

The Roots of Environmental Law and Administration in Israel

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Introduction

After the recovery of the world from the Biblical Flood, the first recorded instance of ecological destruction brought upon the world as a consequence of man's behavior, there appear in the Bible two potentially contradicting statements:

“Be fruitful and multiply and fill the earth: the fear and dread of you shall fall upon all wild animals on earth, and all birds of heaven, on everything that moves upon the ground and all fish in the sea... they are given into your hands.”

Compare this statement with, “Never again shall I curse the earth because of man...”

These contradictory statements provide the essence of the dilemma facing men and women during their stay on Earth. Humans are in a constant, eternal battle to push themselves forward at the expense of others, or hold themselves back in order to take their rightful place in society.

Does man have the ability to not only fill the world with fear and dread, but also to understand his actions and control them, in order to allow him to live in peace with nature?

Does the legal system of Israel provide its citizens with the tools necessary for protecting the environment?

In this disappearing world, Environmental Law and Administration has a critical function. It must provide the necessary tools for defending a defenseless environment from men and women for the sake of the environment and humankind.

In order to take advantage of the legal tools designed to protect the environment there must be a constant flow of knowledge. That is the purpose of this work. It introduces the reader to the Environmental Revolution both in the international arena and in Israel.

It describes the roots of Environmental Law and Administration beginning from the writings of early Environmental Revolutionaries. It provides background information on International Environmental Law including sentinel cases before International Tribunals. Finally, this opening chapter presents an overview of the legal and administrative infrastructure for Environmental Law in Israel. Future sections will build upon and elaborate on this framework.

In General

The roots of Environmental Law and Administration in Israel stem from environmental laws and regulations promulgated in other parts of the world. It is therefore pertinent to first discuss the roots of environmental law in general before moving on to Israel. Modern environmental law is a new discipline. It sprung up in the late 1960's, nursed by such diverse disciplines as science, economics, and philosophy. To begin with, there is the science of ecology, a discipline which attempts to describe environmental phenomena. Ecology has been studied since the late 19th century, but it bloomed only in the middle of the 20th century with the blossoming of the "Environmental Revolution." This revolution changed man's attitude towards nature and his impact on the world.

Ecology comes from the Greek word "ecos," meaning house, and it is the study of planet earth as a home. Ecologists study ecosystems and the inter-relationship of animals and plants in an ever-changing environment. Early ecologists recognized the awesome changes man was affecting on the environment and heralded the beginning of the environmental movement. Learning from these studies, philosophers, economists, lawyers and policy makers developed a code of principles and laws to reverse the trend of the destruction of the environment and allow man to live in harmony with nature.

Early ethics dwelt on the relationship between people, and early laws were simple, almost primitive, declarations such as do not kill, do not steal, do not commit

arson, etc. More sophisticated ethics developed into instructions for societies as groups or communities. With time, man developed more sophisticated methods of cooperation, including political models of community, and moved from protecting the individual and the community to protecting the rule of law. Yet man has yet to declare an environmental ethic: “Do not do unto nature what you would not have nature do unto you,” or “love nature as yourself”.

The most sophisticated model of community today is democracy, practiced by several countries, including Israel. The principles of ecology can teach us a good deal about democracy as well. Ecosystems develop over time and seek for the greatest type of diversity. Ecosystems are ever changing, but they cannot withstand serious traumas. Things move slowly in the environment, as they do in democratic societies. Quick, drastic measures can affect the environment as they can affect the democratic process. In addition, ecology teaches us that all things are interrelated, and the same thing is true of democratic processes. One cannot affect one aspect of society without affecting another. This requires a holistic approach to the environment, and to society itself.

Roots of Environmental Philosophy

In addition to science, one can find roots of the Environmental Revolution in the early philosophic statements about the importance of man and his place in the environment. One of the earliest sources of environmental philosophy appears in the Bible itself, but unfortunately the Bible contains a duality. On the one hand, man is treated as a part of nature, and not separate from it, but on the other hand, the Bible states that man has been placed on the Earth to rule over nature.

Later Jewish philosophers, interpreting this dichotomy, disagreed over its context. The Rambam held that man could not have been placed to rule over the world because he is a part of it, as he was created only after the earth itself. In addition, in later verses in the Bible, man is treated as part of nature. The Bible calls him “a tree of the

field.” Even the word “Adam,” the name of the first man, comes from the Hebrew word for earth, *adama*; which means that man himself sprung from nature and therefore cannot rule over it.

Other religious philosophers treat the environment in a similar fashion. One finds in Moslem texts, and even early Buddhist texts, that man is a part of nature, and not separate from it. But whatever the impact of religion, the fact is that as man has progressed in time, the conflict between living with nature and controlling it has never ceased.

Man is both creature and molder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale.... Stockholm Convention, June 1972.

As man has increased, both in numbers and in might, the danger to the remaining life organisms on earth, has become very real. This danger increased with the advances in science and technology. Not only have these advances placed at man’s disposal tools which enable him to shape the environment, but they have allowed man to double, and now even triple, his life span over the last century.

Beginning in the 19th century, the population of the world grew and it will continue to grow geometrically. This increase in longevity, birth rates and human power is one of the many causes of the Environmental Revolution which began with a simple book written in 1962 by Rachel Carson, entitled Silent Spring.

"The history of life on earth has been a history of interaction between living things and their surroundings. To a large extent, the environment has molded physical form and the habits of the earth’s vegetation and its animal life. Considering the whole span of earthly time, at the opposite effect, in which life actually modifies its surroundings, has been relatively slight. Only within

the moment of time, represented by the present century, has one species- man- acquired significant power to alter the nature of his world".

Mrs. Carson's book hit the right timbre and its effect on other disciplines was immediate. The first to respond were the economists, because Mrs. Carson implied in her book that man would destroy the environment for selfish, economic reasons. If this were true, then the capitalist system could be one of the causes of environmental degradation. If capitalism makes the consumer king, and his major role in life is consumption, then unbridled consumption will slowly eat up the earth's available resources.

In order to protect the capitalist system, economists in the West argued that capitalism was not the villain. There then needed to be some tinkering with the system to enable capitalism to thrive but not at the expense of the environment. These pioneers of environmental economics used the term externalities to show that man was not paying the real cost for producing his goods. To estimate the real cost, one has to take into consideration the cost of polluting the air, water and land. Once these costs have been taken into consideration, factories would be able to produce more goods while causing less damage to the environment. Therefore, early economic philosophers felt that they could keep the capitalist system alive, but reduce its negative impact on the environment.

This philosophy found its way into environmental legislation and the courtroom. The United States pioneered polluter-pay legislation to force factory owners to internalize their pollution of natural resources. From this early legislation arose emission trading statutes followed by land swaps for protection of open spaces. The international community adopted similar measures. The courts followed suit by forcing clean up suits for desecration of the environment and by the creation of environmental funds to clean up polluted streams and land.

This approach, however, did not take into consideration two serious factors which plague decision makers in the environmental field even today: land use planning and family planning. Although the United States and European countries have attempted to use land use planning tools to reduce environmental impact, there are still serious problems in the field preventing the holistic approach so necessary, but so ephemeral. Even more difficult is the discussion of family planning. There are some countries in the world that have considered reducing the number of births amongst their citizens, but most countries have not, due to the negative connotations the subject raises. Israel has even acted in the opposite manner, by actively encouraging immigration and a high birth rate. This has had the expected effect on the environment.

The Roots of Law:

There are six recognized legal systems in the world: The civil law system, common law, customary law, Moslem law, Talmudic law, and mixed. The majority of these systems can be traced back to Roman law, which, itself, was based on earlier legal systems, including Biblical law. The civil code was a product of the Napoleonic Revolution in France. With the overthrow of monarchical government, the revolutionaries decided to write a code of laws to protect the rights of man. The Code Civile was written in the early 1800's, and in time was adopted by most countries in Europe. The common law, which is associated with the English legal system, began in England at a very early period of time, probably as early as the 10th or 11th century and has developed from that time until today. It has influenced all Anglo-Saxon countries, and those countries that were colonized by the British, including Israel.

The Roots of Environmental Law

In looking at early Roman law for the roots of environmental instruction, one finds that Roman Law divided property into communal, public, universal, and the negative

community, meaning property that belonged to no one. Roman law placed natural resources in the negative community, making them ownerless. This has been one of the reasons that the environment has suffered. On the one hand, water flowing in a stream belongs to no one; therefore it belongs to all; on the other if it belongs to no one, who will protect it? Roman Law served as the basis for both the common law and the civil law systems. As a result, early environmental law had no protective mechanisms for the protection of an environmental resource. The only way to protect these resources was under common or civil law provisions for prevention of nuisances. Early nuisance cases dealt with individual problems of pollution such as accumulation of horse manure, smoking chimneys, loud noises and disgusting odors, but there was no provision in the early nuisance law to handle environmental problems at their source.

Beginning in the 1960's, following a ground swell of public opinion, legislators in civil and common law countries could no longer depend on the individual nuisance suit to protect the environment. The United States was one of the first countries in the world to respond to the need and publish legislation specifically designed to protect the environment. It began a series of acts which have served as models for other countries.

The most important of these was the National Environmental Policy Act, known as the NEPA, which was published in 1969. NEPA required that all government action be filtered through a mechanism called an environmental impact assessment system. The assessment process would act to determine whether the proposed action would have a significant impact on the environment and how that impact could be reduced. The NEPA applied to all budgetary requests or legislative and administrative acts and decisions. Therefore, it was all encompassing, and, as a result, overnight, as it were, there developed an environmental community to further the NEPA requirements, and to ensure their implementation. NEPA was followed by a Clean Air and Clean Water Act and a series of laws and regulations that were emulated by other countries.

International Environmental Law and its affect on the Israel Legal System

Introduction

International Environmental Law is divided into case law and international conventions. Case law in the international environmental field has changed significantly in the last 100 years. The early doctrine, known as the Harmon Doctrine, which allowed every state to exploit its natural resources without regard for the impact on the world, has been replaced by a series of principles more consistent with the need to protect the earth from environmental degradation. Today there are numerous principles of environmental law, which have been accepted as part of the international legal regime.

Here follow some examples:

1. The good neighbor rule: Do not do to your neighboring country that which you would not have them do to you.
2. The precautionary principle. Take only those steps which are necessary, and only after determining that they do not cause serious environment impact.
3. The “polluter pays” principle. Pay as you pollute.
4. Sustainable development. Develop the resources of the world so that some will be left for development by future generations.
5. Intergenerational equity. Do not compromise future generations.
6. BAT: Adopt the use of the best available technology to prevent pollution.
7. Cooperation and transparency on environmental subjects, including the right to know.
8. Environmental impact assessments. Before taking any action one must consider the environmental impact of the given measure.

These environmental principles have been developed over the years through case law and through environmental conventions.

The first major environmental convention of the twentieth century was the Stockholm Convention of 1972. It set out very early the principles of the good neighbor

rule and the right to use one's territory without causing damage to others, as well as the requirement to set up environmental institutions in one's home country to further protect the environment.

Twenty years after Stockholm, the countries of the world met in Rio de Janeiro for the second international environmental conference. At Rio other principles were adopted including that of sustainability. In addition, an agenda for the 21st century, or Agenda 21, was adopted. The Rio Convention created the following important precedents.

1. The Earth Charter: a declaration of basic principles concerning the Biosphere concept and reinforcement of the Stockholm Declaration;
2. Agenda 21: a plan of action with environmental priorities based on the declarations of the Earth Charter;
3. Financial Resources: a promise of financial environmental aid to less developed countries;
4. Technology: further transfer of environmental technique according to BAT; Institutional arrangements for further development;
5. Signing of framework treaties for limitation of climate change; preservation of bio-diversity and the precautionary principle.

The Impact of International Environmental Law on Israel

The impact of the international community on Israel has been significant because Israel is very active in the international environmental community. Delegations attend all major functions, and in the Mediterranean Basin Israel is a leader in promoting environmental quality. Israel has ratified numerous international conventions and treaties and adopted local legislation to put those instruments into effect. In addition, the concepts of precautionary principle, best available technology, and impact assessments have all been incorporated into Israeli law. On the other hand, Israel has not ratified the Law of the Sea, nor has it modernized and streamlined its scattered code of environmental laws.

Environmental Law Prior to the Creation of the State of Israel

Israel was declared a state in 1948 after some 40 years of colonial rule by Great Britain and several hundred years of Ottoman rule prior to that. Therefore, when the state was created it inherited parts of the Ottoman code and the British common law system. Both of these systems of government had an impact on the legal system of Israel, and its environmental legislation and administration.

Prior to the creation of the state, Israel's "environmental laws" copied those extant in other countries of the world. Yet, other than the Building Ordinance, this meant nuisance statutes aimed at preventing the creation of a health nuisance, but which had no impact on improving the quality of the environment or protection of natural resources. When the state was first established, previous legislation from the Mandate period as well as some Turkish ordinances were adopted in order to have a continuous flow of legislation to avoid social and economic disruption during the early years of the state. Over time, most of this legislation was replaced by local statutes, but some remained, including those laws relating to environmental nuisances.

Environmental Law and Administration in Israel

Administration: An Overview

Israel sent a delegation to the Stockholm Convention and the delegation returned to Israel bent on creating an environmental unit in the government. This unit, the Environmental Protection Service was created in 1972, with a staff of some 15 employees. The Environmental Protection Service was given the power to coordinate environmental administration in Israel, write an annual environmental report, create the basis for an Environmental Impact Assessment System, and act to promote environmental education and public awareness.

The Environmental Protection Service continued its activities until the creation of the Environmental Ministry in 1988. For a small unit with no enforcement powers it

had a tremendous impact on environmental quality in Israel. It raised public awareness, created the first environmental education programs, developed regulations and legislation, organized Associations of Towns for Environmental Protection at the regional level, and Local Environmental Units at the municipality level.

The Environmental Protection Service put the topic of environmental protection on the political map of Israel, but it was unable to pass major environmental legislation because it was only a unit within a governmental ministry and not a ministry of its own. Only at the end of 1988 was an environmental ministry created. By then, most countries in the world had already had environmental ministries for more than 20 years, and the environment was a natural part of the decision making process.

The Ministry of the Environment has raised the position of government policy making and increased public knowledge. The Ministry created regional departments for environmental protection, and has significant weight in the planning process and in governmental decision making. The Ministry has also passed significant environmental statutes, including laws for the protection of the sea and control of dangerous substances. The Ministry has also produced regulations in the water quality field, as well as those regarding the transport and disposal of dangerous substances. Yet Israel, by failing to create a central ministry in 1972, enabled other ministries to continue working in the environmental field, and therefore, dispersed energy that could have been coordinated into one, united effort to protect the environment.

Recent studies show that the Ministry of Interior has more power to affect the quality of the environment than the Ministry of Environment. The water resources of Israel are “protected” by no less than five governmental ministries. The effect of this plethora of government administrators working to protect the environment (or his/her own position) has retarded the proper growth of environmental law and administration. The gap created has been filled somewhat by several small, non-governmental

organizations, but each works on its own turf, on its own agenda, with only minimal impact on long range governmental policy.

Israel Environmental Laws: An Overview

As has been aptly pointed out in this monograph, Israel Environmental Laws are a hodge-podge of unrelated acts. Some laws date from the British mandate, while others have been recently promulgated. Yet there is no coherent correlation between the new and the old, nor has there been an attempt to compile a sensible environmental code. Israel's air pollution law dates from 1961, and as bold as the Act was when first passed, today it fails to provide the Ministry of Environment with the tools necessary to make Israel's air cleaner. Israel's water laws date from the 1950's, but this brilliant series of legislative acts have been chopped up to satisfy political ambitions. How can one possibly develop a holistic approach to Israel's water resources with five ministries determining policy? The "new" act for control of dangerous substances dates from 1993, but in order to get it passed, the Ministry of Environment made it palatable to members of the Knesset by copying whole sections of the original act. Yet the previous act dates from the British Mandate and its approach is outdated, if not antiquated. Due to the lack of modern legislation, most environmental legal enforcement takes place under the Planning and Building Law and the Licensing of Businesses Law, two statutes under the responsibility of the Ministry of Interior. In short, measured by their number, Israel has an immense arsenal of environmental laws. Measured by their effectiveness, it's time to trim inventories and restock.

Conclusion

The major problem with the environmental legal system in Israel today is not the individual laws, but rather the composite. Israel, as mentioned previously, failed to create an environmental ministry in the early part of the environmental revolution. Therefore, environmental laws are dispersed among many ministries, making them difficult to implement and enforce. Second of all, as long as Israel faces serious

security problems along its borders, the country will not invest the proper resources in environmental protection, because, while guns are booming, people are more concerned with their *immediate* safety and health than the *future* safety and health of the country.

Third, Israel still maintains a pioneering spirit. People in Israel still believe that we must increase population and increase the expansion of cities of towns, making development override environmental concerns. All Israeli governments have encouraged the birth of children, and the combination of large religious (Moslem and Jewish) families, plus the increasing immigration from outside the country, has caused the population of Israel to grow tremendously in the last 20 years. The result has been a drastic reduction in the amount of open space and a decline in the overall environmental quality of the environment.

Furthermore, Israel has depleted her water sources to the point where she will be an importer of water, either through desalination of the ocean or via neighboring states. An even more serious problem facing Israel is the fact that as land disappears, the problems of the deposit of solid waste and soil pollution become even more critical. As the land frontier disappears, the amount of land available for agriculture also disappears and the use of more intensive agriculture further pollutes the available soil. Finally, as the population increases, and the land becomes more crowded, the serious problem of noise pollution decreases the quality of life.

The gathering of exiles from all over the world has created a unique environmental quandary. Some parts of the country contain families from countries with very developed systems for dealing with environmental concerns, who are familiar with the concepts of recycling, prevention of litter, organic foods, etc. These families live right alongside families who come from countries that have had less developed environmental norms. Since environmental quality begins at home, this creates a situation where it is difficult to have a ground level consensus for environmental protection. In addition, the education system in Israel has only recently begun a

systematic effort to teach environmental studies in all levels of school. This means that it will take time to inculcate environmental attitudes to people living in Israel.

When discussing environmental quality with most people in Israel, their immediate response is that we have enough laws and administrative staff, but need to put some teeth in this legislation, i.e. we do not have enough enforcement. What they forget is the first rule of democracy, self-enforcement. In a democratic society each person is responsible for enforcing the law upon him/herself. Enforcement is first and foremost an educational process, not a legal one. Therefore environmental protection will only be effective when each person in Israel understands and internalizes the basic rules of ecology: "The first law of ecology: Everything is connected to everything else...The second law of ecology: Everything must go somewhere...The third law of ecology: Nature knows best." ¹

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