

Environmental Rule of Law in the Context of Sustainable Development*

ARNOLD KREILHUBER[†] & ANGELA KARIUKI[‡]

ABSTRACT

The environmental rule of law forms an important pillar of international law and environmental governance. This Article presents key aspects of the environmental rule of law in the context of sustainable development that have been influenced by Professor Edith Brown Weiss's contributions. In particular, Brown Weiss's scholarship related to intergenerational equity and the precautionary principle has important policy implications. Both these principles are distinguishing characteristics of the environmental rule of law. This Article discusses these characteristics and their implications for the environmental rule of law. The Article highlights that while advancing the environmental rule of law in the context of sustainable development is a challenge for all countries, it is also a growing priority.

TABLE OF CONTENTS

Introduction	591
I. The Genesis of the Environmental Rule of Law	592
II. Distinct Characteristics of the Environmental Rule of Law	594
A. Intergenerational Equity	595
B. Precautionary Principle	596
Conclusion	598

INTRODUCTION

No discussion on the topic of environmental rule of law in the context of sustainable development would be complete without extensive reference to and

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[†] Acting Director, Law Division, UNEP. © 2020, Arnold Kreilhuber and Angela Kariuki.

[‡] Legal Officer, Law Division, UNEP.

appreciation of the work and contributions of Professor Edith Brown Weiss. Her work, expertise, and contributions have influenced and continue to greatly shape the work of many international environmental law organizations and practitioners today. In fact, when current and future law students delve into the emergence of the environmental rule of law in the twenty-first century, Professor Brown Weiss will stand out as a foundational figure who inspired generations of legal scholars, law and decision-makers, as well as the public at large.

In this Article, we present key aspects of the environmental rule of law in the context of sustainable development that form an important pillar of international law and environmental governance. We start by tracing the genesis of the rule of law in environmental matters, with reference to the United Nations Environment Programme's ("UNEP's") Governing Council Decision 27/9,¹ and the many developments that have since contributed to the acceptance of the environmental rule of law as a new paradigm for environmental law in the twenty-first century.

A significant strand of Brown Weiss's scholarship has concerned intergenerational equity and the principle of the human rights of future generations, its content, and its implications for policies related to environment, natural resources, and cultural resources. Another key issue for the environmental rule of law, that Brown Weiss has contributed to, is the principle of precaution which provides a way forward in the face of scientific uncertainty. Both these principles are distinguishing characteristics of the environmental rule of law. The subsequent sections of this Article discuss these characteristics and their implications for the environmental rule of law. The Article highlights that while advancing the environmental rule of law in the context of sustainable development is a challenge for all countries, it is also a growing priority.

I. THE GENESIS OF THE ENVIRONMENTAL RULE OF LAW

The rule of law—a fundamental legal concept—is broadly defined as a principle of governance in which all persons, institutions, and entities (public and private, including the State itself) are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.² The United Nations describes its requirements as those which ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.³ Environmental rule of law, or rule of law in the field of the

1. UNEP Governing Council Dec. 27/9, *Advancing Justice, Governance and Law for Environmental Sustainability*, U.N. Doc. UNEP/GC.27/17 (Mar. 12, 2013).

2. *See id.*

3. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

environment, describes when laws are widely understood, respected, and enforced and people and the planet enjoy the benefits of environmental protection. It provides an essential platform underpinning the three pillars of sustainable development—economic, social, and environmental.⁴

As Professor Brown Weiss has noted, hardly any other field of international law has developed with such speed and in such volume as international environmental law.⁵ While these developments have made significant advances in addressing environmental challenges and triggering institutional reforms at all levels, the international legal regimes governing the environment still face an uphill battle to effectively counter environmental degradation and key environmental challenges of our time. They demonstrate that environmental law can indeed make a significant contribution to forging an enduring partnership between environmental protection and a development approach founded on the three pillars of sustainable development. As we know, however, laws and regulations are not an end in themselves—implementation, compliance, and enforcement of those laws and regulations are even more important.

To support countries' efforts to implement their international obligations domestically, the then UNEP Governing Council adopted, in February 2013, the first internationally negotiated document⁶ to establish the term “environmental rule of law.” The Decision underlines the fact that law, coupled with strong implementing institutions, is essential for societies to respond to increasing environmental pressure in a way that respects fundamental rights and principles of fairness, including for future generations. The rule of law is therefore seen as critical to the achievement of sustainable development objectives and environmental goals.

In facing ever-increasing environmental complexities, many people now view environmental human rights, environmental law and jurisprudence, and environmental governance as increasingly central to resolving environmental justice problems. These key issues comprise, in part, the precepts of environmental rule of law:⁷

1. Fair, clear and implementable environmental laws;
2. Public participation in decision-making, and access to justice and information in environmental matters, in accordance with Principle 10 of the Rio Declaration;

4. See generally, U.N. ENV'T PROGRAMME, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT (2019).

5. Edith Brown Weiss, *The Evolution of International Environmental Law*, 54 JAPANESE Y.B. INTL. L. 1, 1 (2011).

6. UNEP Governing Council Dec. 27/9, *supra* note 1.

7. World Congress on Justice, Governance and Law for Environmental Sustainability, *Rio +20 Declaration on Justice, Governance and Law for Environmental Sustainability* (June 20, 2012).

3. Accountability and integrity of institutions and decision-makers, including through the active engagements of environmental auditing and enforcement;
4. Accessible, fair, impartial, timely, and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies;
5. Recognition of the mutually reinforcing relationship between human rights and the environment; and
6. Specific criteria for the interpretation of environmental law.

The elements of environmental rule of law, taken together, also highlight its contribution to increasing awareness of fundamental rights shared by all and our obligations to protect those rights for everyone. As set out in an Issue Brief on Environmental Rule of Law, prepared in May 2015,⁸ under the patronage of the members of the UNEP International Advisory Council for Environmental Justice, environmental rule of law integrates critical environmental needs with the essential elements of the rule of law and provides the basis for reforming environmental governance. It prioritizes environmental sustainability by connecting it with fundamental rights and obligations, implicitly reflecting universal moral values and ethical norms of behavior. The document concludes that, without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary—that is, discretionary, subjective, and unpredictable.

The senior legal members of the UNEP-led *International Advisory Council for the Advancement of Justice, Governance and Law for Environmental Sustainability* include Edith Brown Weiss. In this capacity, Professor Brown Weiss has provided strategic guidance to the international community in improving the legal foundations for achieving international environmental goals and overcoming legal barriers. She has continued to be a powerful global advocate for law, justice, and good governance, helping to give renewed impetus to efforts to secure the solid legal foundations of international environmental law.

II. DISTINCT CHARACTERISTICS OF THE ENVIRONMENTAL RULE OF LAW

We turn now to discuss two key characteristics of the environmental rule of law that distinguish it from environmental governance in general, and that make it both particularly important yet challenging for countries to implement in their jurisdictions. Firstly, because the environmental rule of law is implemented in the face of uncommon timescales—that is, timescales of many centuries and more⁹—it implicates intergenerational equity. While unsustainable development may serve short-term individual or organizational interests, environmental rule of

8. U.N. Env't Programme, *Issue Brief on Environmental Rule of Law* (May 2015), <https://perma.cc/BD8W-N2B9>.

9. *See id.*

law plays an important role in protecting the individual and collective interests of citizens and future generations over the long-term. Secondly, environmental rule of law often depends on decision making in the face of significant uncertainty.¹⁰ Limits on current scientific understanding mean that environmental matters can raise more questions than answers. Nonetheless, environmental rule of law provides approaches, such as the precautionary principle, to help governments regulate even in the face of scientific uncertainty.

A. INTERGENERATIONAL EQUITY

The first distinguishing feature of environmental law that continues to play a crucial role in global governance and continues to gain traction at the international law level is intergenerational equity. What if we would consider future people themselves as human rights holders with current States as their duty-bearers? As Professor Brown Weiss has noted, the principle of intergenerational equity is the foundation of sustainable development and, consequently, a core topic for the environmental rule of law. Her key argument, a position that UNEP also supports, is that the present generation acts not only as a trustee for future generations but also as beneficiary of the trust.¹¹ To counter any potential friction resulting from the dual role of the present generation as both trustee and beneficiary, Brown Weiss suggests we focus on sustainability in addressing the conflict.¹² This is a key point.

Sustainability requires that we view the earth and its resources not only as an investment opportunity, but as a trust passed on to us by our predecessors for our benefit and that of future generations—which immediately brings about rights and responsibilities.¹³ Recognizing that future generations have human rights would be a step in this direction. In her works, Brown Weiss has proposed normative principles of intergenerational equity that provide a practical basis upon which the rights of future generations may be observed.¹⁴

The enforcement of this right must be founded on the elements of environmental rule of law. Across the world, courts have also considered intergenerational rights in the adjudication of cases. Take the well-known and often-cited *Oposa* case for instance: the Supreme Court of the Philippines stated that the plaintiffs had the *locus standi* to sue on behalf of future generations based on an “intergenerational responsibility insofar as the right to a balanced and healthful ecology is

10. See UNEP Governing Council Dec. 27/9, *supra* note 1.

11. Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGICAL Q.* 495, 499 (1984).

12. Edith Brown Weiss, *In Fairness to Future Generations and Sustainable Development*, 8 *AM. U. INT'L L. REV.* 19, 19 (1992).

13. *Id.* at 19–20.

14. Brown Weiss, *In Fairness to Future Generations and Sustainable Development*, *supra* note 12, at 19.

concerned.”¹⁵ Although its actual effectiveness may be debated, intergenerational standing is useful in cases where the environmental damage is long-term and grows over time such that future generations are more threatened by irreversible and irremediable damage than the present one, even for actions taken presently.

But for future generations’ rights to become really effective, they must be fully integrated into constitutional and international human rights law. Courts have already started examining and integrating intergenerational values in constitutional environmental rights. The French Constitutional Court, in its decision concerning the prohibition of the production, storage and circulation in France of plant protection products containing active substances not approved by the European Union because of their effects on human health, animal health, or the environment, gave constitutional value to the protection of the environment and the common heritage of human beings.¹⁶ In other words, it gave institutional value to intergenerational equity. The Pennsylvania Supreme Court annulled a statewide oil and gas development land use regime on the basis of “a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”¹⁷ More importantly, it added that, “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come.”¹⁸ Courts have also invoked intergenerational equity in climate change cases. In the *Urgenda* case, the Hague District Court found the principle to be relevant in establishing the scope of the duty of care of the Dutch government to take measures to reduce greenhouse gas emissions.¹⁹

Given the goals the international community has set to achieve sustainable development, governments must take active steps to minimize environmental damage. The precautionary principle is the *sine qua non* to preserve our natural resources and common heritage for the future generations to come.

B. PRECAUTIONARY PRINCIPLE

The international community has handled scientific uncertainty in several different ways in applying international environmental law and used various responses to address it. As we have seen in discussions around climate change, health impacts of plastic, even genetically modified organisms, governments often rely on scientific uncertainty to explain a lack of legal responses or regulation. But circumstances often demand government action, even in the face of such uncertainty—or especially in the face of such uncertainty. And several approaches can allow us to regulate during these times—free, prior and informed

15. *Oposa v. Factoran*, 224 S.C.R.A. 792 (S.C., July 30, 1993).

16. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2019-823QPC, Jan. 31, 2020.

17. *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 546 (Pa. 2016).

18. *Id.* at 546 n.15.

19. *See Hof’s-Gravenhage* 9 Oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda).

consent; environmental and social impact assessments; and advisory bodies, for instance. In this contribution, we focus on the principle of precaution, a tenet that forms a central part of the environmental rule of law.

One of the main distinctions between environmental rule of law and other areas of law is the need to make decisions to protect human health and the environment in the face of uncertainty and data gaps. Instead of being paralyzed into inaction, careful documentation of the state of knowledge and uncertainties allows the regulated community, stakeholders, and other institutions to more fully understand why certain decisions were made.²⁰ Though legal scholars continue to debate whether the precautionary principle has any legally-binding force, it stands at the beginning of the so-called “procedural” principles/concepts which may help states and non-state actors to more easily meet their substantive obligations.

Advancing sustainable development and achieving the Sustainable Development Goals (“SDGs”) requires that the precautionary principle includes accountability for harm and transparency in independent scientific evidence. Indeed, SDG 16 commits to advancing access to justice through appropriate administrative and/or judicial review. As the literature demonstrates, regulatory agencies and environmental courts in certain countries already include and apply some of these requirements.²¹ Several countries’ legislation and courts continue to work on strengthening the implementation of the precautionary principle.

International courts of law have also been confronted with the precautionary principle on multiple occasions. The Court of Justice of the European Union²² and the International Court of Justice (“ICJ”) have adopted different positions on the status and extent of the principle. The ICJ, in the *Danube* case, qualified it as a general rule of international law.²³ But whether it is a principle of customary international law or not, the extensive use by judicial and administrative bodies points to international consensus when it comes to ways of advancing sustainable development. The principle does not offer a solution to every new problem induced by scientific uncertainty, but it is a guiding concept in situations of potential environmental risk.

Professor Brown Weiss has contributed immensely to framing the precautionary principle and putting it on the international agenda. She has published widely on how the development of the precautionary principle and other principles of international environmental law reflect a real concern about the consequences of

20. *See id.*

21. For instance, New Zealand, Australia, India, Germany, France, and Belgium. *See generally* GEORGE PRING & CATHERINE PRING, U.N. ENV’T PROGRAMME, ENVIRONMENTAL COURTS & TRIBUNALS: A GUIDE FOR POLICYMAKERS (2016).

22. *See* Case C-180/96, United Kingdom v. Commission of the European Communities, 1998 E.C.R. I-2265.

23. *See* *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, ¶ 132 (Sept. 25).

climate change on the environment of future generations. Throughout her publications, however, Brown Weiss has addressed the lack of commonly accepted definitions of the precautionary principle and their general vagueness, calling for harmonization of these definitions.²⁴

CONCLUSION

It would be impossible to honor Edith Brown Weiss's work in one article. However, this Article has attempted to highlight one key contemporary international law issue that Professor Brown Weiss has contributed to developing—the environmental rule of law. All the distinguishing features of the environmental rule of law are issues that leading legal scholars, such as Brown Weiss, have developed and implemented over several years. Two key features have been used to demonstrate concrete examples of how the environmental rule of law is advancing sustainable development by creating an expectation of compliance with environmental law, and strengthening general rule of law by increasing trust in the government and holding decision-makers accountable. It is a field that, although relatively new, is constantly developing. This is why all relevant stakeholders must continue their dialogue on environmental rule of law in order to increase cooperation and the broad ownership of environmental rule of law measures. In the context of environmental governance, it is important that we incorporate the environmental rule of law as a means of enhancing social and environmental progress. But strengthening the environmental rule of law requires coordinated efforts from a diverse group of actors, not just those in the environmental law sector. As Professor Brown Weiss has reminded us, we—together—have the fiduciary obligation to move forward in making the environmental rule of law a reality for all.

24. Edith Brown Weiss, *Intergenerational Equity: A Legal Framework for Global Environmental Change*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 385, 390–93 (1992).