HISTORY OF ENVIRONMENTAL LAW

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Contents

1. Introduction: The Purpose of Environmental Law

Prior to the 1960s, environmental law did not exist as a discrete domestic and international legal category. Modern environmental protection has some roots in nineteenth century public health and resources conservation laws as well in private legal actions for pollution damage. (*Environmental law has roots in private actions which protect the use and enjoyment of land, nuisance and abuse of rights, and in the public health reform laws of the nineteenth century (Hughes, 1986)).* However, prior to the late nineteenth and early twentieth centuries, there was no widespread appreciation of the idea that ecosystems and water and air masses were geographical units that should be the subject of special legal protection. The science-based idea that the biosphere was a fragile system vulnerable to human-induced impairment only became widely accepted

after World War II. When the idea gained wide acceptance in the late 1960s, legal protection of air, water, soil, and ecosystems, such as wetlands and forests, quickly followed, particularly in USA, Europe, Australia and New Zealand. Since then, environmental protection has became an important element of the domestic legal systems of all developed countries and many developing ones. Since the 1980s, environmental law has also become an important and evolving component of international law.

Environmental Law is ultimately the product of environmentalism which can be roughly defined as a value system that seeks to redefine humankind's relationship to nature. Specifically, environmentalism seeks to induce humans to act as stewards of nature, rather her exploiters, and therefore to respect the functioning of natural systems by limiting activities which disturb these systems. The ultimate objective of environmental law is to change the system of resource use incentives from those that induce unsustainable development to those that induce environmentally sustainable development. Environmental law is thus fundamentally a new concept with more discontinuity than continuity with past legal and intellectual traditions. Many of the values advanced by environmental regulations are not tied to the enhancement of human dignity, human welfare, the protection of property or the maintenance of social order, Rather, environmentalism seeks to radically redefine the relationship between humans and nature by partially subordinating initiative to benefit two communities—ecosystem and future generations—that have traditionally had no legal personality. Like all emerging areas of law, environmental law is therefore an unsystematic, synthetic and unstable mix of rules from other areas, recently enacted positive laws, and new but contested normative principles.

Environmental law is not well-integrated into either domestic legal systems or international law because it is a modern, parasitic field of law with minimal roots in either common law, the western constitutional tradition, civil law, Asian or customary law. If environmental law is to survive, it must reflect a permanent paradigm shift which many say has in fact occurred. The great geographer Gilbert White set out the argument that such a change is taking place:

[P]eople around the world in the 1990s are perceiving the Earth as more than a globe to be surveyed, or developed for the public good in the short term, or to be protected from threats to its well-being both human and natural. It is all of these to some degree, but has additional dimensions. People in many cultures accept its scientific description as a mater of belief. They recognize a commitment to care fore it in perpetuity. They accept reluctantly the obligation to come to terms with problems posed by growth in numbers and appetites. This is not simply an analysis of economic and social consequences of political policies toward environmental matters. The roots are a growing solemn sense of the individual as part of one human family for whom the Earth is its spiritual home. (*Gilbert F. White, Reflections on Changing Perceptions of the Earth, 1994 Annual Review of Energy and the Environment 19 (1994*)).

If environmental law can justly be said to be an emerging permanent body of law with a core of universal principles, this value shift is the basis. There is considerable evidence that core principles of environmental law have been widely adopted by a broad range of

countries. As one surveys the laws of all countries of the world that have made environmental protection a political priority, there is considerable uniformity in the objectives, policy instruments and basic legal principles. Environmental lawyers speak a universal legal, scientific and ethical language. The reason is simple: the institutional problems that give rise to environmental degradation, pollution and the loss of biodiversity are basically similar throughout the world and variations in response come more at the enforcement rather than at the legislative level.

Environmental law's uniformity has occurred for two reasons: (1) the law is derived from common scientific and economic assumptions about the causes and consequences of environmental degradations and (2) most countries have followed the European/US model of policy instruments for pollution abatement, environmental impact assessment, toxic risk assessment and biodiversity conservation. Because environmental law is a byproduct of the rise of environmentalism as a political force throughout the world since the 1960s, it has three highly linked universal primary objectives: (1) the remediation and prevention of air, water and soil pollution that causes both demonstrable damage and involuntarily exposes persons to socially unacceptable risk levels, (2) the conservation of biodiversity, landscape and heritage for present and future generations, and (3) the promotion of environmentally sustainable development. (Each of these objectives continues to be contested but the contest is increasingly at the margin. That is, the issue is not whether there should be environmental protection, but what is the optimal level of protection for a particular country, given the costs and benefits of protection. Naturally, this "calculation" will vary from country to country depending on its stage of development, relative wealth, culture and political institutions. This said, enactment of environmental legislation rests on the assumption that it is necessary to reverse the long history of unrestrained resource development that has given rise to environmental degradation.

2. Roots of environmentalism

Environmentalism seeks to forge a new relationship between humans and the natural systems which support life on this planet. It therefore seeks to reverse a long tradition of disregard for the consequences of unrestrained resource exploitation, use and consumption. From the dawn of human history to the end of the nineteenth century, law and social institutions, supported by Judeo-Christian and other religious traditions, placed few limitations on the exploitation of natural resources. The short and long term environmental and social costs of rapid resource exploitation were seldom either assessed or mitigated. This statement appears to be true for both indigenous civilizations, Europe, the European colonization of Africa, Australia, North and South America and a larger part of Asia. It is equally true for both countries that recognize private property and those which vest the ownership of resources in the state.

2.1. The domination of nature from antiquity to the rise of environmentalism

Humans have long speculated about natural systems and their relationship to them but two attitudes, fatalism or domination, prevented the development of an environmental ethics and thus environmental law until well after the European Enlightenment. For centuries human beings were dependent on nature for survival and thus developed

theories of their relationship to it. People were, to varying degrees, conscious that the choices that they make about the use of nature could have an impact on society. However, by late antiquity the idea that humans could adapt nature to their own purposes by knowledge and technology had begun to take root, although modern domination of nature is a product of the enlightenment and the industrial revolution that it produced because these two developments produced both the knowledge and the technology to modify natural systems on a previously unprecedented scale.

Originally nature was sacred but the Greeks and Romans replaced reverence with rationalism (see Hughes, 1994). This led to more intensive use and ultimately to considerable landscape degradation in the ancient world. Modification can be traced back to the classical Mediterranean civilizations. For example, soil salinity appears to have been a major reason that the ancient Samarian civilization in the southern Fertile Crescent declined and was eclipsed by Babylonia, and there is some evidence that salinization and environmental deterioration played a substantial role in the downfall of Mesopotamia (see Postel 1999). The ancient Greeks and Romans had considerable respect for nature as divine, but they exploited much more than they conserved, and they degraded the Mediterranean coastal zone through deforestation, overgrazing, erosion and war. More importantly, they failed to develop a systematic scientific understanding of nature and a theory of sustainable use and management.

Environmental or green history primarily seeks to explain the reasons for environmental degradation and to account for the reversal of deeply rooted attitudes and practices. It reflects both a revival of an interest in the role of landscape and climate in shaping societies, which is less deterministic than previous theories of historical geography, and in the power of science and state power to modify the landscape. The basic narrative is to characterize the Earth as an Eden corrupted by human activity, especially the colonial plantation economies of the eighteenth and nineteenth centuries.

As the historian Simon Schama observed (1995): "[A]lthough environmental history offers some of the most original and challenging history now being written, it inevitably tells the same dismal tale: of land taken, exploited, exhausted; of traditional cultures said to have lived in a relation of sacred reverence with the soil displaced by the reckless individualist, the capitalist aggressor." The important point is that the western tradition is one of constant modification of nature without a substantial appreciation of the short and long term adverse consequences of this modification. Unrestrained modification accelerated with the colonization of Africa, North and South America and Asia, starting in the sixteenth century with the colonial plantation economies.

The dominant world view that emerged from the Judeo-Christian and Greek thought characterized undeveloped nature as a storehouse of raw commodities to be exploited and transformed. The father of environmental ethics, Aldo Leopold, linked environmental degradation to the theory that property is an abstract, exclusive relationship between persons and things because this "commodifies" nature. "Conservation (environmentalism) is getting us nowhere because it is incompatible with our Abrahamic concept of land. We abuse land because we regard it as a commodity belonging to us."

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