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Extraterritoriality and the Rule of Law

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Introduction

This paper will focus on state responsibility. In particular, it will focus on the obligation of states under Principle 2 of the Rio Declaration 1992 "to ensure that activities within their jurisdiction or control do not cause damage to the environment of … areas beyond the limits of national jurisdiction".

The ideal of legal equality, or the universal application of the law to all persons (natural and juridical) by the ordinary courts is a key ingredient of the Rule of Law. This paper will therefore argue that extraterritorial legislation should be used by states to control the activities of non-state actors (e.g. citizens, permanent residents, and registered aircraft, companies, and ships) as a universal mechanism for preventing damage to the global environment generally - and areas beyond the limits of national jurisdiction (such as the Polar regions) in particular.

To address this central question the paper will critically examine and interrogate the legal and theoretical basis for extraterritorial legislation from the perspectives of constitutional law, criminal law, environmental law, and international law.

New Zealand's role in the international legal system

Since 1960 New Zealand has enacted 34 statutes and delegated legislative instruments pertaining to Antarctica covering a wide range of matters including bail, biosecurity, conservation, customs and excise, criminal procedure, district court jurisdiction, fisheries, hazardous

substances and new organisms, immigration, income tax, indigenous claims, marine mammals protection, extending the New Zealand nuclear free zone, the public service, search and surveillance, and wildlife, in addition to legislation implementing the Antarctic Treaty system. The transfer of the United Kingdom claim to the Ross Dependency in 1923 was accepted altruistically on behalf of the wider Commonwealth, and its approach to the Antarctic Treaty negotiations in 1959-1960 was characterised by a wider commitment to global trusteeship.

Paradoxically, the need to address climate change has not always fared well before the New Zealand courts on all occasions. For example, in *West Coast ENT v Buller Coal* [2013] NZSC 87 it failed to grapple with the climate change effects of exporting coal for burning overseas on the basis that New Zealand's contribution to global greenhouse gas (GHG) emissions is small and that importing states would simply source coal from elsewhere if it was not exported by New Zealand. More importantly analysis of the decision in *Buller Coal* drew attention to the failure of domestic legislation to address the overseas activities of New Zealand registered companies in terms of their climate change effects.

The application and extent of statutes

By its nature extraterritorial legislation extends national jurisdiction beyond state boundaries. At international law it is regarded as an exception to the general norm that state jurisdiction is bounded by geographical boundaries. Typically, extraterritorial legislation either applies exclusively to the state's own nationals regardless of where they reside, or additionally to non-nationals residing outside the legislating state. Such legislative activity can justified by the nexus of nationality in relation to the state's own nationals (for example, regarding customs and excise and income tax obligations), or in relation to non-nationals where this nexus is absent some broader justification is required (for example, a desire to condemn human trafficking). However, extraterritorial legislation is controversial because it impinges upon regional and international

jurisdiction that is normally based on bilateral and multilateral treaties, and risks the fragmentation of international approaches.

Realist and liberal frameworks for extraterritoriality

Theoretically, extraterritorial legislation is constrained by “realist frameworks” grounded on the practical reality of enforcing state power abroad such as the ability to collect evidence, prosecute, and bring offenders before the courts. While “liberal frameworks” focus on enhancing or maintaining state interest based on an anarchic world view. State interest is however not unlimited and is kept in check, for example, by an “effects test” that has been articulated before the US courts and by the restatement of American foreign relations law that is objective and factually based, qualitative by requiring any effects to be “substantial and foreseeable”, and reasonable in terms of the likelihood of risk to legitimate state interests (for example, national commerce). These competing frameworks therefore articulate opposing presumptions against extraterritoriality or for extraterritoriality.

Critically, extraterritoriality is driven by globalisation and the need to regulate activities like human trafficking or money laundering or trade in endangered species that cross state borders. Extraterritorial legislation can provide an effective remedy (in addition to multilateral action) to address these issues. Arguably, multilateral action provides legitimacy for extraterritorial legislation. But counterfactually some commentators (Johnson and Post) note that extraterritoriality is undemocratic and justifies expanding sovereignty via state hegemony. While other commentators (Xanthaki) argue that “non-territoriality” or “a-territoriality” based on the social contract whereby the governed concede “legislative authority” to the governors provides the basis for constitutionality within states and bilateral and multilateral relations between states within the international community. The social contract provides legitimacy for legislative action at all levels of governance, and extraterritoriality is “a departure from the norm” (p310) unless legitimized constitutionally via bilateral or multilateral agreements.

Common law tradition and extraterritoriality

New Zealand follows the United Kingdom tradition and historically legislation is based on a presumption against extraterritoriality. Exceptions to this general rule have typically focused on exercising criminal jurisdiction over nationals regardless of where the offending has occurred by deeming the offence to have been committed within the national jurisdiction. In civil matters the rules of private international law have typically applied. Extraterritorial legislation in relation to criminal offences is underpinned by the logic of preventing forum shopping that could otherwise occur if nationals are allowed to evade the law by transporting themselves or their property outside the jurisdiction of domestic courts. In some cases extraterritorial legislation is firmly based on the nexus between the national and the state (for example, customs and excise and income tax offences), whereas in other cases (such as human trafficking) it appears to be based on avoiding reputational damage that could arise from allowing their nationals to commit or participate in criminal activities overseas that are condemned by the international community. This approach has been used to justify regulating the state's citizens and residents, registered companies, and state registered vessels and aircraft, regardless of their geographical location within state territory or abroad.

Climate change, extraterritoriality and Antarctica

Returning to climate change, some commentators (France-Hudson) have argued that emissions trading schemes do not authorise polluting activities by commodifying emissions as property rights, but merely provide a mechanism to avoid criminal prosecution for activities that would otherwise be unlawful absent holding the required number of credits for surrender. Looking at matters from this perspective the failure to regulate the overseas activities of natural and juridical persons normally domiciled in or operating from the state clearly exposes a lacuna that enables evasion and forum shopping.

While the contribution of New Zealand's GHG emissions to global GHG emissions may be small, this is not now a credible argument for inaction.

Based on the conceptual frameworks discussed above, promulgating extraterritorial legislation (for example, by amending the geographical extent of the Climate Change Response Act 2002) would be consistent with constitutional comity and underpinned by the international legitimacy provided by the United Nations Framework Convention on Climate Change 1992 and the Paris Agreement 2015. More importantly, extending the obligations under the New Zealand emissions trading scheme (NZETS) to the overseas activities of citizens and residents, and registered companies, vessels and aircraft would be consistent with New Zealand's active role in the international legal system and its view about its claim to Antarctica as a global trustee. This view is also consistent with "a-territorial" provisions in Article IV of the Antarctic Treaty 1960 that froze sovereign clams in the continent, and the constitutional view (articulated by Xanthaki) that extraterritoriality is legitimized by international obligations under the UNFCCC and the Paris Agreement as an additional implementation mechanism for meeting GHG reduction budgets and targets. Beyond that, extraterritorial application of the NZETS to the overseas activities would also be consistent with the common law tradition and extraterritorial legislation by controlling the activities of citizens and residents, and registered companies, vessels and aircraft that have a direct nexus with the New Zealand state and its international obligation to ensure that activities within its control do not cause damage to the environment of areas beyond the limits of national jurisdiction, including, the Antarctic environment.

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