BOOK REVIEW

AFTER SUSTAINABILITY: AN INTERDISCIPLINARY LOOK AT ENVIRONMENTAL LAW AND POLICY

A review of R Ramsay and G C Rowe (with two chapters by J S Jones), *Environmental Law and Policy in Australia: Text and Materials* (Butterworths 1995). LXII and 858 pages. ISBN 0 409 30682 7. $98.00.

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SUSTAINABILITY — THE ENVIRONMENTAL FLAVOUR OF THE NINETIES

By December 1997, upon the international community's inability to reach a successful agreement at the Kyoto meeting on global climate change, "sustainable development", the wonderful umbrella term for environmental policy and law in the 1990s, had lost much of its magic. "Sustainable development" was invented to bridge the differences between the industrialised and developing nations at the 1992 United Nations Conference on Environment and Development (UNCED) at Rio de Janeiro. It was meant to give governments all over the world a flexible yet reliable foundation to design and implement environmental policies that would efficiently prevent environmental degradation and distribute fairly the benefits and burdens of environmental protection.

The concept of sustainable development stimulated a large number of impressive efforts to change the direction of environmental policies from over-protective to economically and socially feasible. Although there is little consensus on the precise meaning of "sustainability", some of the commonly accepted elements include the importance of the developmental and environmental needs of present and future generations, the precautionary principle, the reduction and elimination of unsustainable patterns of production, and the need to integrate environmental

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protection into the process of economic and social development. The goal of "sustainable development" has not been confined to developing countries. It also became a key objective of virtually every environmental policy in the United States, Canada, the European Union, and Australia. It has been employed for the design of, among other things, sustainable energy production, sustainable waste treatment, sustainable transport systems, sustainable clear air control, sustainable water management, and sustainable town planning. The marriage between environmental issues and a vast array of interests in development, industry and commerce, and social justice certainly sounded promising. It somehow caught everybody's attention. Not only governments liked it, but also grassroots activists as well as big corporations endorsed the concept of sustainability, if only for their own purposes. Yet, five years after Rio it became obvious that grand words are not enough to save the planet.

The Rio Declaration on Environment and Development or the colourful mix of environmental policies known as Agenda 21 were mostly a declaration of good intentions. It was the 1992 Framework Convention on Climate Change that was one of the few concrete results of the Rio conference. The international commitment to environmentally sustainable development very much depended on finding ways to turn these intentions into good law. At an international level, the forging of a generally binding climate treaty would have been a first step to accomplish the difficult goal. Such a treaty would have had to specify and implement the incipient international regime to control human activities which substantially increase the atmospheric concentrations of greenhouse gases. In Kyoto, however, participating countries were so enthralled with haggling over emission reduction figures that they completely neglected the more important goal of sustainable development. Or was it that the magic of sustainability had lost its charm? Ultimately, the members of the international community were back where they had been five years before: at an impasse of conflicting interests that were hidden, but not resolved, by the invention of a buzz-word.

ENVIRONMENTAL LAW AND POLICY

Influenced by the weight of mounting documents and literature on sustainable development, legal academics have often found it difficult to keep sight of the true substance of environmental law. Environmental law is different from, let us say, torts or property or criminal law, because it has been growing over the past twenty-five years without developing a firm structure. In environmental law, much happens by chance. Driven by spectacular incidents (like the proverbial leaking toxic waste drums), regulators often resort to *ad hoc* legislation. In a similar fashion, courts hand down rulings on environmental matters which only rarely clarify controversial environmental issues. Environmental law is policy-driven, and the pertinent policies are more often than not the tentative results of complex political, economic, social, and cultural disputes. Therefore, a substantial part of dealing with environmental law involves monitoring and understanding the relationship between "green policies" and the body of environmental law proper.

Although "sustainable development" has had an impact on recent environmental policy-making (and will even have a larger impact on the language of environmental laws), the occupation with a flurry of buzz-words cannot replace a thorough analysis of the complex nature of environmental law. This is particularly important for legal

education. Therefore, the book by Ross Ramsay and Gerard C Rowe is an invaluable contribution. Not only does it present a comprehensive picture of Australian environmental law and policy, but the authors meticulously describe and analyse the elements and structure of the legal process with respect to the environment. On the one hand, Ramsay and Rowe never fail to demonstrate the elementary substance. However, on the other hand, they present selected material that helps readers look behind the black-letter aspects of environmental law. The book combines excerpts from Australian, English and American case law, statutory law, and policy documents with carefully selected quotations from pertinent books and articles. Introductory passages guide readers through the maze of environmental law and policy.

Environmental Law and Policy in Australia is divided into seven parts and twenty-three chapters. Part One introduces readers to the policy context of environmental law and environmental concerns affecting Australia. Part Two contains interdisciplinary perspectives, namely: environmental philosophy, science, economics, and politics. Part Three is dedicated to the basic regulatory approaches and techniques: common law remedies, public law regulation and public ownership of land, and fiscal methods of environmental regulation. Part Four investigates the different levels of jurisdiction in environmental regulation. Starting from the level of international law, this part also describes environmental regulation in a federal system and the environmental role of local government. Part Five gives an account of general regimes of environmental regulation, such as land use and environmental planning, project control, environmental impact assessment, and pollution control. Part Six deals with the regulation of specific environmental resources (for example, nature conservation, biological diversity, water, mineral resources). Part Seven considers environmental dispute resolution, including the more traditional topics of standing and litigation, but also focusing on alternative dispute resolution.

INTERDISCIPLINARY PERSPECTIVES

The legal protection of the environment and natural resources is based upon a number of choices. These choices range from fundamental decisions on rationality, lifestyles, and preferences to specific decisions on the appropriate degree of protection of, let us say, a butterfly whose habitat is threatened by proposed logging operations or of the people living next door to an industrial facility. What kind of choices have to be made to accomplish a reliable and balanced system of environmental protection? How could we justify a decision to postpone the satisfaction of our present needs in order to preserve the chances of future generations?

With good reasons, Ramsay and Rowe suggest that these questions cannot be answered by studying only legal texts. Choices with respect to environmental benefits and burdens have to be considered from an interdisciplinary perspective: "Those who frame environmental laws, who implement and apply them, or who interpret them are invariably confronted with issues related to the extent of knowledge about claimed environmental problems, the social and personal values associated with environmental phenomena (be it wild forests or the traffic levels in residential streets), the comparative economic value of competing uses of resources, and the practical interaction of individuals and groups as they seek to achieve their own goals in competition with others" (p 15). According to this observation, the book contains a broad presentation of environmental philosophy, science, economics, and politics.

The chapter on environmental philosophy explores different concepts of environmental ethics. It compares anthropocentric and ecocentric approaches to the evaluation of nature and the environment. The text includes, among other things, excerpts from Aldo Leopold's *A Sand County Almanac* and examples of deep ecology, Gaian ethics, and the views of Aboriginal people. The common question behind these texts is: does a species have an intrinsic value or can its value be determined only in terms of human preferences? If one is inclined to take an ecocentric approach, it would be untenable to destroy a butterfly's habitat merely because the profits from a logging operation exceed the economic value of the endangered species. However, an ecocentric approach may lead to puzzling dilemmas. While it may be desirable to protect rare butterflies, whales, or koalas, it is less clear whether the smallpox virus, virtually eradicated apart from laboratory samples, deserves the same degree of protection. Ramsay and Rowe confront the ecocentric approach to environmental ethics with the following observation: "Voices which might have been expected to proclaim the intrinsic worth of whales and koalas have not been noticeable in defence of the smallpox virus" (p 17).

The chapter on environmental science (contributed by Judith S Jones) reflects on the crucial role of scientific approaches to environmental protection. Although many choices concerning the environment seem to involve values rather than facts, a thorough understanding of the facts is indispensable. However, since most environmental issues are riddled with uncertainty and complexity the application of environmental law is often limited by very narrow scientific groundwork. Starting with the virtues and pitfalls of inductive scientific reasoning, the chapter considers the sources of unreliability and uncertainty in scientific methodology and the reasons for successful and unsuccessful consultation of scientists by policy-makers. The precautionary principle is used to demonstrate the host of problems involved in the use of science by environmental law and policy (pp 55–65). By lowering the threshold of scientific certainty required for regulating environmentally adverse activities, policy-makers and legislators have moved into dangerous territory. In the absence of sufficient evidence that the activity will harm the environment, how can the restriction of a certain type of activity be justified? Obviously, the precautionary principle cannot be adopted as a universal principle without abandoning principles of scientific rationality to some degree. On the other hand, complex and multi-causal risks, particularly if they involve small probabilities of extraordinary damages, cannot be prevented if regulators wait for uncontested scientific proof — because frequently this would mean postponing measures until damage has already occurred. Adopting such a notion of precaution, however, is already a political choice: "It is important to point out here that the precautionary principle, contrary to assumptions which are sometimes made, is not a scientific principle but rather, as considered here, a principle guiding policy-making in its use of scientific claims and data" (p 56).

The chapter on environmental economics examines nature and the environment as scarce resources that have to be efficiently allocated and equitably distributed: "The fact that economics is essentially concerned with the rationing of scarce resources makes it a discipline fundamental to environmental policy" (p 69). The logic of this approach is not to limit environmental issues to commercially viable enterprises, but to employ economic methods to improve the use and protection of the environment in the face of conflicting values. Accordingly, a substantial part of environmental economics is concerned with the valuation of environmental resources necessary to determine,

among other things, the extent of damage to the environment or the economic importance of environmental losses with respect to the gross national product. Also valuation of the environment is important to cost-benefit analysis, one of the principal tools of environmental decision-making. The chapter also contains several excerpts on the economic implications of ecological sustainability which underline the limits of neo-classical economic theory as the predominant tool of economic analysis of environmental problems. Moreover, Ramsay and Rowe suggest that environmental economics must not be confined to the question of efficiency, that is, the most profitable use of environmental resources. Rather, environmental policy and law also has to address the question of justice: "The issue of equity is all-pervasive in relation both to the incidence of environmental harms themselves and to measures to protect and improve the environment. A noisy road or airport, or a factory generating unpleasant smells and dust, can have a major impact on the health and amenity of the people affected; location decisions can therefore have major welfare effects" (p 98).

The chapter on environmental politics is dedicated to the participants in the political process, political strategies and issues of public participation. Since environmental law and policy have resulted from the activities of social movements and grassroots activism, the chapter focuses on public interest groups such as Greenpeace, nature conservation societies, or citizen involvement in environmental decision-making. Due to the mounting commitment of private individuals who feel the responsibility for the preservation of nature and the environment, governments all over the world have been forced to include "green" topics in their political agendas. Although it would have been necessary also to consider the interests and strategies of other political players (for example, landowners or industry) to fully understand how political choices are made, the chapter gives a splendid account of the public's role in environmental policy-making.

CONCLUSIONS

Undoubtedly, many people are still interested in the protection and improvement of the environment. If the planet can be saved, however, it will most certainly not be through law. This must not discourage us to take into consideration the role that law might play in environmental issues. Political, economic, social, or cultural choices with respect to the environment ultimately lead to new laws and regulations, that can only be interpreted and applied properly if their difficult relationship with the political process is fully understood.

Taking an interdisciplinary look at environmental law and policy, Ross Ramsay and Gerard C Rowe present a compelling survey of the legal protection of the environment and natural resources. The textbook won the 1996 Butterworths Book award with good reason. It is not only an excellent source for students or environmental law classes, it also provides interested readers with a well-structured and broad introduction to the theory and practice of environmental law.

BOOK REVIEW

The Law of War Crimes: National and International Approaches, Timothy L H McCormack and Gerry J Simpson Editors, Kluwer Law International (1997)

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At this time there are two functioning *ad hoc* international criminal tribunals, one for the former Yugoslavia and the other for Rwanda. The international community is on the threshold of creating a permanent criminal law regime. This volume brings together domestic and international approaches to war crimes which hitherto have been most commonly discussed separately. In doing so, the editors acknowledge that they "were keen to excavate some of the more obscure examples of war crimes and phenomena" (p xix).

Aside from a noteworthy forward by Professor James Crawford of the University of Cambridge and a detailed preface by the co-editors (who individually are on the Faculty of Law of the University of Melbourne and the Australian National University), the book is divided into nine chapters, each authored by one or both of the editors or six other legal scholars.

In his "Critical Introduction", Gerry J Simpson points to certain ambiguities that attended either from the previous war crimes trials or their ramifications. The chapter is devoted to an exploration of some "philosophical, cultural and jurisprudential dimensions of war crimes trials and international criminal law generally", and in doing so Simpson's "purpose is constructive" (p 3). His analysis considers four serious difficulties, marshalled under the headings of: partiality, legality, definitions of criminality and war crimes as history. While "victor's justice" may be true with respect to the Nuremberg and Tokyo trials, it fails as an argument with regard to subsequent trials before national tribunals such as in Germany and Israel or in the *ad hoc* tribunals involving the former Yugoslavia and Rwanda. Legality is subject to four encompassing issues. These are generality and uniformity regardless of the actor's status, the principle of *nullem crimen sine lege* (including the proliferation of definitions of a war crime, and

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retroactivity), procedural fairness (issues of limitation periods, capacity of witnesses), and defences (issues surrounding superior orders and act of state). In sum, Simpson's chapter is an "argument against the complacent assumptions that the history of war crimes trials is an edifying one" (p 30).

The second chapter by Timothy McCormack, the other co-editor, provides an historical overview of evidence of "domestic" rules proscribing criminal conduct during armed conflict using examples from antiquity through to the present day. He then analyses various unsuccessful attempts both in the last century and the twentieth century to create structures and mechanisms to facilitate an international criminal law regime. The historical account is engaging because it brings to light many little known events. From the adoption of the Hague Conventions of 1899 and 1907, he progresses through time covering the *ad hoc* international responses, each with their own limitations.

In the next four chapters, the contributors focus on national approaches to war crimes. Axel Marschik, who is on the Faculty of the University of Vienna, undertakes in chapter three to examine European national approaches to humanitarian war crimes. His analysis highlights domestic practice, national legislation and the jurisdiction of national courts. Specifically, detailed but not exhaustive emphasis is on Germany, Austria, France, the United Kingdom, the Netherlands, and Spain. To a much lesser extent, reference is also made to the situation that existed in the former Soviet Union and former Yugoslavia. Marschik illustrates how European States have cooperated and complied with the Security Council Resolution 827 (1993), which instituted the International Criminal Tribunal for the former Yugoslavia. Underlying his investigation is whether there is sufficient uniform European state practice to suggest that there is the formation of regional customary law on war crimes.

Israel's war crimes trial practice is described in chapter four by Jonathan M Wenig, who practises law in Melbourne. His focus is threefold. First, Israel's legislation and jurisdiction relating to war crimes. Controversial, of course, is Israel's exercise of jurisdiction invoking both the protective principle and the passive personality principle. Secondly, one encounters his analysis and impressions on the Israeli approach in the war crimes trials of Eichmann and Demjanjuk. Thirdly, the national turmoil caused by Israel's trials of Jewish collaborators and of Kapos, the Jewish policeman in the concentration camps. Australia's war crimes trial experience (chapter five) is ably discussed by Professor Gillian Triggs of the Faculty of Law at the University of Melbourne. She describes Australia's spasmodic record of prosecuting war crimes, the amendment of 1988 to its War Crimes Act of 1945, and the failure of the three war crimes prosecutions between 1990 and 1992. Most illuminating is the difficulty encountered by the courts with providing the evidence of international law in Australian courts. She alerts the reader that for some justices retrospective provisions of the War Crimes Act did offend the principle of separation of powers in the Australian Constitution and there may be concerns for "individual's rights threatened by legislative excesses" (p 144). She outlines briefly the International War Crimes Tribunals Act of 1995, which for Australia represents "a willingness to surrender national jurisdiction to international tribunals for the prosecution of war crimes" (p 149).

The final chapter on domestic practice regarding trial of war criminals is that pertaining to Canada (chapter six) by Professor Sharon A Williams of Osgoode Hall

Law School, York University. She recounts that Canada and other Commonwealth countries responded to the secret British telegram not to start war crimes trials after 31August 1948. Eventually the Deschênes Royal Commission was constituted in 1985 to discover whether there were thousands of war criminals in Canada. One of the consequences of the report resulted in Canada amending its Criminal Code in 1987 to enable prosecutions of war crimes and crimes against humanity to take place in Canada using extraterritorial bases of jurisdiction, its Citizenship Act and its Immigration Act. The few trials proved somewhat inhibiting according to the author and further amendment of the Canadian Criminal Code is necessary "to open up a realistic possibility of prosecution" (p 170).

The emphasis in the final three chapters reverts to international aspects of war crimes. In chapter seven, Professor Roger S Clark of the School of Law at Rutgers University, provides an historical account of the Nuremberg and Tokyo international tribunals and discusses the substantial legacy they provided in terms of the development of both customary and treaty-based international criminal law. Professor Christopher L Blakesley, who teaches at the Louisiana State University Law Centre, contributes a stimulating insight into the law governing the two operating *ad hoc* international tribunals for the former Yugoslavia and Rwanda (chapter eight). The impact of these tribunals, he feels, is directly linked to positive prospects for a permanent court. It is crucial, Blakesley asserts, "that the tribunals be perceived as effective in gaining custody of and prosecuting perpetrators of war crimes in an efficient manner which comports with the international human rights of the accused" (p 228).

The ninth and final chapter of the work is authored by the co-editors who evaluate the current proposals in the United Nations which seek to create a permanent international criminal law system. In particular, they are concerned with the International Law Commission's Draft Statute for an International Criminal Court and the Draft Code of Crimes Against the Peace and Security of Mankind. They do not engage in a comprehensive examination of the provisions of the Statute and Code, but do summarise and distil many of the controversies surrounding the documents. Most of the chapter is devoted to the proposed Statute because it "represents the most realistic and technically adroit attempt to lay a foundation for a new international criminal regime" (p 229). As for the Code proposal, they suggest various reasons why "in its present state, [it] is an unworkable basis for reviewing international criminal law" (p 229).

Although there has been much written on the Nuremberg and Tokyo trials, and there is a growing but less extensive literature on the ongoing work of the former Yugoslavia and Rwanda tribunals, greater attention should be forthcoming on the national level.

The lively contributions are a successful blending of the international and national approaches in the one book. The authors have written with collective clarity and erudition. It is a worthy addition to the literature that will continue to spawn further interest and work on the subject until nations and humankind have mechanisms in place to assure accountability.