

Comparative Environmental and Natural Resources Law

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Preface

This book provides a comparative study of the laws and policies governing environmental degradation, environmental impact assessments, environmental human rights, and the management of water quality, wildlife, and habitat. It focuses on five nations, specifically, the United States, Canada, New Zealand, England, and India. The first four have been chosen for comparative analysis because of their common origins, which enables the reader to trace the evolution of environmental law and policy from some of the earliest judicial and administrative materials available, and because of their relatively common cultural influences yet divergent modern environmental problems and strategies. The fifth nation, India, represents yet another country deeply influenced by England but charting its own course as an emerging economic giant, whose growth poses significant implications for global climate change and other environmental concerns.

There is an exceedingly practical reason for choosing these countries as well. English is the common language of all but India, and legal materials are readily available in English in India. Studying law across cultural and jurisdictional lines is challenging enough without adding language barriers to the mix. English-speaking lawyers and judges who fail to “exercise extreme caution in using comparative materials from foreign language systems” run the risk of getting “lost in translation.” Jane Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation*, 1 J. Tort L. 6 (2007). This book strives to avoid that potential pitfall. Even so, scholars and lawyers from outside of the United States may wince at the citation form utilized throughout the book, which takes a distinctly American approach. Hopefully, all citations are sufficient to enable readers to locate the primary source without difficulty.

Choosing cases and other materials for inclusion is a challenging prospect. Rather than selecting the most “cutting edge” cases or the most spectacular environmental catastrophes in each nation, cases, statutes, regulations, and articles are chosen because they are representative of a particular country’s approach or because they add unique insights into the country or the environmental topic at hand. In an effort to keep this book relatively concise and manageable for teachers, students, and other readers, it may at times seem like the coverage is incredibly broad (“a mile wide and an inch deep,” as we say in the western United States about some of our rivers). Other topics, however, are covered in minute detail. In all instances, the choice of materials is intended to aid the reader in comparing or contrasting the laws of various nations, and in assessing the relative efficacy of any given legal doctrine or theory for achieving environmentally sustainable outcomes.

Comparative Environmental and Natural Resources Law is suitable as a text for law school classes and seminars as well as graduate courses in environmental and international studies. Students need not have taken a domestic environmental law course prior to studying this subject.

My own fascination with Comparative Environmental and Natural Resources Law began in Greece, when I taught a seminar on the Comparative Law of the Marine Envi-

ronment for Tulane Law School. I subsequently taught Comparative Water Law as a seminar in New Zealand and Comparative Environmental Law in Portland, Oregon. I am grateful to the students of Tulane, the University of Auckland, and Lewis and Clark law schools, who responded to early versions of these materials with good cheer as well as insightful questions and comments. I am also grateful to research assistants Tanya Nodlinski, Joslyn VanCleave Luedtke, Samantha Pelster, and Samantha Staley for their diligent work on the book.

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Introduction

Prior to the 1960s, concerns about the state of the environment were rarely raised in court or even in the media. Most disputes about pollution or the loss of wildlife were private ones, tested and resolved by private property or tort law. But by the time the first Earth Day was celebrated in April 1970, communities across the globe demonstrated that they would no longer be content with governments, corporations, and landowners that treated pollution and habitat destruction as merely an economic dispute to be resolved behind closed doors. Accordingly, the right to a quality environment was proclaimed at the United Nations Conference on the Human Environment in the 1972 Stockholm Declaration, and a vast body of environmental law grew from that foundation. See JOHN BONINE AND SVITLANA KRAVCHENKO, *HUMAN RIGHTS AND ENVIRONMENT* 1 (2008); Kate O'Neill, *The Comparative Study of Environmental Movements*, in *COMPARATIVE ENVIRONMENTAL POLITICS* 119 (2012) (eds. Steinberg and VanDeveer).

Perhaps most importantly, the Rio Declaration was adopted in 1992 at the conclusion of the United Nations Conference on Environment and Development (UNCED) (the Earth Summit), in Rio de Janeiro, Brazil. There, countries adopted Agenda 21—a blueprint for sustainable development. Through the Rio Declaration and Agenda 21, signatories committed to rethink economic growth, advance social equity, and ensure environmental protection.

In June 2012, twenty years after Rio, world leaders gathered in Brazil at the Rio+20 conference. The official discussions focused on two main themes: how to build a green economy to achieve sustainable development and lift people out of poverty, including support for developing countries that will allow them to find a green path for development; and how to improve international coordination for sustainable development. According to the United Nations, Rio+20 was the largest U.N. conference ever held. Over 100 governments were represented at the Head of State level. Additionally, 487 Ministers attended. Significant outcomes included:

- Over \$513 billion was mobilized in commitments for sustainable development in the areas of energy, transport, green economy, disaster reduction, desertification, water, forests, and agriculture.
- Governments, business, civil society groups, universities, and others registered 692 voluntary commitments for sustainable development.

UN Conference on Sustainable Development, *Rio+20 By the Numbers* (June 23, 2012), at <http://www.uncsd2012.org/index.php?page=view&nr=1304&type=230&menu=38>.

Some say that not enough progress has been made, however, since 1992. NGOs and community groups are criticising a deal “dangerously lacking” in ambition, urgency, and political will. “[A] sober, unambitious mood prevailed as negotiators produced what critics called a watered-down document that makes few advances on protecting the environment.” Christian Science Monitor, *Economy Casts Shadow on Rio+20 Environmental*

Summit, June 20, 2012. According to Friends of the Earth, world leaders have responded to the global environmental crisis by sticking their heads in the sand. “World leaders are understandably concerned about the broken economy—but until they stop treating it separately from our social and environmental problems it will never be fixed.” Friends of the Earth U.K., *Climate Change News*, June 23, 2012, http://www.foe.co.uk/news/rio20_outcome_36239.html. Environmental groups are pressuring governments to invest in clean energy from the sun, wind, and water and to end fossil fuel subsidies.

International declarations, such as the Stockholm and Rio Declarations, are considered “soft law.” International “hard law,” by contrast, is comprised of treaties, conventions, and customary international law. Implementing the objectives and policies of soft law declarations often falls to bi- or multi-lateral agreements, such as the 1988 Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (San Salvador Protocol), which provides that “Everyone shall have the right to live in a healthy environment and to have access to basic public services.” O.A.S. Treaty Series No. 69, Inter-Am. C.H.R., OEA/Ser.L.V/II.82 doc.6 rev.1 (1992). The Protocol was ratified by 14 nations in the Americas (but not the United States and Canada). Parties to the Protocol and other international or regional agreements and treaties typically adopt domestic legislation to implement the international provisions. Accordingly, a critical means of effectuating the objectives and policies of international law is national (domestic) law adopted and enforced within each concerned nation.

Numerous casebooks and courses are devoted to international environmental law, which includes international, multi-lateral, and bi-lateral declarations and agreements. The focus of this course is *not* international environmental law but rather a comparative look at environmental laws adopted within selected nations. Of course, domestic legislation and caselaw is sometimes shaped by international agreements and norms, and influential agreements and norms are addressed in this book. Professor Pervical’s remark is certainly apropos: “globalization is affecting the field of environmental law in a way that is blurring traditional distinctions between domestic law and international law.” Robert V. Pervical, *The Globalization of Environmental Law*, 26 *Pace Envl. L. Rev.* 451, 451 (2009).

Comparative law is “the study of the similarities and differences between the laws of two or more countries, or between two or more legal systems.” Morris Cohen, Robert Berring and Kent Olson, *How to Find the Law* 565 (9th ed. 1989). It is *not* a system of law or a body of rules in and of itself, but rather a method of legal analysis and a means of assessing the strengths and weaknesses of different legal systems.

Determining which countries to compare is a daunting task. As noted in the *Preface*, this book singles out five: the United States; Canada; New Zealand; England; and India. The United States and Canada are close neighbors, geographically speaking, while New Zealand is about as far away as you can get on this planet. Yet these countries share a common heritage—the English language and the common law. In terms of their approaches to environmental law, four of these countries—the U.S., Canada, England, and India—have taken media-specific, and therefore somewhat fragmented, approaches to air, water, waste, wildlife, and land conservation issues. In contrast, New Zealand has made path-breaking efforts to adopt a more holistic, ecological approach to pollution prevention and sustainable development in its Resource Management Act of 1991.

In addition, the U.S., Canada, New Zealand, and England, are industrialized (rather than developing) countries. India has many large industries and produces and exports a vast array of goods as well, but its economy and its culture provide a sharp contrast, in many ways, to the other four countries. Despite its differences, India’s legal system is

heavily influenced by British overtones, too. These five countries also share certain physical characteristics—hundreds of miles of coastlines and inland waters; hardwood and softwood forests; and both exceedingly large cities and less populated rural areas.

These parallels enhance the ability to draw meaningful comparisons among the legal systems and environmental policies of these five countries. The jurisdictional and cultural divides are significant, but those differences can teach us something about our own legal systems. A far greater contrast in approaches would emerge if we were to add civil law countries or developing countries to the mix. A few such comparisons are sprinkled here and there throughout the book in hopes of stimulating creative thinking and new insights.

Determining which subjects to compare is an equally daunting task. The book strives for broad enough coverage of environmental laws and policies to enable the reader to get a feel for the legal landscape of the five nations. It covers environmental federalism, common law liability, environmental impact assessment, water quality and pollution, biological diversity, and environmental human rights. Two major topics within environmental law are addressed only in relation to these delineated subjects: air and solid waste. Each of these would warrant lengthy chapters in and of themselves, and if the reader wishes to pursue them, the multi-volume treatise on *Comparative Environmental Law* is an excellent starting point: Nicholas Robinson, et al. (eds.), *Comparative Environmental Law and Regulation* (2011–12). There are a number of useful books on point as well, e.g., Noga Morag-Levine, *Chasing the Wind: Regulating Air Pollution in the Common Law State* (2005); Michael Bowman and Alan Boyle (eds.), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (2002); René J.G.H. Seerden, Michiel A. Heldeweg, Kurt R. Deketelaere, *Public Environmental Law in European Union and US: A Comparative Analysis* (2002).

The book is organized as follows. The first part examines the benefits of studying comparative law and, more specifically, learning about diverse approaches to resolving environmental problems. Second, in Chapter 2, the book covers negligence, nuisance, and other common law responses to environmental issues. This chapter also looks at the public trust doctrine as a tool for addressing climate change. Chapter 3 considers landmark laws governing environmental decisionmaking, beginning with the U.S. National Environmental Policy Act, widely considered the “grandfather” of environmental assessment requirements, and then comparing the objectives, requirements, and enforcement of similar statutes in Canada, New Zealand, England (and, by extension, the European Union), and India. In Chapter 4, keystone environmental statutes governing water quality and pollution are covered. Chapter 5 explores approaches to biological diversity, wildlife management, and land preservation. In the final part of the book, Chapter 6, environmental human rights in these five nations and beyond are addressed. Case studies on specific environmental controversies are provided throughout the book to enable readers to take a “hands on” problem-solving approach to environmental and natural resources law and policy, and to compare outcomes under the laws of various nations.