

THE AVOSETTA SERIES 4



Principles of European Environmental Law

Proceedings of the Avosetta Group of European Environmental Lawyers

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Europa Law Publishing

1 Introduction

Environmental principles are increasingly treated as the common denominators around which environmental law and policy are organized. The focus of this chapter will be to compare the modern and post-modern law paradigms with a view to emphasize the role of several environmental principles on the evolution of those models.

The following analysis is based on a theoretical research that I carried out between 1994 and 2002, whilst I was director of the Environmental Law Center in Brussels. In a book recently published by Oxford University Press,¹ I explained the purpose of the principles of the polluter-pays, prevention and precaution, how each of those principles link with one another and what legal issues entail. In so doing, I drew attention to the specificity and legitimacy of this group of new environmental principles that, while far from similar to traditional General Principles of International Law, are necessary to ensure the regulation and management of environmental risks. Hence, I made a distinction between General Principles of Law, which are characteristic of modernity and the cluster of new environmental principles, which are better suited to adapting the shifting and convoluted forms that characterize contemporary or post-modern environmental law. Nevertheless, I showed that the principles of the polluter-pays, prevention and precaution did not represent a complete break with modernity, since they eventually re-establish rationality.

I will not embark on a discussion regarding the definition of the terms modernity and post modernity. A complete discussion on those terms is not possible in the space available here, furthermore, another lawyer has recently summarized the various meanings of those terms.² After a brief look at the substance of the modern and post-modern law and the principles related to each of those two models, I will turn to the functions of a new set of environmental principles that signal a shift in emphasis away from the completeness and the coherence of the legal system towards a more convoluted regulatory process.

2 Modern law

Modern law, which rests on the fixed standards of traditional rulemaking, reflects the character of modern societies. Modern law is represented as an autonomous system made up of general and abstract rules; in other words a system which is deemed to be rational, complete and coherent.

¹ N. de Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules*, Oxford University Press, Oxford, (2002).

² B. Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State*, Ashgate Publishing, Aldershot, (2003).

In a liberal vision, the function of modern law is to provide for the coexistence of individual freedoms: each person has the right to enjoy maximum freedom to pursue his own interests, as long as he does not impinge upon the freedom of others. In order to provide every person with the maximum degree of freedom, modern law concentrates political power in the hands of the State. In that context, the need for legal certainty and foreseeability has led relations between individuals to be bound by general rules that refer to abstract concepts grouped together in general categories. Both generality and abstraction guarantee impartiality by drawing a veil of indifference between a rule and specific situations.

In addition, modern law presents itself from a Kelsenian perspective, as a pyramidal construction, with the most general rules at the apex. It thus appears to constitute a coherent whole that is a system of hierarchical rules linked to each other by logical and necessary relationships. This systematization confers upon the law the attributes of clarity, simplicity and certainty. Furthermore, its axiological neutrality characterizes modern law. Indeed, modern law seeks clearly to distinguish itself from non-legal spheres. The rule of law in the modern perspective has to be seen as completely autonomous in relation to extra-legal disciplines such as economics or political sciences.

Whether they are called *principes généraux du droit*, *principios general del derecho*, *Rechtsbeginselen* or *Rechtsprinzipien*, the General Principles of Law have been central to modern law. General principles of law have been called upon to fill possible lacunae.³ At the level of international, EC and national legal orders, courts regularly find themselves confronting gaps in written sources. To the extent that courts must rectify such deficiencies to rule on a case, they will do so by deducing a relevant principle from a mass of rules. Once it has been enunciated, the principle will be applied as an autonomous norm to resolve the dispute. Subsequently, that same principle can be applied in other cases. In so doing, courts make the law a consistent system in the sense that they make it possible to ensure systematic unity of the law amid the disorder of positive rules. The demand is more conspicuous in the international community, where there is no central lawmaking body. According to Cassesse, 'in this community, general principles constitute both the backbone of the body of law governing international dealings and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the community'.⁴

In addition, principles of customary law play a significant role as an autonomous source of international law, albeit the fact international courts can invoke them only if specific conditions are fulfilled. Indeed, only substantive and

³ T. Tridimas, *The General Principles of EC Law*, Oxford University Press, Oxford, (2000), p. 9; P. Birnie and A. Boyle, *International Law and the Environment*, Oxford University Press, Oxford, (2002), p. 19.

⁴ A. Cassesse, *Principles of International Environmental Law*, 2nd Edition, Cambridge University Press, Cambridge, (2002), p. 151.

repeated uses of State practice as well as *opinio iuris* are likely to transform an emerging norm into a customary principle. Some customary principles, such as international cooperation, simply reflect the application of general international law principles to environmental issues.⁵ Others, like the obligation not to cause environmental harm, are specific to international environmental law. On the other hand, principles that are not yet supported by significant practice, through repetitive use in an international legal context, cannot give rise to a legal remedy (e.g., the right to a healthy environment, the principles of common but differentiated responsibility and of subsidiarity). As a result, there are hitherto few general principles or customary principles of international law. For instance, Birnie and Boyle conclude that, in practice, the most frequent use of general principles by international courts 'derives from the drawing of analogies with domestic law concerning rules of procedure, evidence, and jurisdiction and these are only marginally useful in an environmental context'.⁶

3 Post modern law

Jean-François Lyotard has defined post-modernity in his book *The Post-Modern Condition* as 'incredulity toward meta-narratives'.⁷ It follows that all metadiscourses, whether in the social or in the natural sciences, are suspected. Nevertheless, after more than twenty years of discussions among social scientists, post-modernism still remains an incomplete intellectual construct within which a large number of concepts – divergent as well as convergent – jostle each other.

Applied to law, post-modernity emphasizes the pragmatic, gradual, unstable change nature of contemporary law. We support the thesis that post-modernity applied to law should not be understood in a deconstructionist perspective as social scientists are keen to do. Rather it must be seen as a means of analysing the emergence of a new legal culture.

By contrast to other legal disciplines, environmental law has taken a distinct post-modern identity. Indeed, this new legal discipline has undergone, during the past two decades, more transformations than any other field of law. These transformations have brought environmental law far from the premises of modern law described above. It is with the issue of the different factors that have contributed to modern law losing the attributes of generality, systematicity and autonomy, thus hastening the passage of contemporary environmental law to the

⁵ P. Sands, *Principles of International Environmental Law*, 2nd Edition, Cambridge University Press, Cambridge, (2003), p. 232.

⁶ P. Birnie and A. Boyle, *op. cit.* note 3, p. 24.

⁷ J.F. Lyotard, *The Postmodern Condition, A Report on Knowledge (Theory and History of Literature)*, University of Minnesota Press, Minneapolis, (1984), xxiv.

post-modern sphere, that this section is concerned. The issue of the functions of the environmental principles will be addressed in the next section.

3.1 Dispersion of the law makers

The sovereign State has given way to a plurality of institutions, which are as much infra national as supranational, as the number of regulators has increased dramatically in the past thirty years. 'Upstream', inter-governmental institutions such as the WTO, the EC and NAFTA, directly influence the elaboration of environmental rules at national level. In addition, as environmental problems have worsened, it has become necessary to develop at the international level a body of law more specifically aimed at reducing environmental impairment. 'Downstream', public policies concerning environmental education, health, land-planning natural resources, nature protection, generally fall within the competence of the numerous national actors (regions, provinces, Lander, communities, ...) most closely involved with the areas being regulated, thus increasing the number of relevant regulators even further. Furthermore, standard-setting bodies (ISO, CEN, Codex alimentarius) have established their own functional norms and procedures, thereby giving rise to a non-state law that vies with State law. Those standards can even be incorporated to some extent in hard law.⁸ Hence, as Sands points out 'lawmaking is decentralized with legislative initiatives being developed in literally dozens of different intergovernmental organizations at the global, regional and sub-regional level. Coordination between the various initiatives is inadequate, leading to measures which are often duplicative and sometimes inconsistent'.⁹

3.2 Fragmentation of law

Lack of time and means, the complexity and changeability of the questions to be addressed, pressure from lobbies, lack of interest in legal questions – these difficulties are giving rise to a proliferation of specific laws edited in haste and littered with gaps and contradictions, whose duration dwindles in direct proportion to their mediocrity. The need to adopt new legislation often rests on a permanent state of reluctance to apply existing legislation. Thus,

⁸ According to the new approach for technical normalisation, the institutions of normalisation (CEN, CENELEC) can find themselves entrusted with the task of developing technical specifications 'needed for the production and placing on the market of products conforming to the essential requirements established by the Directives' adopted on the basis of Article 95 of the EC Treaty.

⁹ P. Sands, *Environmental Protection in the XXIst Century: Sustainable Development, International Law*, in R.L. Revesez et al, *Environmental Law, the Economy and Sustainable Development: The United States*,

environmental regimes in most countries are teeming with hundreds of laws whose effectiveness leaves a great deal to be desired, owing to their precarious and confused nature.

In addition, environmental law challenges well-established boundaries between private and public law¹⁰ and international and national law.¹¹ It does not have an overall focus or objective. Instead, it has tended to develop in a haphazard fashion, responding to particular needs, in the light of new ecological crises. By the same token, the line between soft law and hard law is becoming indistinct, as treaty mechanisms increasingly turn towards 'soft' obligations¹² and non-binding instruments, in turn, incorporate mechanisms traditionally found in hard-law texts. Furthermore, environmental law encompasses both more and less than the law of sustainable development. Even though the objectives are by no means identical, 'there is a major overlap in rules, principles and techniques'.¹³ It follows that environmental law does not form a coherent whole.

3.3 Acceleration of time

Environmental law is experiencing a true flight forward. The speed at which norms are produced has accelerated drastically. The ineffectiveness of existing regulatory regimes is compelling legislators to constantly adopt new rules. Time is no longer a measure of duration; radically accelerated, it reduces the long term to a short term and continuance to immediacy. As a result, lawmakers favour flexibility over long-term action. Reflecting this, the legal universe has become one of short-term programmes and constant change. The legitimacy of the State is no longer acquired as of right, but is rather a function of the relevance of State-generated programmes. Furthermore, those post-modern policies based on programmes are designed to achieve concrete ends in a way that general, impersonal rules are intended not to be.

¹⁰ See, for instance, the proposed Environmental Liability directive, which entails mainly administrative obligations rather than civil liability schemes.

¹¹ EC law and the ECHR tend to merge into the legal orders of the States members of the European Community and the Council of Europe. Thanks to direct effect, several obligations laid down in those international agreements can be invoked before national courts. As a result, it has become difficult in Europe to deal with environmental law through a purely national approach, without taking into account the obligations laid down in those two international agreements.

¹² See, for instance, the 1992 Convention on Biological Diversity allows for its own further development.

3.4 Decline of State authority

As hinted as above, at the international level, 'soft law', is replacing the 'hard law', advocated by those who support control and command systems. At national level and even at EC level, more flexible, incentive-driven and consensual instruments are gradually replacing classical command and control mechanisms. A new form of co-regulation replaces the "thou shalt not" approach. For instance, voluntary participation by those whom the State intends to regulate has in this way come to replace classical forms of State intervention, in the name of 'shared responsibility'.¹⁴ Self-regulatory mechanisms (*e.g.*, voluntary labels, eco-audits, tradable pollution rights), under which those being administered are considered fully involved actors ('stakeholders'), play a major role in most of these new environmental policies. This trend is already entrenched both at municipal and at EC level.

The result of this approach is that it affords greater autonomy to the private undertakings. In addition, it tends to downplay the role of legislation and to dilute the responsibility of public authorities in formulating and implementing public policies. Inversely, the decline of State authority is often associated with an increased political role for civil society. New rights to information, participation and access to justice have been accorded to citizens, in order both to integrate them into the process of defining and implementing public policies and to facilitate the subsequent acceptance of negotiated norms. In parallel to this trend, lawmakers at both the international and national levels have become increasingly open to the influence of human rights advocates, environmental NGOs and other activist groups.

3.5 Increasing dependence of the law on extra-legal spheres

While modern law seeks to distinguish itself from non-legal disciplines, rules of law in the post-modern perspective are no longer seen as being completely autonomous in relation to the extra-legal sphere. Rather, a much greater openness towards the economic, ethical and policy spheres characterise post-modern law. In this respect, Sands is of the view that "over the past decades the rules of international law have become increasingly complex and technical as environmental considerations are increasingly addressed in economic and social fields".¹⁵

¹⁴ Edgeworth asserts that environmental law is a typical example of this novel regulatory practice. B. Edgeworth, *op. cit.* note 5, p. 153.

¹⁵ P. Sands, *op. cit.* note 5, p. 69.

3.6 The undermining of the premises of modern law

As a result of these upheavals, post-modern law is going through a process that is radically different from any of those that characterize modern law. Rigidity (hard law) has given way to flexibility (*e.g.*, contracts); abstraction (law of general ambit) to individual decisions (environmental agreement, concluded with a particular undertaking, on a case by case approach); the continuity (based on abstract and general rules) to timeliness (obligation to update the regulation, ephemeral programmes); and authority (command and control instruments) to co-regulation (negotiation with stakeholders).

Needless to say that these significant changes are seriously undermining the foundations of modern law (*e.g.*, hierarchy between legislative and executive norms, autonomy of the legal system, identity of the legal subject).

4 Environmental principles represent the interface between modern law and post modern law

Whilst modern law is devoid of precise objectives, contemporary laws are goal-oriented. Hence, most environmental international agreements and national environmental codes are characterised not only by the proclamation of legal objectives, but also by the embodiment of principles (precaution, prevention, the polluter-pays, sustainability, substitution, self-sufficiency, proximity, integration, participation, reduction of pollution at source, cooperation, stand-still) meant to set various social and political actors in motion.

Compared to other legal disciplines, environmental law is a prime example of a goal-oriented discipline, marked by the presence of an array of principles. For instance, from their origins as vague political slogans, the principles of the polluter-pays, prevention and precaution have been recently incorporated into different legal instruments, ranging from the 1998 Swedish and the 2000 French environmental codes to more sophisticated protocols. By contrast to other chapters of the EC Treaty, the environmental chapter (Title XIX) lists at least five principles (prevention, precaution, polluter-pays, rectification at source, high level of protection), some having decisive influence on some hard case rulings by the CFI and the ECJ.¹⁶ In the process of codifying their national laws, national lawmakers set forth principles that are already embedded in international agreements.

Those principles are strikingly different from the General Principles of Law that we described above. While the latter are applied by the courts through an

¹⁶ N. de Sadeleer, *op. cit.* note 1, pp. 119-124.

induction process, the former have been set forth in statute provisions, with a view to be applied by public authorities.

The presence of those principles in both soft and hard law is due precisely to the fact that environmental law is more strongly characterised by post-modern elements than any other legal disciplines. In particular, the polluter-pays, preventive and precautionary principles are emblematic of the functions that principles must assume in the context of post-modern law that stresses flexibility, adaptability and pluralism. First and foremost, by openly proclaiming new orientations, these directing principles enrich the formulation and implementation of environment law by State authorities within a post-modern perspective. In other words, they can stimulate new public policies (section 4.1). By more clearly defining the limits, within which public administrations exercise their discretionary powers, these principles provide authorities with a more coherent orientation and consequently legitimise their actions (section 4.2). By freeing courts from the constraint of an overly literal interpretation of texts, they have also an interpretative function (section 4.3). Finally, we will see that these principles may play a determining role in balancing interests – an activity which plays an important part in post-modern law – by helping courts to understand the specific value of environmental protection measures (section 4.4). As a result, those principles are highly characteristic of post-modern law.

4.1 Enabling function

Principles are never sufficient on their own. The lawmaker cannot merely set forth principles in the form of a wish list without engaging in concrete legislative revisions. Rather, he must legislate area by area, procedure by procedure – in order to give full expression to those principles.¹⁷

Therefore, principles are in the first instance meant to enable the legislator, who must breathe life into them by adopting specific implementing laws. At the national level, the lawmaker then implements the principles through specific legislation. The same is true for international environment law, with protocols being guided by the basic principles set out in framework conventions. In EC law, several directives and regulations are deemed to implement the various principles set out in Article 174(2) of the EC Treaty. For instance, when there is uncertainty as to the existence or extent of risks to human health, the precautionary principle enables EC institutions to take protective measures ‘without having to wait until the reality and seriousness of those risks become fully apparent’.¹⁸ In addition, the principle of integration plays an important role in

¹⁷ N. de Sadeleer, *Les principes du polluer-payeur, de prévention et de précaution*, Bruylant, Brussels, (1999).

¹⁸ Case C-157/96, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte National Farmers' Union of Great Britain*, [1998] ECR I-2267.

the choice of the proper legal basis of environmental measures.¹⁹ Last but not least, this enabling function can justify encroachments on fundamental rights such as the right of property.²⁰ For instance, the polluter-pays principle, which requires the abatement of nitrates produced by intensive farming activities, can justify encroachment on property rights, in so far as the interference is not disproportionate or intolerable.²¹ By the same token, the precautionary principle has been recognised as a justification under Article 30 of the EC Treaty with a view to restricting fundamental rights to trade freely, chemicals hazardous to human health.²²

In addition, the flexibility of the environmental principles enables rule makers to make less detailed rules.²³ Put another way, principles allow the legislator to achieve economies of scale, thus replacing a *pointilliste* regulatory technique that finds expression through a multitude of detailed rules. Such flexibility has the added advantage of making it easier to adapt rules to changing circumstances, ensuring for the principles, the type of sustained use that more precise and complete rules no longer enjoy. Being malleable, principles do not need to be formally modified when circumstances change. Principles could similarly serve to temper the increase in legal precariousness that typified post-modernity. Malleable and adaptable by nature, those principles function within a long-term perspective absent from more precise rules, which must be formally modified every time circumstances change. Yet while specific rules are continually being modified to conform to changing situations, directing principles remain imperturbable.

4.2 Directing function

When the law-maker proclaims the polluter-pays, preventive and precautionary principles, he is also addressing subordinate administrations: regulatory as well as individual decisions will henceforth be required to conform to the principles set out in the law. These principles will thus serve as guides and signals for the use of discretionary powers by administrative authorities. For instance, Winter points out that principles set forth in Article 174 of the EC

¹⁹ N. Dhondt, *Integration of Environmental Protection into Other EC Policies: Legal Theory and Practice*, Avosetta Series, Europa Law Publishing, Groningen, (2002), p. 170.

²⁰ G. Winter, *Environmental Principles in Community Law*, in J. Jans, *The European Convention and the Future of EC Environmental Law*, Europa Law Publishing, Groningen, (2003), p. 5.

²¹ Case C-293/97, *The Queen v. Secretary of State for the Environment, Minister of Agriculture, Fisheries and Food*, ex parte: *H.A. Standley and Others, D.G.D. Metson and Others*, [1999] ECR I-2603.

²² Case C-473/98, *Kemikalieinspektionen and Toolex Alpha AB*, [2000] ECR I-5702.

²³ N. de Sadeleer, *op. cit.* note 20, p. 302; J. Verschuuren, *Principles of Environmental Law, The Ideal of Sustainable Development and the Role of Principles of International, European and National Environmental Law*, Nomos Verlagsgesellschaft Baden-Baden, (2002), pp. 40 and 124.

Treaty can be attributed a 'directive function'.²⁴ This function entails among others the obligation to handle complex environmental cases comprehensively and not incrementally.²⁵ In my book on Environmental Principles, I have deliberately chosen the term 'directing principles' instead of the usual term 'policy principles' which, in my view, does not convey this particular legal function.

This function is fully justified in the light of postmodern developments explained above. Public authorities increasingly require guidance as they find themselves having to balance interests that demand the use of wide discretionary powers on a daily basis. I will give a few examples. When authorising a project with significant effects on a protected natural area, national authorities must, according to Directive 92/43/EC, balance the 'imperative reasons of overriding public interest' that justify the project against the obligation to prevent irreversible damage to biodiversity. The obligation to use best available technologies under the 96/61/EC IPPC Directive also leads to some weighing of environmental and economic interests. When the European Commission must decide individual requests for exemption from the prohibition on anti-competitive practices under Article 81(3) of the EC Treaty, it should not exempt practices with harmful consequences for the environment; at the same time, it should adopt greater flexibility regarding projects that would be favorable to the environment.

4.3 Interpretative function

Principles can be seen as a link between ideals and rules²⁶ Indeed, principles differ from rules in the sense that the latter can be more easily applied in an individual case. However, administrations and courts alike, can use principles in the process of interpreting statutory rules in concrete cases, especially when those rules are vague and open.²⁷ An interesting example is the differentiation between waste and product, which has been the subject of much heated academic debate as well as litigation in EC law. According to the ECJ, the concept of waste must be interpreted in light of the aim of Directive 75/442/EEC, which is to protect human health and the environment against harmful effects caused by waste. Furthermore, the ECJ has pointed out that, pursuant to Article 174(2) of the EC Treaty, EC policy on the environment is to aim at a high level of protection and must be based, in particular, on the precautionary principle and the principle that preventive action should be taken.²⁸ It follows that the concept of waste cannot be interpreted restrictively.

²⁴ G. Winter, *op. cit.* note 20, p. 11.

²⁵ G. Winter, *ibid.*, pp. 7-8.

²⁶ J. Verschuuren, *op. cit.* note 23, p. 25.

²⁷ J. Verschuuren, *ibid.*, pages 38 and 131.

If it is true that some environmental principles such as the precautionary principle increase the freedom of interpretation enjoyed by the courts, the latter nonetheless remain bound to find solutions in harmony with the spirit of the legal system. Moreover, courts only have recourse to principles such as prevention or precaution when they see the need to make one interpretation prevail over another. In addition, principles are always used in tandem with more precise rules, which serves to reduce the threat of legal uncertainty even further.

4.4 Weighing the conflicting interests

As we have seen above, from the perspective of modern law, both national and international courts fulfill an important role by elaborating general principles of law in order to fill gaps in the legal system. From the perspective of post-modern law, courts certainly have to apply principles set out in legal texts such as framework conventions or framework laws (directing principles) rather than principles derived from case-law (general principles of law). The role of the court is thus shifting from judge-made principles to the implementation of principles recognized by the legislator.

Recourse to these principles is therefore encouraged to the extent that, unlike precise rules, they make it possible for divergent interests to coexist, by providing the flexibility needed for adaptations; they are able to balance all the interests that must be taken into consideration in a given case. Overly precise rules are far too decisive to support multiple public policies liable to contradict each other at every turn. Considering their vagueness, the principles of the polluter-pays, prevention and precaution thus allow courts to weigh and reconcile highly divergent interests with maximum flexibility. Furthermore, by shedding new light on an environmental measure when it comes into conflict with intersecting interests, the environmental principles may serve to tilt the scales more strongly in the direction of environmental protection. In sum, those environmental principles constitute key means by which to mitigate contradictions and antagonisms.

5 Conclusions

Several principles of environmental law mark a shift between modern law, which rests on fixed standards of rule-making and post-modern law, which emphasizes the pragmatic, gradual, unstable, and reversible nature of rules. If in a modern perspective, there has been a long clear distinction between law and the other spheres, this is no longer the case today. From a post-modern perspective, environmental law is more likely to be organized around an array of principles that will provide the basis for conciliating conflicting

nings can be pinpointed at a precise moment of modern history; rather than a complex process built up incrementally as the result of the upheavals that at regular intervals have shaken the order of modern law. In addition, the shift from modernity to post-modernity is not a radical one. Indeed, the two models continue to coexist. Finally, although set out in law, the principles characterising contemporary environmental law, suggest a certain fragility. Even when they are recognized in framework conventions or environmental codes, they are never secure from the forces of circumstance, since nothing prevents the lawmaker from renouncing their use. Similarly, they may at any time be contradicted by the protocols or the regulations intended to put them into effect, because they occupy the same level in the hierarchy of norms. If they were to play a significant role in guiding lawmakers, it would be preferable to set them out at the highest level of the legal order – in the case of Continental legal regimes, the Constitution.

