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Governmentality, Law, Public Interest and the Environment

Jo Goodie

Law School of Law
Murdoch University
Perth WA

J.Goodie@murdoch.edu.au

Abstract

The legal regulation of the environment is exemplary of the formation, practice and challenge of modern legal discourse and governance. The latter part of the twentieth century has seen the emergence of environmentalism and the problematization of the environment in terms of the management of hazard and risk. The social authority of law to endorse and regulate governmental programmes has meant that it has been inevitably implicated in the contestation and negotiation of environmental governance. In turn, environmental governance and discourse have required a certain refiguring of legal rationality. Legal discourse has been confronted by the immanent critique of environmentalism. In this paper I reflect upon the formation and limits of legal discourse about protection of the environment.

Introduction

The legal regulation of the environment is exemplary of the formation, practice and *challenge* of modern legal discourse and governance. The latter part of the twentieth century has seen the emergence of environmentalism and the problematization of the environment in terms of the management of hazard and risk (Beck, 1992; Rutherford, 2000). This modern appreciation of the environment is largely dependent upon the emergence of ecological science, which has framed new techniques for measuring, describing and regulating the environment. Although, scientific techniques have been key to revealing certain environmental problems, governance of the environment is not an entirely scientific venture. Environmental science has both facilitated and required the support of institutions more closely associated with social and economic governance (Rutherford, 1999a). The social authority of law to endorse and regulate governmental programmes has meant that it has been inevitably implicated in the contestation and negotiation of environmental governance (Gunningham, 1994). In turn, environmental governance and

discourse have required a certain refiguring of legal rationality. Legal discourse has been confronted by the immanent critique of environmentalism.

The law has taken up and engaged with various dilemmas surrounding the management of potential harm to the non-human environment and the appropriate response to harm caused to humans by toxic environments. Yet the environment does not readily fit neatly into any of the usual categories of legal rights and interests, or the process of legal regulation. When thinking about the environment as a legal subject it is necessary to move beyond the idea of the environment as simply a physical space. It is, from the legal perspective at least, a contingent and instrumental concept. As such it is at the opposite end of the spectrum from the autonomous, rational individual who is the darling of the common law. At the same time the environment only exists as a subject of legal concern in as much as it is the space in which the human legal subject lives, breathes or works. Legal governance of the environment has stretched and unsettled orthodox legal governance. In this paper I reflect upon the formation and limits of legal discourse about protection of the environment.

Environmental law as a focus of governmentality theory

The environment is not a homogenous or concrete entity. Just as there is no single entity we can designate as the environment, the body of law and policy that might be described as 'Environmental Law' is broad and diverse. I am not attempting here to develop a grand theoretical account of environmental law as a whole, nor to explicate or analyze any substantive area of environmental law. Rather, my analysis focuses on 'how' debates and dilemmas involving environment protection have become the concern of law and the subject of legal governance.

Throughout my discussion, I take up Foucaultian theory of governmentality, commonly known as the governmentality approach, or sometimes as the analytics of government (the literature is vast and growing rapidly; see especially, Barry, Osborne and Rose, 1996; Burchell, Gordon and Miller, 1991; Dean, 1999; Dean and Hindess, 1998; Foucault, 1991; Miller and Rose, 1990; Osborne, 1998; Rose, 1989, 1992, 1993, 1996; Rose and Miller, 1992).

The governmentality approach to social analysis does not attempt to construct a unifying or meta-account of society (Garland, 1997: 184, 200). Instead it focuses on how particular fields of social relations, such as the environment, emerged as problematic, how they are understood and by what means are they governed. Governmentality theory assumes that all governance is, 'intrinsically linked to the problems around which it circulates, the failings it seeks to rectify, the ills it seeks to cure' (Rose and Miller, 1992: 181). My examination of legal governance of the environment considers how the law has been employed as a governmental technology to address the 'environmental problem'. The focus of my analysis is the legal recognition of environmental lobbyists, and the 'public interest', which they claim to represent, as stakeholders in the management of the non-human environment. I

am interested in exploring how the character of the environmental legal subject has unsettled orthodox assumptions about how the law typically functions.

The law is a political rationality, and as such the legal domain is, 'morally coloured, grounded upon knowledge, and made thinkable through language' (Rose and Miller, 1992: 179). Environmental public interest litigation readily evidences the epistemological, moral, and idiomatic characteristics of modern governance. As a general rule the courts shy away from explicitly acknowledging that public interest litigation is setting any kind of moral agenda for the common law. Nevertheless, attempts to have the public interest in environmental governance recognised by the common law, as an issue that justifies judicial review, are part of a contest to identify what 'ideals and principles' should inform legal governance. Public interest litigation highlights the fact that the authority of environmental governance relies on specific forms of knowledge and a certain epistemological construction of the environment. In addition, public interest litigation is a nice illustration of the how idiom informs understanding and allows the revelation of 'truths'. Although we might expect the legal idiom to be predominantly dispassionate, environmental public interest litigation is resolved within a discourse that is influenced by 'collective emotion' as much as 'instrumental calculation' (Garland, 1997: 203).

The interface of the environment and law

Foucault is noted for his construction of a disciplinary field as a site of a certain form of analysis, an analysis that traced the 'conditions of possibility' for the emergence of the discipline (Hunt and Wickham, 1994: 6-7). I am not attempting here, to trace the emergence of law or the environment as disciplinary fields. The focus of my inquiry will be on how it "came about that some particular way of organising thinking, talking and doing about [law as it interfaces with the environment] took the form and content that it did? (Hunt and Wickham 1994: 7). This is a task that involves more than simply recognising that, "the 'things' involved in the operation of [legal discourse] almost certainly resemble the 'things' involved in competing discourse", in this case environmental discourse (Kendall and Wickham, 1999: 38). My project entails consideration of how each of the disciplinary domains which we might label 'environmental' or 'legal' have articulated or delimited what can be assumed or said about the other (Kendall and Wickham, 1999: 41). The disciplinary domain of law produces and privileges certain beliefs, practices and ways of acting and thinking, in turn; it is a product of the existence of the 'conditions of possibility' for the formation of certain ideas or action.

The legal domain

The legal domain encompasses and is produced by a range of institutions from-courts and the legal profession, through academe, to the law's critics and reformers. Judgments, case-law, legislation, reform agendas, texts, academic commentary and curricula provide the most visible expressions of the opinions, practices and values which are in a sense the 'law'. Law, like

all disciplines is riven with conflict and a measure of consensus, but at its heart remain – the rule of law and the pre-eminence of the rational legal actor who enjoys a range of civil, political and proprietorial rights.

By reputation the rationality within which legal ideas are conceived, organized and put into practice is depersonalised and necessarily distanced (Rutherford, 1999a: 46). For example in the terms of orthodox legal understanding the common law functions through the impartial application of a set of accepted rules and precedents to resolve disputes. The authority of the judiciary, who interpret and apply the common law, is predicated on their dedication to independence, and commitment to a reasoned, impartial decision-making process.

Adherence by legal actors to this ideal of a depersonalised legal rationality is one of the significant conditions of possibility that delimits the ambit of modern western legal discourse. However, while the very reputation of the law depends on it being one of the 'depersonalised rationalities' of the state, it is a description of law that is too limiting. Such a characterisation suggests that the law is somehow uncontentious, or that as an institution it exists outside the influence, and beyond the values, prejudices, and styles of thinking of non-legal discourse.

Laster suggests that, through certain forms of thinking and practice that are distinctly legal, law has asserted itself as a discipline, "like all disciplines, law has reified its own conventions and disciplinary modes of thought (Laster, 2001: 219). While our understanding of the law may be conditioned in part by law's 'reified' projection of itself and the ideal of law as a 'depersonalised rationality' of modern governance. The actual practice of law may be something far more open to outside influence. It is certainly less than rational, detached, or impartial, although maintenance of its reputation might demand that we think of it in those terms. The legal domain is not closed; it is very much subject to the influence of non-legal domains as consideration of the legal governance of the environment demonstrates.

The environmental problem

The 'environmental problem' is implicit in all modern environmental discourse. The environment as a social and cultural entity does not exist outside its problematization. It is a problematization perhaps made first 'made famous' by Malthus and the science of ecology (Lanthier and Olivier 1999; Rutherford, 1999a). After Malthus, 'nature' was not an object over which humans could so readily claim unfettered mastery. Management of the environment, as well as the population it might sustain or harm, was recognised as problematic. Almost ironically the very difficulties managing the environment presented were revealed by the knowledge that also presented the possibility and imperative of environmental governance (Dean, 1999: 100; Rutherford, 2000: 113-117). Mitchell Dean, observes that Malthus's discovery of resource scarcity became a 'bio-economic reality' that was 'enshrined in the work of the English political economists of the early nineteenth century'. It was 'used to generate new norms of government that must be factored against the optimisation of the life of the population' (Dean, 1999: 100).

Biopolitics

Foucault argued that from the eighteenth century on the focus of government was 'biopolitical', that is, on the maintenance of a productive population. Populations, as opposed to individual citizens or territory, produce different sorts of problems to government for resolution (Dean, 1999: 99). This form of governance relies upon, and has developed in combination with, the particular application of knowledge and techniques from the sciences and social sciences. Through the application of this biopolitical knowledge it becomes possible "to rationalize problems presented to governmental practice by the phenomena characteristic of a group of living human beings constituted as a population: health sanitation, birth rate, longevity, race" (Foucault 1997: 73, quoted in Dean, 1999: 99). Modern biology, which displaced the authority of classical natural history, is one of the particular forms of expertise and knowledge that facilitated the emergence of biopolitical governance (Rutherford, 2000; 1999a).

The post-industrial focus of biopolitical governance is complicated by a different set of environmental problems than those that concerned Malthus. Simple resource scarcity is no longer so much the issue, as the globalisation of resource deficiency, or effective waste disposal, or the latent toxicity of so many of the by products of material production and the potential synergy of those toxins (Doyle and Kelsen, 1995). Beck argues that late modernity is characterised by the "increasing *scientization* of risk and the expanding *commerce* of risk" (Beck, 1992: 56). Risk produces its own form of biopolitical and bio-economic reality, and in turn a preference for particular governmental techniques. Risk is the product of an interesting matrix of rationalities and techniques, from the scientific and economic through to the anti-materialism of ecologism. As Rutherford observes: "Ecological governmentality is particularly concerned with questions of justice and equity … a significant element in the environmental debate is the concern to develop an environmental ethics" (Rutherford, 1999b: 116). Beck argues that:

> [Risk's] cognitive agents' are not only those experts who produce scientific knowledge and its technical applications, but also those *counter-experts* (of the ecology movements, citizens' action groups, etc.) who produce critiques of environmental degradation, technology and so on (Beck, 1992: 28 quoted in, Rutherford, 1999b: 104).

However, even within the domain of the counter-expert scientific knowledge is privileged. Rutherford following Steven Yearley (1992) argues,

> [E]nvironmental movements are profoundly anchored in modern science, even though the very epistemological and sociological nature of scientific knowledge production conspires to make such a reliance highly problematic, unstable and contested (Rutherford, 1999b: 101)

Hunt and Wickham (1994: 83-87), observe that this dynamic is typical of modern governmental strategies. A particular mode and programme of governance is produced through the resistance and challenge by one form of calculation and knowledge to another.

As a science, ecology has provided the epistemological basis for the emergence of environmentalism, which has, in turn, had significant influence on the form and trajectory of environmental governance (Rutherford, 1999a and 1999b). Environmentalism is a product of ecology's attempts to articulate the problem of the environment. It also relies heavily on ecological discourse to justify and define the limits of its claims. Environmentalism, in combination with ecology, has undoubtedly revealed and defined many environmental spaces and entities. While other technologies, harder sciences, and differently motivated agendas have also been instrumental in the construction and auditing of environments and in the shaping of environmental governance, ecological science, as Rutherford observes below, has been particularly significant.

> [T]he development of scientific ecology, particularly systems ecology, provided both a guiding political rationality and the technical apparatus of calculation and assessment that by the late 1960s began to make possible a form of regulatory science that was capable of governmentalizing society-environment relations (Rutherford, 1999b: 113).

Following the governmentality theorist Miller (1992), we might say that certain ecological forms of calculation have enclosed spaces and activities and defined them as environmentally problematic.

The environment as a legal subject

In becoming an object of legal attention, the environment has not become a more stable or less contested domain. The environment is a quite different legal subject from its precursor the autonomous, rational, legally capable individual. While the autonomous, rational legally capable individual could lay claim to the possession of substantive legal rights, the environment is a shifting subject that is the product of a constant negotiation of conflicting interests and exercise of administrative discretion. That is what makes it an interesting and appropriate focus for a consideration of the formation and limits of law as a technique of modern governance.

The sanction and regulation of the law offers some form of protection to the environment, the law also operates as a gatekeeper for the environment by endorsing the authority of particular environmental stewards. This is particularly evident in environmental public interest litigation. I am now want consider the process by which the law has been persuaded to expand of the ambit judicial review and endorse the auditing of environmental governance by expert non-government organisations.

Twenty years ago, an interest in environmental governance was unlikely to move a court to allow standing to an applicant asserting that interest. From the courts' perspective, the public interest in the environment was a 'nebulous' concept, which lacked any of the comfortable concrete qualities of an individual litigant insisting on the protection of readily identifiable legal rights. In 1980 the High Court of Australia made the following observation in refusing an application by the Australian Conservation Foundation seeking judicial review of a decision to license a tourist development on the central Queensland coast:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern … A belief however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi* (*Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530 per Gibbs J).

While the High Court was refusing to recognise the non-corporeal and collective interest in the environment, other legal and political actors were arguing that the 'standing' rules, which had determined when a matter of public interest could be the subject of judicial review, were inadequate. The standing rules were thought to be inadequate precisely because they allowed no recognition of the various interests public interest litigation might take up (Australian Law Reform Commission, 1985).

If framed appropriately, an application by an environmental organisation such as the Australian Conservation Foundation would not so readily be dismissed today as it was in 1980. Through the process of professionalisation, and most importantly through the assertion of scientific expertise, environmental lobbyists have found a respectable and almost apolitical voice, which has allowed the courts to interpret the standing rules in their favour (*The North Coast Environment Council Inc v Minister for Resources* (No 2) (1994) 36 ALD 533; *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70 at 76; *Re: United States Tobacco Company and Australian Federation of Consumer Organisations Inc. and: The Minister for Consumer Affairs; The Trade Practices Commission and Australian Federation of Consumer Organisations* (1988) 83 ALR 79).

Organisations such as the Australian Conservation Foundation and the Australian Federation of Consumer Organisations have exploited and transformed what Hindess calls the 'conceptual and discursive conditions' within which interest in environmental governance is situated (Hindess, 1986: 119). They have done so through their organisational ability but more significantly through their scientific expertise, as Rutherford observes:

> Regulatory ecological science does not so much describe the environment as both actively constitute it as an object of knowledge and, through various modes of positive intervention, manage and police it (Rutherford, 2000: 56).

In particular the presentation of scientific evidence in support of a legal claim allows the court to retain its status as neutral arbiter. It frees the court from any charge that it has recognised the public interest advocate's claim because of the presiding judge's personal sympathy for the advocate's cause. Most importantly it locates the applicant and their public interest claim in a discursive space which allows the court to assess the legitimacy of the claim. Environmental non-government organisations, as opposed to individual citizens qua individuals, have come to be identified with, to the extent of articulating, 'the public interest' in environmental governance.

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