Philosophy: Environmental risk and international law

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Elsewhere, [1] I have argued that to create the anticipatory law necessary to regulate environmental risk (ER) requires both a superstructure of positive law in the Precautionary Principle (PP) and a corresponding normative substructure based on the philosophical imperative to protect and empower humanity-in-the-person. This allows us to justify a priori planning and regulatory policy to prevent harm before it occurs. Here, I will specify what such a normative substructure might entail.

What a normative substructure might entail

First, a corresponding normative substructure for PP must be based on intrinsic, not instrumental, values. This is necessary to justify PP as an anticipatory regulative tool that supports policy action before the introduction of ER into the environment. Instrumental value based upon sovereign concerns like power, security, or wealth maximization can only regulate ER after it is introduced into the environment and only then, if its effects can be judged in terms of the base instrumental value employed.

However, there are at least two moral points of origin for the normative substructure of the law. The first and most basic elements evolve from repeated human interactions that breed behavior patterns and set expectations for cooperation and social stability. These social conventions create the terms of social cooperation through the instrumental value of practice and layers of progressive sanctions to ensure the persistence of these practices.

The norms generated by this source define the process of stable social cooperation as the primary instrumental value. Social convention informs the positive law as rules/rights are easily entrenched as necessary to the basic cooperative fabric of society.

By contrast, the second moral foundation for law's normative substructure is transcendent of context and finds its origins in argument from fixed metaphysical principles based on human reason. These aetiological norms do not depend on their social context for legitimacy, but contain their own internal critical standard of validity that is inherently disruptive of social convention in the name of empowering the intrinsic value of humanity/nature.

These critical norms are primarily substantive laws that find their imperative in the freedom or status of humanity-in-the-person, as an end-in-itself, not on the instrumental stability of the social process. The principle in this context is not contextual to a dominant instrumental process-norm but independently based on critical reason and the intrinsic values involved.

ER as a subject of international law

As a subject of international law, ER transcends any state's individual sovereignty or ability to affect the ubiquitous nature of its effects. Transnationally, humanity and nature should be addressed by all levels of government, but first and foremost, at the universal level of law, if we are to have significant results. Given its focus on intrinsic value and its international character, ER policy must be implemented by an authority beyond the state to properly empower PP.

However, ER is traditionally approached within the context of the instrumental value of collective action defined by state sovereignty under the voluntary law of jus dispositivum. Issues like climate change have been categorized as sovereign voluntary law, notably in a series of treaties from Kyoto to Paris. PP has been part of this instrumental codification process, but without attaining the status of holding authority beyond the state.

Consequently, the implementation of PP has been ineffective, and its impact on regulating ER is largely inconsequential. However, if two distinct normative foundations for international law exist, and if the status quo is based on the first instrumental-process alternative, as previously described, then the second foundation is the more appropriate philosophical paradigm for achieving the success of PP.

Since ER involves the intrinsic values of humanity and nature, PP must justify the anticipatory regulation necessary to protect and enhance them. This would require that the PP be built upon a critical-aetiological norm that supersedes the dominance of the instrumental-sovereign order. This category of legal rule is known as a jus cogens principle.

These aetiological principles are based on reason and critical of the instrumental process-base of jus dispositivum. They find their foundation outside the context of sovereignty, and provide authority beyond the state. But currently, PP as ER law is being treated as jus dispositivum. How might it achieve the necessary status for jus cogens?

I argue that this transition is possible since international law is an evolving system that exhibits the progressive codification of rules/rights. An example within the ER law is the Good Neighbor Principle (GNP). Rendered in 1941 due to the Trail Smelter Case, it addressed a transboundary pollution dilemma between Canada and the United States.

The GNP began with the original Trail arbitration as a remedy for a number of other judicial solutions that were not judged to be adequate. These solutions, which included Do Nothing, Monetary Compensation, and Compensation With Mandatory Monitoring, did

not solve the ER problem, nor did they adequately establish a state's obligation to prevent 'transboundary' ER.

Subsequently, GNP progressed from legal principles into treaty law, including the RIO treaty. Next, it advanced from treaty to customary international law through incorporation into the Articles of State Responsibility. At this point, it became applicable to all states regardless of their consent, but progressive codification continued to evolve. Concurrently, other caselaw (Pulp Mills) redefined the GNP to require mandatory environmental impact statements.

Further, its substantive customary duty was enhanced with the mandate to anticipate and prevent transboundary harm other than environmental (Corfu Channel). These cases, and subsequent policy arguments, also identified the PP as a fitting enforcement mechanism for the GNP. This demonstrates that the GNP/PP has been progressively codified past the point of the voluntary law of jus dispositivum. However, they have not been legally recognized as jus cogens with authority beyond the state.

Towards the full transition of PP into jus cogens

The missing step to the full transition of PP into jus cogens law may be in replacing the normative instrumental value-based substructure that was its foundation as jus dispositivum, with the alternative normative substructure of critical principle based on protecting and empowering humanity-in-the-person. Legal argument from this intrinsic value normative substructure should allow the anticipatory character of PP to find its proper place within jus cogens law.

Reference

1. https://www.openaccessgovernment.org/article/philosophy-environmental-risk-policy-and-public-law/186355/

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