

Does the Law Protect the Environment?

by Sarah Vanuxem

Is the law doing enough to protect the environment? Through an analysis of the concept of environmental crime, Grégory Salle shows that legal provisions are limited by a social vision that favors the technical and capitalist exploitation of nature.

About: Grégory Salle, *Qu'est-ce que le crime environnemental ?* Paris, Éditions du Seuil, Collection Anthropocène, 2022. 288 p., 21€.

“What is environmental crime?”: Grégory Salle, a social science researcher at the French National Centre for Scientific Research (CNRS), sets out to answer this question in an eponymous book (titled in French *Qu'est-ce que le crime environnemental?*) over the course of seven chapters that can be presented around the following interrogations: 1) How are environmental crimes treated in the media (Chapter 1) and in official reports (Chapter 2)?; 2) How and to what extent do international institutions (Chapter 3) and national courts (Chapters 6 and 7) combat and punish environmental crimes?; and 3) What exactly is meant by “environmental crime” (Chapters 4 and 5)?

Following an analysis performed “against legalism,” the author argues that “environmental crime” (broadly understood) serves primarily to maintain the prevailing relations of production. He thus reaffirms in his own way conclusions that were already drawn in the 1970s in France:

Before preventing or stopping pollution, environmental law [...] is in the service of a society that fails to question the place of technology, growth, man’s traditional

relationship to his environment, or anything else for that matter [...] an enemy of sorts that one had better know well (Jean Alfred, "L'écologie et le droit," *La gueule ouverte*, 7 May 1973).

Reporting on Environmental Crime

The book begins with a description of the way French media and international institutions report on environmental crimes. Salles' analysis of radio, television, and press coverage of these crimes pays special attention to the "Planète" column of the newspaper *Le Monde*, and in particular to an issue devoted to ecocide and the work of legal expert Laurent Neyret. Overall, the analysis reveals a reluctance to deal with environmental violations, on the one hand, and to classify such violations **as crimes or offenses**, on the other. It also shows the following: Environmental damage is rarely linked to the capitalist mode of production (which for Salle is the source of the problem); the countries of the South are presented as its main perpetrators; and the majority of journalists limit their investigations to legally reprehensible damage.

Salle also examines the data on environmental crime published in reports of the International Criminal Police Organization (Interpol) and the United Nations Environment Program (UNEP) in 2014 and 2016, respectively. This analysis leads him to argue that the media and official documents show the same analytical bias: They describe environmental crime as perpetrated by Southern countries alone and for the benefit of underground economies, that is, as part of illegal activities. As such they are "poles apart" from "decolonial ecology," which purports to address "the double colonial and environmental fracture" (p. 62).¹ Salle further contends that the expressions "sustainable development" and "green growth" are used unquestioningly and that their potentially oxymoronic or contradictory nature is consistently overlooked.² Thus, economic development is said to be threatened by environmental violations, but is itself never presented as a threat to the environment.

¹ On this critical approach, see Nastassja Martin, *À l'est des rêves – Réponses Even aux crises systémiques*, Paris, La Découverte, 2022; Malcolm Ferdinand, *Pour une écologie décoloniale*, Paris, Seuil, 2019.

² On this critical approach, see Hélène Tordjman, *La croissance verte contre la nature : critique de l'écologie marchande*, Paris, La Découverte, 2021.

Punishing and Combating Environmental Crime

Salle makes clear that international institutions devote limited resources to combating environmental crime. In particular, he observes that UNEP has remained a mere United Nations program and has even abandoned its “critical stance on development, growth, and consumerism in favor of closer relations with the business world and the promotion of green ‘economy’” (p. 92). The extent of the shift is such, he argues, that the program no longer proposes to fight climate disruption, but only to help adapt to it. Yet, as he also points out, a UNEP report published with the United Nations Interregional Crime and Justice Research Institute (UNICRI) in 2018 does reflect a certain “repositioning”: The report acknowledges the responsibility of governments and firms, and describes Northern countries as the scene of criminal activities linked to wildlife trafficking.

Does it follow that the courts punish environmental violations? Based on an examination of the action of French, English, and American courts, Salle argues that environmental law is poorly enforced overall. He notes that the courts prefer to apply the provisions of civil law (or at best of administrative police) than the rules of criminal law. And when judges do rule on criminal matters, they tend to classify the violation as a misdemeanor rather than as a felony. As for penalties, fines are preferred to prison sentences. Salle concludes from all this that environmental crimes are perpetrated for the most part with near impunity. Thus, although a law passed in France in December 2020 did create two new environmental offenses (one relating to pollution and the other to endangerment of the environment), this reform was adopted in a general context of “*de facto* decriminalization of environmental law” (p. 188, note 232).

Salle stresses the fact that some environmental violations cause outrage and attract the attention of the courts, while others are ignored despite being just as serious. For instance, several major trials dealing with marine pollution—including the Erika, Deepwater Horizon, and Exxon Valdez oil spills—have marked the history of environmental law. And yet, oil spills account for a small share of marine pollution compared with the “regular but unspectacular degassing” carried out “by (authorized) ocean-going vessels” (Jean-Noël Salomon, quoted on pp. 211-212). This discrepancy highlights the intrinsic limitations of the law: Even if the law were rigorously applied, a great deal of environmentally harmful actions would remain within the realm of legality and would continue to go unpunished. According to Salle, the holding of mock courts or opinion tribunals in recent years is a symptom of the

inadequacy of the law in force. One example is the 2017 International Monsanto Tribunal, which produced an advisory decision stating that Monsanto could be prosecuted for the crime of ecocide were this crime to be included in international criminal law (p. 200).

Defining Environmental Crime

Yet, what exactly is meant by “environmental crime”? Is it a synonym for the crime of ecocide? As is made clear in the introduction, the word crime has a broader meaning in English than it does in French: It does not refer solely to the most serious offense in criminal law (p. 11). In Chapter 5, Salle examines the case of sand and tries to determine what makes its “conquest criminal” (p. 128): Although sand—the world’s most consumed resource after water—took millennia to build up, it will soon be completely depleted, after just a few decades of unbridled exploitation. Because we do not know how to recover sand from concrete “*post festum*,” a shortage is looming, which in Salle’s view may justify speaking of a crime. However, it is difficult to establish which extraction, processing, or use activities are legal and which are illegal. This difficulty lies not only in the fact that the laws governing the exploitation of natural resources vary from one country to the next (depending on factors like the existence of a state monopoly or the authorization of exports) and evolve in different directions (in France, for instance, the trend is towards deregulation (p. 140)), but also in the fact that legal and illegal actions are closely intertwined and ultimately justified by the—never-questioned—needs of production. Thus, according to Salle, there appears to be an organized defense of the regime in place, which is rapidly leading to the irreversible disappearance of the sand we need to construct our buildings.

Beyond this case study and the analysis of media, official reports, institutional activities, and court decisions, Salle traces the concept of “environmental crime” to the work of a specific discipline: green criminology. Chapter 4 is devoted to this current initiated in the 1990s by criminologist and sociologist Michael J. Lynch. Here we learn that green criminology aims to study environmental violations on the assumption that these are very rarely punished despite being widespread and having serious consequences (p. 110). Thus, the proponents of green criminology take up Edwin Sutherland’s earlier effort to “establish the existence of business crime” and to show that “white-collar crime ‘really does exist,’ is neither rare nor unusual, and is certainly more costly and harmful for society than so-called ordinary crime” (p. 109). Beyond

this common ground, green criminology is divided into various schools of thought, themselves classified into two camps. The first—legalist (or positivist)—camp treats as an **offense** “only that which textual norms and competent authorities qualify and record as such”; the second, representing the majority, distances itself “from official definitions and categorizations in order to extend the status of crime, understood in the most generic sense, to acts which, although legal, are no less harmful” (p. 116). From the latter perspective (which Salle endorses), one might ask, for instance, whether the consumption of luxury goods (such as private jets or yachts) should not “become a **crime or an offense** in view of its negative environmental effects” (Michael Lynch *et al.*, quoted on p. 120).

Can Capital and Law Be Viewed as Criminal?

Announced in the introduction and reaffirmed in the conclusion, Salle’s thesis is reiterated and expanded over the course of the seven chapters: The reason why environmental violations are so poorly documented, so rarely punished, and so often kept from view is that this helps to spare certain actors and interests and, more broadly, to ensure the continuity of our capitalist system, which is based on the exploitation of nature (p. 12). Since we know that “obvious crime is not the only cause of biodiversity depletion, soil degradation, water pollution, and air contamination,” and that “the sources of environmental disaster (from soil artificialization to the melting of ice) are both legal and illegal,” we have to ask whether it is not “the development model and even the mode of production itself that ought to be described as criminal, rather than the uniquely stigmatized portion of reprehensible behavior” (p. 19). Accordingly, Salle proposes to stop presenting environmental crime as “a morbid element in a healthy whole” and to characterize it instead as the product of a “socio-economic organization that is itself destructive” (p. 18). Yet, he notes that this approach raises one difficulty: By pointing “to such a general foundation” as the capitalist system of production, there is a risk that “the sphere of causality or determination will be broadened to the point of being elusive” (p. 234), such that—I would add—readers will be convinced strictly on the basis of shared presuppositions of a “socialist” tendency, to use Salle’s own word (p. 238).

The methodology adopted in the book raises another problem: In this approach, any proposal aimed at improving environmental law or ensuring its proper application is contestable since it can be suspected of perpetuating the capitalist mode

of production through legitimizing “behavior or lifestyles that are socially accepted, and in some cases celebrated, despite being environmentally harmful and even destructive” (p. 229). Thus, according to Salle, lawyers and citizens who campaign for the recognition of the crime of ecocide are actually combatting the type of ecocide that entails the violation of already existing criminal rules (p. 234), and are therefore complicit in environmental crimes that are not recognized as such by the law. Yet, while the guilty parties are indeed numerous, not all of them are guilty to the same extent or in the same way (p. 115)—as Salle himself warns. And we can assume that the crimes recognized as such by the law correspond *a priori* to the most serious crimes. That being said, Salle is clearly not writing against the law, or even against positive law: He claims to distance himself from a legalistic definition of crime and to question the legitimacy of the rules established by the state, yet the proposals he puts forward—forcing the conversion of polluting companies, introducing environmental taxes, and adopting environmental planning—are all state solutions that require the use of force, if not public funding (p. 239).

There is another ambiguity that should be cleared up: While Salle builds on the legacy of Marx, Thompson, and Foucault, his primary aim is not to reveal a legal order that would exist before or “after the law”³ (for instance, an environmental customary law of the poor⁴ or an ecological common sense⁵ that one should recognize and respect) or to describe all of the environmental illegalisms that are likely to be committed and that threaten the most disadvantaged populations⁶—for as he himself points out, the infinite variety of environmental violations remain within the realm of legality. Nor is to call for an extension of the realm of illegality that would permit more repression. His aim is above all to make clear that punishment remains a “major blind spot in socialist thought” and to strive to “subvert punitive reason” (pp. 237-238).

³ Laurent de Sutter, *Après la loi*, Paris, Puf, 2018; Paolo Grossi, *Oltre la legalità*, Bari, Editori Laterza, 2020.

⁴ Karl Marx, “Debates on the Law on Thefts of Wood,” in K. Marx and F. Engels *Collected Works*, Vol. 1, London, Lawrence and Wishart, 1975.

⁵ Edward Palmer Thompson, *Customs in Common: Studies in Traditional Popular Culture*, New York, The New Press, 1993.

⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York, Vintage Books, 1991.

A Critical Approach to Law

Salle evokes the “false start” of French researchers, who, despite the pioneering work of Pierre Lascoumes, have conducted very few studies in the sociology of environmental criminal law, and who, unlike their English-speaking counterparts, rarely engage with the writings of David Harvey or Bruno Latour (p. 126). While this may be true, I would like to point out that continental Europe is also home to several critical schools of law, the school of economic law being the most notable among them. The latter is committed to substantive rather than formal analysis of the legal system, which involves “criticizing legal concepts by not treating them as unquestionable givens.”⁷ The fact remains that the environmentalists belonging to this school do not attach the same importance to criminal law as Salle does. Hence, perhaps, the doctrinal gap highlighted in the book.⁸

While I agree with the author that (consensual) civil law and even (vertical) administrative law will never suffice to combat environmental violations effectively, and while I share his conviction that criminal law is needed first and foremost, I feel it is important to clarify what it means here to reject legalism. Indeed, in criminal law, the principle of legality can legitimately be viewed as fundamental: Encapsulated in the Latin adage *Nullum crimen sine lege, nulla poena sine lege*, this principle states that **crimes and offenses** must be clearly and precisely defined in law, as must the penalties applicable to them. Beyond the fact that Salle never suggests renouncing this principle, I want to insist that the expression “against legalism”—which he uses as his watchword—cannot be interpreted to mean “against legality.” This is especially true when one considers that Salle seeks to establish the criteria for redefining environmental crimes: Should one “qualify as criminal those acts that are harmful and may have serious consequences, but that are committed involuntarily, as a result of ignorance or inadvertence” (p. 119-120)? Should one not take into consideration “the seriousness of the harm caused by this or that violation” (p. 231)?

One might be tempted to reply that there already exists a provision to this effect in France: “ecological damage,” which Salle does not fail to mention (p. 197). Thus, article 1247 of the French Civil Code provides that ecological damage, defined as “*non-negligible* damage to the elements or functions of ecosystems or to the collective

⁷ Jean-Baptiste Racine and Fabrice Siiriainen, “Retour sur l’analyse substantielle en droit économique,” in *Revue internationale de droit économique*, 2007/3 (t. XXI, 3), pp. 259-291.

⁸ See, however, Laurent Neyret (ed.), *Des écocrimes à l’écocide. Le droit pénal au secours de l’environnement*, Bruylant, Larcier, 2015.

benefits drawn by man from the environment,” is reparable.⁹ One might consider transposing this provision into criminal law. But is this not precisely the crux of the ecocide debate? Legal scholars may wonder why—and regret that—the book provides no final comparative analysis of national provisions relating to ecocide. It should be noted, however, that Salle did not write a book on legal technique, but a work of legal sociology and environmental politics that offers a clear and highly useful international overview of the various ways in which our industrial societies deal with what he refers to as “environmental crime.”

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⁹ My emphasis.