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The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?

Edited by CHARLES- HUBERT BORN, AN CLIQUET, HENDRIK SCHOUKENS, DELPHINE MISONNE, GEERT VAN HOORICK [Routledge, 2015, 505pp, ISBN 9781138019584 £90]

A week is a long time in politics, Harold Wilson once quipped. This book explores the impact of twenty years of the Habitats Directive, and what is now nearly forty years of the Birds Directive. The verdict, summed up by one contributor, Carlos Romão, depends upon whether you are a glass half full or a glass half empty person. The Directive 's school report would be littered with 'could do better' comments – but as the editors conclude it nonetheless 'may indeed be seen as 'European wildlife's best hope'. It is odd for a legal measure to still be classified as a 'work in progress' over twenty years after its enactment (a phrase used in the forward by the EU Environment Commissioner).

It is difficult to think back to 1979 and the passage of the Birds Directive. There was no Biodiversity Convention, no express basis for European action on the environment, no TEU, no 'ecosystems services' discourse, no Aarhus Convention on access to information or participation in ecojustice; our approach to regulation was vastly different. This was the first step into environmental law for the EU. For me reflecting on the journey since then is a reflection on a lifetime's reflection development of law. Even in the distance since the Habitats Directive was approved in 1992 thinking has moved on. It is difficult to overstate the significance of it at the time. Romão, describes the Habitats Directive as 'unique instrument for its time' in terms of methodology, reflection of bio geographical thinking and rigour. But times have moved on. This book contains a series of papers derived from a conference to mark the twentieth anniversary of the passage of the Habitats Directive. It explores the impact of the Directive (and the Birds Directive) so far and considers whether the Directive is sufficiently resilient to be the basis of future biodiversity protection. Perhaps in the heady days of its passage it was seen as a solution to habitat loss and degradation, but in a less optimistic age, authors recognise it is one part in a bigger whole if we want to achieve the 2020 targets some time this century.

The chapters systematically document the operation of the Directive and highlight its weaknesses and future opportunities. It covers well-trodden areas, but in a way that brings out new insights, and less trodden areas such as marine habitats and species protection provisions. In a sense this book is like a Law commission consultation, setting out the evidence and issues. Sadly in the foreword the EU Commissioner indicates they do not have plans to consider changes to what now looks like an innovative but dated instrument. One possible justification for this focus upon making the current system work is that the Natura 2000 network of habitats envisaged by the Directive is only just in place and in 2007 17% of the protected habitats were in a favourable conservation status. As EU Environment Commissioner Janez Potočnik comments, it might therefore be a little premature to argue for a fundamental review.

Lurking behind the whole book is the data on actual impact, leading Verschuuren to ask – is Natura 2000 only an ecological network on paper? There is no doubt that in a number of high profile cases the Directive has had an impact, but its avowed aim was to save and secure the restoration of habitats. As Romão observes, only about 30% of land designated with a conservation status within the EU is only covered by Natura 2000 designations. The rest are covered by domestic designations or dual designations – with substantial variations between states. Of the lands designated under Natura 2000 only 17% seem to be in a favourable conservation status – with considerable areas where the status is ‘unknown’. The evidence for the label is widespread, the evidence of its having an impact less clear. Krämer pulls no punches in his juxtaposition of continuing EU proclamations of commitment to biodiversity with this evidence on the ground. Some of the writers identify weaknesses in the Directive itself, but Krämer points the finger elsewhere, and argues that the problem is not the Directive, but that the Directive and associated law is not playing a sufficiently prominent role in the Commission’s strategy.

The tensions between local obligation and global vision run through the book. Clément sees the vision of the Directive as requiring that conservation is no longer a local or even national balance, but one in which the Europe wide conservation imperative needs to be weighed. The Directive sits at the interface of a desire to preserve *national* nature and economic imperatives in a global context. Schoukens and Woldendorp go as far as to suggest the Directive is a key contributor to resentment of the EU in some quarters. It is a paradox that it sees conservation as a pan European imperative, but places responsibility firmly on nation states (Gracia-Ureta and Lazkano). There is a contradiction in asserting collective ownership of the habitats of Europe, with a duty on all European citizens towards the whole, with the single designation of Natura 2000 and at the same time delegating active management responsibility to states to deliver directive objectives in their own way i.e. there is no management model and no stakeholder approach. If Natura 2000 is to be a coherent pan European network, then some sort of vision is needed for that network - its conservation vision and its trans boundary significance.

Aragao highlights the significance of this lack of coherence in relation to trans boundary habitats. Habitat and species distribution and significance are biogeographic phenomena, and whilst sometimes national boundaries align to geographic features, other factors have often been more influential in their establishment. The reliance on national level provisions to flesh out the law and practice under the directive means that habitats and species operating trans boundary can be subject to vastly different status and protections in different states, and habitats at the boundaries are particularly vulnerable. Arago highlights the extent to which recourse is to international law in such cases. Surely, the vision for articulating a pan European collective responsibility to our habitat could have made a better fist of transboundary legal protection and routine governance? The failure of vision in this respect is in stark contrast to the Biodiversity Convention agreed by the UN in the same year as the Habitats Directive.

Clément reflects on the extent to which biodiversity loss is the cumulative total of lots of small impacts. In each individual case the economic activity is normally stronger. In pollution control you can regulate lots of small impacts through overall permit schemes to control overall impact, but this sort of distributive approach is harder in relation to habitats and species. These sorts of cost distribution questions are normally ones with which courts struggle, but in the context of the Directive, judicial activism has been significant.¹ Is the level of control it has achieved a judicial product or product of Directive? Of the dramatis personae of the book, judicial activism recurringly outshines the Commission or state governments in terms of engagement with the priorities of the original vision. The Commission itself does not emerge in entirely positive light, for example McGillivray highlights its weak interpretation of compensatory measures and lack of transparency and Krämer's coruscating critique of Commission oversight of transposition and reporting. Once again, we see the courts playing a central role in determining the impact of the Directive. The French hamster like Rosencrantz and Guildenstern stands symbol for the victims of the failings of the Directive in more than one paper.² Perhaps he should have featured on the cover?

Schoukens and Woldendorp document the Sisyphean task of selecting and designating sites under the Habitats and Birds Directives. The processes and principles of designation seem entirely reasonable when viewed in isolation. It is only when they engage with other apparently reasonable imperatives that the process of balancing and assessing becomes messy and time consuming. It is difficult to see how such a contentious process could be simpler, but Stahl places her finger on a vacuum at the core of the Directive. The entire aim of designation is to achieve 'conservation objectives', but the Directive assumes these exist. It does not articulate them or provide a mechanism for doing so. The nearest to a definition is a loose sense of maintaining or restoring habitat and species at a favourable conservation status. The courts and member states have been left to develop rather uneven formulations of more localised definitions.

A positive feature of the book is its attention to species protection. People have struggled with the absolute nature of the species protection provisions. Schoukens and Bastmeijer argue that this is because it leaves no room for human mastery, and provides no back door routes around the protections. Such absolute provisions are often characterised by free marketeers as anti-competitive. But Schoukens and Bastmeijer argue that now that just about every attempted loophole has been ruled out the absolutism of the provisions is itself a spur for creativity. Perhaps optimistically they envisage a move from loophole hunting to new ways of carrying out development or agricultural activity more in tune with the species protected.

¹ See Lees E, Allocation of Decision-Making Power under the Habitats Directive, (2016) Jo Env Law 1-29.

² Commission v France [20011] ECR I-4869, European Hamster Case (*Cricetus cricetus*) is cited by a number of contributors.

More could have been said about the relationship of the Directive to other areas of activity, in particular to areas where law has changed dramatically since 1992, although one section of the book is subtitled ‘twenty years of solitude?’ and many papers explore aspects of the evolving context.

Fogelman’s excellent analysis of the contrast between the Habitats and Birds Directives into the Environmental Liability Directive illustrates how fertile such territory can be. She uses this relationship to explore the difficulties of reconciling different aims of protection of humans vs. management of natural resources with its longer term and less human centred focus, identifies core challenges and offers solutions through revisions to the ELD. Whilst De Sadeel provides a strong critique of the relationship between the movement of species and trade and with the Water Framework Directive (De Smedt and van Rijswijk) there is more to be said about both the Habitats Directive and more recent provisions through this sort of contrast of schemes. The need for better integration into specific sectoral policies, and the issues of doing so in the face of strong sectoral discourses is considered (Schoukens and Dotinga marine ecosystems and fisheries, Doussan and Schoukens Common Agricultural Policy). And in a different way, Winter explores the impact of judicial development in other areas, in his paper the property provisions of the European Convention on Human Rights.

An area of major change since the Directive that is not considered in its own right, but which features in several papers is stakeholder engagement. Stakeholders are now central to environmental thinking whether through economic approaches or as a result of Aarhus Convention thinking. But in the Habitats Directive context there is not even clarity about who stakeholders are (García -Ureta and Lazkano), no public participation requirement and no transparency provisions (McGillivray). Clément points out the irony of the Directive’s framing us as all responsible as citizens but its silence as to stakeholders. Kramer considers the failure to turn stakeholder / active citizenship rhetoric into reality as a key critique of the last twenty years.

Finally, whilst the question of invasive alien was a live issue at the time of the Directive, it did not adopt a comprehensive approach to it, and locates it as a ‘supplementary’ issue. Understanding of the issues and options has moved a considerable distance since 1992. Misonne considers the need for further clarification on this. Sadly this volume was completed before agreement was reached on the EU Directive on Invasive Alien Species, missing the opportunity for the sort of inter-directive analysis Fogelman so successfully deploys in relation to the ELD.

. The EU’s own approach to biodiversity has changed significantly since 1992. The Biodiversity Strategy to 2020³ focuses upon action to improve conservation status (but then as Krämer observes this is just one in a long line of such commitments), completing the Natural 2000 network and making it fully

³ ‘Our life insurance, our natural capital: an EU biodiversity strategy to 2020’ Council Decision 11978/11.

operational. In that sense the Directive remains at the core of EU thinking. Cliquet, Decler and Schoukens argue that the Directive provides an adequate legal framework for the 2020 Strategy, but 'in a somewhat implicit' way. Krämer in contrast considers the legal structure needs to be more prominent in EU action.

Conceptual changes in thinking about biodiversity conservation have also changed since 1992. The 2020 Strategy raises the question of whether 'habitats' as a conceptual building block is appropriate given the Strategy focus upon 'ecosystems services'. The Strategy requires member states to set a strategy framework for the conservation and restoration of ecosystems, with a target of no net loss of ecosystem services. Whereas the Directive and Natura 2000 focus upon a specific network of sites, this points to a wider focus upon total net loss. At present the Directive is the only legal enforcement framework in town, and there are going to be inevitable tensions in enforcing a no net loss of ecosystem services policy through a framework that deals with a subset of designated sites is uneasily connected. Mertens looks to the future to explore what an ecosystem services approach would mean for the Directive. She concludes the two can co exist, that 'ecosystems services' offers a human centred language and rationale for action that may engage people, and that these could enhance commitment to implementation of the Directive. More challenging is the question of how to balance a focus upon a specific network with the holistic ecosystem approach.

A second feature of ecological thinking that has developed since the Directive is that of 'connectivity'. Rather than adopting a static view of nature, connectivity stresses the importance of connecting habitats and ecosystems, so to increase resilience –and enable natural responses to change. It is particularly a feature of responses to climate change., and is focussing thinking at micro and macro level. At face value the Natura 2000 network could offer a strong tool for delivering connectivity, but Verschuuren explores the concept of connectivity and the way the Natura 2 provisions work, to identify its limitations. Natura 2000 criteria have focussed upon the significance of the site, rather than stressing connections, but he identifies judicial pointers which could be seen as requiring connectivity as legal as opposed to purely policy feature of Natura designation. As Hoorick documents, it is not that the Directive has nothing to say about areas outside Natura 2000 designated sites; it is that the measures fall short of what is needed.

The third set of thinking that has changed our approach to biodiversity is climate change. Trouwborst tackles how the Directive interacts with climate change action (or inaction). The thinking behind the Habitats Directive, and its focus of attention is upon direct human interventions, or at least proximate human interventions. The impacts on biodiversity from climate change are different, because human agency is indirect, so the focus of legal intervention in relation to biodiversity is upon mitigation and adaptation. Concepts such as connectivity come into play. Elsewhere Trouwborst and others have considered how the directive could be amended or supplemented, but in this paper he concludes that overall the Directive 'is sufficiently dynamic to accommodate 'natural' climate-induced dispersal', but that it is harder to adapt the Directive to

support 'assisted colonization'. He concludes the challenge is one of adapting the implementation of the Directive, not reforming the directive.

Only one paper raises a fundamental challenge to the Directive: Reese explores the options for market solutions through concepts of habitats offset and banking. He argues for increased flexibility through these economic mechanisms. The directive makes offset a last resort in relation to habitats (Art 6.4), but offers a little more scope in relation to species. Whilst the Commission's own guidelines provide limited scope for offset in relation to species, Reese explores the extent to which the German use of the concept of a 'functioning ecological context' as opposed to 'site', creates space for offsetting. More generally he argues that Article 16 derogations from Article 12 allow development of the site, but still require the conservation status of the species to be retained, which at least opens a door to offset in relation to species. Perhaps not as much as Reese would want, but to him it is an indicator that yet again, the Directive is to be seen as capable as moving in whatever direction policy makers want to take it.

Taken together the papers form an essential resource for those interested in European habitat protection. However, whilst it articulates a pan European vision of habitat protection, and moves seamlessly across the EU, International law's presence in the book is limited, with the notable exception of Aragao's paper on transboundary conservation. Yet international law has moved on a pace since 1992 – the year of the Directive and the Biodiversity Convention. Has the Directive kept pace? How does its relationship to the Convention work? Luk and Gregerson explore the extent to which the Directive does not fully implement international obligations. They argue that the Directive needs to be implemented light of the Bern Convention and that currently the Convention is not being properly implemented in the EU because of its reliance on the Directive, Again, some of this is implementational, although they point to some legal amendments (such as a revision to the species listed in Annex II) that would ensure the Directive is in compliance with Bern Convention obligations.

Some repetition is inevitable, but the approaches are sufficiently diverse that does not matter and has been edited to minimise this. A collection of papers from a conference can make the heart sink, with anticipation of, at best, a curate's egg of a read. However such concerns would be misplaced in the case of this collection. Just about every paper offers a new insight into the successes and failures of the Directive. Some point to a need for legal reform, others focus upon opportunities for implementation improvements to address concerns.

There is a challenge for any legal measure that is a global leader in its time, and is then overtaken by those who come later – will it adapt sufficiently. On this reading the Directive has the capacity to adapt, but is not yet showing sufficient signs of doing so. In the foreword the EU Commissioner indicates that further reform of the measure is not on the table at present, other than through the Regulatory Fitness and Performance Programme (REFIT). Ultimately the editors conclude there is a need to respond to the pressures for more flexibility without compromising standards. This book may not lead to reform, but it is hugely informative and a major contribution to the reform debate. However, rather like

the Directive itself, the significance of its existence may outweigh its impact on the ground.

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