



Richard Macrory - *Regulation, Enforcement and Governance in Environmental Law*

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Review by Patrick Bishop*

Anyone interested in environmental law is likely to be familiar with the name Richard Macrory. Appointed as the first Professor of Environmental Law in the United Kingdom, Macrory continues at the forefront of the academic development of the subject. Further, Macrory's career as a practising barrister has allowed him to fuse academic rigour with an awareness of the practical realities of environmental law. *Regulation, Enforcement and Governance in Environmental Law* is a collection of Macrory's previously published work, spanning four decades although presumably in the interest of topicality, most of the contributions were published in the late 1990's and 2000's.

The preface provides a fascinating insight into the development of environmental law as a discipline. Macrory commenced his legal career as a newly qualified barrister working for Friends of the Earth; at a time when the term 'environmental law' did not appear in the legal lexicon, the role of the lawyer was largely focused on lobbying Government for legislative reform and using planning enquiries to reveal the inadequacies of Government policies in addressing environmental threats (p.3). To the newly initiated, faced with an ever-burgeoning body of complex legal rules relating to environmental protection, the breadth of materials reproduced in this book will clearly demonstrate the almost exponential growth of environmental law in the last thirty years.

As the title of the book clearly intimates, the themes covered are almost as broad in scope as environmental law itself. While Macrory acknowledges the growing

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importance of public international law in environmental protection, the book focuses on UK and European Union law. Further, for the most part, a black letter legal analysis is avoided; as such, the materials reproduced largely adopt a thematic approach, focused on the nature of regulation, enforcement and institutional arrangements which underpin the substantive detail of the law.

The book is divided into six parts, with each containing a number of substantive chapters linked by a common theme. Part one focuses on regulatory reform with particular emphasis to the scheme of sanctions available to regulators. Part two is concerned with institutional arrangements, including, *inter alia*, the long running debate over the need for a specialist environmental court or regulatory tribunal. Part three entitled 'The Dynamics of Environmental Law', comprises a collection of materials discussing the development of new environmental standards, notions of responsibility and the use of new technologies as means of assisting enforcement activity. The book then proceeds (in part four) to provide case reports of leading and influential decisions of the UK higher courts and the European Court of Justice dealing with environmental protection. The remaining two parts of the book focus on European environmental law; first, in part five, the materials reproduced deal with principles of European Union law, such as environmental integration, free trade and subsidiarity and how these principles interact with, and influence the development of environmental law. Finally, part six returns to the issue of enforcement but from a supra-national European Union perspective.

In a short review of this sort, it is not possible to provide a detailed account of the arguments and analyses provided by some of Macrory's seminal publications. As such, one can only provide an account of some of the book's most significant themes. A recurring idea running through much of the book is that, given the polycentricity and evolving nature of ecological problems, the environmental lawyer is often faced with the task of adopting imaginative responses to new challenges. To this end, Macrory cautions those who study and practice environmental law that they should be wary of limiting their attention to laws focused on the core concerns of environmentalists (p.421). An example is provided by Macrory's first legal article, published in the *New Law Journal* in 1979, entitled 'Cycle Lore' (p.433 *et seq*). At first sight, at a time when a carbon footprint was something left behind by an inconsiderate coal miner, an analysis of the powers of local authorities to provide street furniture, including bicycle racks, may not have raised obvious environmental implications. It can however be viewed very differently in a modern carbon conscious context. To continue the climate change theme, chapter three, entitled 'Regulating in

a Risky Environment' (p.155 et seq), first published in *Current Legal Problems 2001*, remains particularly apposite. Macrory provides a stout defence of direct or 'command and control' regulation (renamed 'determine and direct') and highlights some of the weaknesses of economic instruments as a means of achieving environmental goals. Given the heavy reliance on such an approach provided by the Climate Change Act 2008, the analysis provided by Macrory could be construed sounding a valuable cautionary note.

Another implicit theme, evident in sections of this book, is deterrence, though a perusal of the index will not reveal a listing for 'deterrence' (although intriguingly, there is a reference to the difficulties of estimating an effective LSD dose for elephants!). However, the observations and arguments made in two sections of the book may be clearly linked to the deterrent effect of regulatory criminal law. The accepted economic view of deterrence is that compliance shall be ensured where the costs of transgressing the law, discounted by the likelihood of apprehension, exceed the gains to be made from regulatory breach. First, following the Hampton Review (*Reducing Administrative Burdens: Effective Inspection and Enforcement 2005*), Macrory was commissioned to review options for the reform of regulatory sanctions. The ensuing report, *Regulatory Justice: Making Sanctions Effective 2006*, which eventually led to the enactment of the Regulatory Enforcement and Sanctions Act 2008, is reproduced in the book. The Act envisions an enhanced sanctioning tool kit which will, amongst other things, vest the power to issue monetary administrative penalties in regulatory agencies. As the name intimates, such penalties may be imposed without recourse to the criminal courts and the corresponding due process safeguards which normally make such a course of action a relatively expensive exercise. As such, the assumption underpinning the new penalties is that they are more likely to be utilised thereby bolstering the deterrent effect of regulatory law. Second, chapter ten, entitled 'Technology and Environmental Law Enforcement', is concerned with the use of satellite remote imaging technology and how this may be used to discover contraventions of environmental statutes. Such an approach clearly has the potential to increase the likelihood of apprehension, which may also lead to an enhanced deterrent effect.

At first sight, this book seems to resemble a 'text, cases and materials' on environmental law. However, while the scope is undoubtedly broad, the coverage of environmental law is by no means comprehensive. Perhaps an appropriate description would be: environmental law seen through the prism of the scholarship of Macrory. For those seeking a black letter account of environmental law, this book is

to be avoided. However, this in no way should be construed as a criticism; unsurprisingly given Macrory's standing as one of the pre-eminent environmental lawyers of his generation, the extracted materials are academically rigorous and demonstrate a profound analytical understanding of the shape of environmental law as a whole. For established scholars of environmental law, many of the materials reproduced will already be familiar; nevertheless, the book represents an invaluable point of reference. Even those already familiar with Macrory's work will benefit from the introductory section of each of the book's six parts, where the catalyst and background to the arguments advanced in the proceeding extracts are clearly highlighted. This book is surely destined to become a 'must read' for anyone (academic, practitioner or student) interested in the development of regulation, enforcement and environmental governance.