Book Review


Since the UN Stockholm conference on environmental protection in 1972, environmental principles such as the polluter-pays principle have played an increasing role in policy as well as in law. What at first sight appears to be political slogans has entered the court room and became more or less hard law. The object of Nicolas de Sadeleer’s book is to determine the legal status of the environmental principles at the international, EC and national levels. In doing so the author concentrates the analysis on three environmental principles: the polluter-pays, the prevention and the precautionary principles. De Sadeleer intends to demonstrate two theses. First, the paradigmatic-shift in the battle against ecological risk: from *a posteriori* control based on civil liability to *a priori* control based on anticipatory measures. The second thesis is that environmental principles contribute to the balance and dynamics of environmental law and their legal character (p. 5).

The book contains two parts. In the first part (pp. 1–226), de Sadeleer presents each of the three principles, their historical background, how the principles have been applied internationally, in EC and at the national level and the interrelationship between the three principles. Starting with a relatively brief introduction to the polluter pays principle (pp. 21–60) and the preventive principle (pp. 61–90), the main focus of the analysis in the first part is on the precautionary principle (pp. 91–224).

The analysis in the first part of the book gives a good introduction to the understanding of the three principles. The author concludes that despite their seeming simplicity all three principles contain concepts there are nebulous, protean and flexible and not easy to implement and that the principles only become effective when they are reflected in significant changes of positive law (p. 226). One can hardly disagree with these general conclusions. Four critical remarks are however necessary.

First, the analyses of the precautionary principle is insufficient compared to the latest rulings of the European Court of Justice and the Court of First Instance. Following the latest ruling (after the book was published), the application of the precautionary principle requires a more comprehensive scheme than indicated by de Sadeleer – meaning that the precautionary principle is not only a sword providing the authorities with wider discretion but it also functions as a shield for industry, as the *Pfizer* case (T 13/99) demonstrates.

Second, the author argues against the systematic division between risk assessment and risk management required when using the precautionary principle. The author argues that “risk assessment focuses on quantifying threats rather than preventing them” (p. 185). This criticism can be raised against American courts, but not against
the ECJ. As the old ECJ ruling on BSE and the later rulings on antibiotics demonstrate, under EC law the risk assessment includes a qualitative assessment in certain steps and does not always require a quantification of threats – but the division between assessment and management is kept to ensure that the precautionary principle is not used as an arbitrary tool for authorities.

Third, according to de Sadeleer, the polluter-pays principle concerns the curative (retrospective) aspect of environmental protection focusing on the restoration of the damage (pp. 15 and 74). In contrast, the preventive principle concerns the administrative regulation before the environmental damage happens, and the precautionary principle offers an even more advanced concept, an anticipatory model which is able to deal with uncertainty of environmental risk (pp. 16–19). Although it is historically correct that the first approach towards environmental protection was retrospective (liability for nuisance), it is misleading to claim that the focus of the polluter-pays principle (PPP) was the repair of existing damage. In fact, the PPP was developed by the OECD to prevent the public authority from having the economic burden of the preventive costs expected at the time when environmental protection became one of the main topics on the international agenda – as the author also indicates in the analysis of the function of the PPP (pp. 33–36). It might very well be that the PPP can justify strict liability for environmental damage, but that was not the reason or the intention when the PPP was developed and adopted in various legal texts in the 1970s.

Fourth, some of the conclusions and recommendations on the precautionary principle seem in my view to go too far. De Sadeleer suggests we “move to a regime where any activity that has not been proved safe by its developer would be forbidden” (p. 203). Applying this concept will mean that everything is prohibited unless the activity is confirmed by public authorities. This is not the concept of the precautionary principle which in scope is restricted to uncertainty and scientifically identified risks. Later, the author also partly withdraws from the first position suggesting guidelines for the risk – but does not alter his assertion that hypotheses must, at a minimum, be scientifically verifiable (p. 223). Still I cannot agree. It can of course be discussed how much scientific verification and how substantial risks are required to apply the principle – but the two factors are interrelated in a way which hardly can be solved by guidelines.

The second part on the legal status of the three principles in the shift from modern to post-modern law (pp. 227–368) is in my view the most interesting part of the book which contains a combined legal and political scientific analysis. In chapter 4 de Sadeleer gives a theoretical introduction to the concepts “modern law” and “post modern law”. Chapter 5 elaborates on how environmental directing principles such as the prevention, polluter pay and the precautionary principles can be understood in the context of post-modernity, and chapter 6 concerns the legal status of the principles. Finally the conclusions are exemplified in chapter 7 on environmental directing principles versus free trade.

The post-modern law is according to the author reasoned by at least six interrelated factors: (1) the sovereign State has given away competence upstreams to international institutions, down streams to local councils and standard setting is partly left to semi private institutions such as the ISO and CEN; (2) not only have the number of legislators increased, the production of norms (legislation) has increased even more dramatically; (3) the society seems to favour flexibility over long term action and action over predictability creating a world of permanent change – making hard law often less preferable than recommendations and declarations; (4) the approach has changed