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An American Perspective on Belgian and British Environmental Law within Europe

Abstract

It is unusual these days for an American to offer an outsider's view of a comparative topic that does not involve the United States either as one side of the comparison or an interested party. One does not need to look to disagreements over policies regarding NATO, Bosnia, or Iraq to find this tendency. As Europeans know only too well, we Americans are often parochial in our views, if not isolationist. The recent success of the U.S. economy as compared to Europe and Asia has not helped us to lose an unjustified sense of our own primacy. A virtue of the Fulbright program of international exchange of scholars (not to mention the academic innovation called a sabbatical) is to put an American like me into the unfamiliar position of chairing a few sessions of a conference that compares environmental law in Belgium and Britain and trying to offer a useful comment on the subject. In doing so, I hope to provide some relevant points of objective comparison without coloring my comments too strongly with an American point of view. In accordance with my modest knowledge of Belgian and British law, I will also keep this comment brief.¹

Disciplines

Business Law, Public Responsibility, and Ethics | Business Organizations Law | Comparative Politics | Economic Policy | Environmental Law | Environmental Policy | Environmental Studies | International Law | Law | Legal Studies

An American perspective on Belgian and British environmental law within Europe

It is unusual these days for an American to offer an outsider's view of a comparative topic that does not involve the United States either as one side of the comparison or an interested party. One does not need to look to disagreements over policies regarding NATO, Bosnia, or Iraq to find this tendency. As Europeans know only too well, we Americans are often parochial in our views, if not isolationist. The recent success of the U.S. economy as compared to Europe and Asia has not helped us to lose an unjustified sense of our own primacy. A virtue of the Fulbright program of international exchange of scholars (not to mention the academic innovation called a sabbatical) is to put an American like me into the unfamiliar position of chairing a few sessions of a conference that compares environmental law in Belgium and Britain and trying to offer a useful comment on the subject. In doing so, I hope to provide some relevant points of objective comparison without coloring my comments too strongly with an American point of view. In accordance with my modest knowledge of Belgian and British law, I will also keep this comment brief¹.

Belgium and Britain provide an interesting comparison within Europe for a number of reasons. I limit myself here to observing several of the similarities and differences that seem most important and informative, drawing primarily on the papers collected in this volume.

1. I use the terms "Britain" and "British" advisedly (and in part for alliteration), recognizing that the United Kingdom is the correct name for the nation-state composed of England, Wales, Scotland, and Northern Ireland (with any change in the legal status of the latter under the new peace accord outside my scope). Technically, Great Britain refers only to England, Wales, and Scotland. See Jones, B., "Public Environmental Law in the United Kingdom" in Seerden, R. and Heldeweg, M. (eds.), *Comparative Environmental Law in Europe, An Introduction to Public Environmental Law in the EU Member States*, Antwerp-Apeldoorn, Maklu, 1996, 397-398. Here, I use "Britain" and "British" broadly to refer to the U.K. and its citizens.

First, Belgium and Britain are similar in a couple of respects that an outsider may perceive more readily than a Belgian or British citizen. Both countries are relatively small in comparison with continental giants in the global economy such as the U.S. or China. Belgium is approximately the size of the state of Maryland, for example, and has less people than either Chicago or New York City. The United Kingdom is smaller geographically than the state of Oregon. In population the U.K. is comparatively larger, though it still numbers less than the combined population of New England, New York, New Jersey, Ohio, and Pennsylvania².

Both Belgium and the U.K. are also members of the European Union, though Belgium is a founding member and the U.K. a relative latecomer. It is now clear, especially with the advent of the euro, that a primary purpose of the European Union is to build a continental economy - and to some extent a "state" to advance its interests - in order to compete more effectively with the U.S. and other large economies. The governments and increasingly the citizens of Belgium and Britain recognize that their relative smallness in the world economy requires them to join with other Europeans in common economic cause.

Another similarity between Belgium and Britain is that notwithstanding their relative smallness, they are federal states within themselves. Of course, different historical reasons inform the nature of legal federalism in the Belgium and Britain, and the two countries differ significantly in the legal result. In the U.K., Parliament is virtually omnipotent in its legal authority to address any matter it chooses³. Unique in Europe, the U.K. has no formal constitution, though its courts and Parliament now recognize that the legal treaties of the European Union constrain national legislative power⁴. In contrast, the Belgian federal state continues to devolve radically into its main geographical and linguistic parts, namely, Dutch-speaking Flanders and French-speaking Wallonia (along with Brussels as a separate and more and more independent European capital, as well as a very small German-speaking region). As Kurt Deketelaere and Gaëtan Verhoosel make clear in their contributions to this volume, federalism in Belgium is quite a serious matter, and the power and jurisdictional "competencies" of the regions in Belgium have increased progressively in recent years at the expense of those of the

2. This comparative information is compiled from internet sources, including Infoplease.com and the CIA World Fact Book.
3. Jones, B., *l.c.*, 398-400.
4. *Id.* Most significant in this respect are the *Factortame* series of decisions by the European Court of Justice and the House of Lords. *The Queen v. Secretary of State for Transport ex parte Factortame Ltd.*, Case C-213/89, 1990 E.C.R. I-2433; *The Queen v. Secretary of State for Transport ex parte Factortame Ltd.*, Case C-221/89, 1991 E.C.R. I-3905; *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1990] 2 App. Cas. 85; *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1991] 1 App. Cas. 603.

central state. This phenomenon includes environmental law⁵. There are also centrifugal tendencies in the U.K., such as the recent insistence in Scotland for a separate environmental agency⁶, but this is nothing compared to the headlong drive for separation within Belgium (reminiscent, to a North American, of the drama of French-speaking Quebec within Canada). With respect to federalism, then, Belgium and Britain share a similar role within the European Union⁷. Yet they have very different dynamics in terms of the internal character of their own national federalisms.

In addition to the similarity of the roles of Belgium and Britain in European federalism and the differences in their national federalisms, there are other differences between the two countries. One of the most important is the difference between the civil law tradition in Belgium (which it shares with most of Europe) and the common law in Britain. As the contributions to this volume of Michael Faure and Brian Jones demonstrate, this basic difference in the fundamental legal nature of the Belgian and British regimes translates into large differences in the processes and standards for determining environmental liability. For many legal scholars and practitioners, especially those with what an American would call a "legal realist" bent, the issue of predicting liability is the ultimate one⁸. Everything else - such as establishing environmental "policies" or "plans" - is just talk unless legal liability may follow. What matters for the tough-minded businessperson is how much a particular "bad" environmental behavior is likely to cost⁹. Differences among countries in the processes and standards for establishing liability are therefore crucial, and Professors Faure and Jones take us some distance

5. See also Deketelaere, K., "Public Environmental Law in Belgium in general and Flanders in particular", in Seerden, R. and Heldeweg, M. (eds.), *Comparative Environmental Law in Europe, An Introduction to Public Environmental Law in the EU Member States*, Antwerp-Apeldoorn, Maklu, 1996, 33-70.
6. A separate Scottish Environmental Protection Agency was established at the same time as a new Environmental Agency was created by legislation in 1995. Jones, B., *l.c.*, 409.
7. Although once controversial, it is now fairly well-accepted that the European Union is developing its own version of federalism. See, e.g., Lenaerts, K., "Federalism: Essential Concepts in Evolution - The Case of the European Union", *Fordham International Law Journal*, 1998, 476-498; see also Kimber, C.J.M., "A Comparison of Environmental Federalism in the United States and Europe", *Maryland Law Review*, 1995, 1658-1690. For the competing view that emphasizes the international nature of European environmental law, see, e.g., Sands, P., "European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection", *Yale Law Journal*, 1991, 2511-2523. It also remains true that "with all the lofty talk of political union and federalism we are not about to see the demise of the Member States, at least not for a long time", Weiler, J.H.H., "The Transformation of Europe", *Yale Law Journal*, 1991, 2403 and 2481.
8. Much has been written on the subject of American legal realism. For a recent and concise introduction, see Leiter, B., "Legal Realism", in Patterson, D. (ed.), *A Companion to Philosophy of Law and Legal Theory*, Cambridge, Mass., Blackwell, 1996, 261-279. See also Fisher, W.W., et al. (eds.), *American Legal Realism*, New York, Oxford University Press, 1993.
9. Cf. Holmes, O.W., "The Path of the Law", *Harvard Law Review*, 1897, 457-459 ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which [legal] knowledge enables him to predict...").

toward understanding the nature of civil and common law approaches to environmental liability in Belgium and Britain.

One implication that follows from understanding the importance of different types of legal systems for determining liability is that current proposals for harmonizing environmental liability regimes through the machinery of an EC directive or regulation may prove more complicated than they seem¹⁰. An example of overreaching in this direction appears in the Council of Europe's Lugano Convention¹¹. The European Union should avoid repeating the mistake of adopting general legislation on environmental liability that fails to account for the significant differences among national legal systems.

Another argument cuts in the other direction. If in fact existing liability regimes are materially different, then the importance of reaching some approximation of a level playing field on various environmental liability issues in Europe increases. The largest problem here lies in the complexity of environmental law. Because a definition of "law that affects the environment" covers so much, it is appropriate to focus on what Kurt Deketelaere calls the "greening of law" in many areas, including torts (whether statutory or common law), administrative law, economic regulation, European Union law, and even criminal law¹². If this assessment is correct, then the idea of unifying a topic as vast as "environmental liability in Europe" will prove, at least for the moment, misguided. A more promising approach would be to address one area of environmental liability at a time - for example, agreeing on a uniform standard for liability for clean-up and damages from contaminated soil and drawing on a comparative analysis of the merits (and flaws) of the U.S. Superfund legislation¹³.

Another interesting difference between Belgium and Britain in environmental law lies in the types of regulations that predominate in each country. To American eyes, the British system is familiar: a relatively centralized authority over major environmental protection initiatives in a strong environmental agency with a complex set of procedural protections designed to prevent abuse of power¹⁴. In contrast, the devolving Belgian system recreates administrative bureaucracies at the regional level, and in the process raises at least two questions. First, how can the replication of functions within a single, small state in this fashion possibly be efficient - even granting the efficiency gains that

10. See, e.g., "Commission Sketches Outlines of EU Action on Environmental Liability", *European Report*, Feb. 1, 1997 (European Information Service) (discussing various proposals).
11. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, 32 I.L.M. 1228 (signed by only Cyprus, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, and the Netherlands).
12. Deketelaere, K., *l.c.*, 71.
13. See, e.g., Nagle, J.C., "CERCLA's Mistakes", *William & Mary Law Review*, 1997, 1405-1462.
14. See, e.g., Jones, B., *l.c.*, 401-423.

may obtain on the basis of different languages being used where they are spoken¹⁵? Second, and more positively, has the reinvention of environmental regulation in a devolving Belgium presented an opportunity for a rethinking of appropriate methods of environmental regulation? On the latter point, Belgium - and, more precisely, Flanders and Wallonia - present a number of experimental methods of regulation that have been much called for by legal academics in the United States but little heeded in practice¹⁶. In contrast to the U.K., where Cliona Kimber in her contribution to this volume shows that market-based regulation is limited to only several small kinds of problems (namely, a tax for landfills, a subsidy for forestry, and a voluntary agreement scheme for habitat protection), experimental regulation in Belgium is rampant. Kurt Deketelaere gives a laundry list of areas in which Belgium and especially Flanders use market-based regulations - including energy taxes, agricultural taxes, product taxes, effluent charges, environmental subsidies, and insurance¹⁷. Also in the experimental spirit, the example of the Interuniversity Commission recommending legal reform in Belgium is intriguing to any legal academic who yearns for direct influence on policy.

In summary, the various papers collected here provide an interesting window through which to view the differences that underlie the complexity of environmental law in Europe. Taken together, they argue that neat proposals to unify environmental law within the legal structures of the European Union are destined to fail, at least in the short run. Studies like those provided in this book are important because they warn, with the weight of detailed comparative knowledge, of the dangers of using centralized legal authority to impose uniformity from above. To be successful, the harmonization of environmental law in Europe must proceed on a well-informed and carefully comparative basis. Otherwise, it will founder on the entrenched differences in legal systems that have developed historically through the iterated processes of different cultures, languages, and legal traditions.

If this sounds like a conservative assessment of the prospects for harmonization of European environmental law, it is not meant to be - or at least not only that. For in the crucible of different levels of government, as the case of the United States in its best

15. The most obvious problem is the sacrifice of efficiencies of scale. See, e.g., Kimber, C.J.M., *l.c.* note 7, 1660. But perhaps Belgium will prove far-sighted if a federalizing Europe results in the increasing importance and autonomy of regions as opposed to nation-states.
16. For commentary recommending alternative regulatory methods and discussing experiments along these lines, see Ackerman, B.A. and Stewart, R.B., "Reforming Environmental Law", *Stanford Law Review*, 1985, 1333-1365; Hahn, R.W. and Stavins, R.N., "Incentive-Based Environmental Regulation" *Ecology Law Quarterly*, 1991, 1-42; Orts, E.W., "Reflexive Environmental Law", *Northwestern University Law Review*, 1995, 1227-1340. Exceptions include market-based trading in the regulation of air pollution. See Holtkamp, J.A., "Emissions Trading under the United States Clean Air Act", *Environmental Liability*, 1993, 125-131.
17. See also Deketelaere, K., "New Environmental Policy Instruments in Belgium", *Working Paper RSC*, No 98/16, Florence, European University Institute, 1998.

moments shows, there is the promise of "laboratories of democracy" in which new experiments in regulation may be tried without risking an entire economy or investing in a huge new bureaucracy¹⁸. The advantages of federalism should also be valued and respected in environmental law within Europe.

18. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also Osborne, D., *Laboratories of Democracy*, Boston, Harvard Business School Press, 1988.

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