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Competing Values in Environmental Law and Politics

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Abstract

Climate change poses significant political and legal challenges, sitting above all those challenges is the necessity of finding a means of reconciling the conflict between disparate values attached to the environment in the face of climate change. This paper takes up Blake Ratner's (2004) application of Weberian typology of 'value spheres and collective rationality' to interrogate how this conflict might be addressed in terms of the principles of sustainable development. It examines how the courts have employed key principles of sustainable development - such as the precautionary approach to decision-making and the ethical imperatives involved in promoting intergenerational equity – as points of dialogue to resolve disputes and facilitate decision making over issues such as the responsibility to mitigate green house gas emissions or the legal obligation to anticipate and adapt to the probable impact of climate change. Of special interest to this discussion is the growth of a certain style of pragmatism fostered by sustainability and the manner in which it mediates conflicting environmental values.

Keywords

Sustainability, environment, climate change, values, pragmatism, collective rationality, precaution, intergenerational equity

Climate change poses a set of quite unique dilemmas about which there is significant dispute (Hulme 2009), including: the global and cumulative effect of anthropogenic greenhouse gas emissions, uncertainty surrounding the timing and extent of climate change impacts, and the disproportionate consequences of climate change for some communities over others. The polarizing nature of these disputes poses significant political and legal challenges (Prins and Rayner 2007), sitting above all those challenges is the necessity of finding a means of reconciling the conflict between disparate values attached to the environment in the face of climate change. Blake Ratner, taking up Weber's categorization of 'value spheres and collective rationality' to interrogate how this conflict might be addressed proposes that, 'Even in an increasingly polarized climate of global policy-making, the ideal of "sustainable development" retains currency across a remarkably broad swath of the political spectrum in debating alternative scenarios for the future' (2004: 50).

Agreeing with this proposition, this paper examines, from a sociological rather than a strictly legal or strictly political perspective, how the principles of sustainable development, which were first framed in the 1980s to reconcile environmental protection and economic development, do indeed have a new political and legal currency in the disputed and uncertain context of climate change. Key principles of sustainable development - such as the precautionary approach to decision-making and the ethical imperatives involved in promoting intergenerational equity - have been taken up (and are still being taken up) by the courts as points of, what Ratner (2004: 51) terms, a 'dialogue of values' to resolve disputes and facilitate decision making over issues such as the responsibility to mitigate green house gas emissions or the legal obligation to anticipate and adapt to the probable impact of climate change. Of special interest to this discussion is the growth of a certain style of pragmatism

fostered by sustainability and the manner in which it mediates conflicting environmental values.

Sustainability is multidimensional, 'it recognizes ecosystem integrity as fundamental to the productive activities on which human society and economy depend, acknowledges ecological limits to growth in the consumption of resources, and assumes that the distinct goals of sustainability sometimes converge in practice and other times require difficult trade-offs' (Ratner 2004: 53-4). Its multidimensional character is often criticized as the very feature that makes it impractical to implement (Coyle and Morrow 2004: 203). But Ratner contends that if sustainability is conceptualized in multidimensional terms, 'not as a fixed end but as a dialogue of values' it offers a means of negotiating the conflict and consequent inaction on climate change (2004: 51). Sustainability conceptualized in this way provides a Weberian realm of decision making and social action (Ratner 2004: 56, Weber 1947).

The term 'environment' does not simply describe a place or group of organisms. As Douglas Fisher observes, it also contains and promotes 'a value' (2003: 24, see also O'Neill 1997). From its emergence as an object of social, scientific, political and legal attention in the late nineteenth and across the twentieth century, the environment has been associated with some cherished values. Some of these values are perfectionist in character— such as those aesthetic values of the beauty of nature promoted in the nineteenth century, based as they were on the idea of perfect nature and perfectible humans (whether in the image of perfect God or not). Other values are much less perfectionist – such the scientific value of accurate knowledge of nature, which actually relies on the pragmatic process of falsification, whereby nothing can ever be held to be true for all time; everything must remain open to challenge. Although its

path has been anything but straightforward, this always-uneasy alliance between perfectionism and pragmatism has come to define what can usefully be called 'modern environmental sensibility', which is now shared to the extent that the protection of the environment is a matter of such widespread public concern that no political party in Australia can afford to ignore it.

In line with this 'uneasy alliance' environmental values are both eco and anthropocentric, though more predominantly the latter. The eco-centric recognizes the equal biocentric value of all species regardless of their 'human uses and interests' (Dryzek 2005: 184). In anthropocentric terms the environment is valued in many senses, not only for its physical resources. The veneration of its wilderness is not only an ecocentric value; care and contemplation of the environment are symbolically powerful ideals, the environment's 'magnificence imparts peace and security' (Pope John Paul II, quoted in Hulme 2009: 151). By the same token, the use of the environment's resources carries obligations of stewardship, veneration of its wilderness, a duty to conserve and sustain, and a duty to protect its diversity for future generations.

On a slightly different track, the environment has also been the vehicle for the expression of diverse political and moral values such as anti-consumerism, anti-industrialism, democratization, and anti-statism. Such concerns probably have their genesis in a number of different periods and a number of different places:

- In the nineteenth century romantic aversion to industrialization, especially when related to the loss of both the rural idyll and wild landscapes of northern England (Worster 1994, Bate 1991)
- In the slightly later birth in the USA of a movement determined to save the ‘wildness’ that was seen to be the ‘salvation of the world’ (Leopold [1949] 1966: 141)
- In the 1970s development of radical environmentalism, whereby the environment became the source of even greater mistrust of economic development and of the state itself (“not against the failure of the state and society to provide for economic growth and material prosperity, but against their all-too-considerable success” [Berger quoted in Hajer 1990: 87]) and
- In the more recent trend by which climate change has become the ‘key narrative within which political issues from the local to the global are framed’ (Hulme 2009: xxiii).

The diverse array of values discussed so far is used to legitimate different aspects of the legal and political attempts to govern the environment, which both the Western world and the developing world have grown accustomed. The function of the concept of sustainable development as first devised in the Brundtland Report *Our Common Future* (1987) was to capture and institutionalize this complex of values under three mutually reinforcing heads of environmental protection, economic growth and social equity (Ratner 2004: 52). Despite significant and ongoing criticism as to its efficacy (Ross-Robertson: 2009; Ratner 2004), the notion of sustainability has come to define the orthodoxy of environmental legal and political governance (Fisher 2003; Hajer 1995; Ratner 2004; Richardson and Wood 2006; Ross-Robertson: 2009)

Because of its cache, the notion of sustainability can be used not just ‘to postulate the ethical foundations of nature conservation and environmental protection’, it can be used ‘to translate these ideologies into a form and substance that are both meaningful and enforceable within a legal [and political] system’ (D. Fisher 2003: 75). Ratner argues that the concept of sustainability supports the implementation of often conflicting values into substantive decision and policy because it brings ‘different notions of good ... into a common field of dispute, dialogue and potential agreement’ (2004: 62). In this way, sustainability is at the heart of the way in which law, politics, the state, business interests, and environmental activists can work jointly, if not always harmoniously, in a bid to protect the environment. Sustainability allows these different forces to adhere to their different values and achieve most of their goals, unhindered by unreasonable perfectionist goals like returning the earth to its pristine natural state or eradicating all impact of climate change.

The paper has now reached the point where it is explaining what it called at the outset ‘a certain style of pragmatism’. Before the environment became a legitimate and mainstream largely bipartisan concern of modern law and politics, in line with what has been said so far, the tension between remaining true to environmental ideals and being able to practically represent and act in the environmental interest had to be resolved. The question remains: how did sustainability become the measure of environmental protection and achieve this pragmatic goal?

In Australia, as in a number of other countries, the idea of sustainable development was taken up in the 1990s, by both governments and activists, as a means of simultaneously acknowledging the centrality of the environment and pragmatically moving beyond the purist agendas that had characterised environmental politics up until that time (Ross-Robertson 2009: 40-42).

Sustainable development, this is to say, became the means by which two opposing priorities of modern government were reconciled: economic development and environmental protection. Maarten Hajer (1995: 95) argues that the discourse of environmental sustainability effectively adopted an 'alternative and conceptual language', one which was able to marginalize more radical environmental agendas and allow government, business, and activists to work towards pragmatic, technical solutions to environmental problems, thereby pushing 'confrontational' environmental politics into the background.

Sustainable development, in other words, was slowly transformed from a highly contested ideal into the accepted orthodoxy informing contemporary environmental governance at national and international levels (Hajer 1995: 101; Richardson and Wood 2006: 13-14).

While its efficacy has never been proven, sustainable development is able to do what it does because it has been able to situate the environment as both a global icon and a local resource at many different levels, allowing it to treat economic growth and environmental protection as compatible objectives. Sustainable development is thus a means of justifying and directing the course of present development *and* an ongoing process intended to guarantee the sustainability of the natural environment into the future (Coyle and Morrow 2004: 205).

Sustainable development, to put it yet another way, marks an approach to environmental decision making that is ethically as well as practically oriented; it aspires to maintain and advance economic growth *and* environmental well being, not just for the benefit of people in developed countries but no less so for those in the developing world. As Sean Coyle and Karen Morrow observe, sustainable development is ‘deeply imbued with technological optimism, proceeding on the assumption that science and technology will allow us to ‘enhance the carrying capacity of the resource base’ (2004: 203).

To be more specific the principles of ‘Ecological Sustainable Development’ identified in federal agreements in Australia in 1992¹ include aspirational outcomes (biodiversity and intergenerational equity); market based mechanisms incentives for ecological sustainable development, and more direct legal liabilities to encourage ecological sustainable development (polluter and user pays principles); procedural directions aimed at ecological sustainable development focused decision making (the precautionary principle, integrated decision making in environmental planning) (D. Fisher 2003: 353).

Despite the fact that the key elements of sustainable development can be readily identified – its strength and its weakness (depending upon how one wishes to take it up) – lie in the relative plasticity and context specific nature of each of certain ‘key elements’. Sustainability, this is to say, is context specific, it involves a multiplicity of political and economic considerations such that there can never be total agreement, especially at the international level, as to what counts as environmentally sustainable development. In this context, it is

¹ *Intergovernmental Agreement on the Environment 1992; National Strategy for Ecologically Sustainable Development 1992.*

unsurprising that any consensus on the limits of environmental sustainability, the appropriate forms and tolerable extent of development, and the scope of social obligation envisaged must be continuously renegotiated (Dovers and Connor 2006: 31). But, even this requirement to renegotiate is not necessarily an argument against the pragmatic success of sustainability, as Ratner argues, the ‘currency’ of sustainability for environmental governance is this impetus to enter into a dialogue around the multiple values sustainability represents (2004: 57, 62).

Sustainable development supports the pragmatic agenda of environmental governance because it frames a process or basis for decision making, not because it guarantees certain substantive outcomes (D. Fisher 2003: 354). The principles of ecological sustainable development are now integrated in much of Australia’s environmental legislation, generally as ‘a combination of linked outcomes. Some of those are developmental and others are environmental’, but the actual requirement of ecological sustainable development in a substantive sense is not legislatively mandated (D. Fisher 2003: 370). Indeed, in practical legal terms enforcing a substantive requirement of ecological sustainable development would be very difficult (D. Fisher 2003: 351).

This is not really a problem, as enforcing substantive requirements is not necessarily what effective the government of the environment requires. Indeed, as the Vice-President of the International Court of Justice put the matter in the *Gabcikovo-Nagymaros Project* case:

Both these vital and developing areas of law [the law of development and the law of environment] require, and indeed assume, the existence of a principle which

harmonises both needs. ... Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development (*Judgment in the Case Concerning Gabčíkovo-Nagymaros Project* (1998) 37ILM 162 at 205).

Inasmuch as sustainable development has proved itself so flexible and effective, it is little wonder that it has come to be so important to the disparate legal actions relating to climate change. For example, where the ecological sustainable development ideal of intergenerational equity was once merely an aspiration, litigation initiated in the NSW Land and Environment Court in 2006² brought it to life, forcing the government to take into account the environmental impact of the downstream green house gas emissions which would flow from a proposed mining development. In that litigation the court was persuaded that the principle required the recognition of the ethical and social consequences of anthropogenic global warming (Bonyhady 2007: 20).

Similarly, the limits of accurately predicting the impact of climate change invited the Victorian Civil and Administrative Tribunal (VCAT) to adopt a precautionary approach in its decision making (another key principle of sustainability), in a series of coastal planning cases in 2008 and 2009³. In that litigation proposals for development on the Gippsland coast, were

² *Gray v Minister for Planning* [2006] NSWLEC 720

³ *Gippsland Coastal Board v South Gippsland Shire Council (No. 2)* [2008] VCAT 1545; *Myers v South Gippsland Shire Council* [2009] VCAT 1022; *Myers v South Gippsland Shire Council (No. 2)* [2009] VCAT 2414; *Tauschke v East Gippsland Shire Council* [2009] VCAT 2231 at 42.

challenged on the basis that the proposed development would potentially be threatened by climate change induced sea level rise and tidal inundation. While the precautionary approach ‘does not direct a particular outcome to occur ... it regulates reasons for a decision and the process by which a decision is made’ (E. Fisher 2007: 41), in these cases the principle became the impetus for the emergence of a workable narrative that transformed doubt about the extent of climate change impact on the coast line into possible certainty (de Sadeleer 2002: 222). The risk of legal liability coupled with the VCAT’s insistence on the commonsense of a precautionary approach, effectively rendered the uncertainty attaching to predicted adverse effects of climate change otiose – the possible became, for legal and policy purposes, the probable.

In this climate change litigation, the principles of sustainable development have come to work in combination to provide a normative basis for the legal recognition of the need to mitigate and take adaptive action to prevent irreversible damage in the name of future social and environmental wellbeing. Significantly, invoking principles of ecologically sustainable development extends the scope of the environmental law to incorporate the longer term and geographically more extensive, impacts of greenhouse gas emissions and climate change (D. Fisher 2007: 217).

Legal commentators such as Douglas Fisher highlight the ways in which sustainability has become ‘the fulcrum around which environmental law is evolving’ and allowed ‘environmental law to adopt new approaches and new mechanisms’ (2003: 6). From a sociological perspective its success as an instrument of law and politics lies in its capacity to

offer a point of dialogue for the reconciliation of competing values without compromising the ability of law and politics to effectively govern the environment.

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