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Book review: Environmental principles

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Abstract

This contribution is a review of the second edition of Nicolas de Sadeleer's book "Environmental principles – From Political Slogans to Legal Rules", being released in 2020. In his book, Nicolas de Sadeleer analyses the polluter-pays-, the prevention and the precautionary principles, with the latter being the most interesting and controversial one according to the author of this review. He stresses that de Sadeleer's book is very useful for any environmental lawyer.

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Book review: Environmental principles

Gerhard Roller

"Environmental Principles – From Political Slogans to Legal Rules" is the second edition of Nicolas de Sadeleer's book, being released almost 20 years after its first publication in 2002.[1]

Needless to say, that environmental law has much developed in this period. Detailed sub-branches of environmental law have further evolved,[2] and climate law has captured its own place in the ever-growing market of branches of law. Environmental principles play an important role in all these fields of law on international, European and national level. We note a growing number of court decisions and accelerated legislation to respond to the challenges of environmental degradation and climate change: for these reasons it is obvious that an updated version of Nicolas de Sadeleer's fundamental 'oeuvre' is more than welcome. The fact that the second edition evolved from 433 to 540 pages is justified by the growing importance in practice of the polluter-pays-, the prevention and the precautionary principles that are analysed in this book.

In the first part of his book Nicolas de Sadeleer describes the role of the three principles in the temporal evolvement of environmental law (p. 25 ss). Starting from a curative approach, which characterized the early stages of the environmental policy, followed by the preventive model, complementing the first model by preventing risks on the basis of scientific knowledge, ending up with the anticipatory model including also uncertain risks. The three principles are characteristic for these models: The Polluter-Pays-Principle is linked obviously to the first phase, whereas the principle of prevention manages known risks deriving from technological progress,[3] and the precautionary principle is confronted with uncertainty, which is, according to the author, a main characteristic of "post-modern law".

From this starting point, the first part of the book gives an in-depth analysis of the polluter-pays, the prevention and the precautionary principles in three chapters. Following a common structure, the chapters outline the principles from their origin, followed by a systematic analysis and detailed examples of their application to end with concluding observations. The strength of this part – and of the book in general – is the combination of theoretical analysis and the broad legal findings of practical application in various legal regimes, from the international, European to national legal orders.

Certainly, the precautionary principle is the most recent but also the most interesting and controversial principle analysed by Nicolas de Sadeleer. It is thus not by accident that the chapter on the precautionary principle, containing alone 234 pages, is by far the most exhaustive one, compared with the chapters dealing with other principles. In a sub-chapter, the principle is critically assessed in 8 different environmental sectors. N. de Sadeleer analyses how the precautionary principle takes effect and influences more and more legislation and case law. The chapter on the precautionary principle (PP) is a real stimulant for further thinking. Profound theoretical analysis is always complemented by concrete examples. For instance, the role of science in context with the application of the precautionary principle is intensively discussed. The different logic inherent to natural science on one hand and legal thinking on the other hand is pinpointed in the remark "*While the jurist seeks certainty, the scientist points to the uncertainty inherent in environmental risk*." (p. 306). In this context, the problem of uncertainty and time has been at the basis of the long-lasting conflict between the EU and the United States in the WTO hormone case. It is, as de Sadeleer points rightly out, indeed a major shortcome of the SPS agreement and the decisions of the panel and the Appelate Body in the 'hormone-case', that they ignore that uncertainty cannot always be overcome by further research and measures should therefore also be uphold in the long run (p. 330 and p. 515-517). Art. 5 para. 7 of the SPS agreement, instead, is locked in the 'prevention-world', where science can solve any problem, which (un?)fortunately is not the case.

The reasoning about the duty of care that should be rethought in the light of the PP (p. 347) was recently affirmed by the jurisprudence in the Dutch Shell case.

Thus, the first part alone is already a valuable source for any lawyer dealing with environmental law – and being confronted inevitably sooner or later with one or more of these fundamental environmental legal principles. De Sadeleer offers not only a valuable source of information for any legal question linked to the three principles but also embeds his analysis in a theoretical context, including political and philosophical aspects already outlined in the first edition of his book: the shift from modern law to post-

1 Oxford University Press, 2020.

2 "Un droit foisonnant" is a very true characterisation of envrionemental law, Sandrine Maljean-Dubois, Quel droit pour l'environnement, Hachette, Paris 2008.

3 Nicolas de Sadeleer uses the term "certain risks".

modern law which was mirrored by the three principles analysed in his book.

The author explains his understanding of these two models (p. 383 ff.). The elements of modern law, as described by this theory, are general and abstract rules, a hierarchical and autonomous legal system, based on science. In this system, general principles of law exist, which have the function to guarantee the coherence of the legal system. Opposed to this, in the post-modern law system, the aforementioned attributes are, according to the author, more or less replaced by an individualized legal system influenced not by logic but by initiatives of decision-makers, not anymore monolithic and hierarchical but circular and open to other disciplines confronted with global threats and scientific uncertainties.

Obviously, this dichotomy is first of all an analytical category and as such useful. Reality, of course, is much less clear and the borders of the two models are far from being clearly cut.

Although sometimes one might have the impression that this shift from modern law to postmodern law has to be understood as replacing one approach by the other (N. de S. seems to argue in favour of this understanding, e.g. p. 367, also p. 371: "*a new legal model [...] is replacing the classical law of modern societies*"), the author argues finally clearly in favour of a continuation of modern law which is co-existing with the new approach of post-modern law (p. 389/390).

We share this point of view. Indeed, an understanding in the latter sense is also affirmed by the fact that on the level of *instruments* we can observe that a command-and-control-based approach still remains the basis of environmental law – in which the new approach is integrated: no industrial installation in the European Union is allowed to be constructed and operated without a licence and even the GHG trading scheme is far less flexible as it seems, given the highly specific and sophisticated regulatory conditions in which it is embedded. In some areas, like in climate change law, regulatory instruments seem to have a 'renaissance'. But this classical approach is not sufficient. It is supplemented by a more open and flexible approach, which is guided by the polluter-pays-, preventive and precautionary principles.[4] These instruments, based on the preventive approach, can be considered as part of a 'post-modern' model, being more flexible and more marked based (CO_2-emission allowances), that has gained much more importance in the last decades. Voluntary agreements and contracts are sometimes used instead of binding rules (p. 394 ss.).

On the other hand, we might ask if the recent wave of climate jurisprudence could be interpreted as a step back to more coherent and binding rules. The Paris Agreement, although not binding for the states as far as concrete reducing measures are concerned – a fact that has been often criticised (p. 398) – has been the basis for an innovative interpretation of the German Constitutional Court. In a recent ruling the Court obliges the law maker to set up a clear and concrete framework how to reach climate-neutrality at the latest by 2050, doing this in a way that a fair repartition of burdens between the generations is assured. The relevant dispositions of the German Climate Act, not satisfying this obligation were declared as unconstitutional.

The Den Haag Rechtbank condemned in the first instance the Shell Company to reduce its GHG Emission until 2030 for 45 % compared to the base line 2019, although Shell is obviously not even a party to the Paris Agreement. In its interpretation of the 'duty of care' principle, set out in Book 6 Section 162 of the Dutch Civil Code, the judges considered in so far, that the parties of the Paris Agreement stressed that not the States alone have the power to mitigate climate change, but that support from the civil society and private actors is needed. This also applies for Shell to participate in reaching the goals set by the Paris Agreement .[5] "*It can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights*."[6]

The two decisions mentioned above are also emblematic for another aspect highlighted by the author, which could be described as the internationalisation of environmental law. The author considers directing principles as "*Connecting vessels*" (p. 411): "*Some courts rule not only on the basis of their own laws, but base also their decisions on developments within other legal systems*". Indeed, the German Constitutional Court,in its recent ruling on the constitutionality of the German Federal Climate Act cited several times Courts from the Netherlands, Ireland, the United States and Australia.

4 The author defines them as "directing principles", see on this p. 11, 406 ss.

5 "*In formulating RDS' alleged reduction obligation Milieudefensie et al. link up with the goals of the Paris Agreement. The agreement is non-binding on the signatories and is non-binding for RDS. However, the signatories have sought out the help of non-state stakeholders (see 2.4.7). Whether or not RDS or the Shell group can be designated as the 'non-Party stakeholders' referred to in COP 25 can remain undiscussed. The signatories have emphasized that the reduction of CO2 emissions and global warming cannot be achieved by states alone. Other parties must also contribute. Since 2012 there has been broad international consensus about the need for non-state action, because states cannot tackle the climate issue on their own. The current situation requires others to contribute to reducing CO2 emissions: the IPCC has found that the member states' national reduction pledges for 2030 added together are far from sufficient for reaching the goals of the Paris Agreement (see 2.3.5.4).*" Rechtbank Den Haag, VERENIGING MILIEUDEFENSIE et.a. ./. ROYAL DUTCH SHELL, C/09/571932 / HA ZA 19-37 , 26.5.2021, para. 4.4.26, ECLI:NL:RBDHA:2021:5339.

6 Rechtbank Den Haag, VERENIGING MILIEUDEFENSIE et.a. ./. ROYAL DUTCH SHELL, C/09/571932 / HA ZA 19-379, 26.5.2021, para. 4.4.14, ECLI:NL:RBDHA:2021:5339.

So it seems that the gaps and uncertainties characterizing post-modern law are considered as an invitation by the Courts to step in and fill these gaps.

Is there anything to criticise? Not on the substance, but in practical terms it would be useful to have a more detailed table of content (only the main headings are mentioned) and we missed the very well-structured bibliography from the first edition that somehow disappeared completely.

All in all, the book of Nicolas de Sadeleer is a very useful and exhaustive source of information for any environmental lawyer. The environmental principles are interpreted in such a way to make them an important basis to reinforce environmental law. The book makes the reader think in different ways and is an invitation to leave traditional legal pathways.

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In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstad University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

elni Review

The elni Review is an English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review (info@elni.org) in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled “Publications of the Environmental Law Network International”. Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

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