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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

Excerpt

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PART I

Environmental law at the crossroads:
achievements, shortcomings and challenges

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Twelve fundamental challenges in environmental law

An introduction to the concept of rule of law for nature

HANS CHRISTIAN BUGGE

1. Introduction

This introductory chapter reflects on the legal status of nature and the fundamental challenges in protecting nature through law. It presents and discusses the concept of rule of law and how this can be developed into stronger legal protection not only for human beings as citizens, but also for the protection of nature and natural values.

In 2012 forty years had passed since the first global United Nations Conference on the Human Environment in Stockholm. It was also twenty-five years since the report ‘Our Common Future’ – known as the Brundtland Report – was launched with its urgent call for ‘sustainable development’, and twenty years since the milestone United Nations Conference on Environment and Development in Rio de Janeiro.

Over this period an impressive body of environmental law has been adopted in all developed and most developing countries as well as at the international level. There are some important success stories, but there are also numerous examples of ambitions and objectives of environmental policy that have not been fulfilled.

In June 2012 world leaders and more than 15,000 representatives of the civil society gathered again in Rio de Janeiro for the ‘Rio+20’ conference to discuss the progress made and the future course: how to meet the double challenges of global environmental degradation and development needs. What came out of this conference were mainly affirmations of earlier commitments, with few new initiatives.¹ It did not lay a foundation for

¹ *The Future We Want*, A/CONF/216.L.1 of 22 June 2012, adopted at the UN General Assembly on 27 July 2012 as A/RES/66/288.

more effective international and national measures to protect the global environment, although this is urgently needed.

An important factual basis for the conference was the most recent UNEP (United Nations Environment Programme) Global Environmental Outlook (GEO5). This report opens with the following statement:

The currently observed changes to the Earth System are unprecedented in human history. Efforts to slow the rate or extent of change – including enhanced resource efficiency and mitigation measures – have resulted in moderate successes but have not succeeded in reversing adverse environmental changes. Neither the scope of these nor their speed has abated in the past five years.²

The report shows that in spite of all the political objectives adopted, the economic and legal instruments established and changes in attitudes and efforts made, most important trends continue to go in the wrong direction. For example, the report states that ‘the rate of forest loss, particularly in the tropics, remains alarmingly high’. With regard to freshwater sources, despite progress in some areas, ‘there are concerns that the limit of sustainability of water resources, both surface and ground water, has already been reached or surpassed in many regions’. Furthermore, despite many global agreements on the issue ‘there are continuing signs of degradation’ of the marine environment due to pollution. And with regard to biodiversity ‘substantial and on-going losses of species contribute to ecosystem deterioration. Up to two thirds of species in some taxa are threatened with extinction’. This happens in spite of the fact that protected areas now cover nearly 13 per cent of the total land area and ‘policies, regulations and actions have been adopted to minimize the pressures on biodiversity’.³

GEO5 points to the need

to consider policies and programmes that focus on the underlying drivers that contribute to increased pressure on environmental conditions, rather than concentrating only on reducing environmental pressures or symptoms. Drivers include, inter alia, the negative aspects of population growth, consumption and production, urbanization and globalization.⁴

Undoubtedly, these are all root causes of the worldwide environmental degradation, and they can only be met by fundamental political reforms.

² The Fifth Global Environment Outlook (GEO5) Summary for Policy Makers, United Nations Environment Programme (2012), 6.

³ *Ibid.*, 6–11. ⁴ *Ibid.*, 14.

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The environmental crisis is deeply rooted in the dominant values of economic growth and material consumption of our civilization. We have to admit that to a large extent the environmental problems of our time are the negative side effects, and as such to a large extent an expected consequence, of our economic and social goals and ambitions. They are thus not only consciously 'accepted', but also – implicitly – wanted.

At this fundamental level, what is needed is to give environmental protection higher priority as a political goal, and limit economic growth and consumption in the traditional (material) sense. Some of the chapters in this book challenge the very paradigm of economic growth as we know it and the exploitation and destruction of nature that it by necessity entails.

The issue also has an ethical dimension. How we treat nature is fundamentally an ethical question. In modern civilization there is no such thing as a strong 'nature ethics' that directs and limits human action and works as a defence against destruction or degradation of nature. For decades there have been philosophical discussions on the moral status of nature, and on the moral obligations of humans towards nature.⁵ There is a growing movement in the field of animal welfare and even animal rights that is beginning to influence methods and practice in animal husbandry in some Western countries in particular. But in reality there are still few ethical barriers in our societies against widespread destruction and degradation of nature, at least as long as the purpose of the degradation is economic development and human well-being in the short term. This obviously has important consequences for legal thinking and the role of law in this area.

In addition to these fundamental causes, an important challenge from the perspective of environmental law is the discrepancy between the political rhetoric and formally adopted environmental objectives and legislation on the one hand and what happens in reality on the other hand. GEO5 states generally that 'environmental deterioration demonstrates internationally agreed goals have only partly been achieved'.⁶ The negative trends go contrary to the political ambitions and objectives of

⁵ For general sources see, for example, Andrew Brennan and Yeuk-Sze Lo, 'Environmental Ethics', in: Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy (Fall 2011 Edition)*, available at: <http://plato.stanford.edu/archives/fall2011/entries/ethics-environmental> (last accessed 11 March 2013); Joy A. Palmer (ed.), *Fifty Key Thinkers on the Environment* (London: Routledge, 2001); and Christopher Belshaw, *Environmental Philosophy. Reason, Nature and Human Concern* (Chesham: Acumen, 2001).

⁶ The Fifth Global Environment Outlook (GEO5) Summary for Policy Makers, United Nations Environment Programme (2012), 7.

environmental protection and sustainable development, as they have been laid down by both states and international organizations for several decades. The goal of long-term environmental sustainability is fully recognized; why don't we manage to achieve it?

While certainly agreeing with the need for fundamental changes in ethics, political priorities, economic systems and lifestyle, we should be deeply concerned with how law actually works, its limitations and weaknesses, and how it can be improved and strengthened. It has become evident that environmental law – generally speaking – does not work as effectively as the public and the politicians want it to work – and probably presume that it actually works. My assertion is that this is due to a number of fundamental problems and challenges inherent in law and the legal system itself when natural values are at stake. These have to be identified and analysed in order for us to understand and eventually overcome them – as far as possible. This introductory chapter aims to identify some of these problems and reflect on how ideas of a 'rule of law for nature' may serve. Other chapters in the book will elaborate further on specific perspectives and aspects of this broad theme.

2. The concepts of 'rule of law' and 'nature'

The concept 'rule of law' encapsulates the highest values and functions of law and the legal system in society: 'rule of law is the role of law'. As such, rule of law can also be regarded as a primary social value. In its broadest sense rule of law refers to the principle of governance where law is the supreme factor in the relationship between the authorities and the citizen as well as between citizens with conflicting interests. It means that all persons, institutions and entities, public and private, including the state itself, are governed by established laws and accountable to legal institutions.

Rule of law has both a procedural and substantial content. In the procedural sense the laws must be established by an open and democratic process, publicly promulgated and equally and objectively implemented and enforced. They must be controlled and adjudicated by an independent judiciary. Rule of law means security in the form of predictability. Citizens should be able to see and understand from the legal texts their rights and obligations in different situations. Substantially, rule of law now implies that the law complies with internationally recognized human rights norms and standards regarding fundamental rights and freedoms, personal security, protection of personal integrity and due process before

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the courts, with corresponding obligations for both the state and local authorities. Justice and fairness are implicit values in rule of law.

One person's freedom may harm other people's freedom, integrity and rights. Therefore, rule of law does not mean citizens' full freedom, nor does it mean absolute security and physical integrity. What rule of law requires is that any limitation and restraint in personal freedom, and any encroachment upon the individual's security and integrity must be found necessary and proportionate in order to protect other citizens' rights and interests or important public objectives and values. Furthermore, they must be laid down in formal laws and based on a due process, including the right to have one's rights and legitimate interests defended before an independent judiciary.

Rule of law is an anthropocentric ideal. It concerns human beings in their capacity as members of the society and subjects to the state's formal authority. Its aim – and hopefully its result – is the fulfilment of freedom, security and integrity of humans. Defined in this way, rule of law is not concerned with or relevant for nature as a subject of legal rules.

The concept of a '*rule of law for nature*' has two main aspects. The first is the importance of rule of law in general as a prerequisite also for proper management of nature and natural resources. Together with weak social groups, nature – the environment – is particularly vulnerable to lack of law, and to poorly developed legal and political systems. To put it simply: nature needs good laws and strong and unbiased implementation and enforcement of the laws.

But even more, the law must provide stronger protection for natural values. The second and more radical meaning of rule of law for nature – which will be the main perspective and topic of this book – is that important elements of rule of law are extended beyond human beings as citizens to nature and natural values. Instead of being anthropocentric, rule of law for nature even means a better legal protection of nature from human activities that may threaten or damage nature. Substantially it aims at the integrity and security of nature. 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. Of course, this does not mean that it shall be protected at any price and regardless of any other conflicting goal or interest. But these goals or interests must be strong enough to justify the environmental damage, and there must be procedural rules that ensure that the trade-off is made with due regard to nature's value and all other relevant facts. Rule of law for nature means predictability, security and the absence of arbitrariness and bias in decisions

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that affect nature and the full accounting of environmental values in decision-making – be it by private interests or public authorities.

Rule of law for nature also requires an expanded concept of justice and fairness, which includes the non-human world. Laws are not fair – and acts implementing them do not comply with the rule of law – if they ‘legalize’ environmentally destructive behaviour without sufficiently important reason and a corresponding procedure. Ultimately, it means that nature and natural values have legal protection at a similar level as that of human beings as citizens.

Rule of law for nature may, therefore, in a short-term perspective, be in conflict with elements of rule of law for humans – as limitations to the fundamental rights and freedoms of people. However, the universally recognized objective of sustainable development implies that protection of essential parts of the environment is necessary to ensure peace and security, social and economic stability progress, human rights and widespread well-being in the long term.

The values of nature may be ‘intrinsic’, which means values independent of human interests, or ‘instrumental’ – contributing to people’s material and spiritual welfare.⁷ There is a fundamental legal difference between – on the one hand – nature as a value in itself and – on the other hand – nature as a means for the satisfaction of human needs and interests. However, they both need stronger legal protection.

When intrinsic values of nature are threatened, there is per definition no human interest in protecting them. Can they nevertheless be protected? This fundamentally challenges our legal system, which is developed to regulate human actions to meet social needs and solve conflicts between human interests. Here the idea of a rule of law for nature is truly radical and seems to require major legal innovations.

If, on the other hand, nature as instrumental value is threatened, people appreciating this value will presumably take action to prevent it, or at least consider taking action. Whether they will actually do it depends on the strength of their interest, possible costs of an action and conflicting interests, and other factors. Whether they will succeed in protecting their interest depends ultimately on the legal rules that regulate the actual conflict, and how they are applied. In reality, we here meet many of the same

⁷ Instrumental value of nature has for some time been divided into ‘user value’, ‘option value’, and ‘existence value’. For an early discussion of these concepts see David Pearce and Kerry Turner, *Economics of Natural Resources and the Environment* (Baltimore: Johns Hopkins University Press, 1990). They see ‘existence value’ as equal to intrinsic value.

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fundamental problems in environmental law as we face in the protection of intrinsic values of nature, although to a varying degree. And most of the ideas of a 'rule of law for nature' are relevant for nature as both intrinsic and instrumental value.

3. Twelve fundamental problems in environmental law

When we want to analyse environmental law in order to better understand how it works – or why it does not always work as expected – we must be conscious of some deep-rooted problems in dealing with nature and the environment through legal means. In fact, we are here faced with a legal challenge that is fundamentally different from other issues in law. Some of these problems are grounded in the characteristics of environmental problems and in the special types of interests and conflicts we are faced with in this area of law. They may be described and categorized in several different ways. Here, I want in particular to highlight twelve fundamental problems. Several of them may be perceived as obvious and self-evident, but individually and indeed *in sum* they are essential to understanding and explaining the problems that face environmental law and policy.

3.1 *Nature is self-regulating and complex; we cannot influence the laws of nature*

It is special to environmental law that the *object* of its rules and regulations is something that cannot itself be regulated. We can destroy nature. We can protect and improve the conditions for natural processes and natural objects. But we cannot influence nature's own laws, how nature reacts to external influence such as pollution and other encroachments. We cannot stop the greenhouse effect itself or prevent toxic chemicals from being spread by wind and ocean currents all over the planet once they have been emitted into the air or water. We cannot order a pack of wolves to keep within a certain geographic area or by a simple decision ensure a certain environmental quality.

We can of course only regulate the environmental quality indirectly, by regulating human activities that may influence that quality. This is evident and indeed trite, but nevertheless fundamental and of utmost importance for the effectiveness of environmental law. It requires good knowledge of and respect for the laws of nature. Ideally, an adequate regulation of human activities must be based on clear objectives with regard to the environmental quality or values to be protected or attained, and

sufficient knowledge about what regulation of human activity is needed in order to reach that objective. The complexity of nature's law and of the relations and mutual influences and dependences between the innumerable elements in the ecosystems make this task very difficult. Effects are not necessarily linear; unknown thresholds may appear, as when the pH level in a lake passes a level in which fish can no longer live. And since environmental degradation often is the combined and synergetic effect of many human activities (see below), it is difficult to keep the damaging influence on nature within the 'critical load'.

3.2 *Many environmental problems are invisible*

Not all but many environmental problems of modern society are neither seen nor felt by human beings. We cannot 'see' radioactivity, the levels of dioxins in breast milk or CO₂ in the atmosphere. They are not perceived until their effects become evident: health problems and increased mortality among certain social groups, reduction of plant or animal species in an area, and increase in global temperature. This 'simple' fact makes many effects of environmental disturbance very difficult to discover.

In order to prevent and combat this type of problem, 'invisible' facts must be made 'visible'. They must be identified and presented in such a way that they can be understood by decision-makers. This requires resources for research and competent and independent researchers. And the decision-making system must be able and willing to respect and act solely on the basis of scientific knowledge.

What does rule of law for nature mean and imply to meet this problem? Here we get into such issues as producer responsibility: producers' obligation to assess and know about the properties, characteristics and effects of their production as well as their products, and the obligation to make this knowledge known to the relevant decision-makers and to the public. This must be secured by law. Effective enforcement of this also depends on the capacity of public authorities to be aware of and identify the 'invisible' and enforce the necessary legislation in order to avoid unwanted effects.

3.3 *Many environmental problems are marked by uncertainties*

Partly due to the complexities of natural processes there is often a lack of certain knowledge about causes and effects of changes in the environment, creating scientific debate and controversies. Environmental policy