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Environmental Protection, Law and Policy – Text and Materials by Jane Holder and Maria Lee

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In this comprehensive work the authors stress the multi-disciplinary nature of environmental law. They argue for a contextual approach to the subject, which approach is "less a choice of research methodology and more an imperative arising from the subject itself", law being only one aspect of environmental protection, itself derived from policy and politics. In so doing they draw on a wide range of textual sources coupled with various case studies. The book contains 17 chapters, divided into five parts: [environmental] law in context, the EU context, the international context, mechanisms of regulation (pollution control) and, lastly, mechanisms of regulation (controls over land use and development).

It has to be said at the outset that it is slightly difficult to see the 'target' audience for this book. It is not a practitioner's work, being too academic, and it is too detailed for an undergraduate environmental law course, students on such courses being better served by the more traditional undergraduate texts such as Bell and McGillivray's 'Environmental Law'. Indeed the authors seem to acknowledge this: the Preface mentions that the book arose from their teaching on a University of London LL.M course on environmental law. Given the level of detail, the comprehensive sources quoted and suggestions for further reading, it is those pursuing post-graduate studies who will most benefit from the authors' endeavours. It is very much a post-graduate reader.

In Part I the authors give an overview of some of the central themes of environmentalism and how such themes relate to the concept of environmental law. They stress the dichotomy faced by

environmental decision-makers in attempting to accommodate "expert information with ecological, political or popular values, in recognition that the scientific expert can only ever offer a partial understanding of environmental problems", this being "the main dilemma currently facing environmental law".

Thus the scientific approach to decision making (the scientific paradigm as the authors call it) is looked at, along with risk assessment, the precautionary principle, economics and cost benefit analysis, and more besides. There are instances of a straying into the realms of environmental philosophy or deep ecology (the latter is mentioned, along with social ecology, ecofeminism and Gaia theory, none of which your reviewer has had to consider in many years of practise as an environmental lawyer). Hence we have "It is well known that the scientific paradigm has roots that are deep in history and steeped in religion. But the onset of the Enlightenment is considered to have more powerfully and persistently shaped attitudes to the natural world, so that a 'domination of nature' thesis prevails". All very interesting but of questionable relevance in a book supposedly about environmental protection, law and policy, notwithstanding the holistic approach adopted by the authors. Contrast this with the useful discussion on the precautionary principle and EU and UK judicial comment thereon. Admittedly inclusion or exclusion of textual sources is a difficult balancing act in a book of this type, but perhaps the authors' brush has been too broadly drawn? There also seems to be an occasional over-reliance on American academic commentators, some of whom have a particularly 'dense' style of writing that is, politely, somewhat impenetrable.

Of course - and as the authors doubtless would be the first to admit - there is nothing new in the suggestion of close inter-play between environmental law and policy. In Chapter 2 the authors highlight the GMO debate, and it is indeed well illustrative of an environmental issue that has generated much public controversy, with decision-makers facing hard policy choices in the face of much public opposition. Another good example, albeit less in the public eye, is contaminated land, where the bare bones of the legislation in Part IIA Environmental Protection Act 1990 is very much underpinned by the comprehensive statutory guidance issued by the Secretary of State. Planning policy guidance is another obvious example.

The GMO debate is a classic example of professed scientific rationalism being defeated by (as the food industry would have it) uninformed public perception. Government and the food industry may want GMOs, but the public by and large do not. No amount of scientific persuasion can assuage their 'gut feelings' on the issue. As the authors say, there is "an increasing recognition that environmental decisions are not purely technical, but are based on important political values", including the need for broad public involvement in environmental decision making, a theme developed in Chapter 3. However, "Evidence from an apparently neutral, objective elite is very attractive to politicians faced with polarised public opinion and controversial evidence". Or sometimes not: badger culling springs to mind, where no cull has been ordered despite scientific evidence from the Government's own chief scientific adviser calling for one. Presumably the liquidation of numerous cuddly animals, however diseased, was just one public step too far, as evidenced by the statement of the Environment Secretary Hilary Benn that public acceptance would be a factor in determining the Government's policy. Or to hell with the science, this is politics. Where is the scientific paradigm in that?

As mentioned, Chapter 3 concerns public participation in environmental decision making. As well as examining the theoretical concepts of and basis for public participation, reference is made to the UN Aarhus Convention on access to environmental information, to which the EU and Member States are signatories. The third pillar of the Aarhus Convention concerns access to environmental justice, something that is still very difficult in domestic law. Nowadays standing of claimants is not such a hurdle as it once was, but financial obstacles still exist, a situation made worse by the lack of a suitable tribunal to hear environmental claims.

It is a sad fact that the UK has so far failed to legislate for the introduction of an environmental court, despite calls to do so by no lesser persons and bodies as Professor Malcolm Grant (who produced a Government commissioned report on the issue), Lord Woolf and the House of Commons Environment Committee, to name but a few. There is a form of summary environmental justice to be found in the magistrates' courts in the guise of proceedings for statutory nuisance but, as the name implies, that is restricted to the statutory code set out in Part III Environmental Protection Act 1990 for dealing with such nuisances. And if not prejudicial to health, a statutory nuisance still has to be a nuisance at common law, thus importing all the legal complexities of the law of nuisance into the process. 'Summary' does not mean simple. It is certainly no environmental small claims court.

Those seeking redress for environmental harm are still subject to the risks of litigation and its associated costs before the ordinary courts, with the normal costs rule of 'the loser pays'. Not many individuals can run that risk, although it was pleasing to see the Court of Appeal fixing a costs ceiling of £20,000 in a recent case brought by an environmental NGO, so that the NGO knew before the case was heard what their maximum liability for costs would be if they lost. However, even that is beyond the purse of 'Mr Average', and the real cost of losing a pollution case is well illustrated by a recent unsuccessful judicial review claim concerning the environmental permit issued for a Rugby cement works; one of the losers in *R (Edwards and Another)* v *Environment Agency & Others* [2008] UKHL 22 faced a costs bill of £75,000 and the consequent loss of her house (as mentioned in the recent BBC *The Barristers* documentary, which followed this case in the House of Lords). With those risks it will be a brave activist indeed who will take on the alleged corporate polluter.

There really is a case for simplicity here: many environmental cases could be brought before a tribunal based on the existing planning appeals or employment tribunal systems, with suitably qualified 'judges'. There is no excuse for the continuing delay in establishing a bespoke environmental tribunal. The delay is in itself a denial of public access to justice contrary to Aarhus. However - and this is an important point made by the authors - Aarhus focuses on participation by environmental interest groups in decision making (many of whom are well funded), and the role of the public *per se* is unclear. Any tribunal needs to ensure that all persons have straightforward access to it, otherwise we will simply get back to the current position of litigation being for the rich, even if they are rich eco-warriors!

Part II deals with the EU. The authors recount the development of EU environmental law (Chapter 4) and proceed in Chapter 5 to illustrate the EU decision-making process by looking again at GMOs (a favourite topic for the authors). Much of what is said in Chapter 4 is not new, and is to be found in other environmental law and policy textbooks. However, this is not to detract from the useful references cited, or the suggestions for further reading (found throughout the book at the end of each chapter).

The multi-level decision making on GMOs described by the authors in the following chapter is a good illustration of the "familiar tension between politics and science .... alongside a tension between central and national responsibilities." Regulation of GMOs at EU level also demonstrates that the old licensing/authorisation EU regulatory model is still alive and well, although with more modern 'add ons' of rigorous regulatory procedures and governance, plus increased public participation. But, as mentioned above, "agricultural biotechnology has been an extraordinarily fraught issue for the EU, and there are as yet no guarantees as to the stability of the regulatory regime."

Part III looks at the international context: sustainable development (Chapter 6) and the globalisation of international trade (Chapter 7).

Sustainable development – "development that meets the need of the present without compromising the ability of future generations to meet their own needs" (the well-known Brundtland report definition; there are others) - receives comprehensive coverage in Chapter 6. Brundtland was followed by the Rio, and then Johannesburg, Declarations. The authors rightly say that various key developments over recent years flow from it, such as economic instruments as a means of pollution control, and public participation in the environmental field. Indeed there must be few UK policy documents of a land use and economic nature that fail to quote the mantra of sustainability. However, as the authors state, "[w]ithin the sustainable development rubric, environmental protection has to compete with other desirable social objectives", not least global poverty and its eradication. This is the policy dilemma government decision makers face, and faced with it sustainable development seems too often to be sacrificed to economic imperatives of a short-term nature: witness the clearly unsustainable growth in air travel leading to the recent equally unsustainable decision on the Heathrow third runway; or the no less unsustainable counter suggestion by the Mayor of London of an airport in the Thames Estuary, which is likely to affect wildlife habitats protected under international law. It will now be interesting to see how the concept of sustainable development fares in a recession.

On world trade and the environment, the authors refer to the problems of in-putting environmental concerns into a trading system having its roots in 1947: the General Agreement on Tariffs and Trade or GATT. Clearly GATT I was devised long before the stirrings of environmental consciousness in the 1970s and although GATT II came about in 1994, with the creation of the World Trade Organisation (WTO), the place of environmental protection in the deliberations of the WTO is still difficult to assess. The authors refer to the WTO *Beef Hormones* decision concerning EU measures on meat products, which is "the key reference point for establishing the scientific framework within which the WTO regime operates ..... it attempts a very fine balance between relying on the 'objectivity' of science to police trade protectionism, and respect for domestic regulatory decisions." These domestic regulatory decisions will obviously include those going to environmental protection. WTO decisions are also not helped by the ambivalent status of the precautionary principle in international law.

Parts IV and V cover the mechanisms of regulation - pollution controls, both traditional and alternative market forms (Chapters 8 - 11), and land use planning, environmental assessment, nature conservation and wind farms (Chapters 12 - 17). Licensing (authorisations, permits, consents) is the traditional regulatory tool and it remains "the core activity of environmental regulation [with] a long and sometimes ignoble history". The authors consider the introduction of the integrated pollution control regime (IPPC), with one regulator, the Environment Agency (and its Scottish and Northern Irish equivalents), dealing holistically with discharges to air, water, land, thus avoiding the historical sectoral approach. They conclude that IPPC was "... a crucial step in the development of a coherent approach to environmental protection, even if true 'integration' remains some way off", with IPPC responding to criticisms of regulation by traditional 'command and control' mechanisms. However, despite criticisms, it is likely to be a long time before there is a complete move away from traditional 'command and control' forms of environmental regulation, which arguably have the merit of simplicity of operation. If there is a limit on the discharge of a certain type of pollutant (the command), it is relatively easy to enforce (control) this limit, making it a strict liability offence with a due diligence defence. To a regulator, and indeed to the regulated industry, this must seem much more straightforward than complex 'economic instruments', such as emissions trading schemes or those for packaging waste, a bureaucratic nightmare if ever there was one. Even simple direct green taxes can be very unpopular, and thus not find favour with politicians.

As indicated, the last few chapters are devoted to land use concerns. The authors offer a succinct critique of the current system, in place since 1947. Clearly there are many things wrong with it: governments obviously think so because they never stop proposing amendments, particularly in policy planning: in 50 years we have had town maps, development plans, structure plans, local plans, local development frameworks, regional spacial strategies etc. None of this helps public understanding. But overall, the system put in place in 1947 has served us well and should be considered a successful tool of environmental protection, which could be used as the building blocks for greater access to justice, both environmental cases and other land disputes.

There is an awful lot in this book and in some respects its sheer breadth is off putting. However, the reader who perseveres will be well rewarded, and the authors are to be commended on a largely stimulating contribution to the 'Law in Context' series.