

Introduction to Environmental Law

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PREFACE

I should especially like to thank my colleagues for their unflagging and invaluable encouragement, as well as their practical help; They checked the manuscript and proofs and also pointed out anything ambiguous or unclear; without their help this book would not have been completed. I am particularly grateful to my husband, Fahmi Supomo, and my beloved daughter and sons for their love, encouragement, and support.

This book, entitled "*Introduction to Environmental Law*" has purpose to provide initial previews for the general reader, law scholar or students of faculty of law. The book divides into five chapters introduced general understandings of environmental aspects in legal science.

Any remaining deficiencies in this book are of course entirely my responsibility. I have not given precise references for quotations in the book, thinking them inappropriate in work of this kind. However, I direct the readers' attention to the extensive corrections for this book. Finally, it is my expectation that this book is beneficial to the readers.

Indonesia, 11st August 2017

Regards, Authors

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CHAPTER ONE: DEFINING THE ENVIRONMENT

Its Original Meaning

The origin of the word environment itself are French. These indicate a geographical connection. Perhaps for these reasons it has been suggested that “in its most general sense the word environment refers to the area that surrounds or circumscribes human or non-human being”¹ The reference to area suggests a locational restriction and this may be physical or biological. Yet the restriction upon the location is very much a matter of circumstances. In recent years, however, the meaning of the word has expanded to include a wide range of relationships within a system. In other words:²

The environment thus is now considered to be an organised, dynamic, and evolving system of natural (ie physical, chemical, biological) and human (ie economic, political, social and cultural) factors in which living organisms operate or human activities take place, and which has a direct or indirect, immediate or long term effect or influence on

¹ J.G.Vaillancourt, “Environment” in Robert Paehlke (ed), “Conservation and Environmentalism: an Encyclopaedia” (New York and London, Garland Publishing, 1995), page: 217.

² D. Fisher, MA., LLB., PhD, Australian Environmental Law, Thomson Lawbook Co., page:2.

those living beings or on human actions at a given time and in a circumscribed area.³

It has been argued that this extended meaning is so general and so imprecise as to be of little use - certainly for a discipline such as law which seeks to embrace certainty and precision.⁴ Although the word is general - deliberately so - this has not prevented its use and application in myriad sets of circumstances.

There are other words that are close to synonyms for environment in this wide sense. For example, nature. More importantly, there are the three words with one common element: ecosystem, ecology and economy. The common element is *oikos*: the Greek word for house. House has a locational connotation but its use in the English language has in practice been extended beyond that. It is thus similar to environment. However, it is the original meaning of these words that is significant. Ecosystem, again in a wider and strictly inaccurate sense, describes the extended and non-locational or non-specific concept of environment. Ecology is the study of animals and plants leading to knowledge about them. Economy is

³ J.G.Vaillancourt (1995), *op.cit.*, page: 218.

⁴ See also the discussion about "fragile values" in I.H. Tribes, "Ways not to think about plastic trees: new foundations for environmental law" (1974) 83 Yale Law Journal 1315, page: 1317-1322.

the management of a household or in more contemporary usage the stewardship of resources. What is important about all of these words, including environment itself, is that they are intrinsically neutral in the sense that they are descriptive rather than normative. In other words they are devoid of values.⁵

Its Contemporary Meaning

Contemporary usage is somewhat different. Arguably the adjectives environmental and economic contain within them statements, perhaps implied, of a value. Indeed environmental factors are often distinguished from economic factors and these are often seen to be, at least, potentially in conflict with each other. This causes problems for the law simply because the functions of a legal system include the setting of standards and the recognition and protection of values. While these values may be described for certain purposes as environmental, this has the effect of ascribing to the word environment a quality that is not intrinsically there. Much then depends upon the words used in a legal system about the environment. If it is one of the functions of a legal system to set values, then these values are a reflection of the

⁵ David Farrier, Rosemary Lyster, Linda Pearson, Zada Lipman, "The Environmental Law Handbook (Third Edition)", Redfern Legal Centre Publishing, page: 1-2.

priorities of society at any given moment of time. And these vary enormously from generation to generation. Some societies have seen the environment as a resource to promote the material well-being of that community. Other societies have perceived the environment as a source of spiritual fulfilment. In a sense, therefore, the history of the environment has been a dialectic of human values. Indeed, as Max Nicholson has written:⁶

Man has emerged from an animal to a human state largely through an age long, often unspoken, dialogue and a running struggle with his natural environment. That environment cannot be regarded as just an external framework, still less as the mere backdrop of city imaginations. Its pressures and its challenges have become built into man's bodily and emotional make up.⁷

And it was Rachel Carson who a few years earlier had drawn specific attention to the damage caused to ecosystems by human activities:

During the past quarter-century this power has not only increased to one of disturbing magnitude but it has changed in character. The most alarming of all man's assaults upon the environment is the contamination of air, earth, rivers, and sea

⁶ D. Fisher, MA., LLB., PhD, Australian Environmental Law, Thomson Lawbook Co., page: 3.

⁷ Max Nicholson, *"The Environmental Revolution"*, (Harmondsworth, Penguin, 1972), page: 21.

with dangerous and even lethal materials. This pollution is for the most part irrecoverable, the chain of evil it initiates not only in the world that must support life but in living tissues is for the most part irreversible.⁸

Statements such as these clearly ascribe value to the environment. Human beings, either as individuals, as groups or as communities, may well respond to these challenges. Some societies have responded through their institutions. Others have not. If the recognition and protection of values are to be enforced or sanctioned, then society must create institutions and mechanisms – however informal – to do so. Clearly one of these is law. But what are its functions in relation to this?

The environment is by no means always in its natural state when questions about its use arise. At one extreme we may be confronted with issues about whether a rainforest should be logged or whether natural bushland should be mined or cleared for agriculture. At the other extreme, however, we may already have made such a major impact on the land that its status as natural environment has become secondary. Where land has already been built upon or farmed, its natural character has been displaced ~~by the creations of human beings~~. In these circumstances,
⁸ Rachel Carson, *"Silent Spring"*, (Harmondsworth, Penguin, 1965), page: 23.

the issue which frequently presents itself is whether one form of human activity should replace another. In essence, the dispute remains about appropriate land use. In practice, it is impossible to draw a dividing line between these poles of “natural” and “developed” so as to confine environmental law to rules regulating the environment in its natural state. In the first place, there would be problems in defining what we mean by “natural”, given that our air, land and water have all been subjected to varying degrees of human interference.

Secondly, even in situations where the issue involves a change of use of part of the environment which has already been modified out of recognition by human activity, there are opportunities for mitigating the impact of human beings. In fact, this is the main objective of environmental laws regulating air and water pollution.⁹

Integrating Development and The Environment

Attempts have been made to give the concept of sustainable development greater precision and to make it a more useful tool in legal contexts. *The Protection of the Environment Administration Act 1991* (PROTEA) set up the *Environment Protection Authority (EPA)* and

⁹ David Farrier, et.al., 2004, *op.cit.*, page:4.

provided that, in pursuing its objective of protecting, restoring and enhancing the quality of the environment of New South Wales, the authority should have “regard to the need to maintain ecologically sustainable development” (PROTEA s.6(1)(a)). This is said to require “the effective integration of economic and environmental considerations in decision-making processes”. The principles which can assist in its achievement were amended in 1997 and include (PROTEA s.6(2)):

- (a) The precautionary principle – namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public, and private decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
- (ii) an assessment of the risk-weighted consequences of various options,

- (b) inter-generational equity - namely, that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations,
- (c) conservation of biological diversity and ecological integrity - namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
- (d) improved valuation, pricing and incentive mechanisms-namely, that environmental factors should be included in the valuation of assets and services, such as:
 - (i) polluter pays - that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
 - (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,

- (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.¹⁰

Anthropocentric or ecocentric law

The perspective presented by the law has been quite clearly human-centred or “anthropocentric”. Instead of looking at the natural environment as having value in its own right, we have looked at it from the point of view of human beings. Prior to a 1997 amendment to the EPAA, “environment” was defined as including “all aspects of the surroundings of man whether affecting him as an individual or in his social grouping”.¹¹

The problem with the human-centred approach to the natural environment is that it leads to an irresistible temptation to view it simply as a resource to be used for our benefit. Decisions are made on the basis of what is

¹⁰ David Farrier, et.al., 2004, *op.cit.*, page:6.

¹¹ *Ibid*, page:14.

good for people rather than what is good for the natural environment, with the latter becoming a means to an end rather than an end in itself.

Perhaps this is inevitable given that it is human beings who make the law and the decisions. No matter how motivated the human decision-maker is to give some kind of equal status to the integrity of the natural environment, we cannot avoid the fact that a human interpretation of the needs of the natural world will prevail. Yet perhaps we should still strive towards a respect for the natural environment as an end in itself by at least attempting to give it an independent status.

More recently, there have been attempts to modify the anthropocentric focus of environmental law. The new definition of “environment” in the PROTEA and the enactment of legislation like the *Threatened Species Conservation Act 1995*, which seeks to protect ecological communities, and the critical habitat of threatened species are the result of a changing consciousness about the interconnectedness of all living species and systems, encapsulated in a concern for the conservation of biological diversity.

This change in emphasis, however, can also be justified in terms of the future interest of human beings. For example, restrictions on certain developments can be justified in terms of the need to preserve plants whose pharmacological properties have not yet been identified. Similarly, there are ecological processes, many of them still poorly understood, which provide ecosystem services (such as water purification and soil fertilisation) upon which humans ultimately depend and indirectly benefit.

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GLOSSARY

Catastrophic

A sudden event that causes very great trouble or destruction

Encapsulated

To express or show the most important facts of something

Jurisdiction

The authority of an official organization to make and deal with especially legal decisions

Liabilities

The fact that someone is legally responsible for something

Precautionary

An action that is done to prevent something unpleasant or dangerous happening

Stewardship

Someone's stewardship of something is the way in which that person controls or organizes it. .

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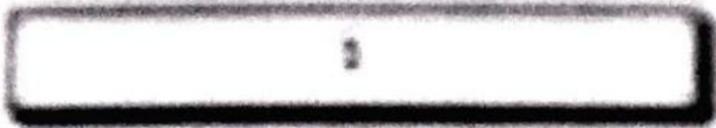
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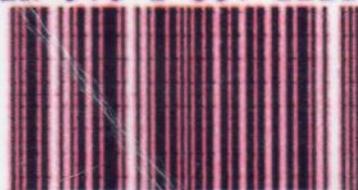


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ISBN 978-1-387-22219-3



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