Taking account of environmental damage

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Historically the law has largely ignored the environment. Legal rights and duties have been confined to a restricted range of interests, essentially protecting only individuals and their property. Even property interests have been approached in a narrow way, concentrating on those which can be viewed in financial terms. Thus the various features of land have been recognised only so far as they might affect its selling price, and forests valued only according to the value of timber as a commodity. Now there is a growing desire to identify and recognise the many ways in which we benefit from the natural environment and to find a place for this in our legal relationships. That task is not straightforward and this paper seeks to explore two possible routes and the challenges they present.

The first route is to retain the law's focus on persons and property, but to expand the categories of interests which are accepted as affecting their well-being and value. Thus it may be possible to recognise that an individual has been harmed not just when they have suffered a physical injury but when they are deprived of aesthetic or spiritual benefits from the environment. Or likewise that a farm has been damaged when activities on neighbouring land remove the pollinating insects the have been providing beneficial, but unrewarded, services to the crops on the farm. This approach does not require a restructuring of legal categories but raises major factual and evidential challenges.

The second route is to change the focus of the law completely and look at the environment as something which can itself hold rights and interests which the law will protect. In this way damage to an ecosystem is not considered merely in terms of what harm is caused to people and their property, but rather in the light of how the ecosystem itself has been harmed. This does require a significant re-orientation of the law, recognising new categories of legal interests and presenting challenges of form and procedure as well as again raising factual and evidential issues.

A third option, not considered fully here, can be seen as a variation of the first route, but placing the focus on human rights. It is now commonplace for legal systems to grant protection not just to the health and property of individuals, but also to their human rights. To the extent at these are defined as including the right to live in a clean environment[2] there is scope to use this as a means of treating harm to the environment as constituting a legally recognised harm, to individuals. There are, however, difficulties in identifying when harm is so severe as to amount to a breach of human rights – clearly not every departure from a pristine environment will count. There are also difficulties in attributing liability between the state, which is responsible for guaranteeing the rights, and other actors whose activities may be the direct cause of the harm but do not generally owe the same sort of duty to respect all the human rights of fellow citizens. Moreover, although this is not the case in Chile, many constitutions treat environmental rights as different from the more immediate rights such as personal liberty which can be the focus of direct vindication in the courts,. In Spain, for example, the "right to enjoy an environment suitable for personal development" [3] is within

[1] This overview is a talk presented at the international seminar on Ecosystems, Ecosystem Services and Environmental Jurisdiction, organised by the Third Environmental Court and Universidad Austral in Valdivia, Chile in November 2014.

[2] Art.19(8) of the Constitution of Chile.

[3] Art.45 of the Constitution of Spain

the section of the Constitution dealing with "Governing Principles of Economic and Social Policy", not those providing "Fundamental Rights and Public Liberties" nor the "Rights and Duties of Citizens". Approaching environmental harm as a human rights issue thus has potential but also pitfalls.

Whatever approach is taken, there are some questions to ask about the overall objectives, which will affect the path to be followed. Is the aim to deal with the few very major incidents which have devastating environmental effects, with the greater number of less significant but still serious incidents, or with the many more lesser incidents which are individually less significant though still noticeable but which cumulatively have a greater effect than the higher profile incidents,. Or is the aim to stretch the law even further to capture the mass of diffuse pollution which is degrading the environment every day? Is the regime seen as playing a major role in changing behaviour, or is that task reserved for more direct regulatory approaches, with liability for damage filling a gap when things go wrong? Is this form of legal intervention viewed as something for public authorities to use or is it intended to open up direct action on the part of a much wider range of society? How these questions are answered will have a big impact on the scope and structure of what is developed, as will the legal context within which it has to sit. This paper does not provide an answer, but tries to provide a guide to some of the steps that need to be taken in working towards an answer.

Adding the Environment to Established Structures

One way of taking account of the environment is to build on existing patterns of liability but to extend them so that they include environmental harms within the scope of the damage that is recognised as having legal consequences. There is an example of a similar process in the jurisdictions in the British Commonwealth where over the past century and more the concept of personal injury has been expanded to take account of nervous shock or psychiatric injury, which was previously not regarded as a form of harm that the law should recognise. This has not involved any reworking of the fundamental rules of the law of tort and delict, just an extension of the range of consequences counted as legally relevant harm.

Over the years, the things that we value and the ways in which they can harmed have changed massively. This is partly a matter of scientific advances, as we develop a better understanding of the many different ways in which activities formerly thought to be innocuous can harm us. But it is also partly a question of changing attitudes, values and expectations. Accommodation that is today regarded as falling below an acceptable level would in the past have been seen as perfectly adequate, whilst the elements that contribute to valuable intellectual property have expanded greatly in recent decades. In such cases, the point at which we would say that someone's interests have been harmed has moved significantly. The law follows these developments and embraces the new ways of seeing things.

As a gross generalisation, such evolution is probably easier in a civil law country than a common law one. In the former the foundation of the law on principles stated in more general terms makes it easier for these to be applied to new situations and to embrace new ways of thinking about what is included within the established structures of the law. Thus where the Civil Code simply provides that anyone who has wrongfully caused harm should

provide compensation for that harm[4] it is comparatively simple for the law to follow the expansion of what is generally considered as being "harm". In the common law countries, which take a more fragmented approach to delict or torts and rely more on previous precedent, breaking away from the established views can be harder, but can still be achieved. That process has lessons for the embracing of new ideas of value and harm, under whichever sort of legal system.

The growing mass of research and literature on ecosystem services and the economic value of the environment (e.g. The Economics of Ecosystems and Biodiversity programme) shows that there are significant, but previously overlooked, ways in which harm to the environment causes harm to human well-being and property. But such adverse consequences are not recognised as harm within the established legal categories. The same was the case over a century ago in relation to the psychiatric harm caused by being involved in traumatic incidents,[5] but now such harm is fully accepted and qualifies the victim for compensation. There are several stages that have to be gone through before such an evolution is complete.

In the first place the courts must be willing to accept that the "new" form of harm exists and is worthy of recognition. This will be based on scientific evidence which can be tested in court, but is also affected by the views in society more widely. Judges will demand evidence that can be tested, but inevitably are affected by perceptions in the wider community, both scientific and public. The courts are never at the leading edge of accepting new ideas but both influence and are influenced by the wider progression of an idea from being absurd, to being an interesting alternative insight, to being possibly correct, to being probably correct, to being accepted knowledge – the gradual acceptance of plate tectonics and continental drift within the scientific and public communities is a good example. With ecosystem services and their valuation we are now a long way down the path to acceptance, so that it would not be a great leap for a court to include ecosystem valuations in its accounting for the harm caused.

Acceptance of the general principle, though, is only the first step in arriving at a workable legal response to a new form of harm. A threshold must be established for when the harm is serious enough to deserve legal attention. It is not every discomfort which is recognised as a personal injury giving rise to a claim for compensation, nor every external incident which may in some way affect the value of a person's property. In relation to psychiatric injury the boundary has largely been set at the point where a feeling of discomfort, fear or anxiety becomes more than just a passing emotion and constitutes a recognised psychiatric disorder. This sets the boundary quite high, as people's lives can be significantly affected before they reach that level of distress. In the environmental context, what level of disruption to ecosystem services is required before an actionable wrong has occurred?

A further step is to identify the range of victims who are going to be able to raise an action. Except for cases such as air pollution, where a physical injury is involved, the range of potential claimants is usually fairly limited by the fact that a collision, or even an explosion, can affect only those in the immediate vicinity. With psychiatric injury the range is considerably expanded and the law has struggled to find the appropriate boundary. Obviously the person at the centre of an incident can be accepted as a primary victim, and

[4] E.g. Chilean Code, art.2314.
[5] *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222

this has been extended to immediate witnesses, but there has been more uncertainty over how far to go beyond that. What about a family member seeing live on television an incident, e.g. the collapse of a stand at a sports stadium, where they fear that a relative may be involved? What about a person seeing news coverage of a ship sinking and not knowing if their loved one was one of those rescued? What about a relative simply being informed that their father or daughter has been killed or injured? The ripples of an incident spread widely, but there must be a limit to liability somewhere. In relation to environmental harm, this may be a particular problem, given that all aspects of our environment are connected. How distant from the primary consequences can a victim be but still claim compensation - distant in space, time and number of links in the chain of causation?

There are also going to be practical and procedural problems. A major practical issue may be proving causation. A spill of chemicals that visibly pollutes river is easy to establish, but where groundwater is polluted, the effects may appear only at a distance in time and space and there may be more than one possible source so that identifying the one responsible may be difficult. Moreover there is likely to be more than one contributing factor to a decline in water quality, so that establishing that any one of them is responsible to a legally recognisable degree may be even more challenging. And if there are several contributing factors, how is responsibility to be shared, especially if only some of them involve activity which will attract liability at all?

At a procedural level there is the question of who can come to court to represent whose interests. If the drinking water for a town is affected, does each individual have a claim or should there be a collective claim taken by the municipality or some other representative body? If so, how does one assess the loss and ensure that the true victims see a benefit from the compensation paid or other remedial action taken? This may point towards remedies that actually seek to restore the ecosystem services rather than merely pay compensation, but that can be a slow and complicated process, which raises further questions of how this is to be monitored and enforced over the years to come. The solutions will differ depending on whether the wrong-doers take direct responsibility for remediation work or meet their obligations by providing money and passing the responsibility on to others. And if a municipality or other public body is acting on behalf of its community, will community members have any recourse if they consider that the remedial work is not being done? A further complication is that the success of attempts at the restoration of ecosystems is rarely guaranteed. The same can be said of many medical interventions, but there we have so much more experience that the degree of risk can usually be calculated and taken into account, whereas with environmental restoration, we are still at the very early days of developing our expertise and understanding, and the results take much longer to become apparent.

These challenges, though, are ones that can be met within the existing structures of the law. Recognising new forms of harm does not require fundamental reworking of legal concepts or relationships, just the application of established principles to new sets of circumstances, a task which is within the reach of a court willing to break out of restrictive past thinking.

Putting the Environment at the Centre

The alternative to trying to embrace wider concepts of harm within the existing legal structures is to establish a new approach that places the environment at its core. This builds on the view that harm to the environment is itself a wrong which needs to be remedied, rather than merely something to be tackled only because of its impact (however widely defined) on people and their property. The environment, though, cannot appear in court itself and therefore a number of challenges must be faced in creating a regime that will provide remedies for environmental damage. A number of attempts have been made around the world and what follows looks at the EU's Environmental Liability Directive,[6] not because it has got things right, but because it is a concrete example which highlights the key points which any regime must address.

The Directive's regime is based on public authorities being able to take action in the event of certain serious forms of environmental harm being caused or threatened. There is a role for the wider public but only the designated authorities have legal powers to act. The remedies are not about compensation but about trying to ensure that the environment is restored, or in the event that this is not possible, that equivalent environmental benefits are provided. It operates within the complex framework of EU environmental law and therefore can build on a sophisticated background of definitions and existing obligations, but it has still had to tackle anew the challenges of dealing directly with environmental damage.

What damage is recognised?

One initial question is to determine the scope of any liability regime. What sort of environmental damage will be recognised? Everything we do has some impact on the environment, usually adverse, whilst depending on one's perspective some impacts may be either good or bad, e.g. expanding woodland habitat at the expense of rich grassland. The Directive concentrates on serious harm and to do this makes use of definitions used in other parts of EU environmental law. It covers:
- water damage: this is based on impacts which have a significant adverse effect on the ecological, chemical or quantitative status of water under the Water Framework Directive,[7] which sets detailed parameters for all water bodies using five categories: high, good, moderate, poor and bad. In essence it is only pollution or other incidents which threaten to move a body of water from one status to a lower one which will trigger the liability provisions.
- land damage: this is based on any contamination of land which creates a significant risk of human health being adversely affected, again a fairly high threshold calling for impacts much more severe than those which may create a significant nuisance. This definition also means that the focus has not wholly shifted away from the effects on people as being the key concern of the law.
- biodiversity damage: this is based on significant adverse effects on a protected species or habitat reaching or maintaining favourable conservation status, building on the EU Birds and Habitats Directives and the supporting guidance and case-law to identify what is protected and explain when its conservation status is favourable.

The Directive thus largely uses existing quality standards to measure which harms will be tackled. For water and biodiversity damage a further consequence of doing so is that this helps to get round the major practical difficulty of measuring the impact of any incident,

[6] Dir. 2004/35/CE.
[7] Dir.2000/60/EC.

since there should be benchmark data already to hand detailing the previous state of the environment, prepared for the classification of waters the designation of habitats and species and their monitoring under the law.

Who is entitled to take action?

The Directive is firmly rooted in public law. The power to invoke its provisions and the control over what exactly must be done is placed in the hands of the public bodies specified for this purpose by each Member State. When and how its provisions are used therefore depends on the willingness and capacity of the designated "competent authority" to discover and respond to relevant incidents. Such an approach should ensure consistency and avoids the risk of a proliferation of different actions taken by different individuals and bodies. It also ensures that industrial operators have just the one, clearly identified body to deal with.

However the wider public are not wholly ignored. Any person who is or is likely to be affected by environmental damage and non-governmental organisations promoting environmental protection have the right to approach the designated authority asking it to take action. Such requests cannot be ignored and the authority must either begin to take action or if it decides not to, provide reasons for this decision. This decision must then be susceptible to review in the courts or by whatever other independent review procedures the national legal system allows. In this way, the public authorities' monopoly of action is preserved, but the public can prompt action and have a guaranteed way of taking things further if they think that any authority is not fulfilling its responsibilities.

Who is bound by the Directive?

A further element of the scope of the Directive is establishing who is bound by its provisions. Here two different approaches are adopted, For water and land damage, the Directive's provisions apply only to those undertaking specific activities, in effect those already subject to environmental control under existing EU law, listed in Annex III of the Directive – industrial processes, waste management and disposal, transport of hazardous substances, water discharges, use of genetically modified organisms, etc. The liability provisions therefore attach to activities which are already subject to substantial controls which, if observed, should largely eliminate the risk of damage being caused.

For biodiversity damage, there is no such limitation and all "occupational activities" are covered, essentially excluding purely domestic activities, which should pose little threat of causing significant harm. This wider reach is, however balanced by narrower rules on liability.

What obligations are created?

The operator responsible for causing relevant environmental damage is bound to take remedial steps as set out in the Directive. There is also potential for direct action to be taken by the authorities and for them to recover the cost from the operator. The Directive, though, is not just based on retrospective liability but also deals with imminent threats of harm. In such circumstances the operator is bound to take the necessary preventive action to prevent harm being caused, or again the authority can act and recover the costs from the operator.

What is the basis of liability?

The degree of fault required to create liability is another major element in any liability regime. Here the Directive adopts two paths. For the operators of Annex III activities (see above), liability is strict for all forms of environmental damage. Liability without fault is often viewed as being unfair, but that can be countered in this case by the fact that since the operators here are already subject to more direct and far-reaching environmental controls they clearly know of the risks of their activities and have been given clear rules to follow to minimise this, a point picked up in the exceptions discussed below.

For biodiversity damage, liability extends beyond the Annex III operators, but is restricted to cases where there is fault or negligence. This has more in common with the standard rules of delict and reflects the balance of interests seen in the wider law. It can be argued either that this is offering biodiversity insufficient protection, or that this is a fair approach given the much wider range of activities which can lead to relevant harm, the fact that many of these involved are not alerted to environmental risks in the same way as the Annex III operators, and the fact that it may be easier for a less blatant incident to cause biodiversity damage that crosses the threshold for liability than is the case for water or land damage.

Exceptions

The rules on liability must be considered in the light of a number of exceptions which qualify their application in ways which affect the overall balance of the scheme. Aside from exceptions to prevent duplication with other international legal regimes dealing with nuclear incidents and marine oil spills, other limitations ensure that the regime does not catch those who might be seen as blameless. The two most significant exceptions (which States could choose to apply or not) allow operators to escape liability firstly where they have not been negligent and where the activity was not considered to create a risk of environmental damage according to the state of knowledge at the time (the "state of the art" defence) or secondly, in the case of an Annex III activity, if it was being carried out in full accordance with the national rules implemented to give effect to the EU laws governing that activity (the "permit" defence). In these cases the application of strict liability is overridden by the fact that as far as the operators knew at the time, they were not undertaking a risky activity, or if they were, they were following all the rules to ensure that no risk arose.

Other exceptions limit the scope of liability in other ways. Some, such as exempting the consequences of armed conflict or exceptional natural phenomena are commonplace in liability regimes, but one other has a significant effect in limiting the scope of the regime. This excludes cases of diffuse pollution, unless a link can be shown between the damage and the activities of individual operators. This emphasises that the regime is limited to specific incidents which can be shown to have a direct and substantial impact on the environment, rather that opening a route to tackle the more diffuse degradation of the environment caused by modern life.

What remedy must be provided?

The focus on the environment is perhaps most obviously shown in the remedies. The Directive is not about providing compensation to people or restoring their private property. Instead it is about restoring the environment – "the purpose of primary remediation is to restore the damaged natural resources and/or services to, or towards, baseline condition".

Where this is not possible, "complementary" remediation must be undertaken on another site so as to provide a similar level of natural resources and services, and if there is to be a time-lag while the restoration is achieved, then "compensatory" remediation must be undertaken to make up for the interim loss of resources and services pending restoration. The environmental goal is thus very clear and the only purpose for which remediation is to be taken. The practical problems of knowing what the baseline condition was should be eased by the nature and definition of the forms of damage covered, certainly for water and biodiversity damage where there is a link with other measures which will have already required some classification or designation, based on assessments of the condition of the resource. Responsibility for determining what is required is placed in the hands of the designated public authority, so that it is clear who is setting the requirements and that this is not left in the hands of the responsible party to assess.

The EU's Environmental Liability Directive establishes a liability regime which has the environment at its heart. Aspects such as the definition of when land is contaminated mean that it is not wholly eco-centric, but the focus of the law, and particularly of the remedies is completely different from what we see in conventional systems of civil liability where it is only people and their property that matter.

Conclusion

Taking account of environmental damage can be achieved in different ways. The existing legal approaches can be extended to recognise that harm can be caused in ways beyond those currently recognised, or a wholly novel set of legal relationships can be created that places the focus firmly on the environment itself. Whatever approach is taken, there will be substantial challenges in relation to evidence and procedure. It is unlikely that it will be possible to resolve all of these at once and the best approach may be to accept that this is an area where gradual evolution is best. By making use of the growing scientific literature on ecosystem services and the valuing the environment, some steps can be made where the position is most clear or the need most obvious, and the lessons learned there applied later to a wider range of circumstances. Such gradual development not only allows opportunities for testing the best way of handling issues, but also gives time for all concerned to come to terms with the change in thinking embodied here. If the change can be presented as evolution rather than revolution, it may have more chance of success.