ENVIRONMENTAL LOSS AND DAMAGE IN A COMPARATIVE LAW PERSPECTIVE

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PREFACE

1. THE CONFERENCE IN COMO

The sixth EELF Annual Conference was held at the University of Insubria in Como in September 2018. Attendance at the conference was high, as there were more the 140 participants and around 90 speakers and chairpersons.

The conference took a slightly different pattern from the previous European Environmental Law Forum conferences, which were devoted to more general topics, focusing on a more specific but at the same time crosscutting issue: environmental loss and damage.

As announced in the original call for papers, the book that we present here is a collection of peer-reviewed contributions of the speakers at the conference. The book reflects the structure of the conference and has the aim of analysing and comparing the regulation of environmental loss and damage in a comparative, interdisciplinary and both public- and private-law perspective. It delves into conceptual and specific legal issues related to liability, compensation and restoration of damage in different sectors and jurisdictions, also taking into account the contributions of economic analysis in this field of regulation. Specific attention has been devoted to the role that liability and insurance may play in terms of mitigation and adaptation to climate change, as well as the prevention of damage from natural hazards. The scope of analysis encompasses national as well as supranational and international regimes, also in view of possible legal transplants and "cross-fertilisation".[1] The book includes 30 contributions that are subdivided into eight parts: (i) liability for environmental harm in the EU; (ii) private and corporate environmental liability; (iii) the role of criminal liability; (iv) legal transplants in the environmental field: the case of environmental liability; (v) state and international environmental liability; (vi) climate change liability; (vii) liability, climate change and natural hazards: the role of insurance; and (viii) real compensation and offset regimes: the strategy of "no net loss".

[1] On this point, the bibliography is now boundless. To underline the relevance of the theme, the International Academy of Comparative Law dedicated a whole session to the theme of "Legal Cultures and Legal Transplants", published in the Isaidat Law Review (2011) Volume 1 – Special Issue 1.

2. THE DIALECTIC BETWEEN GLOBAL LAW AND LOCAL LAW

One of the aspects that the conference aimed at underlining was the different keys to understanding the current dialectic between global and local law in the environmental field.

In recent decades, in fact, we have been witnessing the development of a body of rules that tends towards a progressive approach to the development of common operational choices in addressing environmental problems. This global environmental law has emerged because of several factors. First, the environmental problem, in addition to having affected all legal systems in an almost contemporary way, is suitable to involve by its very nature multiple countries at the same time.[2] Secondly, legal problems in the environmental field are closely intertwined with aspects of the natural sciences, which present themselves as universal, and with economic problems that appear to be common in the globalised world,[3] whereas the link to a particular cultural, social or legal background seems to fade away.

As a consequence, in the field of environmental law, the fact that the problems to be addressed are – in more than one respect – intimately linked to scientific knowledge and cover, for this reason, a certain degree of technicality will lead, in a greater number of cases, to new phenomena of legal transplants. On the other hand, legal transplants of environmental protection models have been strongly characterised and – consequently – influenced by the globalised perception of the environmental phenomenon, and by that of its protection.[4] In particular, with the Rio Conference of 1992,[5] a new era of international environmental law began:[6] international cooperation no longer refers only to the prevention of

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2 *P.H. Sand*, The evolution of international environmental law, in D. Bodansky, J. Brunnée & E. Hey (eds.), The Oxford Handbook of International Environmental Law, Oxford University Press, 2007; *B. Pozzo*, Tutela dell'ambiente (diritto internazionale), Enciclopedia del Diritto, Annali, III, p. 1156, 1161 et seq.

3 *J.B. Wiener*, Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law, Ecology L.Q. 2001 (27), pp. 1295 et seq.

4 *T. Yang & R.V. Percival*, The Emergence of Global Environmental Law, Ecology L.Q. 2009 (36), pp. 615 et seq.; *R.V. Percival*, Fifteenth Annual: Lloyd K. Garrison Lectures on Environmental Law: The Globalization of Environmental Law, Pace Envtl. L. Rev. 2009 (26), pp. 451 et seq.; *R.V. Percival*, Environmental Law in the Twenty-First Century, Va. Envtl. L.J. 2007 (25), pp. 1 et seq.; *R.V. Percival*, Global Law and the Environment, Wash. L. Rev. 2011 (86), pp. 579 et seq.; *Wiener*, *supra*, note 3.

5 *M. Pallemaerts*, International environmental law from Stockholm to Rio: back to the future?, Review of European Community & International Environmental Law 1992 (1), pp. 254–266¸ *E. Brown Weiss*, International Environmental Law: Contemporary Issues and the Emergence of a New World Order, Geo. L.J. 1992 (81), pp. 675 et seq.

6 *P. Birnie*, The Development of International Environmental Law, British Journal of International Studies 1977 (3), pp. 169–190.

transboundary pollution issues, but concerns global issues that can jeopardise natural balances essential for the maintenance of the conditions of life on earth.[7]

3. LEGAL TRANSPLANTS IN THE ENVIRONMENTAL FIELD AND THE NEED FOR A COMPARATIVE LAW APPROACH

A special session of the conference was devoted to legal transplants, taking advantage of the various and different backgrounds and origins of the participants and the speakers. The study of this phenomenon seems in fact very promising for all those scholars who are interested in the dynamic of environmental law evolution.

Today the reasons that drive the circulation of models can be very heterogeneous, traditional concepts of "prestige" and "imposition" as drivers of legal transplants need to be re-interpreted in the light of current circumstances, and new methods of analysing the phenomenon have been suggested.[8]

With the drafting of large international conventions, homogeneous rules and standards are developed. It is not therefore difficult to find a rule formulated in a similar way in the European Union, the United States, Russia or China. This cannot come as a surprise: to similar and common problems, not included in the casts of the different legal traditions, the different legal systems have developed similar answers.

In addition, an important role is played today by international cooperation, which in recent decades has affected many aspects of the legislation of emerging economies.[9] As the European experience can teach us, environmental cooperation has become one of the leading instruments in inducing legal transplants, as "environmental integration clauses are included in most EU agreement of a general nature".[10] A vast literature points out how Europe has become in this sector a *normative power*, able to impose its own perspective and regulation on

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7 *G. Palmer*, New ways to make international environmental law, American Journal of International Law 1992, pp. 259–283.

8 *M. Graziadei*, Comparative Law as the Study of Transplants and Receptions, in M. Reimann & R. Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford University Press, 2007, pp. 441–475.

9 *J. Delisle*, Lex Americana? United States Legal Assistance, American Legal Models and Legal Change in Post-Communist World and Beyond, U. Pa. J. Int'l Econ. L. 1999 (20), pp. 179 et seq.; *N. Wheeler*, The role of American NGOs in China's modernization, invited influence, Routledge, 2013.

10 *G. Marín Durán & E. Morgera*, Environmental Integration in the EU's External Relations, Beyond Multilateral Dimensions, Hart Publishing, 2012, p. 57.

how environmental protection should be taken into consideration,[11] becoming a global producer of norms in this as in other important fields.[12] On the other hand, we can also observe the willingness, by countries that have undergone a rapid process of democratisation, to refer to authoritative models, mostly arising from Western or international models, in the field of the protection of human rights and of the environment. In addition, even the practices of large multinational companies can have an impact on facilitating the circulation of Western models in emerging economies by private contracting.[13]

With regard to the EU, other factors that might drive legal transplants in the environmental field can also be linked to the formation of regulations at the regional supranational level. In this case, legal transplants might be induced by the imposition of harmonised supranational legislation, which finds its roots in one or more advanced legal systems and aims at creating common conditions in all Member States.[14]

Given the complexity of the questions at stake, however, even if today environmental law can be considered at least partially a global law where it is possible to identify common trends, one should not overlook the fact that environmental law has uneven application around the world, partly because environmental law is quite new and growing rapidly and partly because its application is *local* and depends on the differentiated conditions of each legal system.

In fact, the globalisation process that we are witnessing should not lead us into the temptation to believe that global environmental rules will lead everywhere to the same results. Indeed, rules and institutions borrowed in the environmental field will also have to deal with the particular *legal process* of the target system and with a particular *path dependence* that will vary from context to context, as well as with factors that will surely affect the efficacy of

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11 *I. Manners*, Normative power Europe: a contradiction in terms?, JCMS: Journal of Common Market Studies 2002 (40), pp. 235–258; *S. Lightfoot & J. Burchell*, The European Union and the World Summit on Sustainable Development: Normative Power Europe in Action?, JCMS: Journal of Common Market Studies 2005 (43), pp. 75–95; *M. Braun*, EU Climate Norms in East-Central Europe, JCMS: Journal of Common Market Studies 2014 (52), pp. 445–460.

12 *M. De Morpurgo*, The European Union as a Global Producer of Transnational Law of Risk Regulation: A Case Study on Chemical Regulation, European Law Journal 2013 (19), pp. 779–798.

13 *Li-Wen Lin*, Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example, Am. J. Comp. L. 2009 (57), pp. 711–744.

14 The environmental competences enter the Treaty of Rome with the Single European Act of 1987, which inserts a new Title VII, dedicated to the "Environment", consisting of three articles: 130R, 130S and 130T. The Single European Act states that action by the Community relating to the environment shall be based on the principles that preventive action should be taken that environmental damage should as priority be rectified at source and that the polluter should pay. It further provides that environmental protection requirements shall be component of the Community's other policies.

the transplanted rule or instrument. In this perspective, not only the letter of the law counts, but also and above all the existence of tools to make it effective, and therefore the legal system as a whole in which it will be imbedded.

It is therefore necessary to promote a comparative law approach in the study of the spreading of environmental rules, which will help us in understanding the profound reasons for legal transplants and the true effectiveness of the available remedies.

As the judges of the Indian Supreme Court have masterfully reminded us: "If the mere enactment of laws relating to the protection of environment was to ensure a clean and pollution-free environment, then India would, perhaps, be the least polluted country in the world. But this is not so. There are stated to be over 200 Central and State statutes which have at least some concern with environment protection, either directly or indirectly. The plethora of such enactments has, unfortunately, not resulted in preventing environmental degradation which, on the contrary, has increased over the years".[15]

Barbara Pozzo and Valentina Jacometti
Como, August 2020

[15] Supreme Court of India, Indian Council for Enviro-Legal Action v. Union of India 1996 (5) SCC 281, 293.

CONTENTS

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