

Perspectives for Environmental Law—Struggling for Sustained Humanity

In my original article, I distinguished four historical and diachronical phases of environmental law development: (1) the cyclical economy characterised by laws that, by braking economic development, unintentionally also preserve the environment; (2) the exploitation of nature by man based on laws that release the individual's energy and only peripherally limit it to avoid imminent and serious damage; (3) the planned use of nature guided by environmental protection law in the proper sense; (4) insecurity involving a situation of partial success in relation to the abatement of 'old' (visible) damage such as air and water pollution, but failure to cope with 'new' (creeping) damage such as the chemicalisation of the environment, the loss of biodiversity and the heating up of the atmosphere. For phase four, I proposed improvements of phase three strategies such as: environmental quality standards should be reoriented from damage avoidance to ensuring the well-being of organisms; technology standards, rather than keeping risks contained, should aim at soft and cyclical technologies; benefits allegedly drawn from environmentally harmful activities should be more critically scrutinised; and state intervention should be unburdened by injecting environmental concern into the very law that fosters the exploitative energies.

Looking back at these observations, I believe that I underestimated the diachronical character of phase two and oversimplified the complexity of phase four.

1. On Phase Two

With the breakdown of the socialist block, its environmental sins became manifest. Much to the detriment of natural resources, the state of centralised socialism had forced industrialisation in order to catch up with the capitalist West. Environmental legislation did exist but had hardly any effect in practice. Centralised socialism has since been replaced by state capitalism in large countries like Russia and China. With this, the over-exploitation of nature has become even more dramatic. Newly industrialising countries like India, Brazil and Nigeria have joined the group of economic tiger states. They generally rely on the capitalist mode of development. They also have environmental protection laws, but again with only weak practical effect. The overall picture is that vast areas of the earth have plunged back into the second environmental phase or regime. For the relevant states, their first priority must be to enter the third phase—that is to say to adopt working (and not just symbolic)

environmental legislation and to introduce an effective, non-corrupt enforcement administration. I believe it would be fatal to recommend them to pass directly through to the fourth phase—the period of experimentation. They must nevertheless prepare themselves for problems typical in the fourth phase.

2. On Phase Four

Environmental depletion in the second and third phase is largely due to point sources of impact. This enables states to impose specific and strict requirements onto identifiable individual operators (like industry or public bodies). In contrast, the creeping (but in sum tremendous) environmental impact in the fourth phase is due to mass consumption of transportation, products and energy. The opponent is not so much industry but rather us ourselves. Therefore, the perfecting of the overall command and control approach (or direct and supervise in Macrory's terms) I originally had in mind will not suffice. A more complex mix of instruments must be tried.

Of course, as the consumer is served (and manipulated) by industry, regulatory standards like environmental quality objectives and BAT for processes or products are still needed, with even more sophistication than currently practised by many states and the EU. These are then reinforced and balanced by forms of self-regulation such as environmental auditing, return systems for end of life products and self-responsible risk assessment for chemicals.

An almost paradigmatic change of instruments has occurred with the spread of economic instruments. They are also considered to be more apt to address individual consumers. While environmental charging schemes had already been practised before (for example in the form of waste water charges), 'cap and trade' has become the new messiah. 'Cap and trade' means that the use of scarce services of a natural resource is reduced to a supposedly tolerable level. The resulting amount of usage is then allocated to states and by states to individuals—the use quota being tradeable among states and individuals. Elegant as this concept appears, there is a risk of failure if the preoccupation with trading in use allowances loses sight of the relevant environmental concern. For instance, if the initial quotas are not fixed on the ground of environmental necessity, trading schemes avert minds from the fact that more should be achieved than just the realisation of the target. Precisely, this has happened with the climate regime, where cap and trade was first tried on a grand scale. Therefore, cap and trade must be flanked by directive requirements such as BAT. Another risk of failure is that cap and trade, because operating on the basis of the pricing mechanism, favours the more wealthy consumers of nature.

Taking the mix of instruments together, it remains an open question as to how the environmentally conscious consumer can effectively be constituted.

Perhaps, rather than via legal instruments, he and she will emerge from 'alternative' technologies and management. Often based on mistrust in command or benevolence from hierarchies, farmers, engineers and consumers' networks have invented organic methods, renewable energy, soft technologies, conscious consumption, and self-organised product certification. They have simply put the new into practice without waiting for authorisation by government or big business. But of course, they have and will have to continue to be given legal conditions that do not discriminate them against the mainstream.

3. Conclusion

Mass consumption in the affluent world regions (and not forgetting the better-off in the developing world), together with industrialisation in the tiger states have made the human impact on nature almost unbearable for the biosphere. With the change of the climate and other parameters, the earth's system is on the brink of failing core services for humanity.

The earth as a natural system will (and must) be reflected in the relevant legal institutions. This does not mean that a central world government will (or should) be created. In contrast, a multitude of levels of legal institutions will (and should) emerge—all aware of their effects and dependence on the earth system: states in their different stages of development, transnational organisations and networks of industry, horizontal learning arrangements between governments and, last but not least, international law and organisations. The vision of this institutional complex has become and will remain sustainable development. However, all will depend on how the concept is understood: in strong terms, as originally proposed by the Brundtland Commission 20 years ago, or weak, as proposed by the so-called three pillars concept. I believe that the harmonising understanding that man and nature must balance their interests and make compromises ignores the fact that, unlike society and economy, nature is uncompromising. Climate change reminds us that the biosphere can survive without humans, but that this does not work in reverse. This is the challenge for environmental law: to make the fourth phase one of greater commitment to nature as the fundament of us all.

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