REGULATION, ENFORCEMENT AND GOVERNANCE IN ENVIRONMENTAL LAW

Richard Macrory

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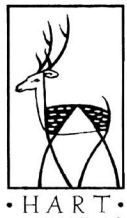

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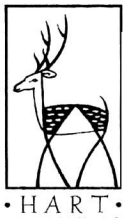

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FOREWORD

I am delighted to be able to contribute a Foreword to this important collection. I have been lucky to have known and worked with Richard for many years, and have admired his intellect, his energy, and his fun (including his conjuring skills). He has had a distinguished and distinctive career, and has made a unique contribution to the development of environmental law in this country and abroad. He was the first editor of the *Journal of Environmental Law*, now recognized as one of the foremost scholarly Journals of its kind in the world. He has been specialist adviser to Parliamentary Select Committees in both the Lords and Commons, a long standing member of the Royal Commission on Environmental Pollution, and a board member of the Environment Agency, England and Wales. He was a founding member and first chairman of the UK Environmental Law Association which continues to thrive, and of which I am privileged to be the President. All this has been combined with practice at the Bar, and a brilliant academic career. He was the first Professor of Environmental Law in this country, and is now Director of the Centre for Law and the Environment at University College, London.

Regulation, Enforcement and Governance in Environmental Law is a selection of some of his most important writings and is focused on major themes concerning the nature of regulation, institutional arrangements, and enforcement. Richard's combination of serious scholarship and extensive experience in the world of environmental policy and regulation make this a particularly significant collection. It starts from his first article published in the *New Law Journal* some thirty years ago (a characteristic reflection on the law concerning bicycles – still relevant today), and brings the story right up to date, with the full text of his 2006 Cabinet Office Review on Regulatory Sanctions. His analysis and recommendations in this Review laid the basis for the core provisions in the Regulatory Enforcement and Sanctions Act 2008. They should have a profound effect on the way we think about regulatory sanctions in this country, far beyond the field of environmental law. The value of his work in this area is already being recognized in other countries.

This book should be essential reading for anyone concerned with the development of environmental law and policy. I hope also that it will be read by the next generation of environmental lawyers. They will be

facing profound environmental challenges, which will undoubtedly require fresh legal solutions. The material in this collection will stand not only as a record of remarkable achievement, but as an inspiration for innovative thinking in the future.

Sir Robert Carnwath, Lord Justice of Appeal
and Senior Presidents of Tribunals
London
May 2009

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PREFACE

Laws concerning environmental protection have a long history in the United Kingdom, but the last thirty years have seen an unprecedented development in both the substantive body of environmental legislation and in thinking about underlying principles and institutional arrangements. To the current generation of environmental lawyers it is almost unimaginable how rapid the change in profile of the subject has been in such a comparatively short time. My own exposure to environmental law began as a newly qualified barrister working for Friends of the Earth in London in the mid 1970s, then the only UK environmental group which employed a lawyer. Legal actions before the courts at that time seemed a fruitless and costly activity, and most of the legal effort was focused on pressuring Government for legislative reform and using public inquiries in the planning field as a forum for exposing the inadequacies and short-sightedness of government policy in addressing longer term environmental issues. Shortly afterwards I began my first academic appointment at Imperial College, London, consciously working with environmental scientists who then appeared to offer a more sympathetic intellectual environment than traditional law schools where the discipline of environmental law was scarcely acknowledged. I well remember meeting at this time a fairly intimidating Law Lord of the old school (and now long deceased) who asked me my field of specialism. I naturally replied environmental law, only to be faced with silence and an expression that somehow combined utter incomprehension and slight distaste.

The materials in this book should at least demonstrate what a long way we have come in less than a generation. In making a selection of my publications, I have largely avoided any analyses of detailed black letter law, but focused on material dealing with major themes concerning the nature of regulation, institutional arrangements, and enforcement which underlie the substantive detail of the law. Whilst acknowledging the growing importance of public international law relating to the environment, my concerns are mainly with UK and European Community law, though many of the core themes have much wider relevance.

Chapter I is concerned with major issues concerning regulatory reform, and in particular the debates on whether traditional British approaches towards constructing regulatory sanctions are best suited to

contemporary needs. Chapter 2 considers challenges to current institutional arrangements, including the need for a specialised environmental court and tribunal, and the environmental implications of the major constitutional changes that have taken place in the United Kingdom in the last decade. Chapter 3 contains material that reflects on the shifting dynamics of environmental law as it copes with changing expectations of how we handle the development of new environmental standards, the opportunities of new technologies to assist enforcement, and the need to develop new notions of responsibility. Chapter 4 is a selection of reports of leading environmental cases over the last decade illustrating how both the European Court of Justice and the higher courts in the United Kingdom have grappled with the interpretation of environmental legislation and the development of legal principle. The final two chapters focus on European dimensions. Chapter 5 is largely concerned with key principles of European Community law such as environmental integration, free trade, and subsidiarity and how these influence and interact with the development of environmental law. The final chapter considers the enforcement of Community environmental law and the unique though by no means perfect mechanisms that have been developed under the Treaty to ensure that Member States comply with their obligations.

The scale and scope of environmental issues which face both this country and the world become ever more apparent. Law and legislation on their own cannot possibly resolve all these challenges, but will provide the bedrock for the decisions that will have to be made. As we move from handling more familiar environmental pressures to major questions of resource and energy use, the next generation of environmental lawyers will need to be even more imaginative in devising appropriate legal responses. I hope that some of the thoughts here will assist in stimulating these future debates.

I am grateful to Martin Hession, Sharon Turner, and Michael Woods who were co-authors on a number of the pieces reproduced here, and would like to thank Ned Westaway of the UCL Centre for Law and the Environment, Deborah Burns of the Law Faculty, Richard Hart and Rachel Turner of Hart Publishing for their assistance in the production of the book.

Richard Macrory
University College
May 2009

Part I
Regulatory Reform

PART I

REGULATORY REFORM

Contemporary environmental law is dominated by regulatory controls. Before the industrial revolution, legal protection for the environment in the United Kingdom largely rested on the availability of common law legal remedies such as the action in nuisance which could be employed by private landowners to protect their property from pollution and other forms of environmental degradation. Private legal remedies can still be of significance, but by the mid-nineteenth century Parliament and government had recognised the weaknesses of wholesale reliance on private legal action as a means of environmental protection. Individuals may not have the stamina or resources to engage in legal action. Private litigation requires the identification of a defendant who clearly caused the damage, and is ill suited where there are multiple potential contributors, or where pollution is diffuse. Where the environment concerned falls outside private ownership (such as wild animals, the atmosphere, public waters), the common law may simply provide no protection. Above all, such remedies are ill suited to ensuring preventative action or the gradual improvement of protective measures and behaviour.

The need for intervention by the State in the form of regulatory requirements concerning the environment therefore became apparent, and is now a familiar element of contemporary legal machinery.

Regulation in the environmental field can take many forms – from the imposition of fixed product standards such as vehicle emission requirements, the requirement of a licence or permit for particular activities, with detailed conditions set by the authorisation body, to various types of trading emission regimes. ***Reforming Regulatory Sanctions*** *(2007) and* ***Regulatory Justice – Making Sanctions Effective*** *(2006) are not dealing with evaluating the different types of regulatory regime as such, but instead are focused on the sanctions that are available where regulatory requirements are breached. Regulation of economic enterprises almost by definition is needed where the market cannot be relied upon by itself to achieve the policy goals desired by society, and an ineffective enforcement and sanctioning regime will undermine a regulatory system. It does not follow that a policy of no tolerance and excessive punishment is necessarily the most effective means to ensure compliance, and most modern regulators dealing with legitimate businesses sensibly adopt enforcement policies based on advice and persuasion in the first place, and*

preserving formal legal sanctions for more serious or repetitive breaches where persuasion has had little effect.

One of the distinctive features of UK environmental law, present for over 100 years, has been the prevalence of the criminal law as the dominant formal legal sanction. In nearly every area of environmental regulation, breach of a regulation is made a criminal offence. Many environmental regulators have the power to serve a formal notice or enforcement order requiring compliance within a specified period, but breach of the notice is also sanctioned by a criminal offence. Mainstream criminal law generally requires evidence of intention or recklessness before an offence is committed, but in the regulatory field offences have commonly been drafted in terms such that the mere act of the breach is sufficient to secure conviction. Offences can be committed even where the immediate cause of the breach was the action of a trespasser or the event was caused by an unforeseen accident, as the 1998 decision of the House of Lords in Empress Cars demonstrates[1]*. The so-called strict liability offence clearly reduces the evidential burden on the prosecutor and was developed in the nineteenth century when enforcement bodies were considered to lack the capability to investigate the internal complexities of business operations. An added advantage for the prosecutor is that a company can be readily convicted of such an offence where the breach was caused by the action or inaction of one of its employees, or failures of equipment or other systems. In contrast, where intention or recklessness is an ingredient of an offence, a company can generally only be convicted where a senior manager or director has shown such intention or recklessness.*

The system is a tough one, though not unique to the United Kingdom[2]*. In theory inappropriate application should be moderated by the discretion of the enforcement body in deciding whether or not to prosecute for a particular breach in the first place, and if a case reaches court in the sentencing practice of the courts that should reflect the perceived culpability of the defendant. Yet there remains intense academic debate on the justification and theory of strict liability offences.*[3] *But in the environmental field there was also increasing public debate in the 1990s in the United Kingdom as to the effectiveness of the ordinary criminal courts in handling such regulatory offences. Bodies such as the Environment Agency responsible for the enforcement of key areas of environmental law such as industrial pollution control, water management,*

[1] *Environment Agency (formerly National Rivers Authority) v Empress Car Company (Abertillery) Ltd* [1998] 1 All ER 481 - see chapter 4

[2] See Faure and Heine (2005) *Criminal Enforcement of Environmental Law in the European Union* The Hague, Kluwer Law International. Within Europe, criminal liability of corporations is also familiar in Denmark, France, and the Netherlands and more recently Belgium and Finland. Concepts of criminal law do not allow for criminal liability of corporations in countries such as Austria, Germany, Italy, and Spain.

[3] For a recent study see Simester (ed) (2005) *Appraising Strict Liability*, Oxford University Press.