Section «Law Science»

Cross- Border Environmental Damage from Different Angles: An Analysis of Liability and Ex Post Remedies in Private International Law

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This paper is primarily focussed on ex-post liability for cross-border environmental torts. In particular, the analysis is centred on the main standards for liability in non-contractual obligations arising out of environmental damages and their effects both from a substantive point of view and from an economical standpoint. As a consequence of the plurality of countries involved in a cross-border tort, the analysis deepens in the conditions for application of conflict-of-law rules and the study of the effects that application brings.

The aim of this 'double analysis' (regarding substantive laws and conflict rules) is firstly to show the effect produced by application of specific sets of substantive rules. Then, giving the best conflict-of-law rule capable of determining in every case the most efficient substantive law, would be a natural conclusion but is partially disproved. Indeed, the result reached by the present work is that general tort conflict-of-law rules striking permanent efficiency within a system are a vague illusion chased by many but never reached. By contrast, it is possible to design conflict rules and substantive rules tailored on the needs and aims of each single market. Bertrand Russel argued that the concept of causation as a relation between events should be replaced in science by functional relations that are not necessarily deterministic. Every system, therefore, is governed by a set of functions containing certain "variables". Similarly, if in law there does not exist a permanent causality between a rule and the desired effect, then it is more effective to analyse the system in order to find its 'variables' and to design the 'function' most suitable to it.

On the other hand, the argument for the desirability of a public law system regulating liability is not taken into consideration. Therefore, every reference made in the course of this paper to state intervention is made only to legislative choices on civil liability and conflict rules.

Rules on liability: a first distinction between common law and civil law systems

In common law countries the problem of protection of the environment is generally faced through rules established by specific Statutes. On a different layer, concerning procedural matters and the application of such Statutes, jurisprudence is still fundamental.

In England and Wales, liability for environmental damage, indeed, relies mainly on common law rules. The system does not recognise a general rule of strict liability or negligence-based liability, since different rules are subject to application depending on the case. Liability for environmental damage may then be established under torts of negligence, private and public nuisance, under the rule in *Rylands v. Fletcher* or under breach of a statutory duty.

Similarly, in civil law countries there is generally applied a fault-based liability system. An exception is given by some Scandinavian countries (Sweden and Finland) which, by contrast, use special strict liability regimes. However, by contrast with the common law systems, general rules of law have a fundamental importance in assessing liability.

The economic view on environmental damage

Damage to the environment caused by the exercise of an economic activity is traditionally interpreted as a market failure. Economists give this 'reading' of the issue essentially for three different reasons. First, environmental damage produces a negative 'externality' of which the cost, if not internalised by parties, becomes a social cost, implying a market failure. A free market system is, indeed, under certain circumstances, inadequate to deal with negative externalities. Individuals are supposed to pursue their interests, which should be sufficient for free market theories to promote also the public interest, since the outcome of the aggregate individual activity should always promote the public interest as well. This is not always true. In the case of environmental damage, for instance, unless the polluter is not forced to internalise the cost of pollution, the same amount is paid by a 'third party', the society, as a result of a negative externality produced by the foregoing wrong allocation of costs.

Secondly, the environment is deemed to be a 'public good' which has no market price and, indeed, is not subject to appropriation by the side of private persons. Public goods are non-rival and non-excludable items; this means that their use by one person does not exclude the consumption of the same good by others. The consumption of those goods, such as clean air and 'ecosystem benefits', is no cost. Thus, persons acting as 'free-riders' will over-use the good without paying for it. Wrong allocation of resources involves then, once more, a market failure.

The third reason of market failure caused by environmental damage resides in the problem of 'commons'. When it is not possible to limit the consumption of certain goods, they become normally subject to overexploitation by persons. The final result of this behaviour is the destruction of the resource overused that, translated in economic terms, constitutes a third type of market failure.

Following these ideas, many countries enacted internal laws in order to regulate the liability of commodities operating within their borders and, at the same time, they ratified international agreements to pursue a common policy.

The argument for desirability of a strong regulation of environmental liability is summarised by two opposite theories. Some economists argued that different environmental standards have the effect of increasing the global welfare, since weaker standards of environmental protection allow developing countries to compete on the international market. On the other hand, some scholars argue that those countries with lower standards should be exhorted to improve their level of care and protection of environment in order to prevent a global harm to people and the environment itself.

With regard to private individuals, economic actors have the main target of pursuing maximization of wealth, which means that they have wide interests to externalise costs, included costs arising from environmental damage. As Dempsey argued *"If the firm succeed, the price of the commodities the body produces, will not reflect the marginal cost to society of the commodity's production"*. The cost of the damage produced to the environment, indeed, is not internalised and then, by consequence, is not reflected in the purchase price. The 'spillover' costs soon become *"economic waste"*.

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