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Introduction: dimensions of justice in environmental law

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1 Outline

Environmental laws and policies are predominantly *goal-oriented*. Standards, principles and procedures for the protection of the environment are often instrumental to achieve, say, the conservation of fragile ecosystems and endangered species, the preservation of fresh water and other natural resources, the restoration of contaminated soils as well as the stratospheric ozone layer, and the protection of human health. This goal-oriented feature is evident in national as well as international law. It is apparent also when legal approaches to managing environmental problems are compared with economic or market-based instruments, such as emission trading, environmental taxes and voluntary agreements and codes of conduct. National statutes and international treaties, standards, instruments and procedures are assessed with these underlying objectives in mind, and mainly analysed in terms of effectiveness and achievability of the set objectives. Even *sustainable development*, as an overarching societal objective with obvious environmental connotations, reflects this goal-oriented conception of environmental law and policy.

Yet, environmental law also involves priorities, conflicts and clashes of interests – and concerns for justice and fairness. In fact, any drafting, negotiation, adoption, application and enforcement of environmental laws – indeed comprehending environmental law in general – induces justice considerations: i.e. concerns for the distributive and corrective effects of laws and decisions pertaining to health, the environment and natural resources, as well as concerns for the opportunities of those potentially affected to participate in such law-making and decision-making in the first place. Although well-established concepts in environmental law, whether based on custom or statutes, appear neutral on their face, a closer study, or simply placing them in a *context*, may reveal disproportionate burdening or restricting effects for certain groups or categories when these concepts are applied. It may also show how certain interests or subjects are ignored or demeaned. Such concerns are indeed raised in local as well as global contexts, and they also include structural issues, such as gender, class, ethnicity and – on a global scale – North–South relations.

We see it in local situations when individuals and neighbourhoods contest the establishment of industrial plants, and when environmental associations protest against

activities likely to harm sensitive ecosystems: whose interests prevail in conflict with the interests of others? We see it when neighbourhoods or communities complain that they are disproportionately affected by hazards to health, and even challenging environmental laws for being racist or sexist: how come allegedly neutral laws have such effects? We see it in global climate change negotiations: most states today agree that climate change should be abated, but how are the costs for cutting down CO_2 emissions to be discharged among the industrialised and non-industrialised regions? And which regions are worst affected by a failure to combat climate change? We see it when nuclear wastes are to be deposited: is it fair to pass on the burdens of radioactive wastes to future generations, while the present enjoys the benefits? Already this set of preliminary observations indicates the critical value of considering the distributive, corrective and procedural features of environmental law. Also, sustainable development as such implies such considerations.

Justice concerns trigger academics and activists alike, and in part for the very same reason: to critically appraise existing institutions and to guide for social change. Thus, as argued by John Rawls, principles of justice provide 'an Archimedean point for appraising existing institutions as well as the desires and aspirations they generate' and 'an independent standard for guiding the course of social change'.[1] Critical justice appraisals can reveal unjust distributive effects of legal concepts, institutions and principles with bearing on health and the environment. In so doing, critical appraisals also guide us and may spark off social change and reforms of national, international and transnational institutions.

These motives have been essential for the 'environmental justice' movement as well. This movement originated in the USA in the 1970s and 1980s,[2] and was largely driven by charges of 'environmental racism' in US developmental and environmental policies.[3] It showed not only the disproportionate burdens on certain groups entailed by hazardous activities and substances, but also highlighted the lack of real opportunities for participating in decision-making. The notion of environmental justice has spread to numerous countries and regions of the world,[4] and, while the (in)justice factors may be contextual and differ from one country to the other, it has taken the form of a critical voice, e.g. by revealing what is seen as unjust consequences of existing

[1] Cf. Rawls 1972, p. 520.

[2] Bullard 1998–9, p. 454, when describing the background of the US environmental justice movement, argues that the environmental justice framework 'attempts to uncover the underlying assumptions that may contribute to and produce unequal protection. This framework brings to the surface the ethical and political questions of "who gets what, why, and how much"'. Thus, it 'rests on an ethical analysis of strategies to eliminate unfair, unjust, and inequitable conditions and decisions. The framework seeks to prevent environmental threats before they occur.'

[3] Bullard 1998–9, pp. 460–8; and Lazarus 2000.

[4] Studies of environmental justice considerations in national laws are provided by Bosselmann and Richardson 1998. A brief account of this development is also given by Schrader-Frechette 2002, pp. 6–13.

social arrangements and norms.[5] For the same reasons, concerns for justice arise in the contexts of international environmental law as well.[6]

This book is also framed by the dual motive of critically appraising existing institutions and guiding for social change. Yet, the book also reflects another motive, namely, to better understand how certain legal regimes, concepts and legislation came into being. Some contributions show to what extent justice considerations influenced negotiations, jurisprudence and legal debate. Rather than providing for one common Archimedean point, however, the book reveals several such points, and several ways of understanding justice in environmental contexts. Yet, while their approaches to justice in environmental matters differ, most contributors nevertheless focus on the procedural, distributive and/or corrective elements of justice, and even stress the link between the procedural dimension and the distributive and corrective repercussions. Some contributions also discuss the theoretical foundations for justice considerations, whether based on social contract theories or on theories of entitlements or capabilities.[7]

The thesis framing this book is that justice considerations arise in just about any legal context involving health, the environment and the use of natural resources. It permeates the development and application as well as evaluation and analysis of environmental laws. In these contexts, justice is an aspiration in its own right, but it also matters for the legitimacy and effectiveness of the policies and laws intended to protect health and the environment. This, of course, does not prevent some contributors from questioning whether environmental justice is the best way to phrase the concerns for the environment,[8] or from suggesting a radical shift in the understanding of environmental justice.[9] The answer partly depends on how justice is measured and which interests, factors and subjects are taken into account.

Throughout this book environmental law and environmental matters are broadly understood so as to include not only the protection of the natural environment, but also concerns for health and for sustainable access to natural resources and ecosystem services. Rather than insisting on a strict demarcation between environmental and

[5] Cooper and Palmer 1995. [6] E.g. Cooper and Palmer 1995, pp. 91–134; Cullet 2003; and Anand 2004.

[7] This distinction of theoretical bases for justice appraisals is in itself far from clear. For instance, in questioning Rawls' premises for the distribution of assets and purporting a theory of entitlement, Nozick 1974, pp. 149–50, argues that the holdings of a person are just if he (or she, one may add) is entitled to them by the principle of justice in acquisition and transfer, or by the principle of rectification of injustice. This is a very different notion of 'entitlement' from that proposed by Nussbaum 2006, pp. 69–92. For her, 'fundamental entitlements' refer to 'an account of minimum core social entitlements'. This, in turn, is based on a natural rights conception of human dignity, which she transposes to a list of 'central human capabilities' to be accomplished in order to achieve the threshold of social justice. While her outline is in part inspired by Rawls' contract theory, she also draws on the capacity approach of Sen. For him, freedom is the foundation for justice, and 'capability' is the substantive freedom of a person to achieve alternative lifestyles; see e.g. Sen 1999, pp. 54–86.

[8] See e.g. Twining in Chapter 4 of this volume. [9] See Petersen in Chapter 5 of this volume.

social matters, this book shows that in some cases these matters overlap and link to each other.

The book is divided into six parts, each one with three to six chapters, titled:

Part I: The notion of justice in environmental law (Chapters 2–5)
Part II: Public participation and access to the judiciary (Chapters 6–11)
Part III: State sovereignty and state borders (Chapters 12–14)
Part IV: North–South concerns in global contexts (Chapters 15–17)
Part V: Access to natural resources (Chapters 18–20)
Part VI: Corporate activities and trade (Chapters 21–23)

Although each part deals with discrete issues, there is still considerable overlap between them. While some of the more general contributions deal with the notion of justice in the context of state sovereignty, global matters and North–South concerns, these issues are also covered by the more specific contributions in Parts III and IV. Gender issues are both dealt with in Part I, on the notion of justice in environmental law, and Part V, on access to natural resources. Participatory aspects of justice are considered in Part II, but are also touched upon in Parts III, V and VI. Justice in the context of access to natural resources is the theme of Part V, but it is also discussed in Part VI. Conceptual matters are not limited to Part I, but occur in all parts of the book. And so on. So the structure is only intended to guide the reader and show the diversity of relevant aspects and contexts, rather than denoting conceptually important divisions.

Together, the twenty-two contributions give a valuable picture of situations where justice considerations arise. Justice is not the only concern when assessing, analysing or debating environmental laws, but it provides highly important entries for appraising environmental laws; as an impetus for social change, and as a means for better comprehending the factors – often not made explicit – behind different legal developments.

2 The notion of justice in environmental law

The discourse on environmental justice may originate from the late 1970s and early 1980s, but the philosophy of justice has a far longer history in which the procedural, distributive and corrective aspects of law and policy are essential. As already mentioned, justice in environmental matters, and even the concept of environmental justice itself, embraces concerns for distributive, corrective and procedural justice. Other related concepts that occur in this volume are 'participative justice', 'criminal justice', 'retributive justice', 'restorative justice', 'social justice', 'cooperative justice' and 'cosmopolitan justice'. The given contexts will reveal their meaning, but generally speaking each of these concepts involve some element(s) of distributive, corrective or procedural justice as well.

Developing notions of justice includes making appropriate limitations of what to include in the analysis or debate. In the sphere of environmental law, justice is discussed and measured with different parameters and on different theoretical bases. Which burdens, which interests and which subjects should be included in such a theory and debate? Environmental law takes the forms of national, supranational (e.g. European Community), international and transnational laws, so the justice considerations discussed here reflect this broad arena. However, expanding the notion of environmental justice from domestic contexts across state borders, so as to include transboundary and even global concerns, may lead in different directions depending on whether the individual or the state (or the people) is taken as the starting point.[10] For instance, when appraising the global climate change negotiations from a justice perspective, one may take each state as the measure and thus compare the opportunities to participate in negotiations and how the burdens are discharged among the parties to the 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change (Kyoto Protocol)[11] and its successor. International law and its critics have tended to be state-centred and quite naturally take the state as the starting point. Alternatively, and probably more provocative, one can appraise the global regimes from a cosmopolitan point of view, thus assessing the procedural, distributive and corrective effects from the perspective of the individual. Only then can the distributive concerns *within* each state be part of the calculation of global justice.[12] Take the case of India, which is considered a developing country in international environmental negotiations, even though its middle class population amounts to the size of several Western European states put together. It can be questioned why the Indian middle class should get away with less stringent legal requirements for combating climate change than the European or American middle class, just because there is a huge poor Indian population which does not contribute much counted per capita. Should international law in this way endorse great or even increasing inequalities within countries?[13] If individuals were the units, the appraisal might look quite different.[14] There are some tendencies in international law, with respect to the use of shared natural resources, to take the situation of the individual, not only states, into account.[15] Yet, considering the position of individuals rather than states is even more relevant with respect to non-democratic countries, where the governments do not really represent the people(s) of a country.[16]

Justice concerns can be traced back in the history of international environmental law at least to the 1941 *Trail Smelter Arbitration*, which is regarded as the *locus*

[10] See e.g. Ebbesson in Chapter 14, and Hey in Chapter 18, of this volume.
[11] 1997 Kyoto Protocol to the United Nation Framework Convention on Climate Change, 37 *International Legal Materials* (ILM) (1998) 22.
[12] See Caney 2005, p. 747.
[13] See Du in Chapter 7 of this volume, where she describes how economic growth in China has led to increased environmental injustice.
[14] This issue is also discussed in Part IV on the North–South concerns in global contexts.
[15] See Hey in Chapter 18 of this volume. [16] Cf. Caney 2005.

classicus in this field. The tribunal, mandated to resolve a dispute between the USA and Canada concerning air pollution, was not only concerned with the apportionment of rights and duties between the parties, but was also asked to 'reach a solution just to all parties concerned'.[17] While the *Trail Smelter* Award includes inter-state justice considerations, there is not much of explicit references to justice in the major global policy documents concerning the environment. Some efforts for expanding the geographical scope of justice considerations can indeed be found in the 1972 UN Declaration on the Human Environment (Stockholm Declaration)[18] as well as the 1992 UN Declaration on Environment and Development (Rio Declaration),[19] by the linkage between environmental degradation to poverty. The two declarations also highlight the different economic and social conditions for different states, and the Rio Declaration even sets out the principle of 'common but differentiated responsibilities'.[20] Still, there is no explicit reference to justice considerations, and neither declaration is as outspoken in this regard as the 2000 UN Millennium Declaration:

> Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.[21]

The language as well as the context, although not limited to environmental matters, reveal that the justice considerations should not be limited to or even concentrated on inter-state issues, but rather involve the concerns for all individuals in all international relations. While the approaches of the Millennium Declaration and the *Trail Smelter* Award differ, they reveal justice considerations that transcend state borders in international jurisprudence as well as international policy documents with a bearing on environmental matters.

In addition to possible geographical limitations and approaches to transcend state borders, justice considerations also involve temporal aspects.[22] As apparent in the context of climate change and international law, the concerns for future generations are frequently invoked. The interests of future generations are often either explicitly referred to in international treaties, national statutes or case-law, or can be somehow

[17] It was to this end that the tribunal concluded the principle 'that no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'. 3 *United Nations Reports of International Arbitral Awards* 1905, at pp. 1908, 1963–6.

[18] United Nations Declaration on the Human Environment, UN Doc. A/CONF/48/14/Rev.1 (1972), 11 ILM (1972) 1416.

[19] United Nations Declaration on Environment and Development, UN Doc. A/CONF.151/26/Rev.1 (1992), 31 ILM (1992) 876.

[20] Rio Declaration, previous note, Principle 7.

[21] United Nations General Assembly, Resolution 55/2, United Nations Millennium Declaration (A/55/L.2, 18 September 2000), para. 6.

[22] Brown Weiss 1989.

implied by legislation, and it is not far-fetched to include future generations in climate justice considerations. Temporal considerations may also go back in time. An essential issue in the negotiations for cutting down CO_2 emissions is whether and how previous inputs should be taken into account. To what extent should a system of 'grandfathering' be used, meaning that the industrialised countries should be allowed to stay at a higher average than developing countries, just because they are used to a certain level of welfare and comfort, and may have invested a lot in different greenhouse contributing activities.

Yet another controversial justice debate, related to environmental issues, concerns the kind of subjects to be included. Most theories of justice (drawing on Kantian thoughts) are limited to the concerns for human beings, but increasing attention is also given to justice for non-human species. How come we take for granted that animals do not deserve justice, but only, at best, charity?[23] And can justice be done to the environment as such?[24]

While most of these conceptual and principled issues are dealt with in this and/or other parts of the volume, common to the four contributors in Part I is the attention given to the geographical scope of justice deliberations.

Richard Falk (Chapter 2) sets the global stage by linking environmental justice concerns to what he sees as the second cycle of ecological urgency. Mapping out the global geopolitical landscape, not least the North–South tensions, he provides a macro perspective to urgent issues of environmental degradation and highlights the likely distributive consequences of adverse ecological changes and the foreseeable energy squeeze.

Of particular importance in this scenery is the scant attention given to the bearing of fairness or justice in either the diagnosis of the environmental challenge or its cure. Richard Falk criticises environmentalists for failing to pay sufficient attention to this justice perspective – a failure which tends to benefit the rich and powerful as well as those currently alive, and to accentuate the burdens and grievances of the poor, marginalised and unborn. He also argues that those who have raised environmental justice issues have been preoccupied with local sites and activist struggles, but not given sufficient attention to the global scale of environmental degradation and the earth's capacity to cope with ecological stresses. Yet, he continues,

> to ignore the extent to which the inequalities of life circumstances in the world are associated with avoiding the externalities of modern industrial life and warfare is not only unfair, but also tends to aggravate national and geopolitical tensions of a North/South character, as well as class and race/ethnic tensions within particular states.

[23] For an overview of the ethical discourse and a critical account of the environmental justice debate for failing to include 'ecological justice' considerations, see Bosselmann 2006. A useful presentation of the ethical discourse is also given by Nussbaum 2006, pp. 325–407.

[24] See Krämer in Chapter 10 of this volume.

He compares the current (second) cycle of ecological urgency with the first cycle, which he places between the 1972 UN Conference on the Human Environment in Stockholm, and the 1992 UN Conference on Environment and Development in Rio de Janeiro. In this second cycle he sees two major challenges, of great importance for any environmental justice deliberation in a global context. The first is climate change and the resulting energy squeeze, which challenges concerns for justice. While the rising price of oil may encourage investments in alternative energy technologies, it is also likely to result in higher energy costs for the poor and especially on those living near subsistence level. The second issue refers to the impact of 'asymmetric warfare' and militarism, i.e. the effects on the human environment from high-tech warfare which is directed at destroying infrastructure and affecting the civilian population.[25]

He concludes that the discourse on environmental justice needs to delve deeply into structural constraints on policy that arise from special interests of governments as well as the private sector. This, in turn, requires exploring policy proposals that call for fundamental shifts in life style, budgetary priorities and market regulations. Admitting that some such changes may appear utopian and politically unattainable, he nevertheless finds them essential in order to enhance environmental justice considerations in any response to the sense of ecological urgency he addresses.

Whereas Richard Falk's notion of justice centres around the distributive concerns in global policy contexts, Dinah Shelton (Chapter 3) reveals the numerous alternative, often contradictory, ways international justice is described in legal debate. She identifies three broad categories to which the discourse of international justice refers – morality, equity and law – and observes how concerns not only for distributive justice, but also for reparative and retributive justice, arise in each of these three categories.

She discerns the moral underpinning of justice in some contexts of international environmental law, but it is clear that the notions of justice as equity or law as such are more robust in the legal discourse on environmental matters. In both these meanings of justice, the distributive aspects are shown to be essential. While the general value of equity is largely accepted, she argues,

> debate exists on the appropriate principles to determine equitable allocation, e.g. whether decisions should be based on need, capacity, prior entitlement, 'just desserts,' the greatest good for the greatest number, or strict equality of treatment.

She demonstrates that the concerns for international distributive and corrective justice mainly arise in the North–South context. This was evident in the struggle of newly decolonised states in the 1960s and 1970s for a New International Economic Order and the push of developing states for an equitable allocation of resources and burdens. These concerns would also influence concepts and instruments in international

[25] On the issue of environmental justice and armed conflicts, see also Okowa in Chapter 12 of this volume.

environmental law, such as financial mechanisms, double standards, requirements of technology transfers and certain flexibility in the time required for compliance. It has also resulted in explicit statements about economic and social development as well as poverty eradication as overriding concerns in the context of global environmental agreements.

Dinah Shelton describes how the concerns for distributive justice are reflected in various substantive norms intended to accommodate the different situations of developed and developing countries. One such case is the principle of equitable utilisation, which applies to various kinds of shared resources, such as the seabed, fish stocks and watercourses. Another case is the principle of common but differentiated responsibilities, as set out in global environmental agreements on ozone layer depletion, climate change and desertification.[26] While both these principles refer to the substantive issues and the distributive outcomes, she also points at the procedural dimension of justice, e.g. through arrangements for international dispute settlements. Even the adherence to the rule of law in itself is generally taken as a construct for international justice. In all, she sees in justice in international environmental law the rational sharing of the burdens and costs of environment protection, discharged through the procedural and substantive adjustments of rights and duties. This is not limited to the distribution among the present populations, but also pertains to intergenerational equity, i.e. the emerging notion that humans have a special obligation as custodians or trustees of the planet *vis-à-vis* future generations to maintain the planet's integrity and ensure the survival of the human species. She concludes that international justice is not only a matter of morality and equity, but may also foster more effective actions and implementation of legal norms.

William Twining (Chapter 4) is less convinced about the merits of framing major concerns for the environment in the language of justice. He places the debate on environmental justice in a broader jurisprudential context: in light of general theories of law, the discourse on law and globalisation, and normative jurisprudence. While sceptical of the usefulness of the environmental justice language, he also shows that the canonical, predominantly Western, legal theories – not least in normative jurisprudence – fail to explain the post-Westphalian world or to grasp issues, facts and concerns that are essential for the environmental justice debate.

In doing so, he emphasises the lack of a global perspective in normative jurisprudence. First, it is largely bound to the nation-state, and fails to look beyond the confines of state borders in theories of justice. Therefore, it does not provide an adequate theoretical basis for justice considerations once the issues transcend narrow, territorially defined concerns – which is often the case in the context of environmental law.[27]

[26] See also the contributions by Mickelson in Chapter 15, Brunnée in Chapter 16, Kjellén in Chapter 17, and Bugge in Chapter 21 of this volume.
[27] See also Ebbesson in Chapter 14 of this volume.

He criticises John Rawls, whose work has probably been the most influential for any contemporary theory of justice:

> From a global perspective, it is bizarre to find a purportedly liberal theory of justice that rejects any principle of distribution, treats an out-dated conception of public international law as satisfactorily representing principles of justice in the global arena, and says almost nothing about radical poverty, the environment, increasing inequalities, American hegemony (and how it might be exercised), let alone about transnational justice or reparations or other issues that are now high on the global agenda.

Second, he argues, a genuinely cosmopolitan general jurisprudence cannot be limited to the conventional canon of juristic texts, based on the 'Country and Western tradition' of legal theorising and comparative law. Rather, it must be adjusted so as to include writings, ideas and controversies from non-Western traditions and viewpoints. It is indeed contradictory, that, while most Western legal theories (including theories of justice) take the (Western) nation-state as the starting point, these theories are often put forth with claims of universal validity. In the same vein, he cautions against conveying human rights notions, crucial to many theories of justice, as if they reflected universal values, without taking the plurality of beliefs into account. Although he suggests that human rights are best conceived as a language for expressing claims and arguments rather than as an abstract set of universal values, he also questions the usefulness of considering environmental issues exclusively from a human rights perspective.

As a way out of these anachronisms, William Twining presents new thoughts of general jurisprudence that are being developed by theorists, who build upon, but also distance themselves from, canonical Western jurists, e.g. by expanding beyond state borders and by challenging the anthropocentric focus of jurisprudence. In this context, he also points at the striking anthropocentricity in jurisprudence and normative theories of justice – even among philosophers, such as Peter Singer, who are outspoken advocates of animal liberation. While such an anthropocentric approach to theories of justice does not necessarily imply an indifference to environmental concerns or that 'ecocentric reasons' are invalid, William Twining questions whether a theory of environmental justice leaves sufficient scope for other values and whether the language of justice is the most appropriate way of expressing all major concerns for the environment.

Hanne Petersen (Chapter 5) agrees with William Twining as to the need to go beyond the 'Country and Western tradition' of legal theorising in search for a normative jurisprudence to deal with general questions about values and law. And this she does by challenging the limits of environmental law – as an instrument of modern states – for combining and taking care of the colliding traditional values of conservation of the environment and the values of securing modern, equality-oriented, distributive justice in gender relations. When considering the gendered aspects of