THE UNBEARABLE LIGHTNESS OF ENVIRONMENTAL LAW

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FROM FLEXIBLE NORMS TO FLEXIBLE FACTS

STORY THIS FAR: FLEXIBLE NORMS
CASE-STUDY: THE WATER FRAMEWORK DIRECTIVE
FLEXIBLE FACTS

UNCERTAINTY? TO BE CHERISHED!
LEGAL ECOLOGY
ON BALANCING AND SUBSUMPTION

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STORY THIS FAR: FLEXIBLE NORMS

✓ syllogistic argumentation: a norm + a fact → a decision / a ruling

✓ flexible norms? ‘open linguistic expressions’
  · get specified when applied to a concrete case

✓ case law affects to the level of flexibility

✓ envt’l law always been distinctly flexible
  · regulation & interpretation is forward-looking
  · good breeding ground for principles

✓ challenges are: predictability & accountability → rule of law
CASE-STUDY: THE WATER FRAMEWORK DIRECTIVE

✓ adaptive management:
  · managing eternally instead of permitting once
  · a holistic approach
✓ quality status: poor, moderate, good, (excellent)
✓ ‘good quality status’ to be reached by 2015 — Art. 4(1)
  · a legally binding norm or merely a technical provision?
  · Case C-461/13 (still pending)
    ^ Advocate General Jääskinen: also within a status
    ^ the stringent possible stance
CASE-STUDY: THE WATER FRAMEWORK DIRECTIVE

✓ AG’s opinion surprise to most: the WFD understood as ~ a planning instrument

✓ the WFD: even meticulously detailed
  · annexes filled with ecological & biological details
✓ technocratic — even research-proven so
  → normative decisions on what ought to be are made before the lawyers have a say
✓ excess work to regional environmental authorities
✓ are there options to this status quo of adaptive management?

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FLEXIBLE FACTS

✓ regulation of adaptive management—some challenges:

✓ economic, social, & environmental goals to be managed
✓ science does not always provide the answers regulators need (Legal Questions and Scientific Answers, Wahlberg 2010)

✓ ecology includes a value choice of its own; that of functioning ecosystems
✓ not only the work of the legislator, but also legal interpretation is forward-looking
  → facts have become as flexible as norms
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UNCERTAINTY?
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✓ premise facts by Keeton (1988)
   · facts that need to be decided upon (instead of finding)
   · facts only occasionally historical
   · inapplicability with the rules of evidence
   · are evaluative, predictative, and general
   · state statute vs. objectives of federal statute
✓ also risk assessment or risk regulation (in the late 90’s–early 2000)
   · trying to tackle the uncertainty by assessing it

✓ are these reflected when the statutes are applied?

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legal principles (Dworkin) as one way to solve the uncertainty dilemma

Verchuuren: no firm line between a rule and a principle

de Sadeleer: added an intermediate category between legal norm & principle

Ebbesson: it’s a trichotomy!
   a) balancing norms b) goal oriented norms c) fixed norms

Beyerlin: all this is simply irrelevant

the practical application of all above-mentioned?
LEGAL ECOLOGY

✓ the aim-setting sections: 1 § of statutes
  · how they could be fully reflected when applied?

✓ Dworkin: principles to safeguard individuals from government’s interventions
  · the aim-setting sections: protect environment from excessive human intervention

✓ argument-theoretical criticism by Habermas: principles are ‘irrational activity’

✓ Alexy: complements Dworkin’s work @ practical level
  · principles form *prima facie* requirements
ON BALANCING AND SUBSUMPTION

✓ reasoning w/ principles follows step-by-step rational structure familiar from reasoning w/ rules
✓ principles form an optimization requirement — to be applied rigorously → open-ended argumentation and transparent lines of thought
✓ The First Law of Balancing:
  ‘The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other.’
✓ The Second Law of Balancing:
  ‘The more heavily an interference with a constitutional right weighs, the greater must be the certainty of its underlying premises.’

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ON BALANCING AND SUBSUMPTION

✓ The Weight Formula:
   ‘The specific weight of a principle is a relative concept. It relates to competing principles and to the intensity of interference with them.’

  → a logical structure: does not contribute directly to the justification of the content

✓ rulings given w/ principles affect the rulings still to come

✓ N.B. also arguments underlying the choice of what is balanced must be made explicit (E. Feteris)
CONCLUDING REMARKS

✓ one can manage even with adaptive management

✓ legal ecology: a note on the practical side

✓ critique: juristocracy?

THANKS!

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LITERATURE


· Wahlberg, Lena Legal Questions and Scientific Answers: Ontological Differences and Epistemic Gaps in the Assessment of Causal Relations Lund University 2010


· Opinion of the Advocate General C-461/13 Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland 23.10.2014, EU:C:2014:2324