REGULATORY WRONGDOING IN IRELAND

Introduction

In examining the issue of crime in Ireland, politicians, journalists, criminologists, lawyers and social commentators are often drawn to ‘real crime’ (homicides, violent assaults, organised crime, sexual offences, requirements of mens rea and actus reus, and general defences) whilst ignoring white-collar offences which are often enforced by specialist agencies. They have tended to be preoccupied with the punitive regulation of the poor–a project closely tied to a police-prisons way of knowing—that focuses on ‘crime in the streets’ rather than ‘crime in the suites’. The narrow exclusivity of this approach is a mistake. More and more we are witnessing the increasing and extensive use of regulatory strategies by the Irish state. In areas such as competition law, environmental protection, health and safety law, and consumer and corporate affairs, there has been a move towards using criminalisation as the last-resort strategy when compliance through negotiation and monitoring has failed. The purpose of this book is to address some of the issues raised by the emergence of a ‘regulatory society’ including in particular to examine the most effective ways of preventing regulatory crime from

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1 White collar crime, in its broadest interpretation, includes crimes falling within the following categorisations: financial (ie share dealing); offences against consumers (ie price fixing), crimes against employees, and crimes against the environment.

occurring or reoccurring. It arises out of a conference held in Dublin in 2009. This conference, organised by First Law in conjunction with the Centre for Criminal Justice and Human Rights at the Faculty of Law, University College Cork, explored the rise in regulatory bodies with enforcement powers and the impact of this change for the role of the DPP.

It has long been mooted that our criminal justice systems do not treat white collar crime or regulatory wrong-doing seriously. For example, Michel Foucault, has suggested, somewhat dramatically, the following about the emergence of a new power to punish in the nineteenth century:

‘[C]rime...is almost exclusively committed by a certain social class; that criminals, who were once to be met with in every social class, now emerged “almost all from the bottom rank of the social order”...; that, this being the case, it would be hypocritical or naïve to believe that the law was made for all in the name of all; that it would be more prudent to recognise that it was made for the few and that it was brought to bear upon others; that in principle it applies to all citizens, but that it is addressed principally to the most numerous and least enlightened classes; that in the courts society as a whole does not judge one of its members, but that a social category with an interest in order judges another that is dedicated to disorder: “Visit the places where people are judged, imprisoned or executed...One thing will strike you everywhere; everywhere you see two quite distinct classes of men, one of which always meets on the seats of accusers and judges, the other on the benches of the accused”...Law and justice do not hesitate to proclaim their necessary class dissymmetry.’

For Foucault, then, criminality and penalty were ‘ways of handling illegalities, of laying down the limits of tolerance, of giving free rein to some, of putting pressure on others, of excluding a particular section’. This has made it possible to ‘leave in the shade’ certain crimes that do not follow the ‘police-prosecutions-prisons’ trajectory.

There is ample evidence of the overrepresentation of certain classes in our criminal courts and prisons. Bacik et al, for example, in a study of 2,000 cases that came before a District Court in Dublin

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between 1988 and 1994 found that most involved individuals from deprived areas (73.3%). This lead them to conclude that ‘one might be forgiven for suggesting on the basis of the data that the Dublin District Court appears to be there for people from deprived areas’. In particular, they noted:

‘The abstract individual defendant is at the core of criminal law doctrine, presented as a rational actor, isolated from the social context within which human behaviour occurs, and lacking any distinctive or defining characteristics. However, it is well established that those individuals who come into contact with the criminal justice system as defendants are not representative of the population at large. Indeed, as a group of defendants, they can be said to share certain defining characteristics: they tend to be disproportionately young, male and working class.’

Similarly studies by O’Mahony in 1986 and 1996\(^6\) reveal that the Mountjoy prison population was comprised for the most part of individuals from the lowest socio-economic classes. This was confirmed in a General Healthcare study of the Irish prison population\(^7\) which also found that the majority of prisoners come from disadvantaged backgrounds.\(^8\) Of course, we need to be careful in the conclusions that we draw from these findings of overrepresentation. On the one hand, there is no simple hydraulic nexus between crime and economic deprivation. Social deprivation in and of itself does not cause criminality. In addition, there are varied reasons why those from higher socio-economic factors may be under represented in our criminal courts. These relate, \textit{inter alia}, to the absence of structural risk factors such as poor housing, low income, school failure, a history of imprisonment among family members, delinquent peers, and a


\(^6\) P O’Mahony, \textit{Mountjoy Prisoners: a sociological and criminological profile} (Dublin, Department of Justice, 1997). The 1986 survey findings are contained within appendix b of this report.


lack of legitimate opportunities. They also relate to the fact that those from higher income backgrounds are likely to be more insulated from criminogenic lifestyles as a result of the ‘stakes in conformity’ that they have acquired. Strong bonds of attachment and involvement in market societies limit the propensity of individuals to commit criminal acts. These bonds are likely to be more developed in socio-economic groupings who perceive that they have expanded life chances and opportunities.

Such reasoning should not however wall us off from the possibility that those from middle class backgrounds do not commit crime. They do, as high profile cases such as those involving the death of Brian Murphy (the Annabel nightclub case) and Rachel O’Reilly (the Joe O’Reilly case) reveal. But such cases fall within the existing paradigm of ‘police-prisons-prosecutions’. Where the middle classes are more likely to figure is in the ‘crime in the suites’ arena. In particular, it is argued that ‘the behaviour of persons of respectability and upper socio-economic class frequently exhibits all the essential attributes of crime but it is only very rarely dealt with as such. Systems of criminal justice favour certain economically and politically powerful groups and disfavour others, notably the poor and unskilled who comprise the bulk of the visible criminal population.’

In many instances, however, we choose to ignore this form of wrongdoing and remain preoccupied with ‘crime in the streets’. The belief was, and is, that white collar crimes, including corporate and political misconduct, are not real crimes to which criminal liability should attach. Rather they are to be viewed as administrative matters that do not demand stigmatisation or moral opprobrium. It is important to recognise that crime and deviance, therefore, are not pre-given, objective categories; rather they are negotiable. This point is picked upon by Joe McGrath in Chapter 2 of this book. He notes that the Irish courts in defining a crime have employed tautological rather than normative indicia such as the presence or absence of criminal procedure, the role of the State as prosecutor, the presence of culpability requirements, the vocabulary used in the construction of a provision and the severity of the sanctions employed. This has downplayed the importance of ‘crime in the suites’ in legal debates

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about the definition of a crime. McGrath argues that there is a need for greater awareness that the conventional crime model is not a universal crime model: ‘Melling’\textsuperscript{10} and the cases following it speak to real crime so attempting to make the conventional crime indicia fit into regulatory contexts is inappropriate. The jurisprudence needs to be re-evaluated and a new approach must be found’.

Albeit that he was not examining doctrinal criminal law, the same point has been repeatedly made by Ciaran McCullagh. In 1995, he suggested:

‘The law making process is the means through which the criminal label is distributed in society. As it operates in Ireland, the process of law making distributes this level in an uneven manner. It sanctions some kinds of socially harmful behaviour and ignores others. It is aided and abetted by an enforcement system that devotes more resources to the pursuit of some kinds of law-breaking than others...The end product of this system is a criminal population which contains a disproportionate number of those who are poor, uneducated and unskilled’\textsuperscript{11}.

He makes the same point in Chapter 7 of this book, noting that criminal law is a social product, permitting it to be shaped by powerful social forces and social actors. If white collar crime is different from ordinary crime, it is only because of labelling rather than normative considerations—the powerful in society design the laws that determine whether their behaviour is defined as criminal or not.

Such a development has the potential to produce two unacceptable outcomes. First it creates a two tiered system of justice where the poor get prison for their wrongdoing whereas the middle classes are immunised from such consequences for their deviant acts. Secondly, in choosing not to label (or enforce) many white collar crime as real crimes, we are implicitly accepting that it does not threaten our security in the same way that street crime does. This is a mistake. As Kilcommins and Vaughan note in Chapter 4 of this text:

‘Though it may appear more remote, more victimless and may often be less dramatic, misconduct in the banking and corporate sectors, in the workplace, in the environment, in the political arena and in the distortion

\textsuperscript{10} Melling v O Mathghamhna and the Attorney General [1962] IR 1.
of competition in the market poses as much, if not more, of a threat to our everyday lives as ordinary crime (with the potential to affect more people). Our security can be affected in a myriad of different ways by misconduct of this nature including, among other things, workplace injuries, loss of equal opportunity, loss of competition, loss of jobs, loss of reputation and the consequent devaluation of share prices and pension funds, threats to the environment, increased taxation, and increased costs for consumers. To-date, we have adopted a very narrow understanding of what constitutes a threat to our security, fastened to a very traditional outlook that views white collar wrongdoing as having rather benign effects. We quickly need to develop a more nuanced understanding that jettisons such traditional thinking.12

Some commentators in looking at white collar crime argue that, where possible, we should not use the full force of the criminal law, the argument being that a sanctioning approach to wrongdoing is inefficient and likely to dampen the entrepreneurial spirit. Instead, compliance strategies should be employed to govern white collar wrongdoing. Compliance techniques that involve persuasion and dialogue facilitate good working relationships, thereby producing more efficient outcomes. For example, in Chapter 1, the Director of Public Prosecutions, James Hamilton, argues for the increased use of administrative sanctions. The advantage of employing such a measure would be that the criminal law would not be cluttered up with provisions which did ‘not always carry the same moral stigma as convictions for the core criminal offences’. Moreover, the level of criminal penalties, particularly fines, did not adequately reflect the benefit to the wrongdoer, and therefore did not adequately deter. The difficulty with the employment of administrative sanctions is the constitutional concern that the imposition of such penalties would properly be regarded as part of the administration of justice. Mr Michael McDowell, SC, considers this issue at length in Chapter 6. He considers various options open to permit the more widespread use of administrative penalties. These include interpreting the administration of justice provisions in the Constitution in the light of Article 45, establishing a public tort, and amending the Constitution by way of a referendum.

Professor Colin Scott, in Chapter 3, also considers a range of alternative measures to criminalisation including prohibition orders, undertakings of compliance, compliance notices, fixed payment penalties, and the use of administrative penalties. In particular he suggests that the use of administrative penalties will bolster enforcement by giving greater control to the various agencies over the sanctions which they may employ in order to promote compliance. He also stresses the risk that neither prosecution authorities nor courts understand the instrumental objectives underpinning regulatory offences. They may accordingly dilute their stringency by demanding conventional criminal law standards (such as a mens rea requirement, or full insistence on the presumption of innocence) thereby reducing the enforcement capacities of the relevant agencies. Professor Irene Lynch-Fannon, in Chapter 5, makes a similar point, citing cases such as Chestvale v Glackin,13 O’Keeffe v Ferris,14 and Re Tralee Beef and Lamb Limited.15 She also notes ‘that there does not seem to be any great enthusiasm for incarceration as a means of dealing with white collar criminals’. She goes on to suggest that ‘the possibility of imposing a more effective civil sanction which meets and regulates the behaviour at stake, instead of worrying about a less than effective criminal sanction following an expensive criminal trial is compelling’.

Other commentators, like Vaughan and Kilcommins in Chapter 4, argue that whilst compliance strategies should be accommodated, we must also be committed to supporting criminal sanctioning strategies that send out the message to white collar criminals that their wrongdoing is treated seriously by us as a society and will, if the circumstances warrant it, result in imprisonment like it does for street crimes. They also suggest that we should not underestimate the powerful cathartic effects that the proper use of criminal law can provide in society, permitting as it does the expression of collective outrage: ‘the criminal law is designed to uphold moral sensibilities and it permits a powerful message to be conveyed in relation to the anger felt by ordinary citizens about the commission of certain crimes. It also acts as an important safety valve, limiting the ‘demor-

15 [2008] 3 IR 147.
alising effects’ on society of the consequences of serious misconduct’. Similarly McCullagh questions whether the use of imprisonment would not have a powerful deterrent effect for white collar wrongdoing given that such crime is often better explained through theories of rational choice than is more traditional crime. White collar criminals according may be more open to being deterred by a prior knowledge of the consequences: ‘if this knowledge does not involve the perception that a penal sanction is a possibility then the prevention of such behaviour is unlikely’. Declan Walsh makes a similar argument in Chapter 8. He points out, for example, that punitive sanctions act as an incentive in the successful operation of leniency programmes. He also notes that there ‘is much evidence to suggest that the threat of criminal sanctions has a greater effect on potential cartelists than the most punitive of economic penalties’.

Against this theoretical backdrop, it is significant to note the increasing number of agencies that have been set up with statutory powers to regulate conduct and enforce standards in a range of areas. The aim of Part II of this book, therefore, is to highlight the range of powers that these bodies have as an illustration of the tensions and trends identified in Part I. Paul Appleby, the Director of Corporate Enforcement, reflecting on these trends in Chapter 9, considers the growth of regulation as related to the existence of a ‘more sophisticated economy and society’. He goes on to consider the necessity in the context of ‘entrusting the regulation of discrete areas’ to those with dedicated, independent and professional resources to do the job. Paul Appleby goes on to outline the prosecution powers of the Office of the Director of Corporate Enforcement (ODCE) as part of the function of ODCE to enforce and otherwise bring about compliance with company law. He uses this factor, in particular, to distinguish the role of ODCE from that of the DPP and notes some of the achievements of his Office both quantitatively and qualitatively. His chapter concludes with a reflection on the value of ensuring that ODCE has, at its disposal, a range of powers to both promote as well as to enforce compliance in company law. David McFadden in Chapter 10 on the Competition Authority makes a similarly persuasive case as to the merits of a regulatory body being able to draw on a full range of powers in the execution of its mandate. In this Chapter, however, McFadden highlights that although there are a ‘broad suite of sanctions’ (and these are detailed in the Chapter)
available to the Competition Authority in the pursuit of its functions, this does not mean that ‘the courts have at their disposal all the sanctions necessary or appropriate for dealing with competition infractions.’ In short, as McFadden persuasively argues, the fact that the Competition Authority does not have recourse to civil fines leaves it with a major gap in its armoury in regulating anti-competitive conduct. The Chapter engages in an important and critical analysis of the use of the law in regulating anti-competitive conduct and it illustrates neatly (especially with reference to the contrast between so-called ‘hard core’ offences and other anti-competitive behaviour) the tensions prevalent in competition law and regulation more generally. The conclusion – that civil fines must be available to the Competition Authority if it is to effectively police anti-competitive conduct – makes clear that it is the full range of powers that is effective in regulation, and not the necessarily the availability of criminal powers.

Against the backdrop of Chapter 9 on the ODCE and Chapter 10 on the Competition Authority, the weight attached to the ‘economy’ over ‘society’ is perhaps apparent from the discussion in Chapter 11 of the powers of the Environmental Protection Agency (EPA) by Gerard O’Leary. Dealing specifically with the 2007 regulations to regulate the quality of drinking water, O’Leary explains and rationalises the focus of the EPA on tools that are both flexible and risk-based and when strategically used can achieve better regulatory outcomes (quoting McRory). The Chapter details how these tools – such as inspections and monitoring – are preferred to prosecution and he highlights the extent to which they can assess and encourage compliance. With specific reference to the learning from the cryptosporidium outbreak in Galway, O’Leary explains the new model for ensuring the availability of safe and secure drinking water proposed by the EPA which aims to prevent such outbreaks occurring in the future. This emphasis on prevention notwithstanding, it is clear that the EPA will and can use the range of powers at its disposal, including administrative sanctions and prosecution, where these are deemed to be the proportionate response.

Moving back into the mainly private arena of personal information, food safety and consumer rights, Chapters 12, 13 and 14 deal with the powers of the Data Protection Commissioner, the Food Safety Authority and the National Consumer Agency respectively.
In Chapter 12, the Data Protection Commissioner, Billy Hawkes, outlines the four areas in which compliance with data protection law is ensured by his office, namely in the adjudication of disputes (the Ombudsman function); education and raising awareness; improving transparency by maintaining a public register of personal data, and as an enforcer of the law. The Chapter details the many areas of the Office’s work that perform these functions including conducting audits, drawing up or approving codes of practice, and exercising the statutory powers to ‘require a data controller or data processor to take whatever steps the Commissioner considers appropriate to comply with the terms of the Act.’ The Chapter concludes with a look ahead to developments at European and international levels.

Chapter 13 on the Food Safety Authority of Ireland (FSAI) by its Chief Executive, Professor Alan Reilly, follows a similar format and highlights in particular the functions the body has in the enforcement of food law, in co-operation with other agencies, and ensuring that the food industry takes ‘all reasonable steps to ensure that food consumed, distributed, marketed or produced in Ireland meets the highest standards of food safety and hygiene.’ The Authority has a range of powers to this end and like the other agencies, has powers to prosecute which it uses as a last resort. The final Chapter deals with the National Consumer Agency and is written by its legal adviser Sean Murphy who notes that the ‘mere presence of a particular power or authority may operate as an effective incentive towards engagement with an appropriate alternative dispute resolution mechanism. In fact, the agency has and uses both civil and criminal powers of enforcement but as the Chapter makes clear, the Agency’s regulatory strategy is determined by a range of factors including where its resources are best used. In this regards, focus is placed on initiatives that achieve sectoral rather than individual compliance. As Murphy explains, the Agency, like other bodies, aims initially to ‘prevent any transgression by its advocacy and information function’ leaving resort to the use of its enforcement powers for cases where this is unavoidable bearing mind the utility of prosecution against the wider benefit to the consumer body. The Chapter reflects the importance to consumers of respect for their rights by retailers and others and notes the demands in this respect of meeting consumer expectations. In this regard, the Chapter notes that the use by the Agency of its functions is a fluid process under regular review.
and it ends where Appleby begins Part II of the book by highlighting the importance for the purposes of enforcing legal standards that a ‘specialist body exists with the necessary expertise and capability to discharge the national responsibilities’.

This book is an unique attempt to draw together some of the theoretical debates around regulation and enforcement and to reflect the growing range of administrative and criminal sanctions now available to a wide range of statutory bodies. It has its origins in a First Law conference focusing on this theme although many of the contributions in Part II were commissioned by the editors to ensure that the book had as much practical importance as possible. The editors would like to conclude by thanking the publisher and all the contributors for committing their resources to this project. We hope everyone is pleased with the end result.

Shane Kilcommins
and
Ursula Kilkelly
Cork
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