

Editorial

The Road to Sustainability: How Environmental Law Can Deal with Complexity and Flexibility

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1. Introduction

This special issue of the Utrecht Law Review focuses on the transition towards a sustainable society and offers six articles that deal with specific legal aspects of the necessary governance towards sustainability. The articles have been written by researchers who participate in the Ius Commune Research School and, more precisely, the Environmental Law Programme and/or the Utrecht University Research Programme entitled ‘The Road to Sustainability’, which takes Resilience, Complexity and Conflict Management as the main focus of its research. In this issue the scope is widened with papers on Corporate Social Responsibility and the payment for water-related ecosystem services, thereby providing a kaleidoscopic overview of the role of the relevant actors, normative principles and instruments that are necessary to deal with complexity, to improve flexibility and resilience and to – in the end – increase sustainability.

2. Pressures and challenges

The physical environment is subjected to increasing pressures resulting from the effects of climate change, population growth and increasing standards of living as well as a corresponding increase in the use of natural resources, a more intensive use of the physical environment, and the continuing loss of biological diversity.

The effects of these pressures are increasingly reflected in the problems and conflicts faced by society, particularly with respect to the allocation and use of natural resources on land and in the oceans, of water, and of the discrepancy between environmental stress and the environmental carrying capacity, also called the ‘environmental usage space’. These developments emphasize the urgent need for the sustainable use of the Earth which must be addressed by the policy of the authorities at the national, European and international level. Moreover, at each of these levels a further differentiation is often required to reflect regional differences. Policy for the physical environment calls for a variety of expertise ranging from technical and scientific knowledge to expertise of an administrative and legal nature. The options to develop new legal instruments are limited by principles of international and European law, the maxim of the rule of law, basic rights, principles of good governance and other policy principles. In addition,

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principles of law for the physical environment may provide motives and arguments for the existence or creation of legal instruments. Examples of such principles are the 'polluter pays' and the 'precautionary' principles.

3. Achieving transition towards a sustainable society

Societal transitions towards sustainability can only be achieved by combining socio-economic and technological innovations with legitimate, effective and efficient governance arrangements. The road towards sustainability is a matter of collective action by both governments and private actors. Governance is a crucial factor to facilitate and stimulate sustainable development and can be described as *a process of interaction between public and/or private actors ultimately aiming at the realization of a sustainable society as a collective goal*. The transformation towards a sustainable society must recognize conflicting values with regard to access to natural resources, the use of new technologies, and the way social and economic development is fostered. The recognition and understanding of the normative aspects of governance arrangements is crucial in making the transition to a sustainable society actually work.

Sustainable development contains major societal challenges, like ensuring human dignity, equality, and welfare; protecting vulnerable ecosystems and cultural heritage; dealing with climate change; stimulating environmentally sound economic developments; realizing the efficient use of energy, water and other resources; and stimulating the use of renewable energy sources and dealing with distributional effects. Governing sustainability is all about finding solutions to achieve these goals and enhancing the resilience of society in coping with environmental and socio-economic disturbances and associated risks. Moreover, governing sustainability is aimed at influencing the main driving forces of sustainability problems, such as technological developments, production and consumption patterns, the misuse of ecosystems and urban, rural and infrastructural land use, taking into account the fact that the intensity of the transitions that are needed can be both fundamental as well as incremental.

4. In search of shared values and a normative framework

Governing sustainability encompasses the complex pursuit among governments, market actors, civil society, NGOs and international organizations of promoting sustainable transition processes taking place at various levels (local, regional, national and international) and affecting different policy sectors (i.e. energy, water, housing, infrastructure, industry and agriculture). These processes are situated within and among multilevel socio-economic and ecological spheres and their future orientation crosses temporal scales. The need to cope with uncertainties in, for example, climate and technological issues is already being debated, but an extended discussion is needed with a focus on the need for shared values and looking for ways to deal with conflicting issues and distributional effects. Uncertainties about complex causal relations, future predictions of global and regional environmental change and society's resilience to adapt are an important stimulus for indecisiveness and hesitation by governing actors. But even complete certainty – if this is at all possible – cannot remove the inherent value conflicts that go hand in hand with the transition to sustainable development, because this requires a reallocation of scarce resources, be it financial, organizational, material or spatial. Vested interests will be harmed by sustainability policies and this negatively affects societal support and implementation processes. Sustainable development requires a fair distribution of burdens, benefits, resources, risks and responsibilities, but is also a highly contested issue of societal transformation. One of the basic needs for a legal framework and the accompanying instruments that can provide guidance on the road towards sustainability is the availability of a normative framework that could guide sustainable development. That would mean understanding and improving the relationship between, on the one hand, human rights, the concept of citizenship (based on rights and duties), principles following from legal systems (like principles of good governance and environmental principles) and, on the other, issues concerning water and climate as well as energy and resources, like access to water, energy and other resources, protection against flooding, food security and supply, dealing with new and uncertain risks (climate, smart materials, ICT) and participation in decision making as well as access to justice

5. A complex mix of actors, policy fields and instruments

The above implies that sustainable development can only be achieved by collaborative and deliberative governance arrangements, having regard to stakeholder participation and partnerships among multiple actors and policy levels. Although it is recognized that these arrangements are considered to be able to deal with the complex, multi-scale, cross-sectoral and long-term aspects of sustainable development, they should be combined with legitimate and efficient state intervention in order to be effective, especially in situations of urgency or the need to protect vulnerable values. In fact, what is needed is a situational mixture of networked, market and hierarchical forms of governance.

Analysing, evaluating and designing interactive governance arrangements for fostering sustainable development are of the utmost importance to facilitate the road towards sustainability. New modes of governance should be developed, focusing on a rebalancing of responsibilities between the several private and public actors which are involved. Relationships between policy levels, policy fields and the role of public and private actors are specifically relevant in sustainable issues. Shifts in the public-private divide may both improve as well as harm further sustainable development, depending on the question of what rationale they are based upon.

6. The shared responsibilities of public and private parties

During the last few years the debate on the responsibilities of private actors for fostering sustainable development has been emerging, because the problem-solving capacity of governments is – as is evident from many legal, policy, and economic studies – somewhat limited. Because a sustainable society is a collective interest, it is necessary to reconsider the role of societal actors and the need for shared responsibilities to enable the transition towards a sustainable society. The question arises what the scope of private responsibilities should be. Some relevant topics in this respect are corporate strategies that integrate sustainability issues in core business, in international value chains and in global trade; the role of NGOs and private actors in improving sustainable behaviour; the role of entrepreneurs in stimulating the use of renewable energies and clean technologies and the role of financial actors and the financial system as a whole in fostering sustainable growth.

7. Improving resilience

Achieving a sustainable society also assumes a resilient society that can cope with new environmental problems and risks and is able to adapt to new circumstances. A changing environment, changing political conceptions with respect to or relating to administrative expenses and regulatory pressure, or new scientific discoveries which highlight the deficiencies of older instruments and principles, all call for the adjustment and modernization of organizational forms, instruments and principles which are central to environmental law. 'Resilience' is concerned with the capacity of the legal system and society to adapt to changing circumstances and the way in which uncertainties are dealt with. This ability to adapt is especially important in environmental law since the use of the environment and its natural resources requires long-term policies. In environmental law it is therefore necessary to take into account any uncertainties regarding future developments such as those related to the effects of climate change. In turn, this requires flexibility on the part of the legal system and in standard setting. However, this immediately raises the question of how such a requirement of flexibility can be reconciled with the requirements of legitimacy and legality. The aim is to achieve a balance between flexibility and legal certainty in order to facilitate adaptive governance that safeguards legitimacy.

Furthermore, the question arises how to cope with complexity in legal and societal issues.

8. Dealing with complexity by improving flexibility?

Complexity is intrinsic in environmental law. Environmental policy is influenced by a range of different actors such as national authorities at different levels, international organizations, and the European

Union, while the actions of non-governmental actors are also able to impact the environment. It is essential to include this complexity of actors in environmental law research because any solution to environmental problems must take into account the needs and competencies of the different actors involved. Within the framework of environmental law actors have access to a wide range of steering instruments including: international agreements, customary international law, decisions of international organizations, regulations and guidelines, national legislation, licensing, enforcement, cooperation agreements, policy rules and commitments, etc. It is also important to use the diversity and complexity of the current range of applicable legal instruments as a line of approach for research since solutions to environmental issues must be realized on the basis of existing and/or new legal instruments. Many of the existing legal instruments may not be able to adequately deal with the novel challenges that go hand in hand with the transition towards sustainability faced by environmental law.

Additionally, the term complexity points towards problems which relate to the fragmentation of areas of competence as well as to geographically overlapping areas of jurisdiction, both between different states as well as within individual states. Complexity also results from the development of multiple norm creation as different actors at different levels adopt rules to regulate multiple and often internally conflicting issues of the physical environment. This complexity is inevitable and is primarily caused by the fact that with so many different actors involved it is difficult to maintain uniformity in the development of norms. A situation where all the different sources of law and policy result in a uniform and coherent message is a practical impossibility. Secondly, complexity is an inherent characteristic of the matters which are subject to regulation such as the protection of the environment and economic development, the management of competing interests in spatial planning decision-making processes, etc.

Although it may not be possible to remove complexity from environmental law, it is important to develop strategies in order to limit and control this complexity. The question therefore arises how environmental law can be developed in a way that it can adequately deal with this *inherent* complexity while avoiding *unnecessary* complexity at the same time. In this context, environmental law research should address questions that arise with respect to multi-level and multi-actor governance, that is to say the interrelations between global, regional, national and local levels as well as those between public and private actors.

9. Dealing with conflicts

Especially when the shift towards sustainability requires a redistribution of resources, conflicts may occur. Therefore conflict management is of the utmost importance, preferably by prevention but if that is not possible, by conflict resolution with adequate remedies. Important areas in the field of environmental law where these questions arise are mitigation and adaptation to climate change, water management, area-based development and protection, the sustainable use and equitable allocation of natural resources, and enforcement and liability.

Measures that have been taken with a view to achieving sustainable development have to compete with opposing interests. Although in the long term such measures actually serve interests such as economic development, housing, tourism and mobility, in the short term these interests are often in conflict with measures which aim to achieve sustainable development. Additional conflicts can arise between different objectives of sustainable development. For example, the improvement of waterworks or the construction of wind farms can conflict with nature conservation and the conservation of the landscape. Conflicts can also result from the so-called 'distributional effects' of policy. This concerns the unequal allocation of environmental usage space, the allocation of emission quotas and water usage, and access to the 'commons' such as areas beyond national jurisdiction, forests, rivers and Antarctica. Furthermore, there has been increasing recognition at the international level in the last few decades that the effective management of the oceans is seriously hampered by the traditional emphasis within the international legal framework on the principles of the freedom of the high seas and flag-state jurisdiction.

Conflicts in environmental law require solutions which can accommodate both the interests that benefit from sustainable development measures (often in the long term) as well as those interests that are impacted negatively by such measures (mostly in the short term). The primacy as regards conflict

prevention and *management* lies with the legislator and the public administrative authorities respectively. The potential to shift this responsibility from public authorities to the private sector and other actors in society is one of the challenges that go with the development towards a sustainable society. The responsibility for conflict *resolution* is chiefly assigned to the courts. The need to improve dispute resolution in environmental law is considerable. Society is dissatisfied with the effects of the broader role of the administrative courts and this has led to attempts to improve the role of the courts concerning environmental law.

10. The content of this issue

On 24 November 2011 an environmental law workshop of the Ius Commune conference was organised on the theme of 'Complexity and Flexibility in Environmental Law'. Some of the papers presented at this conference are now published in this issue of the Utrecht Law Review.

Environmental law is becoming more and more complex. The amount of environmental legislation has expanded enormously over the past decades, and still new regulation comes into force. This is caused, amongst other things, by new environmental problems and risks like climate change, new substances and the need to deal with environmental damage.

The complexity of the current environmental law system may lead to ineffective environmental protection, the frustration and impracticability of economic developments and to an aversion to environmental law as a whole. A legal system that becomes incomprehensible loses its legitimacy. Member States and local and regional authorities therefore request more flexibility when applying environmental law, because it enables them to take local circumstances into account. Several solutions have been developed during the past few years and also existing instruments may help in reducing complexity and may provide for more flexibility, taking diverse points of departure to look at the problem at stake.

The papers in this special issue aim to contribute to answering the following research question, of course all dealing with only a small part thereof: 'How can law contribute to sustainable development in a manner that combines the protection of the environment and natural resources, and the preservation of biodiversity with innovation and economic development while ensuring that the inherent complexity and the way in which uncertainties are dealt with do not impede the necessary resilience and adaptive capacity of the social and ecological system?'

A general departure is taken in the first paper, discussing the development of a unified system of *lex specialis* principles in international climate law by Teresa Thorp. Principles offer not only a normative framework but can also play a guiding role when uncertain or still unknown developments are at stake or in situations of a highly complex nature. Therefore they are regarded as a useful assistance to offer flexibility.

The second paper written by Andrea Keessen and Marleen van Rijswick takes as its starting point the need for adaptive governance in the field of water law, with special attention to the situation where there is a need to deal with the effects of climate change.

The role that multinationals play on the road towards a sustainable society can be improved by Corporate Social Responsibility (CSR), a promising concept that is investigated by Cristina Cedillo Torres, Mercedes Garcia-French, Rosemarie Hordijk, Kim Nguyen and Lana Olup. They focus on the reporting obligations of four multinationals with special attention to conflict situations concerning social and environmental CSR standards.

In Dutch environmental law the most discussed and by many environmental lawyers regarded as the most promising adaptive and flexible instrument at the moment is what is called 'the programmatic approach'. It is regarded as a flexible but also a complex tool to achieve environmental quality standards. Marlon Boeve and Berthy van den Broek discuss the main pros and cons of this new environmental law instrument.

In the last decade increasing attention has also been given to the role of economic instruments in environmental law. The scope of the 'polluter pays principle' is broadened towards payment for ecosystem services. The article by Petra Lindhout discusses the necessary broadening of the scope of the cost recovery principle of the Water Framework to enable the application of payment for ecosystems in

the field of European water law. Liping Dai compares the EU legal system of cost recovery in the field of water management with the way the costs of water services are recovered in the People's Republic of China.