

# What's law got to do with it?

**Bridget Hutter** highlights the critical role of environmental law in regulation

In the 20th century, environmental law represented one of the most important regulatory regimes in modern societies but there have been changes in our understandings of the effects of human activities on our environment and how we see and frame problems. The environmental challenges of the 21st century raise profound questions about how suited the law is to manage the complex problems that confront us. These include questions about the law's compatibility with the complex of environmental strategies that have emerged in response to contemporary understandings of risk; and the ability of law to manage transnational risks, and to embrace uncertainty and change.

Risk management approaches have been augmented by alternative flexible and decentred resilience strategies. They have proven attractive for a variety of reasons. For example, they are premised on uncertainty and in the environmental area this is especially important given the uncertainties associated with climate change. Resilience strategies should be adaptable, flexible and open to modification in the event of unexpected change; they tend to be bottom up rather than top down and this resonates with calls for greater democratization of decision making processes. There is also the hope that they might foster greater equality, not just of participation in decision making but also more equal outcomes. Bringing inequalities into the discussion of risk, resilience and environmental law is important. So too is subjecting some of the claims about resilience to scrutiny.

This is a multi-disciplinary area with varying genealogies and meanings attaching to the concept of resilience. It has also become a fast moving and highly topical area. It is important to critically interrogate how able resilience approaches are to effect equitable solutions to environmental risks. There are challenges to the notion that resilience is more democratic, egalitarian and bottom-up than other strategies. It is a matter of social decision making and value priorities whether adaptation and resilience strategies seek to maintain or change the system. There may be real vested interests in maintaining the current system and hence its existing inequalities and power relations; the alternative would demand a radical transformation of existing social and economic institutions and practices.

The spectacular rise in the popularity of resilience has not made it a replacement for risk approaches. The two strategies are in some respects complementary. Resilience helps to temper the high expectations risk strategies can generate. Resilience approaches try to facilitate systems which can absorb

disruption and respond quickly, since they are premised on the belief that zero tolerance of risk is unachievable so we should plan for continuity and recovery.

Law has a role to play as part of a broader governance system which can work across national boundaries and embrace actors beyond the state. The most appropriate role for law partly depends upon features of the particular legal system. Some legal systems already have features that encourage resilience, but there can nevertheless be obstacles, notably around issues of implementation and enforcement. Elsewhere there may be little respect for the rule of law. This is not just a matter of legal tools and frameworks but of the social and political systems which constitute the legal system and within which legal systems operate.

Research is vital and contributions from different social science disciplines give a broad ranging view of the role of environmental law. We can also learn from experiments in environmental governance, some of which accommodate differences and give voice to more diverse groups, for example, in China and Latin America. This can give us a greater understanding of where the law, and risk and resilience strategies can best work together to protect our environment and promote greater equality.

## REFERENCE

This article is based on Bridget M. Hutter's edited book *Risk, resilience, inequality and environmental law* (Edward Elgar Publishing, July 2017).

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