Conservation of biodiversity – ecology against economy

Authors: Guenter Hager
Submitted: 3. November 2016
Published: 5. November 2016
Volume: 3
Issue: 6
Keywords: Biodiversity, Environmental Law, Endangered Species Act (ESA), Ecological Law
DOI: 10.17160/josha.3.6.246

Conservation of biodiversity – ecology against economy

Prof. Dr. Günter Hager, University Freiburg

I. Introduction

Today we are confronted with a growing loss of biodiversity.[1] Each year thousands of animals and plants disappear. Uncontrolled fishing leads to a drastic reduction of certain species in the oceans. Climate change is a major threat to the survival of species and integrity of ecosystems worldwide.[2] Animals and plants cannot adapt so quickly. They are condemned to extinction. Loss of forests and woodlands entails the loss of species.

All of us agree that we must do something to safe the biodiversity. And nobody will deny that we have done quite a lot.[3] In my lecture I focus on the question what is the task of the law in this context. My lecture has three parts. In the first part I will discuss a famous case on biodiversity, decided by the US Supreme Court, the so called Snail Darter Case (TVA v. Hill). The case opens the way to the second part where the efficiency of environmental law will be discussed. In the third part I will outline the structure of a modern ecological environmental law.

II. Discussion of the Snail Darter Case (TVA v. Hill)

Legal basis of of the Snail Darter Case (TVA v. Hill) is the Endangered Species Act (ESA). The ESA is one of the most potent environmental statutes in the US. The statute protects fish, wildlife and plants endangered by economic growth. To understand the Snail Darter Case (TVA v. Hill), I must give a short overview over the statute.[4]

Sec. 4 ESA directs the Secretary of Commerce to determine which species are "in danger of extinction" and to create a list of such endangered species. The listing opens a comprehensive protection. Sec. 7 ESA a) 2 is the heart of the statute. Before engaging in any

---

[1] See *World Wildlive Fund (WWF)*, Living Planet Report, FAZ vom 28. Oktober 2016, NR. 252, S. 22 ; The Holy Father *Francis*, Encyclical Letter Laudato Si', in the following cited as *Francis* Encyclical Letter, 32 – 42.
[2] *L. R. Liebesman/R. Petersen*, Endangered Species Deskbook, 2010, 101 ff.
[3] Recently the Rossmeer, an areal of 1, 55 million km square in the Antarctis has been protected, FAZ vom 29. Oktober 2016, Nr. 253, S. 9.
[4] *L. R. Liebesman/R. Petersen*, Endangered Species Deskbook, 2010, 9 ff.

type of activity that might have direct or indirect effects on listed species federal agencies must consult with the Fish and Wildlife Service (FWS). Sec. 11 ESA sets forth the penalties in case of violation and authorizes citizens to sue as „private attorneys general".[5]

With this legal background we are prepared to discuss the Snail Darter Case.[6] TVA (Tennessee Valley Authority) was founded to promote the economic and social weal of the region. 1959 TVA planned the construction of a huge dam, the so called Tellico Project. Construction began 1967. Normally projects of TVA were welcome. But this time the local constituencies differed in opinion. There was a conflict between environmental and economic interests. 1973 the situation changed fundamentally. A fish was found, which turned out to be a new species. It got the name "snail darter". At the time of discovery ESA was not yet enacted, but was promulgated a few months later. Could the fish stop the dam?

The first step was to get the fish on the protected list. The responsible agency, the Fish and Wildlife Service (FWS) was reluctant. TVA sped up construction. In 1976 the opponents of the dam took action to enjoin TVA from completing the dam. They accused TVA of violating Sec. 7 ESA, because the project would endanger the continued existence of the snail darter.

The District Court found that it is highly probable that the closure of the Tellico Dam and the consequent impounding of the river will jeopardize the existence of the snail darter[7]. Nevertheless the court refused to halt the Tellico Project.[8] The main reason was that the dam was 80 % complete. $ 78 million had been already committed. $ 53 would be lost if the dam were permanently enjoined. Only $ 20 – 23 million remain to be spent on the project. Congress had appropriated money for the project after discovery of the fish. Under these circumstances, Judge Taylor concluded that congress could not have intended that the Act halt the project. The Act should be construed "in a reasonable manner".[9] Judge Taylor adds that between the endangered species and the extensive project a balance has to be struck. Normally this is a

---

[5] *Bennet v. Spear*, 520 U.S. 154 (1997).

[6] To the factual background, the proceedings and the effect of the case look at the comprehensive study of *Holly Doremus*, The Story of *TVA v. Hill*: A Narrow Escape for a Broad New Law, in: R. J. Lazarus/O. A. Houck, Environmental Law Stories, 2005, 109 ff. The following deliberations are based on this analysis. The case has been already commented on by me in: *Hager*, Das Tier in Ethik und Recht, 2015, 121 ff., and *Hager*, Die tierschutzrechtliche Verbandsklage – Rechtspolitische Diskussion, to be published soon in NuR.

[7] *Hill v. Tennessee Valley Authority*, 419 F. Supp. 753, 757 (E.D. Tenn. 1976).

[8] *Hill v. Tennessee Valley Authority*, 419 F. Supp. 753, 759 (E.D. Tenn. 1976).

[9] *Hill v. Tennessee Valley Authority*, 419 F. Supp. 753, 760 (E.D. Tenn. 1976).

"legislative not a judicial function".[10] But he was sure that the Congress had struck the balance in favour of TVA by continuing to fund the project.[11] This round went to the TVA.

Plaintiffs appealed. The Court of Appeals accepted the District Court's findings of fact that the dam violated the ESA, but took a different view of the legal consequences.[12] The ESA does not exempt projects already underway. "Current projects status cannot be translated into a workable standard of judicial review. … Courts are ill-equipped to calculate how many dollars must be invested before the value of a dam exceeds that of the endangered species." [13] The court concluded that the District Court had no discretion to deny injunction. In other words: The dam had to be stopped. This round went to the fish.

Finally, the US Supreme Court had to decide. This round again went to the fish. The Supreme Court affirmed the decision of the Court of Appeals with 6 to 3 votes.[14] Chief Justice Burger delivered the opinion of the majority.

TVA claimed that ESA was not intended to stop operation of a project which was nearly completed when an endangered species was discovered. Burger rejected this argument because the plain intent of Congress in enacting ESA was "to halt and reverse the trend toward species extinction, whatever the cost".[15]

The next question was what remedy is appropriate. Burger determined that the dam violated the ESA. Nevertheless a Court is not mechanically obligated to grant an injunuction. "As a general matter it may be said that 'since all or almost all equitable remedies are discretionary the balancing of equities and hardships is appropriate in almost any case as a guide,"[16] but in this case other principles have to be considered. "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities". [17] Consequently the court had no discretion to deny injunctive relief.

The dissenting judges Powell and Blackburn required an interpretation of the ESA which avoids absurd results. It is the duty of the Court "to adopt a permissible construction that

---

[10] *Hill v. Tennessee Valley Authority*, 419 F. Supp. 753, 763 (E.D. Tenn. 1976).
[11] *Hill v. Tennessee Valley Authority*, 419 F. Supp. 753, 763 FN 12 (E.D. Tenn. 1976).
[12] *Hill v. Tennessee Valley Authority*, 549 F. 2d 1064 (6th Cir. 1977).
[13] *Hill v. Tennessee Valley Authority*, 549 F. 2d 1064, 1071 (6th Cir. 1977).
[14] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S. Ct. 2279 (1978).
[15] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184; 98 S. Ct. 2279, 2297 (1978).
[16] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193, 194; 98 S. Ct. 2279, 2301, 2302 (1978).
[17] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193, 194; 98 S. Ct. 2279, 2301, 2302 (1978).

accords with common sense and the public weal".[18] Judge Rehnquist dissented on the ground that the District Court had discretion to deny an injunction. [19]

The Supreme Court's decision seemed to be the end of the dam. But the story went on.[20] Congress acted quickly and modified the ESA by introducing an administrative exemption process:[21] An exemption has to be granted, if there was no reasonable and prudent alternative, if the benefits of the project clearly outweighed the benefits of any alternative consistent with conservation of the species and the project was of regional or national significance. In addition to that Congress mandated the completion of the dam. Surprisingly the fish did not go extinct. A transplant program produced a reproducing population at another place. The last round went to TVA. The fish could not stop the dam. It was a welcome extra that the fish survived.

The Snail Darter Case (TVA v. Hill) is a good example for the conflict between economy and ecology. We saw an exciting back and forth. Surely the decision of the Supreme Court was a great victory for the environment. But in the end the economy had the upper hand.

The further developmet shows a steadily decline of the TVA decision.[22] Subsequent decisions more and more limited TVA moving away from "this strict no-balancing rule" and adopting "a case by case approach". The balancing – test was again invoked. A famous article has the significant title: "The Endangered Species Act's Fall from Grace in the Supreme Court".[23] TVA has become an outliner in the Court's environmental jurisprudence. But until today it was not overruled.

III. Efficiency of the environmental law

Regarding the question of the efficiency of the environmental law it is helpful to look back at the snail-darter case. For this case mirrors the whole environmental law. The snail darter-case demonstrates that we have on the one side a high developed system of law with a lot of principles, rules and cases, whereas the practical results on the other side are only modest. I

---

[18] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195, 196; 98 S. Ct. 2279, 2301, 2302 (1978).
[19] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 211, 212; 98 S. Ct. 2279, 2301, 2310, 2311 (1978).
[20] *Doremus*, The Story of *TVA v. Hill*: A Narrow Escape for a Broad New Law, in: R. J. Lazarus/O. A. Houck, Environmental Law Stories, 2005, 109, 131 ff.
[21] *L. R. Liebesman/R. Petersen*, Endangered Species Deskbook, 2010, 59 – 60.
[22] *L. R. Liebesman/R. Petersen*, Endangered Species Deskbook, 2010, 85, 86.
[23] *J. B. Ruhl,* "The Endangered Species Act's Fall from Grace in the Supreme Court", 36 Harv. Env. L. Rev. 487 (2012).

remind you of the heavy battle on the question whether or not judges have a discretion under the ESA, but finally the dam was erected. It was only a lucky chance of coincidence that the fish survived.

The same paradox is characteristic for the whole environmental law. A reputated American professor for environmental law states: "After more than 50 years of experience with environmental law in most developed countries, government experts and scholars have issued countless analyses of different modalities of 'rules for admissible conduct' and published a vast quantity of thoughtful but diverse recommendations for reform of the 'rules' to make them more effective. Government regulation, non-regulatory incentive systems, frameworks of fundamental principles, codes of conduct, direct social action, and many variations or combinations of these basic strategies have been proposed and put into practice around the world. Lawyers and legal scholars have participated effectively in this ongoing reflection on what works and what doesn't work to advance sustainable development, often borrowing learning from, or sometimes directly collaborating with, scientists, economists, political scientists, sociologists, and many other non-legal experts. Unfortunately, the net ecological and social value of these multiple efforts has been, up to this time, inadequate to the task of keeping human societies within tolerable and sustainable ecological and social limits."[24]

Another American Professor for environmental law comes in a long and scrutinized study to the result that Courts in general do not welcome environmental interests but seek to protect business interests.[25]

The conclusion is irresistible: What we need is a radical change. It is not enough to improve some branches of the traditional environmental law. We must create a new conception of environmental law.

---

[24] *Gaines*, in: Guenter Hager, Sanford E. Gaines, Laudato si' Encyclica of Pope Francis: Legal aspects from the German and USA perspective - Aspekte des deutschen und US-amerikanischen Rechts, *DOI: 17160/josha.3.2.125,* p. 8.

[25] *J. B. Ruhl,* "The Endangered Species Act's Fall from Grace in the Supreme Court", 36 Harv. Env. L. Rev. 487, 507, 514, 522 (2012).

IV. New conception of enviromental law – the ecological law[26]

The new conception of enviromental law can well be understood against the background of the traditional environmental law and its flaws. The traditional environmental law is anthropocentric.[27] Surely the status of animals, fish, plants and the whole nature has been raised. Nevertheless we act as if we were the master of the world. Nature is perceived as a pure object. We protect nature, but we pursue firstly our own interests. Economic growth has absolute priority in our scale of values. Mass-production, mass-consumption and a huge financial system push economy ahead. The negative results are evident.

Therefore the outlined system of the traditional environmental law must be overcome by a new conception of enviromental law.[28] An ecological approach has to take the place of the anthropocentric approach. We need an ecological law. What are the characteristicas of such a turn?

We must accept that we are not the master of nature but only a part of it. Future generations must have the same living conditions as we.[29] We owe respect to animals, fish and plants and to the whole nature. The main demand is: To moderate ourselves. We have to recognize a higher instance than ourselves.[30] Top value is the ecological justice.

Healing our relationship with nature is connected with healing all human relationships. This goes especially between the rich and poor countries. We call this global justice[31]. Pope Franziskus has underlined this integrale ecology[32]: We have to "hear both the cry of the earth and the cry of the poor".[33]

---

[26] "Oslo Manifesto" for Ecological Law and Governance, adopted at the IUCN WCEL Ethics Specialist Group Workshop, IUCN Academy of Environmental Law Colloquium, University of Oslo, 21 June 2016, not yet published, the ideas of the paper have strongly influenced the following reflection.

[27] *Francis* Encyclical Letter, 115 – 136.

[28] See "Oslo Manifesto" for Ecological Law and Governance, adopted at the IUCN WCEL Ethics Specialist Group Workshop, IUCN Academy of Environmental Law Colloquium, University of Oslo, 21 June 2016, not yet published.

[29] *Francis* Encyclical Letter, 159 – 162.

[30] *Hager*/*Gaines*, Laudato si' Encyclica of Pope Francis: Legal aspects from the German and USA perspective - Aspekte des deutschen und US-amerikanischen Rechts, *DOI: 17160/josha.3.2.125,* p. 9.

[31] *Vogt*, Prinzip Nachhaltigkeit, Ein Entwurf aus theologisch-ethischer Perspektive, 3. A. 2013, 406 ff.

[32] *Francis* Encyclical Letter, 139.

[33] *Francis* Encyclical Letter, 49.

The leading instrument to reach these goals of an ecological law is the principle of sustainability.[34] Sustainability means that using nature we have to take into account the ecosystem's regenerative ability. This is the line we must not exceed. At the first sight sustainability serves only nature, promotes only the ecological justice, not the global justice between rich and poor. But this is an error. Our endeavours to save, for instance, the elephant, will only succeed, if we improve the social conditions, thereby reducing the incitement to kill the elephants and sell the ivory. Ecological and global justice are inseparably linked.

The creation of an ecological law cannot occur without the support of the majority of the members of society. The society must accept the outlined change.[35] This is a long process of education in environmental responsibility. And my last question is: How can this educational process be pushed ahead? It is the beauty of nature, of animals, fish and plants, which transforms us, which opens our hearts creating the willingness to protect all life. Let us surrender to this power of nature "that we may sow beauty not pollution and destruction".[36]

[34] Fundamentally *Vogt*, Prinzip Nachhaltigkeit, Ein Entwurf aus theologisch-ethischer Perspektive, 3. Aufl. 2013.

[35] *Hager*/*Gaines*, Laudato si' Encyclica of Pope Francis: Legal aspects from the German and USA perspective - Aspekte des deutschen und US-amerikanischen Rechts, *DOI: 17160/josha.3.2.125,* p. 13.

[36] A prayer for our earth, in: *Francis* Encyclical Letter, 246.