Book review: Environmental Principles – From Political Slogans to Legal Rules, second edition. Nicolas de Sadeleer. Published by Oxford University Press 2020, 540 pages

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Environmental Principles – From Political Slogans to Legal Rules, second edition, (the book) provides wide-ranging, informative, and welcome analysis of the three most important environmental law principles: the polluter-pays principle, the prevention principle, and the precautionary principle. The book is divided into two large parts, Part I and II, and consists of twelve well-organized chapters. It furthermore includes Tables of Cases (pp. xvii–xxiii), Tables of Legislations (pp. xxxv–xlii), and an Index (pp. 529–540).

The opening chapter, entitled *General Introduction*, lays down the reasons for focusing on the polluter-pays, the prevention, and the precautionary principles. They are, explicitly or implicitly, recognized in international, European Union (EU) environmental law as well as in the various nation states; they exist in the bulk of multilateral environmental agreements (MEAs); finally, their analysis connects to models of thought that complement each other.

The book's objective is to determine the status of the three principles and evaluate their contribution to the construction of environmental law at the three levels. For guiding the discussion in the book, the opening chapter introduces and discusses a two-fold analytical background, namely post-industrial risk, and post-modernity.

As de Sadeleer explains in the *General Introduction*, the aim of Part I is to shed light on the origin, formulation, and application of the three principles in international, EU and national environmental law. The purpose of the analysis is to support the author's first thesis. There is, the author claims, a subtle shift in the battle against ecological risk with the principle of precaution, basically that the risk has moved from a posteriori control (including civil liability or tort) to the level of a priori control (anticipatory measures).

Based on the analysis that takes part in Part I, Part II of the book, however, concentrates on how the principles contribute to the balance and dynamics of environmental law and their legal character.

For tackling the complexity of the concepts considered in the book, de Sadeleer explains several important methodological choices in the *General Introduction*. Thereafter the author either takes a stand on or explains what is meant with important concepts, functions, and approaches, which are relied on or otherwise play a part in the methodological advances (methodological choices or prerequisites). These include the concept of the environment, its fluctuating content, and difficulties in delimitating its boundaries, however, the author endorses a rather broad and evolutive interpretation. Also, as the author explains, the three principles under scrutiny by the book belong to legal systems (the international,

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EU, and national), which are not comparable, and why a single legal system approach would not have been sufficient for understanding the interaction of legal systems in Europe currently shaping environmental law. Further, the necessity of recognizing the different methodological approaches and legal cultures of the civil and common law, which in the author's view provides the legal analysis sheer breadth. Furthermore, monism and dualism and the different standpoint of those two schools towards the hierarchical relationship between national and international rules. Moreover, the need to understand environmental law as being interacting with other legal branches and why it is necessary in the book to consider other topics, including health, food, energy, land use, and consumer law. Also, why the book's analysis is not confined to the dichotomy between public and private law, which the author deems outdated. Additionally, the author explains why hard law, soft law, and case law all play a part in providing the basis for analyzing the three principles and how they tackle ecological risk. Furthermore, the necessity of acknowledging the link between environmental principles and a right to a clean environment, which, in the view of the author, has been largely ignored in Europe, and the relative importance accorded to each of the principles covered by the book and the reason why some of them get more room than others.

Against the question whether environmental law is lacking a methodological and theoretical approach, de Sadeleer offers a comprehensive and a critical vision of environmental law and explains how Part I of the book develops a critical analysis of the epistemological bases of environmental law, its relationship to science and technology, and its impact of the concept of risk.

While the role of Part II of the book is more future-oriented, as the author explains, the purpose of which is to tests several speculative analyses, the three principles are placed into context of general legal theory, including methodological approaches of interpretation, and, finally, although scholars may disagree on the legal status of the three principles, stressing the importance for a positivist to consider their status through a positivist analysis.

Part I, entitled *The Polluter-Pays, Prevention, and Precautionary Principles: Three Approaches to Environmental Risk*, is divided into five sections: *Part I Introduction*, Chapter 1 entitled *The Polluter-Pays Principle* (pp. 32–83), Chapter 2 *The Principle of Prevention* (pp. 85–133), Chapter 3 *The Precautionary Principle* (pp. 135–361), and finally, *Part I Conclusions* (pp. 363–364).

In the *Introduction*, de Sadeleer explains further the methodological approach employed for the analysis of the three principles under scrutiny. These include epistemological premises and core issues of three models, the curative model, the preventive model, and the anticipatory model.

An in-depth and logical analysis of the three principles follows. The organization of Chapter 1, *The polluter-pays principle*, and Chapter 2, *The principle of prevention*, is identical. Both chapters hold five sections: Introductory remarks, Origins of the principle, Systemic analysis, Application of the principle, and Concluding observations. However, Chapter 3, *The precautionary principle*, the largest chapter in the book, contains two more section (total of seven sections), Implementation of the precautionary principle in different environmental sectors, and Science versus precaution: a false dichotomy. All three chapters are rich with examples from the legislation of several jurisdiction, their content and application. Moreover, de Sadeleer, as would be expected, provides a critical account of the relevant international case-law, including cases stemming from the Court of Justice of the European Union.

As the coverage of the three principles reflects, the author is true to the methodological choices or prerequisites introduced in the book's *General Introduction*.

Part I *Conclusions* contains important deductions. Based on the elaboration of the first thesis, and in relation to risk and uncertainty, de Sadeleer argues that environmental law has developed towards security, emphasizing prevention and even anticipation of risk. In the author's view, the principles of prevention and precaution are symbols of the above reaction. As the three principles operate independently, and as the author suggests, they should be considered in terms of interaction rather than opposition. Moreover, as the author draws forward, the precautionary principle depends on prevention, which implies a support for the polluter-pays principle. While the principles have progressivley developed the author nonetheless concludes that all three contain vague concepts, and are concurrently adjustable, and flexible, and will not be easy to implement. Building a bridge to the book's Part II, the author finally states how crucial it is to introduce greater rigor into the three principles by recognizing the right to environmental protection.

In Part II, entitled *The Legal Status and Role of the Polluter-Pays, Preventive, and Precautionary principles: A Shift from Modern to Post-Modern Law*, de Sadeleer works further on the thesis originally introduced in the beginning of Part I. Part II commences with an *Introduction* (pp. 367–369) in which de Sadeleer frames this part's methodological approach. The purpose of Part II, as its title reflects, is to demonstrate that the three principles, as described in Part I, make an epistemological shift between modern law (basically fixed standards of traditional rule-making) and post-modern law (emphasizing the pragmatic, gradual, unstable and reversible nature of rules). The author then explains the horizontal, opposite the separate approach used in Part I, methodological approach used for Part II analysis of the three principles, where their legal status and function are placed in the center. In addition, the author provides a description of the approaches used in chapters to come and information on the prerequisites (the four-stage approach).

Part II contains four chapters (four through seven). In the first one, *Theoretical Presentation of Modern and Post-Modern Principles* (pp. 371–403), which divides into five sections, de Sadeleer, works from the argument that, in effect, a new legal model reflecting post-modern conditions, is replacing the classical law of modern society. In the author's view, the reasons for the shift include pressures from globalizing economy and the loss of the monopolist role of the nation state to produce rules. Moreover, as the author argues, for ensuring effectiveness, law-makers have had to turn to more flexibility to adapt to dynamic social realities. As the author argues, these conditions (and some more) have taken societies into the age of post-modernity. To underpin the main argument, the author tackles and explains the elements of modern law, and also post-modern law. Thereafter, the author expresses the view that post-modernity factors have been more sharply felt in environmental law than in other disciplines. The stated view is systematically tested in section 4 of the chapter, entitled *Environmental law bears the marks of post-modernity*. Finally, in the chapter's last section, entitled *Concluding observations*, the author presents and explains his main conclusion that a new type of law is emerging which is clearly departing from the basis of modern law.

In the second chapter of Part II, *The Evolving Function of Environmental Directing Principles in the Transition from Modern to Post-Modern Law* (pp. 405–448), and against the modification that the principles have undergone in the passage from modern to post-modern law, de Sadeleer

places an emphasis on five functions (in opposite to the content of rules) of the principles within a legal system, namely purposive, interpretative, legitimizing, guidance, and gap-filling. Based on Part's I analysis, the author explains that the three principles, the polluters-pays, prevention, and precautionary principles, lie at the interaction between modernity (looking back) and post-modernity (looking forward). In section 2 of the chapter, entitled *Directing principles maintain a link with modern law*, the author addresses topics relating to the formation of public policy and the role of the three directing principles, including in the codification of environmental law. Section 3 of the chapter, entitled *Directing principles restrain the excesses of post-modern law* follows, and in which de Sadeleer discusses how the three principles can enrich public authorities, including the legislature, with post-modern perspectives and provide limits to public administrative powers. The role of the interpretive function of the principles is addressed as well as means of legal reasoning. In addition, to match post-modern law characteristic as a new generation of human rights, including human right to environmental protection, section 4, entitled *Directing principles are linked to a human right to environmental protection*, addresses the subtle interaction between the said right and the three principles. As the author argues, through interaction of constitutional provisions, directing principles and procedural rights, including the Aarhus Convention's, post-modern law has produced a new generation of human rights, including a right to environmental protection. Finally, in section 5, entitled *Directing principles, hard cases, and the weighing of conflicting interest in post-modern law*, the author scrutinizes international case-law that reflect the impact of the principles, including the Court of Justice of the European Union, the European Court of Human Rights, and the WTO's Appellate Body, and finally explains how the directing principles should play a part in the methodological approaches of the courts.

In the third chapter of Part II, entitled *The Legal Status of the Directing Principles of Environmental Law: From Political Slogans to Normative Principles* (pp. 449–494), de Sadeleer, against the success of the three principles in international, EU, and national law, turns to the question of their legal status. As the author points out, neither doctrine nor case law has managed to clear that mystery. For tackling the problem, the author introduces sub-questions having relevance to the principles' legal status. In addition to chapter's opening section, the chapter contains three sections. The second one, *Principles and rules of indeterminate content*, provides an interesting discussion and a multifaceted comparative approach relating to the polysemous notion of 'principle'. In the third section, entitled *The autonomous normative value of environmental law principles*, the author draws forward and discusses several interesting questions, inter alia, whether the three principles may be directly applied in the absence of specific regulation, or if they only constitute interpretative rules for such a regulation. An analysis follows providing a coverage of the legal sources of international, EU, and national law. In the fourth section, *The effects of directing principles of environmental law on litigation*, the author discusses several aspects relating the three principles and judicial review before courts. Finally, in the fifth and the last section of the chapter, the author puts forward a few concluding observations, including a soft warning of not to rely on appearances when the legal nature of the three principles is scrutinized. Further, for qualifying as normative principles, a formal approach must be relied on prescribing the necessary duties to ensure their effectiveness.

Finally, in the fourth chapter of Part II, entitled *Environmental Directing Principles versus Free Trade* (pp. 495–518), de Sadeleer offers an inter-

esting account of the clashing objectives of the doctrine of free trade and regional and national objectives of public health or environmental protection. As the author explains efforts to reconcile MEAs and international trade rules have not been successful. The chapter's purpose is thus to demonstrate how some of the principles tackled in Part I of the book, namely the preventive and precautionary principles, shed a new light on the conflict between free trade and environmental protection. The chapter is divided into four sections. Section 2 is entitled *Environmental directing principles versus GATT/WTO obligations* and it covers first the early days of the GATT (1947) and how free trade and environmental concern developed separately for decades. Following the 1994 changes, the GATT/WTO application has nonetheless resulted in an increasing number of international trade disputes. Concurrently, MEAs may be used to restrict international trade. The author then provides an interesting account of the interaction of GATT/WTO rules and the most important MEAs. Section 3, *The precautionary principle in WTO law*, follows and addresses some of the classics, including the SPS and relevant case-law, concerning the application of the precautionary principle in relation to WTO law. As usual, de Sadeleer's approach on the issue is both critical and informative. Finally, in section 4, entitled *Concluding observations*, the author concludes, basically that trade law is not endorsing any general exception for environmental purposes and that in the application of the GATT Agreement it remains to be seen if WTO Members are allowed to enact precautionary measures.

Part II ends with *Conclusions* (pp. 519–521), in which de Sadeleer against his analysis in Part II, introduces his general conclusion that "law has become an integral part of a complex and multiform model bearing the name post-modernity, which will cause the last vestiges of modernity–the basis of today's legal system–to disappear." In relation to the directing principles (the three principles), and based on the analysis of Part II, the author states that the three environmental principles' function emphasize a gradual shift from modernity to post-modernity.

In the last chapter of the book, *Final Conclusions* (pp. 523–527), de Sadeleer, sums-up and draws forward his main findings. Firstly, that the vertical analysis (first thesis and Part I of the book) of the origin, status, and application of the three principles is indicating that a subtle shift in the battle against ecological risk is taking place. Secondly, (second thesis and Part II of the book) that the horizontal analysis relating to the status and function of the three principles shows that they represent the interface between modern and post-modern law. In addition, the author, in the last chapter's section entitled *Epilogue: the balancing of interests at the heart of post-modernity*, offers several critical questions and speculations relating to the three principles and wonders if they may become secondary compared to other principles in the balancing of the competing interest. In relation to the right to the protection of a healthy environment and the right to health (the ECHR), which can be invoked to prevent compromising ecological interest if there is a risk to human health, the author seems to conclude that the ecosystem preservation is still subordinate to the protection of human interests. Finally, the author highlights the necessity to strengthen the directing principles if the environment is to have some hope.

After scrutinizing the book, which is pedagogic, outstandingly informative, and well organized, it clearly reflects a first-class environmental law scholarship. Based on progressive thinking and reflecting an exceptionally broad environmental law knowledge, de Sadeleer has again demonstrated his superior understanding of the most influential and important environ-

mental law principles of present times. In my view, de Sadeleer's manages convincingly to substantiate both his principal thesis introduced in Part I as well as his arguments introduced in Part II.

One of a kind, de Sadeleer's book, not only contributes to high quality environmental law scholarship, it enhances the quality of legal research in the still growing field of environmental law, and is capable of providing environmental law researchers, legal professionals, the judiciary, law students and other interested in environmental law, with a solid understanding of the three environmental principles: the polluter-pays, the prevention, and the precaution principles, and how they have developed from political slogans to legal rules, and continue to evolve against the environmental challenges of the present times.