



## Transcript of CleanLaw Episode 15: Hana Vizcarra and Sarah Light on the Law of Corporation as Environmental Law, March 20, 2019

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**Robin Just:** Welcome to this podcast from the Environmental and Energy Law program at Harvard Law School. Today Staff Attorney, Hana Vizcarra interview Sarah Light, Assistant Professor of Legal Studies and Business Ethics at Wharton about her latest article, The Law of the Corporation as Environmental Law in the Stanford Law Review. In her article, Professor Light proposes incorporating an environmental priority principle into corporate securities, antitrust and bankruptcy law. We hope you enjoy the podcast.

**Hana:** This is Hana Vizcarra with Harvard Law's Environmental and Energy Law program and I'm here with professor Sarah Light, who is Assistant Professor of Legal Studies and Business Ethics at the Wharton School of Business at the University of Pennsylvania. And she also teaches at University of Pennsylvania's law school. Before academia, Professor Light served for 10 years as an assistant US attorney for the Southern District of New York Civil Division and four years as the chief of the office's environmental protection unit. Her academic research examines issues at the intersection of environmental law, corporate sustainability and business innovation. In that vein, Sarah recently published a law review article titled, The Law of Corporation as Environmental Law in the Stanford Law Review. And that is what she is here to speak with us about today. Sarah, welcome.

**Sarah Light:** Thank you so much for having me.

**Hana:** So your article argues for understanding certain areas of what I would term business law as fundamental aspects of environmental law in particular, corporate law, securities regulation, antitrust law, and bankruptcy law. I think most environmental lawyers in private practice would probably vigorously agree that these significantly intersect with environmental law.

**Hana:** In my prior life as a law firm attorney, corporate law regularly intersected with my work through due diligence on deals or crafting environmental provisions in contracts or arguing over corporate law issues, like piercing the corporate veil to determine who was responsible for environmental liabilities or we also regularly reviewed environmental information in corporate disclosures to the SEC So I can certainly support the assertion that these areas of law play a significant role in determining environmental outcomes. Can you tell us a bit more about the premise of this article and what drew you to the subject?



- Sarah: Absolutely. So the truth is I have wanted to write this article since coming to Wharton. Being a professor who studies and does research on environmental law, but as a professor at a business school primarily, rather than a law school. I have spent a lot of time trying to bridge the gap between legal scholarship and management scholarship, understanding what environmental law is and understanding how business managers and managers within firms think about what their environmental obligations or ethical duties are.
- Sarah: And so that means that both in my research and my teaching, I spend a lot of time thinking not just about the traditional canon of public environmental law, statutes like the Clean Air Act or the Clean Water Act or the Superfund Statute, but also thinking about voluntary, in quotation marks, actions that firms and firm managers can take to reduce the negative environmental impacts of their actions or to improve the quality of the environment.
- Sarah: Those voluntary actions are often termed some kind of private environmental governance. The problem of course, is that private voluntary doesn't really exist when we are thinking about a creature like a corporation that is a creature of the law, right? Corporations don't exist, but for the fact that they have been created under the law. And so background legal rules, the legal environment in which firms operate, sets the boundaries of what firm managers are permitted to do, what they're prohibited from doing what they have incentives to do or not to do.
- Sarah: And so, when I think about sort of environmental law as it is often though, not always, but often taught in law schools, we think about environmental law as the environmental canon, the Clean Air Act, and the Clean Water Act. And so the assumption is that firms and markets operate in one sphere. And it is the goal of Congress and the EPA, through public environmental law and regulation, to address negative externalities associated with market production. But firm's goals to simply maximize their value within the marketplace and promote efficient competition.
- Sarah: So my article questions this division of labor between law that govern firms and markets and traditional canonical environmental law that governs the negative externalities of not only behavior by corporations, but by many actors within society and basically says that what we need to do is be thinking about all of these things together. Because firm managers make decisions that have profound environmental consequences long before pollution comes out of a pipe or a smokestack, as an externality that meets a threshold under traditional public environmental law.
- Hana: And in doing so and talking about how these frameworks come together, these different areas of law, you draw four primary conclusions as I understood it in the article. And I'm going to tick them off real quick and then we can talk about them



in a bit more detail. So the first was that this unified approach creates a framework for understanding what influences firms' environmental decision making. And you already set that up a bit and alluded to how the different areas of law influence corporations actions.

Hana: Second being that the influence of these four fields of business law or corporate law can and should be made stronger. And you in your article, propose an environmental priority principle in order to do this. Third, that corporate and business law can fill gaps that traditional environmental law has not adequately addressed. And then that the federal regulatory environment right now, since January 2017, makes a pluralistic understanding of environmental law more urgent. So talking about each of these components, tell what you mean by this unified holistic approach, creating a framework for understanding firm's environmental decision making internally.

Sarah: So what I mean by a unified approach in the introductory remarks that you gave, introducing in the article, you made clear that as I talk about in my article, I'm focusing here on four specific fields, corporate law, state corporate law, antitrust law, securities regulation and bankruptcy law. And so by a unified approach, what I mean is we shouldn't just be thinking about corporate law or we shouldn't just be thinking about securities regulation.

Sarah: We need to be thinking about all of these different fields of law that govern firms and markets together. So first, by looking at all of these fields together, the article develops a analytical taxonomy of five primary ways in which these fields of business or corporate law intersect with environmental values and goals. There are mandates, there are prohibitions, there are safe harbors, there are incentives, and there are disincentives.

Sarah: So the article talks about each of these five primary forms of interaction and gives examples of each. And so part of it is simply by looking at multiple fields, you can see, oh wait a minute, the FCC rules about environmental disclosures have a similar effect to this provision in the antitrust law, or similar to state benefit corporations in these key ways. So I think that analytically, I think it's very useful to look at these as a holistic phenomena.

Sarah: Second, I think that the unified approach is really important because you can imagine a scenario and there are many articles focusing on a single area of one of these fields and saying something like, what we need is stronger environmental disclosure provisions in securities regulation. And that's great, and that may be an important aspect of focusing for a manager attention on the environmental implications of their actions.



- Sarah: However, my argument is if we don't also think about the competing levers in state corporate law or antitrust law or bankruptcy law, that single change in securities regulation might not be enough to get the firm where it wants to go. Right? So you might've focused a firm manager's attention on the fact that it needs to reduce the environmental impacts of its line of detergents for example.
- Sarah: But if antitrust law is going to provide disincentives for that firm to work with other firms in the industry or an industry association to come up with some kind of voluntary environmental standards or codes for the environmental qualities of detergent, then the SEC change the change in the SEC regulations may simply not be enough. Right? It might be necessary but not sufficient.
- Hana: Right. And in some instances they could even work across purposes.
- Sarah: Yes, absolutely. They can certainly work across purposes. So I think my bigger and all encompassing point is we need to look at all of these levers together. The second issue relates to the environmental priority principle. So what I argue is that these fields of law already are environmental law. They already are affecting the environmental decision making of firms, but we should view them in a way that potentially makes them stronger.
- Sarah: And so if one thinks about a continuum on which the five different forms of interaction exist. So I gave the forms before, but if you were going to place them on a continuum, a spectrum from left to right with the most conflict first and the most confluence last, you would say, well prohibition, that's the greatest degree of conflict. You're prohibited from taking an environmentally positive action. Disincentives, then you're in the neutral zone with safe harbors. And then as you move toward confluence, you have something that's an incentive and then finally, a mandate.
- Sarah: So the idea behind the environmental priority principle is that these fields of law should be interpreted in ways that move you from the left to the right along that spectrum. So from prohibitions perhaps to safe harbors, from safe harvest incentives, from incentives to mandates, to make it possible and provide incentives for and ultimately potentially to make it mandatory that firm managers take environmental values and priorities into account.
- Hana: And in the process of doing that, you talked a little bit about traditional environmental law, the Clean Water Act, Clean Air Act, Superfund statutes having gaps and that this being a way to fill some of those gaps. Can you speak a little bit about some of the specific gaps you see this approach to what we consider environmental law and how we think about the levers that allow us to make environmental progress, looking to different areas of corporate law and how they could potentially fill specific gaps that you have in mind?



- Sarah: Absolutely. So environmental law, the traditional canonical statutes have been largely very successful. The air is cleaner, the water is cleaner. We have much more effective plans in place for dealing with hazardous waste transportation, storage, disposal. So traditional environmental laws have been very effective. What they have been less effective at dealing with has been issues of cumulative harm. And what I mean by issues of cumulative harm might be issues like global climate change or deforestation or overfishing or agricultural runoff and nonpoint source, water pollution.
- Sarah: These are actions where there aren't necessarily a concentrated number of firms or polluters with big smokestacks and pipes, whose effluent or whose emissions exceed a particular high threshold, right? The Clean Air Act and the Clean Water Act, there are thresholds in these statutes that we care about. And if you're on the wrong side of the threshold, then there's some control in place.
- Sarah: But all of us are contributing to global climate change and we might not, our actions may simply not meet these big thresholds. And so by focusing on the law that governs the corporation as well as markets, antitrust and securities regulation, the idea is that you're going inside the firm to essentially alter the incentives that firm managers have when they're thinking about, well should we simply dump X or do we need to be more careful about how we are dealing with everything, from global climate emissions to nonpoint source releases of water to whether we're going to use virgin materials or recycled materials?
- Sarah: So the idea is that if you change the internal code within the firm, then that's going to have implications for what the firm does to the environment. So, that's how he think that the gaps can be filled. It's basically saying, we don't need big hammers, we need small adjustments. And those small adjustments can only come by tweaking the internal decision making of firms.
- Hana: And we've seen companies prompted by sustained investor interest or civil society efforts that do seem to be taking environmental and especially these larger more spread risks of climate change and climate concerns more seriously right now. And we even see energy companies touting their efforts on climate change through dedicated reports or additional hard data that they're using to back that up and investment in new technology. Do you see the or do you envision these companies espousing a promise to adhere to an environmental priority principle, even absent a regulatory obligation to do so or maybe not prior to us having fully implemented or integrated that principle into the existing law? Do you think that's possible, I guess?
- Sarah: Yeah, so I do think that, that's possible. So many corporations have adopted principles, plans, targets to address their environmental externalities that are not required by law. They do so for a number of reasons. In some cases, it's because it



makes business sense and it may cut costs or reduce waste. In other cases, it may be for a reputational benefit. It may be because investors are pushing for it. It may be because customers care about environmental values.

Sarah: The business judgment rule, which is part of state corporate law, essentially creates a safe harbor that gives managers discretion to take action that they believe are in the long run interest of the firm, without fear that courts, if they were to get sued, that courts would second guess their judgment, as long as there's no insider dealing, as long as they're acting in good faith. And so that safe harbor, which is neither confluence nor conflict, it's just a space of protection for their discretion, certainly enables corporations to take environmental values into account.

Sarah: Slightly stronger on the continuum, would be something like the State Benefit Corporation laws where a firm can affirmatively choose to incorporate or reincorporate as a benefit corporation, in which case, it basically designates a specific benefit that could be an environmental benefit. It could be a social benefit, as well as needing to consider general benefit of its operations with respect to society and the environment, alongside profit. And so there's a reputational benefit that a firm gets by incorporating as a benefit corporation. And so that might even be one step further, right. Patagonia is the example of the benefit corporation that obviously takes environmental and social values deeply into account.

Hana: I think they just hired an environmental advocate as well.

Sarah: They may have indeed. Absolutely.

Hana: Who was the former EPA-GC, so it'd be interesting to see what that does.

Sarah: Yes, absolutely. Absolutely. And they're currently litigating issues related to the efforts by the administration to shrink national monuments. And so, we will see where that goes. But, so yes, the answer, I think that there's a lot of room for discretion right now, but I would like to suggest that there are some areas in which managers don't have discretion, where it would be great even if we don't mandate that they consider environmental values, that we at least move them from a prohibition to an area where they have discretion to take the environment into account and that it would be a good thing to move from a world where there's discretion for managers can choose to a world in which there are greater incentives to take environmental values into account

Hana: And in our current environment, I mean, we all have witnessed a pretty sharp turn in the federal government's approach to environmental regulations since Donald Trump's election. And here at Harvard Law's Environmental and Energy Law



program, we've been closely tracking the regulatory rollback efforts of this administration. I think we have somewhere around 60 pages on our website's regulatory rollback tracker now covering an even larger number of individual actions that seem to undo environmental protections in some way.

Hana: So thinking about moving this environmental priority principle forward in a more formal regulatory way, where do you see opportunity to try to adopt this maybe at the state or local level in some way, to help push companies and actions across the board further up this chain, further from the left to the right in how they perceive these issues?

Sarah: Right. So, that is a great question. So at the moment, I think aspects of this approach are aspirational, right? I think to myself, wouldn't it be nice? Wouldn't it have been good if prior to the current deregulatory efforts, there had been a greater fragmentation of regulatory responsibility beyond the core and canonical environmental statutes largely enforced by the EPA into other institutions in society, so that there could be some greater degree of insulation from deregulatory action?

Sarah: At this point, when one thinks about the mechanisms by which the environmental priority principle could be implemented, one needs to actually dis-aggregate the fields again, because the fields are, they are enforced by different regulators at different levels of government. So obviously, if we're thinking about securities regulation and antitrust, we're talking about the federal government, we're talking about the SEC and the Department of Justice and the Federal Trade Commission.

Sarah: It is very unlikely that in the current political climate that an environmental priority principle would be put into place at the federal level in those institutions. However, when we're thinking about something like corporate law or including the business judgment rule or benefit corporation statutes, we're talking about the states. And there has clearly been some degree of pushback by the states against the deregulatory approach and there has been a lot of experimentation by states in the environmental arena in general. So I think that the area where it would be really interesting and exciting to see greater experimentation would be in the states, with respect to state corporate law and state benefit corporation law.

Hana: I do think there's a lot of interest right now and looking out beyond the federal government for efforts across the board when it comes to environmental protection and forward-thinking action on climate. And so this is an interesting way at looking at new areas in which states or different levels of government can have an impact for sure. I want to just ask you whether there's anything else you'd like to highlight from your piece that we haven't touched on yet? We'll, of course



make sure to include a link to the piece on our website. But is there any burning aspect of it that we haven't gotten to, that you think we should mention?

Sarah: Honestly, I actually think that your questions have been very comprehensive, and so no, there is nothing that I would add to the account, beyond what we have discussed.

Hana: Well, thank you so much for speaking with us today, Sarah. And I look forward to hopefully seeing this concept incorporated into various areas of law in the near and longterm future and being a part of helping make that happen.

Sarah: Thank you so much. I'm so delighted to have this conversation with you.

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