

EU-US comparison of environmental science policy implementation through law

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I. Method and Assumptions: Comparativist Method

- Comparativism is largely a social science phenomenon.
 - Examples:
 - Comparative history
 - Comparative literature
 - Comparative anthropology
 - Comparative law
 - Introduction to Comparative Law, Konrad Zweigert & Hein Kötz, 3d edition, Tony Weir, transl. (gold standard on comparative law)
 - Method of comparative law begins with “why compare“?

Why Compare?

- Usual pragmatic answer: EU and US are each other's top trade partner.
- More nuanced: two of three founding treaties of the EU were to establish a common market (trade) but also to prevent a third war (US intervened in first two). Barroso maintains the second is the best evidence of EU success.
- Further: US is heavily Eurocentric in history and culture.
 - US uses English legal system and language in 49 jurisdictions, French language and legal system in one. (Much like Canada).

A Word on “Policy” (example-environment)

- “But laws alone are not enough. We need to make more effort to ensure they are properly applied throughout the EU.”

Janez Potocnik, European Commissioner for Environment, 2013, as foreward to *Environmental Policy in the EU*, 3rd Edition.

- Similar is said in China, Ethiopia, Cameroon and Peru, the standard observation is that “we have environmental laws; they are not enforced.”
- But what happens when they are applied and enforced? (Policy as observed practice, not incipient law)

Turning from incipient law

- “There are no specific statistics on environmental cases held by the [European] Court of Justice“ (famous environmental policy book that then goes to analysis of policy as incipient law)
- Analogous to over-use of treaties as source of law in international law discussion, contrary to UN Charter Article 38.
- Keys under a light?

II. Examining Policy Through Implementation of Law

- American legal historian, Edsun R. Sunderland wrote in 1909 that there are three distinguishing features of English law:
 - that courts make law,
 - English law is primarily the product of litigation, not legislation,
 - chancery or equity jurisdiction exists as separate and distinct from common law jurisdiction.
- “Distinguished” from what? Continental civil law.



What Causes Legislation by Litigation?

The Positive “Pull”—Common Law. Maitland,
Sunderland, Holmes.

The Negative “Push”—Legislative Void

1. Cigarette Litigation
2. Gun Control Litigation
3. Climate Change Litigation



Greenhouse Gas Policy Established Through Litigation in Common Law Countries

- A. Actions v. Govt. for Acts or Omissions
- B. Actions v. Govt. for Procedural Failure
- C. Actions v. Private Parties



Actions v. Govt. for Acts or Omissions

1. USA
2. Canada
3. Nigeria

Actions v. Govt. for Acts or Omissions-- USA

- a. (2005) *Inuit Circumpolar Conference v. USA*
- b. (2005-2007) *Korsinsky v. US EPA, NY State and NY City*
- c. (2006) *Coke Oven Task Force v. US EPA*
(consolidated with *NY v. US EPA*)
- d. (2007) *Massachusetts v. US EPA*
- e. (1980) *Commonwealth of Pennsylvania v. Pennsylvania Power Company*

(1980) Commonwealth of Pennsylvania v. Pennsylvania Power Company

- Air Pollution Control Act (statute) established human health and safety standards on sulfur dioxide (SO₂) and particulate matter (PM₁₀).
- Pennsylvania DER, an executive agency, penalized Penn Power for failure to meet those standards.
- Penn Power appealed, claiming it was ,“technologically unfeasible“ to use fossil fuels to make electricity and meet those standards.
- Supreme Court rejected Penn Power argument, stating it “Recognizes the ingenuity and innovativeness of American industry.“ Technology-forcing as policy was born.

Actions v. Govt. for Acts or Omissions (other common law states—where is Ireland or UK?)

Canada

(2007) *Friends of the Earth v. Canada*

Nigeria

(2005) *Ghembre v. Shell Petroleum Ltd.*



Actions v. Govt. for Procedural Failure

1. USA
2. Australia
3. New Zealand



Actions v. Govt. for Procedural Failure--US

- (1990) *Los Angeles v. National Highway Traffic Safety Administration*
- (2003) *Border Power Plant Working Group v. Department of Energy*
- (2004) *Natural Resources Defense Counsel v. Abraham*
- (2005) *Montana Environmental Information Center and Environmental Defense v. US EPA*
- (2007) *Friends of the Earth v. Mosbacher*
- (2007) *Center for Biological Diversity v. National Highway Transportation Safety Counsel*



Actions v. Govt. for Procedural Failure (Australia)

(2004) *Australian Conservation Foundation v.
Latrobe City Council*

(2006) *Gray v. The Minister for Planning*

(2006) *Wildlife Preservation Society of
Queensland v. Minister of the
Environment and Heritage*

Actions v. Govt. for Procedural Failure (New Zealand)

- (2002) *Environmental Defense Society v. Auckland Regional Council & Contact Energy Ltd.*
- (2002) *Environmental Defense Society & Taranaki Energy Watch v. Taranaki Regional Council & Statford Power Ltd.*
- (2005) *Genesis Power Ltd. V. Franklin District Council, Meridian Energy Ltd. & Others v. Wellington City Council*
- (2007) *Greenpeace New Zealand Inc. v. Northland Regional Council & Mighty River Power Ltd.*



Actions v. Govt. for Procedural Failure (statistical outlier?--Germany)

*(2006) Bundes für Umwelt und Naturschutz Deutschland
e. V. & Germanwatch e. V. v. Bundesrepublik
Deutschland*

(Germanwatch, Poznan COP, 2009, had no reply to my
hypothesis)

Actions v. Private Parties—US only

(2005) *Connecticut v. American Electric Power*

(2006) *Comer v. Murphy Oil, USA*

(2006) *California v. General Motors Corp.*

(2006) *Northwest Environmental Defense Center v.
Owens*

(2008) *Kivalina v. Exxon Mobil Corp.*

Examples of EU litigation

- ECJ 366/10 2011
- In UK: Homesun Holdings Ltd v. Secretary of State for Energy and Climate Change (2011) EWHC 3575
- And don't forget: (2006) *Bundes für Umwelt und Naturschutz Deutschland e.V. & Germanwatch e.V. v. Bundesrepublik Deutschland*

Anecdotal evidence: Pennsylvania (12th largest air polluting sovereign in world)

- “Science is talked about a great deal, but for the most part is honored by lip service and distorted and grossly simplified by all sides. The public has little trust in science, but wants all of the goodies that science, as manipulated through technological development brings (Viagra, artificial joints, smart phones, cheap natural gas).
- In government, policy makers use "science" as a buzz word. Or precisely "good science." This is code for meaning "if any doubt about any aspect of the proposition can be conjured up, it can not be believed." Thus, supporting the status quo, or an approach that powerful interests want to go back to. This can take the form of anything said is credible if it comes from a PhD or some group that asserts a technological bent.
- On the other side, NGOs and environmental advocates are no better. When I read their reports I find that they are based on minimal data or uneven value and interpret and extrapolate too far. The end is a report with a dramatic conclusion ... "If it bleeds it leads." ("American rivers may be acidic before 2020." -- Given that rain water is mildly acidic and organic matter decays and forms humic acid etc. it is not surprising.)



Anecdotal evidence EU: City of Cologne Department of Environment

- Main division is environmental planning.
- Environmental lawyer, heads division. Instructs practica and university students in environmental law through planning.

Conclusions

- Why compare? It reminds us that law, including the incipient law known as „policy“ is a cultural phenomenon, and is best addressed by asking whether it serves the needs and expectations of the culture in which it is found.
- Being grounded in law, one must understand the cultural foundation of the law. Common law systems find litigation often to be a preferred method of conflict resolution, whereas civil law systems may well be said to prefer administrative implementation of cultural norms.

Conclusions

- US follows common law tradition of legislation by litigation, and therefore science policy must include the observation of the exercise of discretion in law implementation, and how it concretizes the use of science. It is an empiricist knowledge system.
- Continental Europe follows the civil law tradition of legislation in the grand scheme (the twelve tables of Rome, the Code Napoleon, the Bürgerliches Gesetzbuch (BGB)). It is a rationalist knowledge system. Science in policy is incipient law.
- Ireland and the UK are caught in the middle. As common law jurisdictions, the Trojan Horse from London carries unspoken values of litigation. As EU members, the Trojan horse from Brussels brings science into policy through rationalism.