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Principles of European Environmental Law

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…Chapter 14 – ENVIRONMENTAL PRINCIPLES, MODERN AND POST-MODERN LAW

"**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**.

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.

…**General Principles of Law have been central to modern law. General principles of law have been called upon to fill possible lacunae**.' **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**.

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 repeated uses of State practice as well as opinion juris 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); 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.

3 Post-modern Law

Jean·Francois Lyotard has defined **post-modernity** in his book *The Post-Modern Condition* as 'incredulity toward meta-narratives'? It follows that all metadiscourses, whether in the social or in the natural sciences, are suspected.

… **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 analyzing 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.

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 levels…'

…**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**.

… In addition, **environmental law challenges well· established boundaries between private and public law10 and international and national law11**. It does not have an overall focus or objective. Instead, it has tended to develop III 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' obligations" 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***.

…**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**.

…**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'." **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.

…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**.

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).

…**4 Environmental Principles Represent the Interface Between Modern law and Post-modern Law**

…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.6**

…**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.

…**4.1 Enabling Function**

…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 EU institutions to take protective measures 'without having to wait until the reality and seriousness of those risks become fully apparent'."**

… In addition, **the flexibility of the environmental principles enables rule makers to make less detailed rules. Put another way, principles allow the legislator to achieve economies of scale, thus replacing a pointillist, 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.

…**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.

… **This function is fully justified in the light of post-modern 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***.