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WHAT IS ENVIRONMENTAL LAW?

This volume of 'Text, Cases, and Materials' is an advanced introduction to environmental law in the UK, concentrating on England. It has been written with law students, lawyers, and scholars from other disciplines in mind. It aims to be both explanatory and challenging so that while providing a clear outline of the subject it also encourages readers to think critically and independently. In particular it requires readers to appreciate the complexity of environmental problems *and* law.

As this is the case, this book requires scholars and lawyers to grapple with three interrelated matters in order to understand environmental law. First, there is a need to appreciate that environmental issues are both physically and socio-politically complex. Such an appreciation is not so much about being concerned for the environment but rather understanding the nature of environmental problems and in particular how irreconcilable and intractable environmental disputes often are. To that end, Chapter 2 discusses the nature of environmental problems and, in each chapter that examines a discrete regulatory regime, the particular environmental problems that regime is meant to address are examined.

Second, there is a need to understand that the 'law' that applies to environmental problems consists of a diverse collection of laws that draw on all parts of English and EU legal culture as well as international legal cultures. This is not to say that there is no coherence to the subject but that in many ways environmental law is an 'applied subject' in that it involves the application of basic legal concepts (albeit differently derived and influenced) to environmental problems. Practically, this means that an environmental lawyer needs a good working knowledge of all aspects of the relevant legal cultures and the laws and legal ideas that operate in them. Hence, Parts II and III of this book are overviews of the relevant legal cultures and legal concepts that inform environmental law.

The final matter for environmental law scholars and practitioners to appreciate is that the application of law to environmental problems is a complex exercise in itself. Environmental lawyers need thus not only to understand environmental problems and a diverse body of law, but the interaction between the two as well. Indeed, the process of application of existing bodies of law to environmental problems often requires the re-evaluation of existing legal concepts and doctrines. Thus, in the chapters in Parts IV and V, which analyse the substantive law in particular subject areas, we will see how specific environmental problems often force an adaptation and development of conventional legal ideas.

All of this places those who study and practise environmental law in a curious and not necessarily enviable position. An environmental lawyer needs to have not only an understanding of environmental problems and a significant amount of legal knowledge but also an ability to understand how the two interact. To put it more bluntly, to be a brilliant environmental lawyer one must be able to integrate a sophisticated interdisciplinary understanding of environmental problems with a skilful and

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carefully focused legal approach. We do not say this to be off-putting but rather to point out that the challenges that this book sets out for the study of environmental law are inherent in the subject itself.

This chapter provides an introductory overview of environmental law and the challenges involved in its study by examining three different ways in which the subject can be defined—descriptively, purposively, and jurisprudentially. These different approaches represent fundamentally distinct approaches to the subject and throughout the book the implications of these different approaches are considered. Each definition is also shown to be problematic but each is shown to capture an important aspect of the subject. We then consider the significance of these different definitional approaches, particularly to the practice and the critical evaluation of environmental law. In the second section, we consider some of the perceived problems with environmental law as a subject, including those relating to assumptions about its incoherence and difficulty, and the challenges for environmental lawyers that these perceptions reflect. Finally, we return to the three matters that environmental lawyers must understand to master the subject—environmental problems, the basic legal concepts underpinning environmental laws, and the interaction between those problems and those concepts. This tripartite structure provides a basic framework to help guide inquiry.

1 CHALLENGES IN DEFINING ENVIRONMENTAL LAW

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Environmental law is the law relating to environmental problems. You may be thinking 'That is obvious. What I need is a more comprehensive definition that will help me understand the subject easily'. However, the difficulty is that, in attempting to develop a more comprehensive definition of the subject, scholars adopt very different perspectives. Three different approaches are identified here.

1.1 A DESCRIPTIVE DEFINITION

One approach to defining environmental law is to equate it with the laws relating to environmental protection that exist in a particular jurisdiction. This is a purely descriptive definition and requires the commentator to simply list the various laws that are concerned with environmental protection. On this definition English environmental law consists of UK statutes, delegated legislation, EU legal instruments, policies and case law concerned with regulating pollution, environmental quality, and biodiversity conservation. This approach is rather appealing in that it looks like a relatively straightforward way to define the subject and to give it clear boundaries. It is true that the subject is dynamic and so that with new legislation and new laws the boundaries will change, but it would appear that, by this definition, the subject can be identified at any point in time. However, this approach to defining the subject is not as simple as it appears and, in particular, there are real problems in placing boundaries around the subject so as to establish its scope and nature. These problems can be broadly divided into two categories—those over the definition of 'law' and those over the definition of the 'environment'. In relation to 'defining law', there are a variety of matters that need to be considered. First, the process of identifying the relevant law is not simply a case of isolating a single statute. English environmental law is not only made up of UK domestic law but also includes EU and international law. Much of environmental law is also in the form of delegated legislation and so an environmental lawyer must have regard to a wide range of legal material. Moreover, while there are some common regimes across the UK it is also important to note that there are differences between the environmental law of England, Scotland, Wales, and Northern Ireland. A study of these differences is beyond the scope of this book.

A second problem is that it is not clear what type of 'instruments' are included under the definition of 'law' as there is an important role to be played by policy and regulatory strategy in environmental law. Likewise, as we shall see in Chapter 13, governance frameworks play a significant role in regulating environmental quality.

All this raises important questions about what is the 'law' in environmental law. That inquiry has many dimensions. Thus, for example, in some cases we shall see how environmental problems are regulated through policy, governance networks, and a range of regulatory strategies that are not traditionally legal in nature. Involved in these different frameworks are a range of public and private actors. These will be discussed in Chapters 12 and 13 but can also be seen in the substantive chapters of the book that focus on particular environmental regulatory regimes and problems.

Even if a scholar or student decides to only concentrate on what is traditionally understood as 'law', the situation is no less difficult. This is well captured by the UK Environmental Law Association's (UKELA) 2011–12 review of the state of UK environmental law, which adopted the quality of environmental legislation as its focus for inquiry:

UKELA and King's College London, The State of UK Environmental Legislation in 2011: Is There a Case for Reform? Interim Report, Revised April 2012 (funded by a King's Future Fund award) 7

[The project's research] found significant examples of UK environmental legislation that is problematic in lacking coherence, integration and/or transparency. [Coherence being understood as a reflection of clarity and comprehensibility; integration capturing how different laws and regimes overlap and interact; and transparency being a measure of legislative accessibility.] This legislative complexity is driven by:

- the idiosyncratic historical development of legislation;
- European law requirements, including the regime-specific nature of directives, and the copy-out and referential drafting techniques used to transpose EU law into UK law;
- overlapping legislative requirements;
- a reluctance to consolidate legislation sufficiently often;
- inherently complex statutory provisions and technical requirements;
- over-reliance on detailed guidance and regulatory positions to establish legal requirements; by administrative complexity; and by cross-border differences.

It should [also] be noted that EU environmental law pervades the domestic approach to environmental legislation throughout the UK administrations, and drives much of its complexity. [...]

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The report went on to note various problems of the quality of legislation and the final report for the UKELA project concluded that these problems can cause real challenges for practitioners, regulators, and regulated industry (adding burdens and cost due to uncertainty and wasted time, and inhibiting investment in innovative practices). Such problems can lead to non-compliance with laws and failure to achieve regulatory goals, and they can also undermine access to justice and the rule of law.[1] They can also make life difficult for environmental law students!

[1] UKELA, King's College London and BRASS (Cardiff University) *The State of Environmental Law 2011–12: Is There a Case for Legislative Reform – Final Report*, May 2012, 5–6 and generally.

Some scholars would argue that looking at conventional sources of law—such as legislation—as a focus for studying environmental law misunderstands the nature of 'law' for this subject. Thus, for example, de Sadeleer argues much environmental law is post-modern.

Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 233

> In effect, a new legal model that reflects post-modern conditions is replacing the classical law of modern societies. Under pressure from a globalizing economy, the State has lost its monopolist role as a producer of norms for multilateral and supranational institutions. The nation-state and even the system of states may be either in crisis or heading toward crisis in the face of the increasing seriousness of many environmental problems. In addition, law-makers have had to renounce general legal formulations and turn to more flexible modes of action, better adapted to dynamic social realities, in order to ensure the effectiveness of public policies. Similarly, they have had to abandon simplicity, systematization, and coherence so that legal norms might respond more rapidly to urgent and complex social needs. Finally, they have had to relinquish constraint in favour of a flexible and decentralized system of rule-making, based on regulatory flexibility.

De Sadeleer may be over-emphasizing the 'postmodernist' nature of environmental law but there is no doubt that environmental law does require students and lawyers alike to engage with many different legal forms that operate across jurisdictions. As you study the subject you should consider whether there is a different kind of legal reasoning operating in environmental law.

Furthermore, institutional behaviour and regulatory action will often have a significant role to play in environmental law, particularly in the area of enforcement. This has meant that there is a very strong socio-legal tradition in environmental law scholarship.

Bridget Hutter, 'Socio-Legal Perspectives on Environmental Law: An Overview' in Bridget Hutter (ed), *A Reader in Environmental Law* (OUP 1999) 4–5

> Environmental law represents a major, and perhaps one of the most important, regulatory regimes in Western industrialized societies. This perspective upon environmental law has been an early and enduring focus of socio-legal research into environmental law. There are many definitions of regulation. Traditionally it refers to the use of the law to constrain and organize economic activity. It therefore directs attention to state intervention through law and typically it involves regulation through public agencies charged with the implementation of the law. This is often referred to as the 'command and control' approach to regulation. It involves the 'command' of the law and the legal authority of the state. Typically it involves regulatory law backed by criminal sanctions. But this definition has been broadened to encompass both non-legal forms of regulation and supranational regulation. Indeed, the development of environmental law has led to new ways of conceptualizing regulation and new directions for socio-legal research into environmental law.

For Hutter, studying environmental law requires the analysis of regulatory forms and how they operate. It is a study in human organization. Thinking about environmental law in these terms also highlights that even where a formal legal regime exists there is often a very big difference between what the law is and how it is practised. This is particularly the case in the UK where there is a considerable role for administrative discretion. Another reason why a descriptive definition of environmental

law is not as straightforward as it seems is that, just as with 'law', there is no single definition of the environment. This means that it is not obvious what areas of law the term 'environmental' law covers. This is discussed in more detail in the Introduction to Part III, and throughout this book you will see that statutes, directives, and regulatory regimes are protecting distinct aspects of the environment and in doing so they are often implicitly defining the 'environment' in divergent ways. Thus, often in the context of pollution statutes, the environment is being frequently defined in terms of different media—water, air, soil, and so on—although we will also see that in recent years a more holistic approach to the environment has also been taken in pollution control regimes. In contrast, in nature conservation law, the environment is often being defined in terms of habitats of particular species or ecosystems. Furthermore, different approaches to defining the environment can be seen in which topics different environmental law textbooks and courses choose to cover. For example, some textbooks do not cover land use planning; this particular textbook does not cover noise pollution. In fact, what might be covered by environmental law is contested and by no means obvious.

1.2 A PURPOSIVE DEFINITION

A second approach to defining environmental law is to define it in terms of the purpose the law is designed or desired to achieve. That purpose may be an environmental policy or a particular environmental outcome such as the prevention of pollution or some form of environmental degradation. Defined in this way, environmental law is primarily a social program implemented through law.

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A Dan Tarlock, 'The Future of Environmental Rule of Law Litigation' (2002) 19 Pace Envtl L Rev 575, 576–77

> [E]nvironmental law could be defined as the positive and common law that reflects environmentalism. Environmentalism is an unstable wedding of two policy objectives: (1) the protection of public health from the risks associated with involuntary exposures to pollutants and contaminants, and (2) the protection and preservation of natural areas. Not surprisingly, a more complete definition of environmentalism creates a more complex question with many different and contradictory answers. Following Aldo Leopold, I define environmentalism as an emerging philosophy or value system which posits that we living humans should assume science-based ethical stewardship obligations to conserve natural systems for ourselves as well as for future generations. [. . .] Environmental law can therefore be explained as an effort to institutionalize stewardship obligations.

To define environmental law in purposive terms is useful in that it highlights that much of environmental law is a product of ethics, policy, and/or politics. The history of environmental law can be understood in terms of a series of waves of legal initiatives that reflect different eras of environmentalism and environmental policy. Such a definition also highlights the fact that historically environmental law developed as a regulatory response to the inadequacies of the existing law.

Lord Scarman, *English Law–The New Dimension* (Stevens & Sons 1974) 53

> But the truth has to be faced. The judicial development of the law, vigorous and imaginative though it has been, has been found wanting. Tied to concepts of property, possession, and fault, the judges have been unable by their own strength to break out of the cabin of the common law and tackle the broad

> problems of land use in an industrial and urbanised society. The challenge appears at this moment of time, to be likely to overwhelm the law. As in the area of the social challenge, so also the guarding of our environment has been found to require an activist, intrusive role to be played by the executive arm of government.

A purposive definition also highlights that we need to understand the rationale behind laws in order to understand and to evaluate them.

Alyson C Flournoy, 'In Search of an Environmental Ethic' (2003) 28 Colum J Envtl L 63, 114–15

> Environmental law is itself an important expression of social value. The adoption of laws in this field reflects concern for values previously excluded or inadequately weighed under our laws. [...] If neither the public nor the decisionmakers articulate the ethical issues involved, we cannot ultimately know whether our laws and policies are consistent with our ethics. Just as in archery one learns from seeing where the last arrow struck and adjusts one's aim, we need to know what the bulls-eye is for environmental law, or else we're simply launching arrow after arrow with only random improvement.

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A functional definition thus invariably highlights the inadequacy of an approach to environmental law that simply focuses on legal rules, institutions, and processes. At the very least, an understanding of environmental policy is needed.

Yet, as with descriptive definitions, purposive definitions are not as straightforward as they seem. In particular, these definitions are under-inclusive. This can be seen from three perspectives. First, they construe the driving logic of environmental law as exterior to the law and thus the role of law is largely instrumental. As will be shown throughout this book, law is not just a bundle of rules that are akin to a computer 'app', rather it is a culture replete with a distinct body of reasoning, ideas, and processes. While Lord Scarman's comments about environmental law were valid in 1974, they are no longer. Statutory schemes and administrative action is complemented by a large body of carefully reasoned case law in which judges are not simply protecting the environment or interpreting statutes but also refashioning legal principles and developing new legal concepts. Describing environmental law in purposive terms can overlook these developments.

A second issue or problem with a purposive definition of environmental law is that it seems to suggest that the role of environmental law and environmental lawyers is to enhance environmental protection or to pursue a particular environmental ethic.

Patrick McAuslan, 'The Role of Courts and Other Judicial Type Bodies in Environmental Management' (1991) 3(2) JEL 195, 197

> My view and my argument here is that this is no longer good enough and we have to raise the intellectual level of our legal discourse on environmental matters. We have to start from the proposition that given the environmental crisis that is upon us, lawyers no less than other disciplines have to contribute to the development of what I would call a new ethic of government and administration; we have to try and put flesh on the bones of the concepts of environmentalism and sustainability.

Besides the expectations that this places on lawyers it ignores the fact that while much of environmental law is concerned with environmental protection that does not mean that the operation of law is simply about preventing environmental harm. Rather, many other factors come into play in environmental law issues such as responsibilities of the state, private rights and other interests. The task of the practising environmental lawyer is not so much the promotion of a new ethic but rather being involved in decisions and disputes that are embedded in complex legal and socio-political contexts.

Finally, there is a danger that the purposive approach to defining environmental law ignores the fact that there is considerable disagreement over the nature and definition of environmental policy. Rather environmental law is described as fulfilling the purpose that the commentator wants achieved whether it is environmental justice, sustainability, or pollution prevention. Conflict over environmental protection is not just simply between those who wish to protect the environment and those who don't, but there are also many different understandings of what it means to protect the environment. Many people wish to promote sustainable development but that term can mean various things ranging from a minor adjustment to industrial activity to a radical overhaul of the whole of society (see Chapter 11). Likewise Flournoy, quoted already, identifies a number of different ethical impulses in US environmental law such as environmental justice, a land ethic, private rights ethic, a development ethic, and sustainability.[2] Environmental law thus is a battleground for different perspectives on environmental protection. A purposive account can take into account these divergences of opinion but there remains a danger that environmental law is treated as just politics in another guise.

1.3 A JURISPRUDENTIAL DEFINITION

A third approach to defining environmental law can be seen to be emerging in the literature. This definition addresses many of the concerns associated with a purposive definition and can be described as a jurisprudential approach. Under this approach, environmental law is neither a collection of laws concerned with environmental protection nor an instrument of policy, but rather a body of legal principle. The approach is jurisprudential in the sense that it is promoting the legal integrity of the subject. Consider the comments of Jewell and Steele in the introduction to a collection of essays, which explores the interface between environmental issues and other areas of law.

Tim Jewell and Jenny Steele, 'Law in Environmental Decision-Making' in Jenny Steele and Tim Jewell (eds), *Law in Environmental Decision-Making: National, European, and International Perspectives* (OUP 1998) 3

> [C]urrent developments would seem to pull towards a more 'integrated' approach to the subject, and to suggest the development of environmental law as a distinctive field with distinctive subject-matter. From such a point of view, the type of analysis adopted in this collection—which emphasizes the specific qualities of particular (perhaps even traditional) legal frameworks and sources—will require some explanation. If the current emphasis is on a distinctive series of 'environmental' problems to be solved, then it would seem that 'component' categories of law would need to be amended, or even transcended, in order to achieve such goals. On the other hand, questions of environmental law are intimately associated with questions of legal technique, and even innovative techniques have both a practical and an academic history and setting. In addition, it will be suggested that it is in the nature of current environmental law to invite consideration of environmental issues as part of other concerns, and as connected with other bodies of law.

[2] Alyson Flournoy, 'In Search Of An Environmental Ethic' (2003) **28** Colum J Envtl L 63–118.

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This perspective acknowledges the transformative nature of applying law to environmental problems and that this in turn raises more general issues for how legal scholars think about legal control.

Another jurisprudential approach to defining the subject can be seen in the work of Coyle and Morrow. They are writing very much from the perspective of property law.

Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing 2004) 212

> Environmental law, viewed as a series of arguments concerning responsibility and justice, might be thought of as the product of a sustained reflection upon the relationship between property, rights and nature: a body of philosophical speculation which has its roots in the deliberations of the natural rights theorists of the seventeenth century. For the natural lawyers, property rights are imbued with a moral (and religious) significance which shapes and refines their specific characteristics on the plane of juristic thinking. Within the natural rights tradition, property was thought of as central to the nature and political fabric of the polity itself. [...]

Coyle and Morrow's arguments are interesting. They are attempting to show that a body of environmental law thought can be recognized and that it has a long and well entrenched history. Coyle and Morrow are not attempting to argue that this means there is a coherent and well thought out set of legal principles but that the legal foundations of environmental law are well entrenched.

From the perspective of the environmental lawyer, the jurisprudential approach to defining the subject is very attractive as it puts the subject on a firm disciplinary footing and addresses the perception that environmental law is in some way a 'second rate' legal discipline, because it has little jurisprudential content. A problem, however, which can be seen from comparing these two perspectives, is that it is not obvious what that jurisprudential content is. The Jewell and Steele collection is emphasizing the interface between environmental issues and a variety of areas of law (although not directly property law) while Coyle and Morrow are specifically focused on property law. De Sadeleer's comments also offer another perspective on the jurisprudential content of the subject. Just as with the purposive approach, there needs to be awareness that what is identified as the substantive content of environmental law is more influenced by what the commentator wants it to be than what it actually is.

A second problem is that there may be a danger that a jurisprudential approach to defining environmental law overemphasizes the unique nature of the subject. Consider the comments of Cane in relation to arguments for a special liability scheme for environmental harm.

Peter Cane, 'Are Environmental Harms Special?' (2001) 13(1) JEL 3, 5–6

> Unlike the law of contract or property but like product liability, environmental liability law and 'toxic tort law' are functional or practical legal categories—they do not have a conceptual unity of their own. They have grown out of attempts to use existing legal techniques and concepts to deal with new social problems. This is perfectly acceptable and, indeed helpful, so long as these new functional legal categories are used only as frameworks for organising knowledge and thinking about particular social problems. But difficulties can arise when special regimes of legal liability rules are invented to deal specifically with harms caused, for instance, by 'products' or 'environmental pollution'. [...] My basic point is in thinking about environmental liability law we should aim first and foremost to develop a fair and efficient system of compensation for harm inflicted. We should not complicate this compensation goal by trying simultaneously to punish polluters or to reduce pollution.

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Cane's argument is an interesting one in that he is emphasizing the importance of established legal doctrines for how environmental issues are treated by the law. At the very least it emphasizes the danger of the jurisprudential approach to defining the subject, but if taken more seriously also undermines a purposive approach to the subject.

1.4 WHY DO DEFINITIONS MATTER?

The discussion in Sections 1.1, 1.2, and 1.3 highlights that there is no one definition of environmental law that can adequately capture the subject. Each of the definitions does have some validity but each also has serious drawbacks. As this is the case, these definitions are used as common reference points throughout this book to illustrate the different ways in which the subject can be approached. To do that, however, it is useful to consider in more detail why the definition of the subject matters so much.

It should be stressed that the problems of defining the subject are not unique to environmental law but are particularly acute in relation to it because of its wide scope and dynamic development. The variations in definitions clearly present challenges for the environmental law textbook writer or the environmental law lecturer in trying to figure out what should be included in a textbook or a course. These problems are not of direct concern to the student or the lawyer—so why do the problems in defining environmental law matter to students and scholars of environmental law?

From one perspective it could be said that how we define environmental law is of no consequence. Consider, for example, the perspective of Lord Woolf (then Sir Woolf).

Sir Harry Woolf, 'Are the Judiciary Environmentally Myopic?' (1992) 4(1) JEL 1, 2

> It could be suggested that the initial difficulty is that while environmental law is now clearly a permanent feature of the legal scene, it still lacks 'clear boundaries'. It may be that, again as in the case of administrative law, it is preferable that the boundaries are left to be established by judicial decision as the law develops. After all, the great strength of English law has been its pragmatic approach. It has always been concerned more with remedies than with principles. However, environmental law does not fit conveniently into any existing legal compartment. It is easier to identify the areas of the law with which it is not concerned than those with which it is concerned. For my own purposes I regard it as being concerned with our physical surroundings rather than our political or social surroundings [...] we rely upon no single legal procedure or remedy. Instead we rely in part on the long-established common law actions for private and public nuisance; In part on the public law procedure of judicial review; in part on statutory appeals and applications and generally on the criminal law. Combined these procedures provide a formidable armoury. However at the present time, their deployment can and occasionally does result in an embarrassing succession of proceedings.

Lord Woolf's comments are very apposite. The law with which an environmental lawyer will be concerned will be driven by pragmatic concerns and the boundaries of that law will be determined by the remedies and legal procedures available. Environmental law is thus the application of those different areas of the law to environmental issues. As this is the case there is no need to draw neat boundaries around the subject and if such boundaries are drawn they are likely to be overly restrictive.

However, definitions do matter for three reasons. First, a chosen definition of environmental law will affect what is adopted as the focus for analysis. Thus, for example, defining the subject in doctrinal terms provides a very different picture than if it is defined in socio-legal terms. Any analytical framework will provide a means by which to identify particular recognized features or procedures and to

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draw on common approaches between them, at the expense of identifying other features, relationships, and procedures. A definition will thus affect even a pragmatic approach to the subject because it will assist in identifying what is in the 'formidable armoury' of the environmental lawyer. Thus, for example, environmental law could equally be understood as concerned with: bringing particular types of legal action, invoking particular types of laws, or ignoring formal legal processes and focusing on negotiation with administrative bodies. These different definitions will also have implications for how the subject is taught and for what is understood as acceptable to be published as 'legitimate' environmental law scholarship.

The second reason why the definition of environmental law matters is to do with the way in which the law is applied. The focus here is particularly on how the *environment* is defined, because this will affect the scope of the subject and how environmental issues are conceptualized. Consider the perspective of Holder and McGillivray in an introduction to a series of essays which explore how the environment is legally constructed.

Jane Holder and Donald McGillivray, 'Introduction' in Jane Holder and Donald McGillivray (eds), *Locality and Identity: Environmental Issues in Law and Society* (Aldershot 1999) 1

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[O]ur concern is that geographic, economic and moral boundaries have been drawn around particular ways of understanding this relationship, leading to the partial defining of environmental problems and the marginalisation of particular groups in decisions about the state of the environment. Law has played an important part in drawing such boundaries, for example, by narrowly defining 'the environment' as air, water and land, and by generally dividing up matters of conservation, land use and landscape protection for separate treatment. Law's traditional preoccupation with jurisdiction compounds this state of affairs: environmental problems are conceived of, and contested, in terms of international, European Community [now Union] and national law, often with little appreciation of the operation of complex and often contradictory laws of nature, cross-media, trans-boundary and cumulative environmental effects. A further legal boundary is drawn between that which is privately owned and that which is 'common', with law having traditionally upheld private rights at the expense of common ownership. This creates some doubts about the capacity of law to protect the environment as 'commons' via individualised legal mechanisms. Much of the law relating to the environment may therefore be characterised by spatial, theoretical and disciplinary closure.

Holder and McGillivray's comments highlight the problems of a pragmatic approach. Different legal processes and remedies can be deployed to protect the environment in discrete ways and in doing so has implications for how we understand environmental problems and how to address them. Thus, for example, there is an overlap but disjunction between planning law and pollution control law that results in environmental management being distorted.

Another example of how defining the environment can shape (or confuse) the focus for environmental law can be seen in Macrory's comments concerning the role of different government departments in relation to environmental issues.

Richard Macrory, ' "Maturity and Methodology": A Personal Reflection' (2009) 21(2) JEL 251, 252–53

The difficulties that governments have in constructing coherent environmental ministries reflect the pervading nature of the environment—all the reorganisations of central government environment

> departments that have taken place in the UK over the last 10 years underline the sheer impossibility of fitting the environment into conventional bureaucratic structures. Universities attempting to establish environmental centres and similar initiatives face similar problems in challenging long-established departmental and faculty structures. For many of us engaged in the field, this is what makes the subject so intellectually interesting. But it makes even the use of the term 'environmental law' problematic.

Macrory also went on to consider the challenges in exploring the possibility of considering setting up an Environmental Tribunal.

> One of the questions that had to be faced was what made environmental law special: if an environmental tribunal, then why not a trading standards or health and safety tribunal? We identified a number of characteristics of environmental law that did seem to place it in a distinct category, and which in themselves pose challenges for developing robust scholarship as the authors indicate. First, that in practice many of the legal disputes involved complex and often uncertain technical and scientific issues, and were thus quite different from the sorts of questions raised in planning or amenity type decisions. Next, environmental law involved a complex and fast-developing legislative and policy base. I have never seen a comparative study, but I suspect that the sheer body of new substantive law in the environmental field is higher than in many other areas. Then, there was the sheer complexity of differing and overlapping jurisdictions engaged in environmental law, from criminal and civil law to private and public law. The density of the European Community legislation in the environmental field appeared to be greater than in many others, including town and country planning and health and safety. This was coupled with the significance of a large number of international environmental treaties. In addition, fundamental principles, such as the precautionary principle and the polluters pay principle, have now entered the language of environmental law, and raised challenging questions for interpretation and application. Principles concerning third party access to justice, notably those reflected in the Aarhus Convention, had been highly developed in the environmental field. Finally, the overarching principle of sustainable development was underpinning many policy and legal developments—a concept subject to so many differing interpretations that its value was becoming suspect, but it nevertheless required understanding.

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The third and perhaps most important reason why definitions definitely do matter is that how the subject is defined will directly affect how the law is evaluated. In studying a subject law students are not only concerned with knowing the law. They are also concerned with assessing the quality and integrity of that body of law. Environmental law also needs to be evaluated as part of its development and reform. How environmental law is defined will act as the benchmark for how it is judged. If environmental law is thought to be concerned with preventing environmental degradation, then any degradation that occurs will be construed as a failure of environmental law. If, however, environmental law is understood as a coherent body of principles, then a particular area of environmental law not in line with those legal principles will be understood as deficient. The definition of the subject is thus essential in assessing its validity. In analysing any critiques of environmental law, an important starting point is to understand how the commentator is defining environmental law.

2 THE CHALLENGES OF PRACTISING AND STUDYING ENVIRONMENTAL LAW

While the discussion in Section 1 has focused on definitions, as the last section also makes clear, environmental law is not a straightforward subject to either study or practice. There is much to think

about in relation to how environmental problems are understood, what are understood as the relevant legal frameworks, and how those frameworks apply to particular environmental problems. It thus should come as no surprise that, among environmental lawyers, there is a great deal of soul searching about the nature of their subject. Again this might seem an annoyingly intellectual concern and enterprise, but the issues that vex environmental lawyers and environmental law scholars have significant practical implications. Before looking at those implications, it is useful to expand on those challenges. The extract from Fisher and others relates to that environmental law scholarship but there is much that is also relevant to environmental law itself, lawyers, and scholars in particular.

Elizabeth Fisher, Bettina Lange, Eloise Scotford, and Cinnamon Carlane, 'Maturity and Methodology: Starting a Debate About Environmental Law Scholarship' (2009) 21(2) JEL 213, 218–19

> [T]here is a strongly held belief amongst environmental law scholars that the subject has not yet come of age as an area of legal scholarship and that the best is yet to come. To put it bluntly—environmental law scholarship is characterised as immature. Moreover, these perceptions have not shifted in over two decades. Indeed, for environmental law scholars, environmental law scholarship seems to be like the Peter Pan of legal scholarship—'the discipline that never grew up'. [...] There are many different reasons why the immature image of environmental law scholarship persists. Four are particularly significant: the intellectual incoherence of environmental law as a subject, the perceived marginality of environmental law scholarship in the legal academy, the poor quality of some environmental law scholarship and the sheer difficulty of carrying out environmental law scholarship.

We are of course included among these authors of this article, and the conclusion in this article was that much of the perceived immaturity pointed to methodological challenges in the subject, including challenges arising from: the speed and scale of change; interdisciplinarity; governance; and the multijurisdictional nature of the subject. There is no room here to go into the details of our analysis but it is worth noting interdisciplinarity in environmental law: in particular, Heinzerling makes some very pertinent comments in relation to interdisciplinarity.

Lisa Heinzerling, 'The Environment' in Peter Cane and Mark V Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 701, 702–3

> First, the nearly simultaneous passage of the major environmental laws meant that legislators often had no time to react to the experience under one law before enacting another; thus several mistakes were made in the early environmental laws, and many of these mistakes were repeated from one statute to the next. A large strand of legal scholarship on the environment has taken critical aim at these early mistakes. To this day, environmental law scholars focus much of their attention on issues of statutory design. [...]
>
> Environmental law scholarship is pervasively interdisciplinary. Indeed, it is almost impossible to imagine a first-rate environmental law scholar who is not comfortable with, and whose work does not touch upon, scholarly disciplines beyond law. Toxicology, ecology, public health, statistics, economics, sociology, psychology, philosophy, and more—these fields have as much to do with environmental law, and environmental law scholarship, as 'law' itself (assuming that law is an autonomous discipline in any event). Outside of several constitutional issues that have special relevance to environmental problems

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(such as the 'takings' issue in the United States), traditional modes of legal scholarship—doctrinal analysis, case parsing, analogical reasoning—have relatively little place in cutting-edge environmental law scholarship. Most of the heavy labour is done only with the help of other scholarly disciplines. For example, to look ahead for a moment, the astonishingly popular scholarly trend in favour of market-based mechanisms for pollution control came, not from law, but from economics. In environmental law scholarship, interdisciplinarity is not a trend; it's a way of life.

Our solution to these different challenges in approaching environmental law issues was, and is, to argue for scholars to be more reflective about their methodology. In being so focused on method, scholars can be understood as developing their expertise, thus building the rigour of their analysis, arguments, and conclusions. Fisher has commented on this; although her discussion here is in relation to transnational environmental law, her analysis of expertise is relevant to environmental law more generally.

Elizabeth Fisher, 'The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers' (2012) 1 Transnational Envtl L 43, 48–50

Much has been written about expertise, but for my purposes let me use a very simple definition: namely, that the term connotes a set of skills and knowledge that other scholars are not expected to have. The focus then becomes the knowledge, skills and experience that are required for someone to be identified as a transnational environmental lawyer as opposed to another type of lawyer, including other types of environmental lawyer. Those skills and that knowledge and experience fall largely into two categories: contributory and interactional expertise. These terms are taken from the work in science and technology studies of Collins and Evans. While the questions asked within the context of their work do not relate directly to law, it provides a useful frame. This is particularly because their analysis heavily emphasizes the importance of language.

Contributory expertise refers to the sets of skills, knowledge and experience that are needed to contribute to the development of transnational environmental law as a discipline. This expertise is legal expertise [...]

Contributory expertise is not the only form of expertise that needs to be fostered in relation to transnational environmental law, however. There is also a need to develop interactional expertise. By this I refer to the need to interact with the other disciplines that relate to how environmental problems are conceptualized. In particular, there is a need to develop linguistic expertise in these other areas. The development of this type of expertise is not just about reading the right textbook or knowing what a particular scientific term means—it requires understanding the complexities, ambiguities and nuances of environmental problems and discourses. This often involves engagement with a range of different disciplines. Thus, understanding risk requires a multi-disciplinary approach, as does making sense of the activity of modelling. Fostering this type of expertise also requires the fostering of critical capacity—we should not just blindly accept concepts from other disciplines but subject them to the scrutiny we give to legal concepts. Of course, it cannot be the same scrutiny, but the point about interactional expertise is that it highlights the need to develop a distinct expertise for addressing this process of interaction.

These comments respond to many of the issues highlighted by Heinzerling, also returning to the themes highlighted in the first pages of this chapter. In other words, the practical implications of the challenges of studying and practising environmental law manifest themselves in the need for environmental lawyers to develop a range of different types of expertise.

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3 HOW TO STRUCTURE ENVIRONMENTAL LAW INQUIRY

All of this is sobering reading. The study of environmental law is not just about finding simple solutions to making the world a better place. It is a difficult subject that requires scholars, practitioners, and students to think hard and carefully about what they do. In this last section we provide a very rough general framework to help students in this process. Before doing this, it is valuable to highlight two points from the discussion in Sections 1 and 2. First, defining environmental law is not easy because of (among other things): the surrounding socio-political context; the variations in legal institutions and processes concerned with environmental problems; and the subject's ambiguous legal nature. Second, how the subject is defined matters because it affects what is understood to be the relevant law, how that law is applied, and how that law is evaluated.

This state of affairs seems to leave students, lawyers, and academics in a rather difficult situation. An authoritative definition appears elusive but such a definition is necessary to both the effective practice and study of environmental law. What is thus needed is an approach that somehow captures the ambiguity of the subject but not at the cost of thwarting proper analysis. Such an approach is best achieved by starting with a very inclusive definition of the subject and returning to three matters that we highlighted as being important at the start of this chapter.

An inclusive definition of the subject is something like this: environmental law is the law concerned with environmental problems. It is a highly pluralistic subject and different areas of the law and different environmental problems have given rise to different legal frameworks. Variations in substantive legal norms, legal processes, purposes, and the involvement of different jurisdictions in environmental law reflect the wide scope of the subject. Moreover, it is also not surprising that those environmental issues and associated legal frameworks result in a range of different legal responses. Common approaches can be seen across the subject but there are also considerable differences.

At this stage, an understanding of the three issues highlighted in the introduction—environmental problems, basic legal concepts, and the interaction between the two—becomes significant. Table 1.1 sets out these three issues as a series of conceptual steps that a student or lawyer needs to reason through in thinking about a particular environmental law problem. The starting point is thus not environmental protection writ large but rather a specific issue or dispute. In a sense these steps are overly simplistic, but they also are a way of stressing the scope of knowledge and understanding that an environmental lawyer needs to understand, apply, and evaluate environmental law.

This framework should not be treated rigidly but more as a way to loosely begin or structure a legal inquiry about an environmental problem or issue. The first step is to analyse the nature of environmental issues and environmental disputes. The physical nature of environmental problems can vary considerably in scale and impact. Likewise, there may be very little knowledge about it. As the questions in the table also make clear, such an analysis is not limited to an understanding of the physical nature of an environmental problem but also requires consideration of its socio-political context. The next step is to understand the relevant environmental laws that relate to a particular issue. It should be stressed from the outset that this is not just an exercise in identifying a bundle of rules but requires a far more sophisticated analysis. These laws may come from different jurisdictions and it is important to appreciate the nature of the legal cultures they are derived from. To this end the legal cultures of England, the EU, and international environmental law are discussed in Part II. The relevant laws may take many different forms. In some cases there will be legislative regimes or legal doctrines that have been specifically developed to address a particular environmental problem but there also may be other areas of law which, for one reason or another, are indirectly relevant to environmental disputes.

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Table 1.1 A Process of Inquiring into Environmental Law Problems

1. What is the Nature of the Environmental Issue or Dispute?
a) What knowledge is there about the environmental problem? What is the nature of that knowledge and how is an understanding of the environmental problem affected by scientific uncertainties, values, and decision-making context?
b) Who are the interested parties involved? Is there conflict between the parties and, if so, over what? In particular, what are the values that the different parties hold?
c) What role does the state play in decision-making? Does that role rest on a particular understanding of an environmental problem or favour a particular set of environmental values?
d) How does the existing legal framework shape understandings of the environmental problem and conflict over it?
2. What are the Relevant Legal Concepts Pertaining to the Environmental Problems?
a) Is there legislation or legal doctrine understood to regulate this particular environmental problem?
b) Is there other legislation or legal doctrine that might be relevant?
c) What legal cultures are involved and what are signficiant features of those legal cultures?
d) What are the basic legal issues and areas of law involved?
3. What is Involved in the Application of the Relevant Law to a Particular Environmental Problem?
a) How well do existing legal doctrines and frameworks address the complexity of environmental problems?
b) Does there need to be an adjustment to a particular area of law in addressing environmental problems?
c) How are understandings of environmental problems affected by the application of a particular law?

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They are only 'environmental' in the loosest of senses. Most significantly, there is a need to identify the basic legal concepts that are applicable. To help in this inquiry, Part III of this book discusses these concepts independently of substantive regimes that regulate particular environmental problems.

The third and most difficult step in Table 1.1 is to think about the process of applying the relevant law to environmental problems. In the introduction we described this as a process of interaction because the process of application not only requires a reconsideration of basic legal concepts but also often involves a re-evaluation of environmental problems as well. It is at this stage that the three different definitions of the subject become particularly relevant because, as already pointed out, they will affect the focus for analysis, how the law is applied, and how the law is evaluated. Because of this, these definitions are a constant reference point throughout this book.

While each of these three steps is separate, they do require constant reference to each other. How the law is applied requires consideration of not only what the law is, but also the nature of the relevant environmental issue. Likewise, the legal framework will affect the environmental issue and the legal framework can only really properly be understood by thinking about the legal issues it raises. The important point is that an environmental lawyer must have a wider perspective than simply knowing what the applicable law is in descriptive terms. He or she must not only think about a body of environmental laws, but also think about the environmental problems that that body of law addresses and how that body of law is applied. The end result is not a neat map of the subject but a series of questions

that helps to structure the lawyer's or the student's inquiry into the subject, or a particular area of it. The questions given here are not exhaustive. The important point is that a true understanding of the subject can only be gained though analysing (at least) these three aspects.

One final word of warning in understanding the nature of environmental law—nearly all legal scholarship is a normative enterprise and environmental law particularly so. This means that any reader of any text needs to consider whether what is being described or discussed is what the law *is* or what the writer would *like it to be*. Sometimes this is obvious in that the writer is calling for reform, but sometimes it is more subtle and is implicit in the analysis. This can be particularly seen when scholars will often classify the law, describe a case, or provide a particular explanation of a legal development in the hope it will lead to a 'better' application of the law or that a particular explanation of a case will lead to a 'better' interpretation. What this means is that, in such cases, the act of describing is also an act of prescribing.

This leads on to our final point. While much environmental law and environmental law scholarship is concerned with prescribing 'better' approaches to environmental disputes, there is no agreement over what is 'better'. Again, this will be discussed in Chapter 2 but here it is worth noting that even this book is an act of prescription—as an introduction to the subject, it is also one that is prescribing a particular intellectual approach, an approach that not all scholars may agree with, but which can be simply summed up as the need to take environmental problems, law, and the interaction between them seriously.

4 CONCLUSION

There often exist two perceptions among students embarking on the study of environmental law. The first is that the subject is a very worthy one about saving the world. The second is that saving the world is largely about learning and applying very dry and technical legislation. In other words, it is very dull. As this chapter demonstrates, and the rest of the book will show, both these perceptions are inaccurate. Environmental law and environmental law scholarship are important and complex. Those attempting to master the subject need to be critical and careful navigators of both law and environmental problems.

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FURTHER READING AND QUESTIONS

1. For further discussions about the difficulties of defining environmental law see A Dan Tarlock, 'Is There a There There in Environmental Law?' (2004) 19 Journal of Land Use and Environmental Law 213; Todd S Aagaard, 'Environmental Law as a Legal Field' (2010) 95 Cornell L Rev 221; Andreas Philippopoulos-Mihalopoulos (ed) *Law and Ecology: New Environmental Foundations* (Routledge 2011) chs 2–3.
2. Looking at the course you are studying, can you identify a definition of the 'environment' or 'law' underpinning its design?
3. For discussions about environmental law scholarship focusing on the UK see Elizabeth Fisher and others, 'Maturity and Methodology: Reflecting on How to Do Environmental Law Scholarship' (2009) 21(2) JEL 213; Richard Macrory, '"Maturity and Methodology": A Personal Reflection' (2009) 21(2) JEL 251; and John McEldowney and Sharon McEldowney, 'Science and Environmental Law: Collaboration across the Double Helix' (2011) 13 Env L Rev 169.