Conserving Our Ecosystems: The Need to Recognize a Coherent Legal System as an Important Element of the Ecosystem Approach

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Overview

1. The ecosystem approach and its three dimensions of integration
2. The integration of legal instruments as an element of the ecosystem approach
3. Obstacles to legal integration or coherence
   a. Fragmentation
   b. Discretionary rules and principles
4. Tensions between a wide margin of appreciation and an ecosystem approach, due to dependency on value judgments
5. The road ahead...
The Ecosystem Approach

”A strategy for the integrated management of land, water, and living resources that promotes conservation and sustainable use in an equitable way”

(CBD COP5, Decision V/6, 2000)

Now endorsed in international, EU and national legal instruments!

Main objective: to ensure the maintainance of ecosystem integrity, i.e. maintaining the structure and functioning of ecosystems, so that a healthy level of production and provision of ecosystem services can be ensured

➢ Through holistic and integrated governance
Three Dimensions of Integration

1. The Integration of Governance Interests
   - Conservation and sustainable use of ecosystems
     - CBD Definition + Malawi principle nr.10

2. The Integration of Governance Sectors
   - Cooperation between sectors
     - Malawi principle nr.12 + Operational point of guidance nr.5

3. The Integration of Legal Instruments
   - A coherent legal system
The Integration of Legal Instruments

- Inter-sectoral cooperation is affected by the architecture and nature of the legal system

- A coherent legal system will facilitate cooperation between sectors and the integration of conservation and sustainable use interests, and should therefore be considered as an important element of the ecosystem approach
Cont.

• **Ecosystems are complex adaptive systems**
  - System features that arise from the interaction of the individual components are different than the features of its individual components!
  - Therefore, ecosystems require a holistic approach rather than a fragmented approach.

• **So, a coherent legal system is needed to facilitate both aspects of an ecosystem approach; integration as well as holism**
What is a coherent legal system in the light of the ecosystem approach?

Some features of environmental law:

1. Fragmentation of environmental law
2. Open and abstract terminology in rules
3. Multi-interpretational environmental principles
1. Fragmentation of environmental law

- Many legal instruments with different relationships to the ecosystem
  - Conservation of species, habitat, land
  - Regulating activities within the ecosystem, e.g. fishery, oil and gas exploitation, shipping, building
  - Regulating ‘other’ activities with a more indirect effect on the ecosystem, e.g. pollution from industry

- The ecosystem may be a place where various legal instruments with diverging objectives apply
2. Discretionary legal rules

- Discretionary legal rules in env.law

- Decisions need to be ‘rational’, ‘effective’, contribute to ‘sustainable development’, ‘to the extent possible..’, if ‘environmentally justifiable’

**Example:** Section 4 of Norway’s Nature Diversity Act 2009

“The objective [of the act] is also to maintain ecosystem structure, functioning and productivity to the extent this is considered to be *reasonable*”
3. Environmental principles

- Subject to diverging interpretations,
  - integration principle, the precautionary principle, polluter pays principle. Also the overarching concept/principle of SD

- Do not aspire denoting a particular outcome of the decision-making process. Instead a certain normative direction is provided under which a variety of interpretations is possible
What is the problem?

• *Discretionary* rules and principles require the *weighing and balancing* of diverging values

• Basically two approaches to carry out v.j.
  – CBA and the monetization of ecosystem values
  – Decision-making based on multiple criteria; such as monetary values, and qualitative and quantitative indicators

• Under both approaches these ‘value judgments’ are subject to a degree of *subjectivity* in addition to technical difficulties, controversialities, and arbitrariness

➢ Risking inconsistent value judgments on ecosystems
Due to the fragmentation of environmental law and governance, various value judgments are executed under different legal and political constraints and traditions on different parts of the same ecosystem!

picture: IUCN-FEG
The Road Ahead

- A wide margin of appreciation combined with fragmentation may impede the realization of the ecosystem approach

Do we need a wide margin of appreciation?

- This actually complicates a holistic approach due to the arbitrariness embedded in value judgments on parts of the same ecosystem

An Ecosystem Approach Requires Environmental Law to...
1. Harmonize the legal acts that apply to the same ecosystem

2. Codify the overarching objective of that legal system, e.g. maintenance of ecosystem integrity

3. Ensure that principles and rules are interpreted and applied in accordance with this objective

4. Decrease dependency on and arbitrariness of value judgments by creating consistent rules on the conditions for their use, the execution of v.j, and the implications of v.j. for the outcome of the final decision
A Coherent Legal System

• Consistency in the use and interpretation of legal terminology across legal acts
  – Commonly used discretionary legal terms
    e.g. reasonable, rational, proportional, environmentally responsible/defensible/justifiable
  – Commonly used ideals and principles
    Sustainable development, precautionary principle
Cont.

• **Consistency requirements for the execution of value judgments**
  – When is a judgment required?
    • Certain issues to be regulated by law...
  – Requirements for the weighing exercise?
    • Certain overriding concerns..
  – What is the effect of the value judgment for the outcome of the decision?
    • Advisory, recommendable, or perhaps legally binding?
Thank you for your attention!

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