

Law, Governance, and the Ecological Ethos

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Abstract: This chapter examines the limitations of both command-and-control and market-based legal mechanisms in the pursuit of environmental justice. If the environment is to be protected to at least a minimally acceptable degree, approaches which focus on the coercive force of the state must be complemented by the development of an “ecological ethos”, whereby groups and individuals are motivated to act with non-self-interested concern for the environment. The need for this ethos means that the state is dependent on the cooperation of a wide range of non-state actors. Recent work on environmental governance emphasises the delegation of aspects of governing to such actors and supports efforts to increase popular participation in governmental processes. The chapter therefore advocates a governance approach which seeks to rectify some of the limitations of state-led environmental law, while encouraging popular participation in a way which can encourage the development of an ecological ethos amongst the citizenry.

Keywords: environmental law, regulation, private law, command and control, markets, governance, environmental justice, ecological ethos, participation, climate change

1. Introduction

The last fifty or so years have witnessed rapid developments in the ability and the willingness of the state to regulate the environmental impact of those who operate within its boundaries, with some clear successes, as well as notable failures. Environmental law is, of course, not a new phenomenon, and the period of time since the Industrial Revolution, in particular, has witnessed various attempts by political communities to control the harmful side-effects of human activity, such as attempts to improve air quality in Britain by measures such as the 1848 Public Health Act on industrial emissions, and the more wide-ranging 1956 Clean Air Act which followed London’s Great Smog of 1952

(Ashby and Anderson 1981). It is commonplace, however, to look to the late 1960s, and developments such as the passage of the US National Environmental Policy Act in 1969, which placed a responsibility on federal agencies to prepare environmental impact statements before undertaking actions with significant environmental effects, and the 1970 creation of the US Environmental Protection Agency, for the beginnings of modern day environmental law. Many see the subsequent creation of state-controlled regulatory regimes as a significant progressive accomplishment. Sheila Jasanoff claims that the codification of environmental law “can justly be seen as an achievement of humankind’s enhanced capacity to reflect upon its place in nature”, writing that, “With this body of legislation, the governments of virtually all the nations of the earth announced their intention to safeguard the environment through systematic regulatory action, and to subordinate the desires and appetites of their citizens to the needs of other species and biological systems on the planet.” (Jasanoff 2001: 331). Of course, as scientific understanding has advanced, so has our appreciation of the way in which environmental impacts do not respect state boundaries, and the same period has also seen the development of an extensive and complicated body of international law through a raft of treaties and agreements between states, and as a result of the actions of a complex web of international institutions, including the United Nations and its various agencies and programmes. This, again, is often viewed positively: Birnie, Boyle, and Redgwell note that the law that has emerged from this process, while not without weaknesses, is “neither primitive nor unsystematic” (2009: 1), and has provided a “framework for cooperation between developed and developing states, for measures aimed at equitable and sustainable use of natural resources, for the resolution of international environmental disputes, for the promotion of greater transparency and public participation in national decision-making, and for the adoption and harmonization of a great deal of national environmental law.” (2009: 2)

The development of environmental law, then, has not come about without effort or cost, and one can point to any number of examples where it has had a clear impact, in relation to air and water pollution, the protection of wildlife and ecologically significant areas, the depletion of resources, and the regulation of genetically modified organisms, as well as many other policy areas. Consideration of

environmental concerns has become institutionalised in many policy making contexts, and requirements have been placed on a wide range of public and private bodies in terms of environmental reporting and audit (Weale et al. 2002: 1). However, it is equally clear that we live in a world where, these legal developments notwithstanding, grave environmental problems persist. Perhaps most significantly, the nascent environmental law regime has proved largely inadequate as a way of responding to the existential threat posed by human-induced climate change. So there is at least a perspective whereby instead of seeing environmental law as a still-developing force for good, which has made significant progress in relation to the prevention of harm and the inequitable distribution of environmental “bads”, it can alternatively be viewed as having failed its most important test and as being fundamentally unfit for the purpose of furthering the cause of environmental justice: in the words of Mary Christina Wood, “modern environmental law has proved a colossal failure” (2009: 43). The point of this article is not to insist that the world’s failure to react appropriately to climate change is the “fault” of environmental law; as Birnie et al. argue in an international context, “to say that economic or political models have as much or more to contribute than international law is merely to observe that protecting the environment is not exclusively a problem for lawyers” (2009:1). Instead, this article argues that environmental law and governance face particular challenges which do not apply to other forms of legislation and regulation. This means that the relationship between environmental legislation and environmental justice is complicated, and importantly different from the case of, for example, the relation between distributive justice and state regulation of the ownership of property, or between corrective justice and the system of criminal law. The particular character of environmental justice and the failings of contemporary domestic and international environmental law regimes in relation, in particular, to anthropogenic climate change both require and legitimate different forms of action on the part of law-making institutions. Environmental justice is unlikely to be adequately realised through either command-and-control or market-based legal mechanisms, but instead, it is argued, requires a model of environmental governance more broad than law where citizens share in a wide-spread “ecological ethos”, whereby they are willing to forego from acting on the basis of apparent short term self-interest when such actions cause or risk environmental damage, either in isolation or when considered together with the actions of others.

2. Environmental law and the state

For the purposes of this article, I will define a context as being environmentally just when (a) there is an appropriate degree of protection for the environment, and (b) where environmental burdens and benefits are distributed fairly, both within and across state boundaries, and both within and between different generational cohorts. Such a definition does not simply require that the costs of environmental bads be allocated in a just manner (Caney 2005): it also requires that the production of environmental bads is itself limited to those which are deemed acceptable by one's background account of sustainable development (Hopwood, Mellor, and O'Brien 2005; see also Bryan Norton's contribution to this volume). To what extent can and should the state employ the law to pursue the end of environmental justice? Insofar as environmental law involves using the coercive power of the state to affect individual and group behaviour, it is, of course, controversial from an ethical point of view. Political theorists have long debated the rights and wrongs of intervention by the state in the life of its citizens. Disagreement as to both the justification and the legitimacy of state action leads to a range of models of the scope and character of the good polity (Simmons 1999). Thus, while some see the state as a moral agent which is justified in acting to promote ethical ends in a wide range of circumstances, others argue for a limited conception of legitimate government and maintain that the state exceeds its bounds when it steps beyond the minimal functions of a night watchman (see Goodin 1989; and Nozick 1974, respectively). Consequently, different models of the state license different forms and degrees of state regulation.

In his book *Regulation: Legal Form and Economic Theory*, Anthony Ogus argues that there is a tension in all industrialized societies between two forms of economic organization. The first is the market system, under which individuals are largely left free to pursue their own goals, subject only to basic constraints. The legal system, he writes, "underpins these arrangements but predominantly through instruments of private law; regulation... has no significant role." (2004:1) The relevant distinction between private law and regulation here is that the former is concerned with relations between particular private parties, whereas the latter additionally involves the state. The law in a market system has a "primarily facilitative function": it provides a legal framework which agents can

use to manage their interactions with one another, though they have the option of agreeing to interact in different ways outside of this state-provided structure (2004:2). The state has a role in upholding individual rights through systems of constitutional and criminal law, but social utility is seen as being furthered by voluntary contractual agreements between different parties. One obvious problem with such an approach, however, concerns externalities: the effects of such agreements on individuals or groups who are not parties to the contract. Effects on the environment are amongst the most important such externalities, and they are hard to address within private law: though there are a range of possible mechanisms which can be employed, by means of contract law, property rights, and tort law, for example, these are of debatable efficacy and come with significant transaction costs (2004: 24, 204). Nonetheless, some environmental legislation has operated squarely within this paradigm as some institutions have sought to develop market-based mechanisms for protecting the environment: the development of emission quotas, for example, whereby the state sets a cap on the permissible emission of a pollutant, issues permits enabling firms to emit certain amounts of the pollutant up to this limit, and then allows a market in such permits falls within this category. (See Chichilnisky, Heal, and Starrett 2013 on the economics and Singer 2010 and Caney 2010 on the ethics of emission quotas; Stavins 2004 on market-based environmental policies more generally).

By contrast, in a more collectivist system, the state plays a different, more active role: intervening to correct market deficiencies to promote the common good. This opens the door to a more extensive model of “command and control” regulation, whereby the state uses coercive force to set up penalties, backed up by civil or criminal law, which are triggered if individuals are caught breaking the rules or acting in ways which cause particular kinds of harm. This has been the dominant form of environmental legislation, and has been widely employed even by states which have generally shied away from collectivist intervention and instead adopted *laissez-faire* approach to the workings of markets. Hutter, for example, notes that command and control regulation has generally expanded even in political contexts where other aspects of state activity have been cut back and deregulated, not least on account of pressure from the environmental movement (Hutter 1999: 5). Though the command and control model of environmental regulation has undoubtedly had many real successes,

particularly in relation to the “first wave” of environmental legislation of the 1970s and 1980s (Vandenbergh 2001: 193), it is clear that models of environmental governance which focus solely or primarily on the coercive force of state regulation face serious limitations. Early environmental legislation sought to prevent certain forms of environmental harm, particularly in relation to pollution. In a world where the main effects of pollution were thought to be local in character and where the primacy of state sovereignty was less contested, it is not hard to see how one might be optimistic as to the potential for using the power of the state to minimise or eliminate threats to the environment. Things today are not so simple.

Contemporary states are limited in the extent to which they are able to use regulation in order to pursue the ends of environmental justice even in domestic contexts. Increased understanding of the nature of anthropogenic effects on the environment means that it is now clear that environmental justice cannot be achieved simply by preventing or reducing particularly egregious instances of pollution: instead, much more extensive change is necessary. The idea of sustainable development plays a key role in much contemporary environmental thinking. This means that choices that agents make in their daily activity are significant for the pursuit of environmental justice: on some accounts, at least, certain kinds of environmental bads can only be avoided if large numbers of individuals, groups, and companies make far-reaching changes to their ways of life. The state can legislate to encourage such choices, using its powers of taxation to incentivise and disincentivise particular choices, by increasing taxes on gasoline or creating tax breaks for corporations which use sustainable energy, for example, and penalising those who either cause or risk certain types of harm, but its powers effectively to police behaviour are limited by both the possibility and desirability of microscopic state-led scrutiny of how individuals live their lives. In many contexts, both small and large scale, there is a myriad of ways in which agents can flout their environmental obligations in a fashion which makes it very unlikely that anyone will ever know what they have done and be able to call them into account. Some have even disputed whether it is harmful, and so wrong, for an individual to act in an environmentally unfriendly way in many aspects of her day to day life, given

the near certainty that her own individual contribution to, for example, anthropogenic climate change is likely to be either minute or non-existent (Sinnott-Armstrong 2005).

The international context complicates things further, since the powers of international legal institutions are more limited than those that states wield over their own subjects. The weakness of international legal mechanisms has been vividly illustrated by the world's collective failure properly to address climate change, as evidenced, for example, by the lack of effective mechanisms to ensure compliance with the 2002 Kyoto Treaty. The current state of international law, resting primarily on a patchwork of multilateral treaty agreements, means that states can flout their self-imposed obligations with relative ease, incurring penalties which consist of more demanding future targets which will be open for negotiation at the end of the current commitment period (Gardiner 2010: 20). It would be wrong to suggest that there is no compliance with international law or that there is nothing to be done to encourage states to comply with their self-made obligations, but it is safe to say, at least, that comparative study reveals uneven and patchy compliance in a range of different cases (Weiss and Jacobson 2000).

It should also be noted that environmental law tends to be strongly anthropocentric in character: it is generally phrased in terms of and justified by explicit reference to human interests, with other interests and values generally seen through the prism of their instrumental utility to humans (Emmenegger and Tschentsher 1994). Though some have put forward arguments for the extension of legal rights to natural objects, we are far from a situation where there is widespread acceptance of the justifiability or plausibility of non-human legal rights-bearers (Stone 1974; Grear 2012). As Birnie et al. note in an international context: "Nature, ecosystems, natural resources, wildlife, and so on, are... of concern to international lawmakers primarily for their value to humanity." (2009:7) This need not, they note, be understood in narrow economic terms, since reference can also be made to aesthetic, amenity, and cultural value, but the dominant perspective is nonetheless one which reflect the 1992 Rio Declaration's statement that "Human beings are at the centre of concerns for sustainable development", particularly insofar as international environmental claims are expressed in terms of the language of human rights (UNCED 1992).

Existing legal provision is also seriously limited in relation to intergenerational justice. Ideas of duties to future generations do admittedly find legal expression, and it is not unusual to see constitutional documents, statutes, and international agreements which make explicit reference to duties to posterity. The first Principle of the 1972 Stockholm Declaration states that man “bears a solemn responsibility to protect and improve the environment for present and future generations” (UNCHE 1972) and, as Philippe Sands notes, recent international treaties have sought to preserve particular natural resources and other environmental assets for the benefit of future generations with reference to, inter alia, wild flora and fauna, the marine environment, essential renewable natural resources, water resources, and biological diversity. (Sands 2009: 85). It is one thing for there to be theoretical legal protection for the interests of future peoples, however, but quite another for these interests properly to be respected, despite the promise of recent work on the incorporation of the public trust doctrine, which stresses the common ownership of many natural resources, into environmental law (Wood 2009a and 2009b). There are certainly moves in some judicial contexts to use the law to uphold the rights of future generations, as famously happened, for example, in the 1993 Supreme Court of the Philippines ruling in *Oposa v. Factorian*, which sought to cancel timber license agreements in order to preserve the country’s virgin rainforest for future generations, explicitly accepting the legitimacy of actions being filed on behalf of people who do not yet exist. However, as the travails of different administrations in relation to climate change have revealed, successful interventions of this kind are relatively rare. The well-known limits of judicial policy-making mean that courts are unlikely to be able to have far-reaching effects in such cases without the active support of other political institutions (Butt, 2006): Weston and Bach note that “Clear-cutting of tropical forests continued unabated in the Philippines after *Oposa* despite the clear enunciation of intergenerational principles on paper”, before concluding that although courts can play a role in the promulgation and clarification of legal principles in relation to future generations, “of the legal tools available to those seeking intergenerational justice in climate change, litigation is a very resource-intensive strategy generally of limited impact (2009: 36). Perhaps the most important point to be made here concerns the difficulties which political actors face in seeking to further long term goals, and, in particular, in safeguarding the interests of future persons in a way which requires sacrifices from those

living in the present, particularly in contexts of risk and uncertainty. This is evidently a general problem faced when contemporary polities try to plan for their long-term future, such as determining future pension provision. All political institutions in democracies must work within the confines of public opinion, and there is good evidence to say that this is as true for supposed independent institutions such as judiciaries as for elected representatives. If mechanisms such as the constitutional protection of the interests of future persons are to be successful, they must operate within a political context where publics are sympathetic and willing to make sacrifices for the sake of those who come after them. The question which now needs to be addressed is what the state can and should do to develop and further such an attitude amongst its citizenry.

3. Environmental governance and the ecological ethos

Although command-and-control and market based approaches to environmental protection may seem very different, they have something in common. Both models are compatible with a general outlook which places the primary responsibility for caring for the environment with the state. Both assume that firms and individuals will act in a self-interested fashion within the terms of the law in question. The aim of the law in each case, therefore, is to organise incentives and disincentives in such a fashion so that environmentally good outcomes will result from self-interested actors seeking to further their own good but playing by the rules. Of course, it will be an important question in each case whether the rules are, in fact, being followed, or whether agents are managing to get away with furthering their own good by acting in an illegal fashion. The model, however, is nonetheless one where environmental protection is thought to come about by using the power of the state to align self-interest with environmental good. Whether environmental law works by disincentivising actions which cause environmental bads or by incentivising actions with positive effects, and whether one assumes the existence of a global economic system dominated by growth capitalism or advocates some kind of state-led redistribution or restructuring, the picture is one whereby desired outcomes can come about as a result of the self-interested actions of agents who seek to maximise their own advantage within the law.

Is this kind of state-centred approach sufficient to bring about environmental justice? It is instructive here to look at relevantly similar debates as to the relation between state regulation and the pursuit of justice in the more deeply theorised field of distributive justice. Consider, for example, the highly influential work of John Rawls on the topic. Rawls famously developed an account of distributive justice which afforded individuals the same set of basic liberties, respected a far-reaching principle of equality of opportunity, and only permitted distributive inequalities between individuals when such inequalities were necessary to improve the position of the worst off members of society – the “difference principle”. (Rawls 1999). But Rawls’s principles of justice only applied to what he called the “basic structure” of society: those social and political institutions which assign basic rights and duties and significantly affect individuals’ lives by regulating the division of advantages that arise from social cooperation over time (Rawls 2001: 10). Individuals have duties to obey the law and to uphold just institutions, but so long as they keep to the terms of the law, they are free to pursue their own self-interest. This feature of Rawls’s theory is often misunderstood as representing a claim that individuals are inherently self-interested. This is quite wrong: the point, rather, is that there is a functional division of labour within Rawls’s theory (Freeman 2007: 100-1). The state takes care of justice: individuals can get on with living their own lives safe in the knowledge that their justice-based obligations are being fulfilled by the state. Suppose, then, that we envisage a society characterised by full compliance with Rawls’s principles of justice, where the law regulated society in such a way that inequalities were only permitted when they maximised the position of the least advantaged. Would such a society be perfectly just? This is contested. G. A. Cohen draws upon the feminist claim that “the personal is political” to maintain that principles of distributive justice apply not only to the basic structure itself, but also to the choices that people make within the legally coercive rules and institutions of the basic structure (Cohen 2000: 122). The idea here is that a society which demonstrated what Cohen terms an “egalitarian ethos”, defined as a “structure of response lodged in the motivations that inform everyday life” (Cohen 2000: 128), whereby individuals did not need the incentives provided by the difference principle in order to act in a way that improved the position of the least advantaged, would be more just than a society where inequalities had to be introduced in order to achieve the same goal. Thus, “an ethos which informs choice within just rules is

necessary in a society committed to the difference principle” (Cohen 2000: 132) Cohen’s point here is not the anarchist one that we should do without the state: his egalitarian ethos functions within a context which features a substantial degree of state action to set up and regulate the basic structure of society. So the idea is not that we do not need just laws in order to achieve a just society, but that – in Rawls’s model, at least - just laws are not sufficient.

This idea of a motivating ethos has obvious application in relation to environmental protection in the contemporary world. It now seems clear that state-led enforcement mechanisms will be insufficient to stave off grave environmental harms in the near and medium future. If the environment is to be protected to at least a minimally decent level, then agents must do more than seek to pursue their self-interest within a context of rules and regulations which constrain or incentivise their behaviour towards environmental goods. Instead, the pursuit of environmental justice requires that an *ecological ethos* is widely shared, both domestically and internationally. Such an ecological ethos requires that groups and individuals are motivated in their day to day lives to act with non-self-interested concern for the environment, and so generally refrain from acting on the basis of apparent short term self-interest when such actions either cause or risk damage to the environment, either in isolation or when considered together with the actions of others. The precise content of the ecological ethos will differ depending on the detail of one’s favoured model of environmental justice and sustainable development, incorporating a particular attitude to risk and the precautionary principle. It may be specifically anthropocentric in its scope, or it may stipulate a wider concern for the natural world above and beyond the interests of human beings. The key point for current purposes is that the ecological ethos goes beyond positive law: it requires that individuals act with an appropriate degree of respect and care for the environment in cases where the law is silent, and in cases where they could break the law without risk of detection. The claim here need not be that such an ethos is a necessary aspect of any environmentally just society: perhaps in different contexts, state-led enforcement mechanisms could be sufficient to ensure environmental justice. Alternatively, in other situations such enforcement may be unnecessary for the pursuit of environmental justice: the ecological ethos could motivate people to do all that was necessary without the need for any coercion

at all. The scale of climate change, however, makes both positions untenable in the here and now. Quite how the laws of the state and the ethos interact and reflect one another will be a contingent question for particular societies, but both are needed in today's world if environmental justice is to be realised.

Acknowledging the importance of such an ecological ethos helps clarify the role of the state in relation to environmental policy. The state is not able directly to legislate its way to environmental justice: it is dependent on the non-coerced cooperation of a wide range of non-state actors, ranging from individuals to non-governmental organisations, from corporations to social protest movements. The role of such actors is stressed in accounts of environmental governance: an approach which, as James Evans writes, "provides a third way between the two poles of market and state, incorporating both into a broader process of steering in order to achieve common goals" (Evans 2009: 4; see also Martello and Jasanoff 2004: 3) Environmental governance emphasises both the delegation of aspects of governing to non-state actors, and efforts to increase popular participation in governmental processes. This involves the state fulfilling a different role than in command-and-control contexts, whereby it does not direct but rather facilitates decision-making by others. The involvement of non-state actors is not automatically good news for the environment, of course: as in the case of command-and-control regulation, governance processes can be captured by private interests, and face serious challenges in their attempts to develop progressive environmental policy. Thus, for example, writers disagree as to how public participation best feeds into environmental governance. Pieter Galsbergen differentiates between "participatory" and "rejectionist" approaches, which differ as to whether they view the state in broadly positive or negative terms. The participatory approach emphasises the legitimising effects of popular participation, and draws on accounts of deliberative democracy to suggest that the practical effects of sharing in democratic governance will have beneficial effects on participants, by educating them in the detail of environmental policy, for example, and encouraging them to think in terms of public rather than individual good. The rejectionist approach instead sees existing state structures as having been largely captured by private interests that oppose ecological change, and views participation "as an opportunity to correct the bias of the state and its agencies".

(Glasbergen 1998: 8) Environmental governance is not an ecological panacea, but its focus on multi-level decision-making and subsidiarity does potentially allow for interesting institutional innovations, such as the introduction of ombudsmen to look after the interests of parties who lack meaningful representation within the present day, such as future generations, as has recently happened in Hungary (Jávor 2006).

There is scope, then, for a governance approach which looks more broadly at the making of environmental policy, and stresses the desirability of participation by a wide range of non-state actors and by the public as a whole, to rectify at least some of the limitations of state-led environmental law, while encouraging popular participation in a way which can encourage the development of an ecological ethos amongst the citizenry. A focus on the ecological ethos also permits a particular, interventionist role for the state in the promotion of environmental education in schooling and in public health campaigns. For some, this will obviously set alarm bells ringing, both as a result of the deeply contentious character of much contemporary debate over the environment, particularly in relation to climate change, and as a consequence of widely shared beliefs that it is inappropriate for the state to use its privileged position to promote particular doctrinaire accounts of the good. Such concerns have force, of course, but it should be noted that state interventions in relation to environmental education are already commonplace in many countries. If we conceive of the furthering of the ecological ethos as a necessary component of the pursuit of justice, it is more straightforward that the state has an obligation to seek to encourage a respect for the environment in its citizens, in the same way that it is entitled to promote respect for the rule of law and the prevention of harm to others, or to promote the civic virtue of its citizens and thus encourage democratic participation, or to go beyond the promulgation of anti-discriminatory law and actively encourage respect for cultural, racial, and sexual diversity. Given the scale of the threat posed by human-induced climate change, it is not tenable for modern day states to adopt an air of neutrality in relation to the desirability of the inculcation of an environmentally-friendly disposition within its citizenry. Duties to future generations, to some of the world's poorest people, to fellow citizens, to humanity broadly

perceived, and, arguably, to the natural world as a whole require law and policy-making bodies of all sorts to do all they can to encourage the pursuit of environmental justice.

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