LawExpress

LAW REVISION BESTSELLER
FIND OUT WHY INSIDE & ONLINE
Nielsen Bookscan data 2009–2012 Law Revision Series

> UNDERSTAND QUICKLY
> REVISE EFFECTIVELY
> TAKE EXAMS WITH CONFIDENCE

2nd edition

ENVIRONMENTAL LAW

SIMON SNEDDON

'The leading revision series. Comprehensive, student focused and full of tips and guidance.'
Victoria Murray, Principal Lecturer, Northumbria University

ALWAYS LEARNING

PEARSON

LawExpress

ENVIRONMENTAL LAW

Concepts

Sustainable development

The UNCHE 1972 recognised that there was a link between economic development and environmental protection ('The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world'), but the formal incorporation of the impact had still not been made by 1984, in the UN Resolution on the Charter of Economic Rights and Duties of States (A/RES/39/163).

In 1983 (A/RES/38/161), the UN convened the World Commission on Environment and Development (WCED, generally known as the Brundtland Commission). The commission reported in 1987 ('Our Common Future' or 'The Brundtland Report'), and the report pointed to the need to ensure sustainable development (SD) to provide mechanisms to increase international cooperation.

KEY DEFINITION: Sustainable development (SD)

Development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.

Sustainable development has several advantages as an approach – it considers environmental protection, but with the emphasis on economic and social development. It is also quite pragmatic, since it takes into account needs of the undeveloped and developing world, as well as the potential benefits and problems of technological advances.

Sustainable development has made the transition from a concept of international law (and thus soft law) to hard EU law in a remarkably short period. It was included as Agenda 21 of the UNCED 1992 and was incorporated into the EC Treaty in Article 2 ('a harmonious, balanced and sustainable development of economic activities . . .') and Article 6 ('Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development').

Sustainable development is not as straightforward as it might appear, however. One of its strengths as a soft law concept was that it can mean different things to different people (and so states could sign up to Agenda 21 and interpret the ideas as they wished).

In the UK, SD appears in statute several times, most recently in s. 110 of the Localism Act 2011 ('Duty to co-operate in relation to planning of sustainable development'). It also appears in the outline of the principal aims and objectives of the Environment Agency (s. 4(1) Environment Act 1995).

! Don't be tempted to . . .

Try not to think of SD as being a concrete set of rules that govern activities. Even in statute, the term is not defined consistently (if at all) and it is left to the courts to apply the most suitable definition of SD in any particular case.

The government's approach on SD has been criticised recently, however. The Environmental Audit Committee (see Chapter 4 on enforcement of environmental law) criticised the closure of the Sustainable Development Commission in March 2011, and says that since 2008 'policy on sustainable development has not been overseen by a designated ministerial committee' (EAC, 2011).

Precautionary principle

The precautionary principle, which evolved out of the German *Vorsorgeprinzip* or principle of anticipation through foresight, can be summarised as being 'an approach . . . that is based around taking precautions even if there is no clear evidence of harm or risk of harm from an activity or substance' (Bell, McGillivray and Pedersen, 2013: 68).

As a principle, it is open to a number of interpretations:

- The process or project should be allowed to proceed unless or until it is found to be damaging to the environment.
- The process or project should not be allowed to proceed unless or until it is found not to be damaging to the environment.

These could both be argued to represent the precautionary principle, but will clearly have dramatically different impacts on development.

The precautionary principle appears in EU law in Article 191(2) TFEU as one of the key principles upon which EU environmental policy will be based.

REVISION NOTE

One practical embodiment of the precautionary principle is illustrated in Chapter 5 (on planning) and Chapter 6 (on environmental permitting) as environmental impact assessments, which should be considered alongside the theory.

Polluter pays principle

The polluter pays principle (PPP) is probably one of the most widely recognised of the principles covered here.

KEY DEFINITION: Polluter pays principle (PPP)

The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortion in international trade is the so-called 'polluter pays principle'.

This means that the polluters should bear the expenses of carrying out remediation measures decided by the public authorities (OECD Principle A(a)4, 1974).

Within EU law, the PPP was first mentioned as a principle in the 1st Environmental Action Programme in 1973, and is currently one of the key principles outlined in Article 191 of the TFEU.

Under the PPP, the polluter should pay the costs incurred through polluting activities, either directly or indirectly, using mechanisms such as:

- administration costs for pollution control system (licensing fees which pay for monitoring, for example);
- external costs – for example, landfill (through taxes); or
- clean-up costs (by setting requirements/standards in relation to polluting activity).

EXAM TIP

Remember that large polluters are often multinational corporations, who will often try to offset the burden of paying for their pollution by reducing shareholder dividends, or raising prices. Since it is the shareholders and the customers who drive the corporation's business, could it be argued that even with this offsetting, the polluter is still paying? In other words, don't interpret 'the polluter' too narrowly in your answer.

Human right to a safe and healthy environment

If the three concepts above have evolved into more or less enforceable principles of environmental law, then there are also new concepts emerging that might in future become hard law. Key among these is the argument that certain aspects of the environment are so strongly connected with human rights that to damage the environment is to be in breach of a human right, either under the UDHR or ECHR.

This was brought up in the ECHR cases of *López Ostra* v *Spain* (1994) 20 EHRR 277 (where the state failed to close a polluting factory), *Fadeyeva* v *Russia* (2005) 45 EHRR 295 (where

the state failed to relocate people affected by a noxious steel factory), and *Giacomelli* v *Italy* (2007) 45 EHRR 38 (the state had failed to close a polluting waste treatment plant). All of these cases involved a breach of Article 8 (the right to a family life). To date, only one environmental case has been found to be a breach of Article 2 (the right to life), and that was *Öneryildiz* v *Turkey* [2004] ECHR 657.

KEY CASE

Öneryildiz v *Turkey* (1994) ECHR 657

Concerning: hazardous pursuits; landfill sites; positive obligations; protection of property; right to effective remedy; right to life

Facts

The applicant lived in a slum quarter of Istanbul surrounding a rubbish tip which exploded because of the decomposition of the refuse and killed nine of his relatives. A report showed that the authorities failed to take any measures at the tip in question to prevent an explosion of methane.

Legal principle

The court noted that the regulatory framework applicable in the present case had proved defective in that the tip had been allowed to open and operate and there had been no coherent supervisory system. That situation had been exacerbated by a general policy which had proved powerless in dealing with general town-planning issues and had undoubtedly played a part in the sequence of events leading to the accident. The Court accordingly held that there had been a violation of Article 2.

Whether or not these four cases amount to the beginnings of a new concept of environmental law remains to be seen.

EXAM TIP

Consider what takes an idea from the abstract to concept to principle. At the moment, this is an organic process, but you would impress an examiner with a discussion about whether there should be a more prescriptive approach in developing new principles of law.

Putting it all together

Answer guidelines

See the essay question at the start of the chapter.

Approaching the question

The question asks you to consider the sources of environmental law and the level of impact that each might have. The broad nature of the question allows you to shape it along a direction that best suits your knowledge. You could look at this question in terms of 'environmental law' as a broad, single concept, or make the approach much more specific to one or two particular areas of law, for example, planning law and climate change. You should also spend a little time introducing the potential sources of law covered above.

Important points to include

- What area will you be focusing on?
- What are the sources of law? International/ EU/ domestic/ a combination of all of these? Has the law been developed in this area by the courts? How?
- (How) do they mesh together in relation to the area you have chosen?
- How 'effective' is the law in this area?
- Would this be improved if the law had originated from a different source?
- You might think about a comparison with another area of law here.

✓ Make your answer stand out

Make sure that you distinguish clearly between the different sources that might have impacted on the particular area of law that you are discussing. If it has emerged from soft law, for example, revisit the Blutman–Kaufmann-Kohler–Ellis–Barelli debates above. An analysis of this sort will ensure you get the best marks, whereas merely describing the various sources will not.

READ TO IMPRESS

Barelli, M. (2009) The role of soft law in the international legal system: the case of the United Nations Declaration on the Rights of Indigenous Peoples, *ICLQ* 58(4), 957–83

Barczewski, M. (2011) From hard to soft law: a requisite shift in the International copyright regime, *IIC* 42(1) 40–54

Bell, S., McGillivray, D. and Pedersen, O. (2013) *Environmental Law*, 8th Edn. Oxford: Oxford University Press

Birnie, P., Boyle, A. and Redgewell, C. (2009) *International Law and the Environment*, Oxford: OUP

Blutman, L. (2010) In the trap of a legal metaphor: international soft law, *ICLQ* 59(3), 605–24

Cassese, A. (2004) *International Law*, 2nd Edn. Oxford: Oxford University Press

Castro, C. (2004) Sustainable development: mainstream and critical perspectives, *Organization & Environment* 17(2), June, 195–225

Cook, K. (2010) The right to food and the environment, *Env. L. Rev.* 12(1), 1–11

EAC (2011) Embedding sustainable development across Government, after the Secretary of State's announcement on the future of the Sustainable Development Commission, Volume I, House of Commons Environmental Audit Committee Report HC504, London: TSO

Ellis, J. (2012) Shades of grey: soft law and the validity of public international law, *Leiden Journal of International Law*, 25(2), 313–334

Finch, E. and Fafinski, S. (2012) *Law Express: English Legal System*, Harlow: Pearson

Kaufmann-Kohler, G. (2010) Soft law in international arbitration: codification and normativity, *JIDS* 1(2), 283–99

Kirk, E. (2012) *Law Express: EU Law*, Harlow: Pearson

Morag-Levine, N. (2011) Is precautionary regulation a civil law instrument? Lessons from the history of the Alkali Act, *J. Env. L.* 23(1), 1–43

OECD (1974) *Environment and Economics Guiding Principles Concerning International Economic Aspects of Environmental Policies*, Paris: Organisation for Economic Cooperation and Development

PCA (2011) *About Us*, The Hague: Permanent Court of Arbitration

Vinuales, J. E. (2011) Balancing effectiveness and fairness in the redesign of the climate change regime, *LJIL* 24(1), 223–52

www.pearsoned.co.uk/lawexpress

Go online to access more revision support including quizzes to test your knowledge, sample questions with answer guidelines, podcasts you can download, and more!