

Domestic Environmental Law

Domestic, or national, law refers to the legal system applicable to a defined territory over which a sovereign power has jurisdiction. International law, on the other hand, regulates the conduct of states and other international actors. Over the years domestic and international systems of law have evolved in parallel. In certain fields and regions of the world, international law has shaped and significantly contributed to the development of domestic environmental law. Yet international environmental law also reflects domestic experiences considered successful by the community of nations. The result is a complex relationship in which the two levels of environmental law mutually contribute to and reinforce each other. This section deals with domestic environmental law; the next section addresses international environmental law.

Early Developments

Environmental law is a relatively new field; other branches of law have historically been used to remedy environmental problems. In the common law system, tort law—which provides remedies for harm caused by one individual to another—provided the necessary legal foundation in early cases. Nuisance actions were the most popular, because they allow a successful claimant not only to receive compensation, but also a court order to abate the nuisance, such as a smell or smoke. In the civil law system claimants invoked tort and property law in much the same way. Historically, however, tort law, based as it is on the protection of individual rights and the need to prove specific injury, has not been a significant means of preventing environmental degradation.

The inadequacy of tort and property law convinced governments, including local authorities, to adopt measures to tackle the most pressing environmental problems. There is some debate regarding the true nature of the first local ordinances regulating odors, smoke, and wastewater. Some scholars argue that they are early environmental statutes, while others see them simply as health-based policies having the effect of regulating environmental problems. Most of these early measures were, in fact, enacted after sporadic crises that endangered public health.

Modern Environmental Law

Since the 1970s environmental law has experienced an unprecedented growth in many countries. This was made possible through the enactment of new statutes and regulations that provide for higher standards of environmental protection. The level of government that has enacted these instruments varies from one country to another. In federal states such as Canada, jurisdiction over the environment is shared between the provincial and federal governments. In the United States the federal government has adopted most of the important environmental statutes, but their implementation is delegated to the states through a complex system of incentives and responsibilities. The European Union (EU) has a developed system of environmental law, the legal basis for which is now to be found in the 1992 Maastricht Treaty on European Union. Although implementation is the responsibility of individual EU member states, European law permits individuals, as well as other member states and the European Commission, to pursue actions for breach of these rules before the European Court of Justice in Luxembourg.

Most countries have created institutions to handle environmental matters and given them varying degrees of independence, power, and jurisdiction. The primary function of such institutions is to coordinate domestic efforts aimed at protecting the environment. This normally involves statute and regulation development, environmental law enforcement, integration of environmental concerns in governmental decisionmaking, and general environmental education. The nature of the institutions also differs greatly from one country to another; there is no ideal arrangement. Many countries have created an independent environment ministry or have established a specialized Agency, such as the U.S. Environmental Protection Agency, which was created by an executive order and reports directly to the President. Some countries, such as the U.K., have both. Another approach, adopted widely in Latin America, is the creation of an environmental commission that groups together representatives of many other ministries and departments.

Organization of Environmental Statutes

Environmental statutes have traditionally been drafted and organized around important themes such as nature conservation and protection of the principal natural media: air, water, and soil. This allows the elaboration of rules of limited application that are easier to manage and enforce, but may fail to acknowledge

the importance of an holistic approach and to deal with important natural relationships, such as the effects of air pollution on water quality. Other countries have adopted different approaches. New Zealand has a seminal 1991 Resource Management Act, which integrates all sectors and relevant activities, while Canada has consolidated five of its main environmental statutes into one single act of general application. A similar technique is also used in other countries, such as Chile, that have adopted environmental framework laws, under which sectoral laws can be promulgated in an integrated way.

Legislative Techniques

Despite the particular organization of a country's environmental laws, a law-making body can resort to a number of legislative techniques to attain its policy objectives.

Prior authorization

A general prior authorization requirement prohibits any person from engaging in any activity that could harm the environment without prior permission. This essentially establishes a permit or license system, whereby any activity constituting a potential source of pollution requires the permission of a central authority. This technique can be adapted to serve different policy goals. The scope of the permitting system can be broad, to cover almost any component of the biosphere, or limited, to regulate only certain types of activities.

Environmental standards

Environmental standards are mostly "command and control" measures by which a central authority mandates specific requirements to be followed by the regulated community. As such, commentators distinguish them from "economic instruments," which rely on market-based approaches and will be examined below.

The objective of standards is to prescribe specific quantitative and qualitative limits to be followed by the regulated community. They may take at least five different forms. First, health standards are normally based on risk assessment analysis that identifies safe tolerance levels. These are used to control pesticides and other similar substances, and may be enacted without taking into account the compliance costs for the regulated community. Second, ambient environmental standards are used widely in the control of water and air pollution. These standards prescribe specific limits on the concentration of certain designated pollutants that will be tolerated, for example, in the ambient air or water. They may be used for the control of non-point or diffuse pollution sources, such as the nitrate content of run-off from agricultural land. Compliance with such standards may require major changes of agricultural or commercial practices. Third, emission and discharge standards are also used to combat air and water pollution. Instead of specifying limits applicable to the ecosystem, such standards place limits on the composition of the actual emissions or discharge by a specific source.

Two further forms of standards relate to technology. The most commonly used standard is technology-based. A statute may prescribe the use of the "best available technology." Through cost-benefit analysis the environmental agency will then specify for each class of industry the specific technology that it considers to be the "best available," and which is therefore mandated. Such standards can be upgraded relatively easily. More progressive are "technology forcing" standards, which cannot be met by the regulated community under the current state of technology. The intention, however, is that the obligation to meet this type of standard will stimulate and "force" technological innovation. This technique has been used in the United States to regulate motor vehicle emissions.

Liability

Liability refers to the condition of being actually or potentially subject to a legal obligation. Under civil liability, individual liability may be due to negligence, that is, if the individual's conduct fell below the objective standard of a reasonable person. Criminal liability is more serious, and requires proof beyond reasonable doubt of an unlawful act and specific intent. Strict liability is an intermediary concept that is commonly used in environmental laws. It relieves the state of the obligation to prove that the unlawful act resulted from negligence (civil liability) or that the defendant's conduct was intentional (criminal liability). In other words, the state need only prove that the particular defendant committed an unlawful act; for example, discharging wastewater. Another important liability concept consists of joint and several liability, according to which violators will be held liable together and individually. In this case governments can sue both violators together or either of them individually to recover, for example, the cost of clean-up. This technique is very useful when it can be proven that each defendant contributed to an unlawful activity, but the exact

contribution of each is difficult to demonstrate, and sometimes the injury is simply indivisible.

Retroactive liability is the hallmark of modern soil statutes and constitutes an exception to general principles of law. Under these principles no one should be held liable for the acts of another or for actions that were lawful when they were taken. Many governments have invoked this exception as a solution to the contamination of land by hazardous wastes. In urban areas land contamination often results from decades of intensive industrialization that has occurred without any meaningful pre-existing environmental standards.

Under some soil statutes current and past owners of contaminated land may be held liable for clean-up costs, even if they have not personally contributed to the contamination. Under certain circumstances operators, transporters, and, to a limited extent, lenders can also be held liable. Retroactive liability is still controversial and has raised some problems. It has important economic consequences, as the value of such land may drop precipitously in cases where clean-up costs exceed the property's value. In the long run, retroactive liability can also result in new investments going only to pristine "greenfield" sites, to avoid contaminated areas that are often situated in disadvantaged communities. Despite these difficulties the harshness of the liability provision has, in some countries, coerced industries into better environmental behavior and substantially minimized major health risks.

Environmental impact assessment

Among modern environmental statutes environmental impact assessment (EIA) laws crystallize a preventive approach to environmental protection, because they integrate environmental considerations in decisionmaking processes. Generally, EIA laws require the preparation of an environmental impact assessment for any proposed development activity, to review and assess its environmental impacts. The requirement can be applicable to a broad array of actions, and may include issuance of a permit or prior authorization, the funding of a project, and the adoption of a new statute or policy. The first step under EIA laws (known as screening) is to determine whether or not the proposed activity is likely to cause environmental impacts beyond a certain threshold. If such a determination is positive, the proposer must proceed with the preparation of a formal assessment. Depending on the nature of the probable impacts, the general public may be notified and public consultations held. The environmental assessment may be required to identify appropriate mitigation measures, or alternatives to the proposed action, that minimize environmental impacts. The key issue is whether EIA statutes oblige the proposer to implement the mitigation measures and alternatives previously identified. Without such a mitigation requirement, EIA laws may render decisionmaking more transparent, but they do not provide effective safeguards to protect the environment.

Enforcement of Environmental Law

Enforcing environmental law is critical to ensuring that the regulated community complies with the policies embodied in a statute. The goals of a good enforcement program are that a government: (a) achieve general environmental compliance through deterrence, (b) identify environmental violators efficiently, and (c) prosecute them diligently. Compliance can be achieved through general education and outreach to the regulated community, backed by effective prosecution procedures. In addition government bodies may conduct inspection activities periodically or on the basis of probable cause. In some countries a regulated industry is obliged to make its monitoring data publicly available. This information allows nongovernmental organizations (NGOs) to play an important role in identifying violators.

Governments, through their administrative agencies, are normally responsible for prosecuting violations of environmental law. In some countries individuals or NGOs can also sue violators and recover a share of the awarded penalty as a reward for their initiative, through procedures known as citizen suits or public interest actions. In addition national constitutions or environmental statutes may protect the right of an individual to a clean environment. In India, for example, such provisions have allowed the courts to take a highly proactive role in environmental protection.

New Trends in Environmental Law

Two new trends are currently shaping environmental legislation. The first is integrated pollution control (IPC), which allows for the regulation of an ecosystem as a whole, instead of approaching it on a sector-by-sector basis. This mechanism specifically seeks to avoid the transfer of pollution from one medium (such as water) to another (such as air), and helps in controlling pollution from non-point or diffuse sources. This approach was pioneered in the U.K., and is now being used in the E.U.

The second trend is the use of economic instruments that complement command and control measures.

Under this approach, the government sets out targets and allows members of the regulated community to allocate among themselves the burden of compliance. Theoretically, if the price of noncompliance is set at an appropriate level, the desired abatement of pollution will be achieved. The advantage is that sources with lower compliance costs will over-comply and receive economic benefits from those with higher compliance costs. The result is the attainment of pollution abatement at a lower net cost to society, compared to strict command and control measures. Other economic instruments include the use of taxes, environmental auditing, eco-labelling (to reassure consumers that a product meets certain environmental standards), and the reduction of subsidies that allow the regulated community to play a role in shaping new practices.

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