

Introduction to a research agenda for environmental law

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Introduction to *A Research Agenda for Environmental Law*

Josephine van Zeben and Chris Hilson

How does environmental law relate to environmental realities? The answer to this question – which is central to this research agenda as well as to environmental law more generally – may seem obvious and clear cut: surely the aim of environmental law is precisely to manage environmental realities? However, when we consider the development of environmental law over time, a bidirectional relationship between environmental law and our environment emerges: as environmental realities, and increasingly crises, shape the agenda of environmental law, so too has the agenda and development of environmental law shaped our environment (albeit not always as intended).

The intention to shape the environment through law is exemplified by the important theoretical step towards the adoption of a legal concept of ‘the environment’ in the 1960s and 1970s. Early examples of what legally constituted ‘the environment’ can be found in the Malaysian Environmental Quality Act of 1974, which reads “environment” means the physical factors of the surroundings of the human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics.¹ By way of comparison, the United Kingdom (UK) did not include any reference to the concept of ‘environment’ until 1990. The UK Environmental Protection Act 1990 states that “[t]he “environment” consists of all, or any, of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground.”² The more recent UK Environment Act 2021 notably refers to the ‘natural environment’ which is defined as ‘(a) plants, wild animals and other living organisms, (b) their habitats, (c) land (except buildings or other structures), air and water, and

¹ Environmental Quality Act 1974, s 2.

² Environmental Protection Act 1990, s 1(2).

the natural systems, cycles and processes through which they interact'.³ The European Union has defined the environment as 'the combination of elements whose complex interrelationships make up the settings, the surroundings and the conditions of life of the individual and of society, as they are or as they are felt'.⁴

A common thread in these legal definitions is their embedding of an understanding of ecological interconnectedness to justify recognizing and addressing the quality of the human living environment as a distinctive and important legal goal. Prior to the conceptualization of the environment as a legal (ly relevant) concept, environmental quality was addressed (if and when it was addressed) through a patchwork of legal approaches, relying upon areas such as property and tort law. These legal areas were designed with different, non-environmental, goals in mind and therefore had few, if any, mechanisms for dealing with diffuse, complex and multicausal injury to nonhuman species or entities.⁵

Against this backdrop, this Volume understands the mandate of environmental law as the regulation of human behavior in light of its impacts on the surroundings or conditions in which humans, plants, and animals function.⁶ This includes regulating behavior with a view to preventing certain harmful impacts, such as climate change mitigation policies, as well as regulating behavior that is aimed at rectifying existing harm, for example through nature restoration efforts. This characterization is not without controversy, but is adopted here to emphasize environmental law's historically anthropocentric focus and outlook,⁷ which tends to prioritize human interests, and environmental law's functional limits: while law has had (limited) success in changing human behavior, it cannot change ecological processes, except through human intervention.

³ Environment Act 2021, s 44.

⁴ European Environment Agency, 'environment' www.eea.europa.eu/help/glossary/gemet-environmental-thesaurus/environment.

⁵ Josephine van Zeben and Arden Rowell, *A Guide to EU Environmental Law* (University of California Press 2021) 4.

⁶ Ibid.

⁷ This focus may, and/or should, be shifting as discussed in subsequent chapters. See Epstein, 'The Rights of Nature and Environmental Law: A Developing Relationship', ch 3 in this Volume; and Lansink, 'Animal Rights and Environmental Law', ch 4 in this Volume.

Notwithstanding these inherent limitations, the creation of environmental law as a scholarly field and area of practice has been a meaningful step forward in law and for the environment. Environmental law has generated extraordinary success whenever it has managed to align legal approach, social conditions, research and technology. At its best, environmental law has produced some of the most impactful and rewarding policies that humans have ever developed: identifying and addressing the hole in the Earth's ozone layer;⁸ saving tens of millions of lives from air pollution;⁹ and preserving tens of thousands of priceless natural places and some of the world's most treasured species.¹⁰ Despite these successes, environmental law has not been able to prevent the widescale degradation and pollution of our environment,¹¹ nor the profound changes to our climate that have started to manifest themselves.¹²

Our changing environmental reality has profound implications, two of which are particularly relevant for environmental law. First, the scale and severity of the current environmental shifts are such that awareness of the need to address environmental impacts has spread beyond the boundaries of environmental law to include other legal fields, such as corporate, tax, and human rights law. This opens the door to more interdisciplinary collaboration between legal fields but also forces environmental law to become more proactive about its goals, methods and position.

Second, in the bidirectional relationship between environment and environmental law, the current ecological crisis is forcing environmental lawyers to consider their normative position. Our legal environmental responses are

⁸ Stephen Andersen, Marcel Halberstadt and Nathan Borgford-Parnell, 'Stratospheric Ozone, Global Warming, and the Principle of Unintended Consequences – An Ongoing Science and Policy Success Story' (2013) 63 *Journal of the Air & Waste Management Association* 607.

⁹ Peringe Grennfelt and others, 'Acid Rain and Air Pollution: 50 Years of Progress in Environmental Science and Policy' (2019) 49 *Ambio* 849.

¹⁰ Tanya Tran, Natalie Ban and Jonaki Bhattacharyya, 'A Review of Successes, Challenges, and Lessons From Indigenous Protected and Conserved Areas' (2020) 241 *Biological Conservation* 108271.

¹¹ See e.g., Edwin Alblas and Josephine van Zeben, "'Farming Out" Biodiversity: Implementing EU Nature Law Through Agri-Environmental Schemes' (2023) 17 *Earth System Governance* 100180 (noting how the success of EU nature conservation law has been limited, in part due to its poor reach over agricultural land which has been the source of major declines in biodiversity).

¹² Josephine van Zeben and Arden Rowell, 'Environmental Law Beyond Emergencies: Lessons from the Future' (forthcoming).

partly based on normative choices about what a good environment would look like, and are informed by historical, natural, cultural, and political conditions that tend to vary widely within and between countries. While the mandate of ‘regulating human behavior in light of its environmental impacts’ is normatively neutral, the reality/practice of environmental law is laden with normative decisions related to ever-more fraught trade-offs that even the most technically oriented environmental law scholars will have difficulty avoiding.

Finally, environmental legal scholarship is also shaped by its own ecosystem. The need to create innovative, ‘relevant’ scholarship that is potentially suited for a broad legal audience is particularly felt by early career researchers and, together with funding opportunities, is a powerful force in shaping research agendas.¹³ In this Volume, we have tried to take a step back from these influences and reflect on what developments seem the most formative for environmental law as a field of practice – in other words, developments that we believe might have implications for environmental law in an applied manner. Based on the discussions in the Volume, the concluding Chapter 21 will reflect on what these developments mean for environmental law as a scholarly discipline.

The Volume is divided into three Parts. Part I explores six *ways of thinking about* environmental law that we believe are shaping, and will continue to shape, the field in meaningful ways. Some of these perspectives have been developing over the past decade (for example, environmental law in the Anthropocene),¹⁴ while others are yet to be fully conceptualized (e.g. regenerative thinking,¹⁵ and the relationship between private law and environmental law).¹⁶ In addition, this Part invites readers to start considering the connection

¹³ See e.g., Chris Hilson, ‘Trends in Environmental Law Scholarship: Marketisation, Globalisation, Polarisation, and Digitalisation’ (2023) 35 *Journal of Environmental Law* 21, 35.

¹⁴ See Barritt, ‘The Drama of the Anthropocene: Despair and Hope in Legal Scholarship’, ch 2 in this Volume.

¹⁵ See Hilson and Savaresi, ‘Regenerative Approaches and Environmental Law: Beyond Sustainability?’, ch 6 in this Volume.

¹⁶ See Bartl and Leone, ‘Polluters Pay and the Double Disembedding: Overcoming the Unholy Relation Between Private Law and Environmental Law “Beyond The State”’, ch 7 in this Volume.

between these new areas of thinking themselves (e.g. between biocultural,¹⁷ animal rights,¹⁸ and the rights of nature¹⁹).

Part II highlights eight developments that shape *environmental law realities*, each of which has important consequences for environmental law's creation, implementation, and application. The contours of some of these realities are already well defined, such as the role and importance of the science-policy interface for environmental law,²⁰ or the continuing importance of litigation within the climate and environmental fields.²¹ Others are developing realities, such as the new articulation of civil society's role in environmental law through climate assemblies,²² as well as legal thinking on corporate responsibility on the environment.²³ But there are also extra-legal developments affecting legal realities, such as the resurgence of discussions regarding sovereignty over natural resources and rare minerals,²⁴ the development of sustainable finance,²⁵ the future of the city,²⁶ and the presence of forever chemicals in our living environment.²⁷ While these new realities do not always necessitate new modes of thinking about environmental law, existing environmental principles, concepts and practices may need to be critically reconsidered.

Parts I and II focus primarily on developments from within or outside environmental law that immediately impact environmental law. In Part III, we move on to explore five broader societal transformations that we expect

¹⁷ See Sajeve, 'Using Biocultural Rights to Rethink Environmental Law through Human Rights', ch 5 in this Volume.

¹⁸ Lansink (n 7).

¹⁹ Epstein (n 7).

²⁰ See Lee, 'Politics and Expertise: New Environmental Targets in English Environmental Law', ch 8 in this Volume.

²¹ See Markey-Towler and Peel, 'Business As (Un)Usual at the Frontiers of Climate Change Litigation', ch 11 in this Volume.

²² See Duvic-Paoli, 'Climate Assemblies: Situating a Legal Experimentation', ch 9 in this Volume.

²³ See Eller, 'Corporate Environmental Due Diligence and Value Chains', ch 12 in this Volume.

²⁴ See Huber, 'The Resurgence of Sovereignty: Environmental Implications and Pathways for Future Research', ch 10 in this Volume.

²⁵ See de Arriba-Sellier, 'Sustainable Finance: Green Taxonomies as Instruments of System Change?', ch 13 in this Volume.

²⁶ See Smit, 'Centring the City in Environmental Law', ch 14 in this Volume.

²⁷ See van Zeven, 'PFAS Are Forever: Regulating Chronic Toxicity in Our Living Environment', ch 15 in this Volume.

will also implicate environmental law, including calls for degrowth,²⁸ efforts to move towards a circular economy,²⁹ managing the relationship between environmental law and technology,³⁰ and attempts at restorative rewilding³¹ and decolonization.³² Many of these societal transformations in Part III will have lasting effects and/or will require permanent regulatory attention to be effectively managed. It is particularly interesting to see how environmental law can, and will, play a role in addressing those transformations that are yet to be completed, or even fully conceptualized. For example, rewilding, degrowth, and circularity are transformations that themselves claim to provide a solution to certain environmental problems. However, how these solutions will take legal form remains largely unclear and underexplored by the existing academic environmental law literature.

With their distinct focuses, we believe that each Part of this Volume provides new agendas for the practice and study of environmental law. These agendas may be grounded in environmental thinking (Part I), developing environmental realities (Part II), or societal transformations (Part III), but the red thread between these parts is the question of what changes environmental law has to make (if any) to respond to these internal and external changes or challenges. We will conclude the Volume with the important task of drawing out interweaving threads between these parts since this is often where the tensions lie that can push environmental law further as an academic field.³³

²⁸ See Davies, 'Degrowth: An Idea for Our Time', ch 16 in this Volume.

²⁹ See Lesniewska, 'Making a Case for Radical Circular Economy Legal Research', ch 17 in this Volume.

³⁰ See Epstein, 'Environmental Law and Technology: A Research Roadmap', ch 18 in this Volume.

³¹ See Fleurke, 'New Approaches in Nature Conservation: The Legal Nexus Between Rewilding and Nature Conservation in the EU', ch 19 in this Volume.

³² See Kodiveri, 'Colonial Legacies and Decolonial Futures: Environmental Law and Indigenous Resistance in India', ch 20 in this Volume.

³³ See van Zeven and Hilson, 'The Futures of Environmental Law', ch 21 in this Volume.