufficiently clear and unambiguous; and that there is a right of legal representation. As such, any criminal penalties for environmental issues would necessarily need to meet these standards for application in this jurisdiction.

It is unclear whether the necessary technological capability exists in order to effectively mandate the application of the “cradle to cradle” principle. As such, given that adherence to this principle is essentially impossible – for many industries at least - it would seem very unlikely that any criminal sanction seeking to implement this standard would be permissible under Irish law, or that seeking to make non-adherence to this principle a criminal offence would make any sense at all.

Question 8.

8.1. If one country spends large amounts of its wealth on cleaning the air, but other countries continue to pollute the air in the course of economic activity, is the first country foolish since air goes all around the world?

Not necessarily. Global climate change, fuelled largely by carbon emissions, is obviously a global concern. There are also other forms of pollution which have a cross-border and global effect. Carbon is emitted from every country on earth. There are obviously some large and industrialized states which emit massive amounts of carbon and other gases which contribute to climate change, in volumes which are disproportionate to their share of the global population.

However, it is important for change to begin somewhere and so, while it may seem somewhat futile and quixotic, it is important for states that are concerned about climate change and other global pollution issues to set an example and thereby achieve credibility when lobbying other governments to agree to international environmental agreements such as the Kyoto Protocol.

8.2 If environmental pollution is truly a world-wide problem rather than a local problem, what kinds of incentives could be created to encourage all countries to resist the tendency to prefer economic activity over environmental constraints? Is the criminal law more or less effective than other incentives?

We do not think that the criminal law is an appropriate basis for sanctions for environmental breaches at an international level. There are a number of reasons for this. First, there will inevitably be many issues related to proof of causation. In the Irish system at least, there is a higher burden of proof in
criminal cases than non-criminal cases; that being that the commission of the offence must be proved “beyond a reasonable doubt”. This may make it very difficult to obtain convictions in these cases, as the cause and effect of pollution can often be unclear, at least to this standard.

Secondly, we anticipate jurisdictional problems. If one state chose not to prosecute a polluter in its jurisdiction for any reason, that polluter would essentially be free to continue polluting. Any other state would need to exert extra-territorial jurisdiction over that polluter in order to prosecute them under their criminal law, and the actual process of bringing that polluter before their courts would be very difficult if their national government refused to co-operate.

8.3 Cleaning and protecting the environment is not free, it is expensive. Who should bear the cost? Why?

Polluters should be made to pay. A good example of this approach would be the introduction of a carbon tax. Therefore it is most appropriate to use the taxation system to charge producers for acts of pollution. This would then cause the environmental damage which results from the production of goods and services to be reflected in their price, thereby accounting for what economists would call a “negative externality.” This would also incentivise producers of goods and services to do so in the least environmentally destructive way possible, as doing so would provide them with a competitive advantage in the marketplace.

Question 9

8.1. Is there any other comment on the subject you would like to make.

None

8.2. What are your “outside of the box thinking “ideas?

We think that the most likely form of effective international legal framework for dealing with environmental issues would be some form of international organization whereby all countries are required to disclose their pollution levels and then monetary penalties can be impose on those countries that breach the agreed standards, not unlike the World Trade Organisation.

8.3. Do you feel a personal responsibility to guard the nature in the world for the coming generations.
Yes