

RULE OF LAW PERSPECTIVES ON DIFFERENT LIABILITY INSTRUMENTS APPLICABILITY TO UNDERPIN ADAPTIVE GOVERNANCE OF GREENLAND'S MARINE ENVIRONMENT



JURIDISK INSTITUT
AARHUS UNIVERSITET

WORKSHOP, OSLO
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NANA AMALIE HARBO
PH.D.-STIPENDIAT



MAIN QUESTIONS

The main questions to be addressed:

1. How to understand the concept of **legal certainty**?
 - with particular focus on how broad an interest-concept can be accepted under the legal certainty concept
2. Does **liability instrument** have any role to play in a system for adaptive management of the marine environment?
 - case study: environmental liability schemes in the Greenlandic Act on Mineral Resources

THE CORE OF THE LEGAL CERTAINTY CONCEPT

Legal certainty implies that citizens must be able to **know and predict their legal situation**, e.g. their duties, responsibilities and rights and to be **protected from arbitrary use of state power**.

“Legal certainty is a common term for the protection requirements to be respected by the public, to ensure the individuals and groups of citizens against arbitrary, unjustified interference and discrimination. Such requirement also includes procedural equality.”

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ource: Ellen Margrethe Basse: *Miljørettens Grundspørgsmål* (1994), p121f

A NEED TO SPECIFY THE CONTENT OF THE LEGAL CERTAINTY CONCEPT?

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- The concept of legal certainty describes some of the most fundamental characteristics of a society built on rule of law, and is therefore a key concept in jurisprudence.
 - The term is often part of the legal and political argument that a specific legal situation is unacceptable.
 - But the concept is also vague and value-laden, and tends to have different meanings depending on context and legal field.
- relevant to clarify the exact content of the concept when using it in legal argumentation.

Source: Ellen Margrethe Basse: Miljørettens Grundspørsmål (1994), p121f

THE DANISH DEBATE AS BACKGROUND

A key topic of the discussion: within the field of environmental law – should the concept of legal certainty:

1. Be reserved for the traditional conception that legal certainty relates to the protecting of the immediate addressee of a public authority decision and - if relevant - the interests of the close neighbors.
2. Or should other and more or less well-defined interests, e.g. a 'common interest' or 'future generations interests' in a certain environmental quality be acknowledge as legitimate protection interests that should be included in legal certainty considerations by the public authorities in concrete cases.

Debate question: should we accept that the legal certainty concept can be used both in a 'narrow' and a 'broad' sense depending on the legal field and specific legal question?

ARGUMENTS FOR THE NARROW CONCEPT

One of the arguments for a narrow concept is that the **broad legal certainty concept in fact implies a “system-consideration”** - meaning that the broad concept - which balances several interests - in reality is a way of legitimating a priority of ensuring maximum achievement of objectives for environmental management.

Advocates for a narrow legal certainty concept argues that it is important to ensure that **legal protection of the individual addressee are clearly distinguished from and weighted against other relevant considerations in the public authorities decision-making**, e.g. organizational and economic efficiency, goal achievement, etc.

See e.g. argumentation in Karsten Revsbech, Nyere tendenser I dansk forvaltningsretlig teori – systemhensyn eller retssikkerhed? (1992)

ARGUMENTS FOR THE BROAD CONCEPT

Argumentation in favor of a broader legal certainty concept within the field of environmental law:

“Environmental decisions have legal as well as actual effects that may have far-reaching impact on living conditions for a broader group of citizens” [which is why] “many people other than the immediate addressee have interests that qualifies as legitimate protection interests – this includes residents in both a narrower and wider sense, other common interests, and perhaps even future generations whose living conditions are determined by resource utilization and pollution.”

Source: Ellen Margrethe Basse: Miljørettens Grundspørgsmål (1994), p121f

STATUS

In Danish legal theory: within the field of environmental law, a broader legal certainty concept seems to be accepted (however not by all):

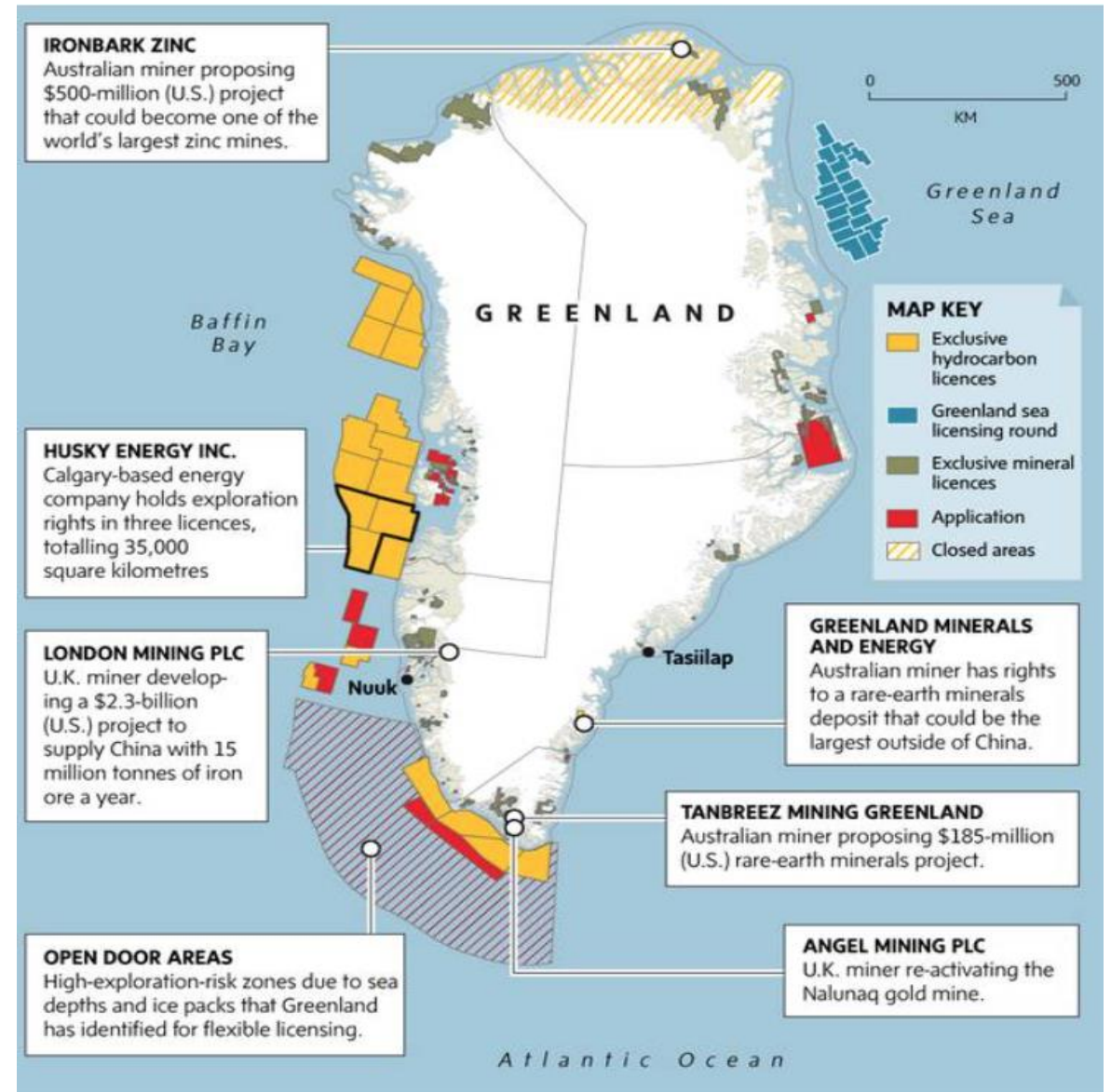
- Rule of law concept incl. the legal certainty value represents a balancing of multiple interests in protecting the environment.
- Rule of law values can also cover protection of the 'common interests.

The Danish administrative practice is however still dominated by a traditional focus on protecting the addressee and a narrow group of interests. The Danish environmental authorities are reluctant to include broader environmental considerations in concrete environmental decisions and to accept a wider range of interests as legitimate parties in environmental cases.

GREENLAND - SETTING THE SCENE

- Greenland is not an independent state – Greenland is a part of the Danish Kingdom
- A huge territory but very small population
- The 2009 Self-Government Act
- The 2009 Mineral Resource Act
- Divided responsibility between Denmark and Greenland regarding the marine area – the 3 nautical mile boundary
- Besides fishery, no significant industry
- Relatively clean and undisturbed environment
- The status of the large scale extractive industry in Greenland – something that may happen in the future!

Picture: Greenland Bureau of Minerals and Petroleum



TWO LIABILITY SCHEMES

CHAPTER 14 OF THE MINERAL RESOURCE ACT

Environmental liability scheme

- GL Mineral Resource Act **sections 63-66**
- Basically a public law regime → The government ensures that the polluter is held responsible for damage to the environment.
- Proactive duty to respond (and bear the costs) for the operator
- Protection focus: environmental protection
- Inspired by the EU environmental liability directive

Scheme on compensation for environmental damages

- GL Mineral Resource Act **sections 67-72**
- Traditional compensation rules - strict liability.
- Civil law scheme
- Focus on compensation for economic losses, damage to property and personal injury
- Operator is responsible to compensate losses.
- Inspired by the Danish Act on liability for environmental damages

THE ENVIRONMENTAL LIABILITY SCHEME

Characteristics:

- Not a compensation scheme, but a mean for prevention of long-term negative environmental impacts from mineral resource activities.
- The prevention perspective is primary - cost allocation is secondary.
- **The operator's duty to act is central** - the duty occurs immediately and the content of the duty (the actions to be undertaken) is determined on the basis of the nature of the actual danger or the nature of the damage .
- The operator is liable for failure to comply with the obligation to act.
- Reflects a broad legal certainly concept

The potential of such liability instrument to underpin adaptive marine management?

PROBLEMATIC ASPECTS OF THE ENVIRONMENTAL LIABILITY SCHEME

- Fragmentation of the laws for protection of the Greenlandic environment.
- The unclear concept of ‘environmental damage’
- No legal standing for environmental stakeholders.

SCHEME ON COMPENSATION FOR ENVIRONMENTAL DAMAGES

Characteristics:

- Establish the condition for the operators obligation to pay for others cost or loss due to environmental damage → the focus is economical loss compensation.
- Traditional tort law principles sets **clear conditions** that must be met in order for the loss to be transferred from the injured party to the injured party → ensures protection of legal certainty for the operator.
- Reflects the narrow legal certainty concept

The potential of such liability instrument to underpin adaptive marine management?

TO SUM UP

1) The concept of legal certainty can be understood in a narrow and a broad sense. The environmental liability scheme represent the broad concept (balancing of multiple interests) while the compensation scheme represent the narrow concept (protecting the rights and interest of the directly involved).

2) An environmental liability scheme such as established in the Mineral Ressource Act section 63-66 has potential to underpin and create synergies with the different components of an adaptive marine ecosystem-based management. However, a number of unclear issues in the Greenlandic schemes needs to be clarified to make it work in practice.



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