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978-1-107-04326-8 - Rule of Law for Nature: New Dimensions and Ideas in Environmental Law

Edited by Christina Voigt

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RULE OF LAW FOR NATURE

“Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature.” This 1987 statement by the World Commission on Environment and Development has never been more relevant and urgent than it is today. Despite the many legal responses to various environmental problems, more greenhouse gases than ever before are being released into the atmosphere, biological diversity is rapidly declining and fish stocks in the oceans are dwindling.

This book challenges the doctrinal construction of environmental law and presents an innovative legal approach to ecological sustainability: a rule of law for nature that guides and transcends ordinary written laws and extends fundamental principles of respect, integrity and legal security to the non-human world.

CHRISTINA VOIGT is a Professor at the Department of Public and International Law, University of Oslo, Norway, where she works in particular on legal issues of climate change, sustainability and the interface between environmental and trade law.

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To my sons Oscar and Victor and their generation

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P R E F A C E

“Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature.” This is what “Our Common Future”, the report of the World Commission on Environment and Development, demanded more than a quarter of a century ago.

Since then, a wide range of environmental laws and regulations has been adopted at different scales and levels. International environmental law has emerged and rapidly expanded in scope and quantity. Regional environmental law, in particular EU environmental law, is now defining and prescribing environmental quality and standards for member states. At the national level, most countries have one or several environmental laws in place.

These developments over the last forty years are remarkable and could easily be mistaken for success. But so far, environmental laws have only led to modest environmental gains. Main trends of environmental destruction continue almost unchanged. It appears that decades with widespread environmental legislation have not made much of a difference in putting the world on an environmentally sustainable track. The overall shift towards environmentally sustainable development remains a distant goal, as if environmental law never existed.

The World Commission’s call has thus never been more relevant and urgent than today. Now, in 2013, more greenhouse gases than ever are put into the atmosphere, biological diversity is rapidly declining and fish stocks in the oceans are dwindling.¹ The outcome document of the 2012 Rio+20 UN Conference on Sustainable Development had heads of state and government “recognize the severity of the global loss of biodiversity and the degradation of ecosystems and emphasize that these undermine global development, affecting food security and nutrition, the provision of and access to water and the health of the rural poor and of people

¹ UNEP, *Global Environment Outlook 5*, 2012, at 461.

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PREFACE

worldwide, including present and future generations.”² At the same time, these heads of state and government recognized

that planet Earth and its ecosystems are our home and that “Mother Earth” is a common expression in a number of countries and regions, and we note that some countries recognize the rights of nature in the context of the promotion of sustainable development. We are convinced that in order to achieve a just balance among the economic, social and environmental needs of present and future generations, it is necessary to promote harmony with nature.³

Environmental laws are without doubt essential for the protection of natural resources and ecosystems and reflect our best hope for the future of our planet.⁴ Some see that environmental laws have flourished and expanded, but much needs to be done if the legal system is truly to promote “harmony with nature”.

Present environmental laws and their implementation are not adequate to ensure the maintenance or – where damage has happened – restoration of the integrity of natural systems. This situation begs many questions: Why is the ever-growing norm density in environmental law not mirrored by accelerating good news of high environmental quality and sustainability? Why is it very difficult to achieve effective results with environmental law and what can be done to change this situation?

The contributors to this book have varying views on these questions and on how they should be met. Some criticize existing environmental laws as “legalizing pollution”. Others are worried that, through environmental laws, the environment becomes a property to be used rather than preserved, and thus question the larger paradigm of which environmental law is only a part. While some point to important positive signs on which further development could be built, others are concerned that environmental law is facing systemic, complex challenges and that it is not clear that we will be able to address effectively the problems facing our planet.

To remedy this situation, this book argues that a “rule of law for nature” is needed: a legal framework that extends to the environment the procedural and substantive legal principles enshrined in the “rule of law”.

² Outcome of the Conference Rio+20, *The Future we Want*, A/CONF.216/L.1, 19 June 2012, para. 197.

³ *Ibid.*, para. 31.

⁴ *Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability*, available at: www.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability.pdf (last accessed 30 May 2013).

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Historically, the concept of rule of law is deeply linked to the principle of justice, involving an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. The rule of law refers to a principle of governance in which the state – the sovereign – is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and that are consistent with international human rights norms and standards. The concept requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁵

A “rule of law for nature” transposes these concepts from the original state–citizen dimension to a system of governance in which *all* persons, institutions and entities, public and private, including the state itself, are accountable to laws that aim at protecting the health, integrity and security of the environment. Hans Christian Bugge writes in his chapter: “It means that nature and natural values are protected by law from encroachments, deterioration and destruction in fundamentally the same way as citizens are protected by law ... Rule of law for nature means predictability, security and the absence of arbitrariness and bias in decisions that affect nature and the full accounting of environmental values in decision-making – be it by private interests or public authorities.”⁶

In this book, a rule of law for nature is approached from different perspectives. They range from the proposition that unwritten higher law – the universal laws of nature – must guide and transcend ordinary written laws, to the view that fundamental principles of respect, integrity and legal security need to be extended to the non-human world, to the more moderate view that government has to exercise its power also in relation to the environment in accordance with well-established and clearly written rules, regulations and legal principles. It also marks the shift from a purely human-centred concept of law towards a concept of law that is recognizant of ecological realities.

⁵ Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 23 August 2010, S/2004/616. See also Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, Resolution adopted by the General Assembly, A/RES/6//1, 30 November 2012.

⁶ See Chapter 1 by Hans Christian Bugge.

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In doing so, this book challenges the doctrinal construction of environmental law and presents innovative legal approaches to ecological sustainability. As Edith Brown Weiss aptly puts it in her chapter: “We are at a critical juncture in ... environmental law, in which we will need to forge new paths to address global environmental problems and to advance the rule of law for nature.”⁷ Forging of new paths is the aim of this book. Of course, not all answers can be given and all problems solved. Rather, it is hoped that the book stimulates further thinking and research in these important fields and that, as a consequence, a rule of law for nature takes shape.

Part I of this book sets out a diagnosis of the fundamental, complex and systemic shortcomings that environmental law faces. This Part also looks ahead to the major legal challenges that loom in the onset of the Anthropocene – the epoch in which humans have become the central force affecting our planet.⁸

Part II continues with a doctrinal reflection on a “rule of law for nature”. What is meant by it? How can it possibly remedy the challenges mentioned above? What would a rule of law for nature require?

Third, and most importantly, the book looks for ways to reform environmental law-making, interpretation, implementation and enforcement. It presents innovative and constructive legal approaches to ecological sustainability. The book reflects on the legal status of nature and environmental functions. It shows how ecological goods and services can be better taken into account in decision-making and the implications of the rule of law in this respect.

In Part III, the book portrays a wide spectrum of innovative legal ideas and approaches to solving environmental challenges. It comprises global, transnational, regional as well as domestic perspectives, all informed and connected by the attempt to strengthen the legal protection of nature. The environment does not correspond to administrative or sovereign boundaries. In the same way, new environmental legal concepts can and should travel across boundaries and be implemented at all levels, whether international, regional or in national legal systems.

Part IV deals with the notion of rights for nature. Nature’s rights resemble the ultimate legal recognition of intrinsic value and moral standing of the environment.

Part V then discusses various procedural aspects of a rule of law for nature, such as the merging of environmental and social impact

⁷ See Chapter 2 by Edith Brown Weiss.

⁸ See Chapter 3 by Nicholas A. Robinson.

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assessments to provide a more comprehensive, holistic impact assessment, administrative enforcement of environmental laws and the possibility for legal review of compliance by states with their international legal obligations.

In Part VI, the role of companies and markets is analysed from the perspective of environmental improvements. Again, we find the argument here that nature should be bestowed with autonomous rights that operate as trump cards over other social goals.

Finally, in Part VII the book turns to the oceans and the fact that a large part of the Earth's marine environment is outside national jurisdiction. It asks how environmental protection of marine life can be strengthened and suggests, for example, the innovative application of the traditional public trust doctrine.

The authors represent different legal fields, though most of them are prominent scholars and practitioners in environmental law. Importantly, however, they bring together a wide spectrum of views from different parts of the world. As such, the book is a fruitful exercise in exchanging views and ideas on strengthening environmental protection through the rule of law. Moreover, the list of contributors is balanced in terms of age and gender.

It is hoped that the book will provide environmental law scholars, students, researchers, lawyers, judges and civil servants with compelling new perspectives upon the pressing issue of improving the quality of environmental protection. However, while focusing on *environmental* law, the book also provides important insights as to the law's potential for scholars working in other fields of law and to (environmental) social scientists who are not lawyers. As such, the book is a contribution to the environmental discourse, and aims at stimulating debate and further research on how to further the quality of our natural environment across disciplinary boundaries.

Christina Voigt