

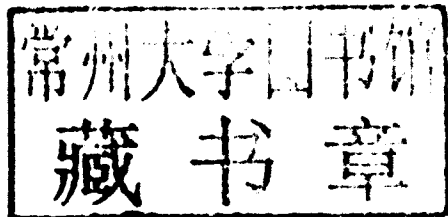
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European Perspectives on Environmental Law and Governance

Edited by
Suzanne Kingston

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Foreword

I am honoured to have been invited to write a Foreword to this volume on European environmental law and governance. This book adds to the literature dealing with a rapidly evolving and critically important area. The book addresses a number of questions in relation to the legal and governance mechanisms required to achieve the sustainable management of natural resources and the protection of the natural environment from a European perspective.

The book has three sections. The first deals with the climate change challenge, offering commentary on the development of European Community climate change law and examining the international dimensions of climate change governance.

Climate change is one of the most critical issues of our time, not only from an environmental and economic perspective but also because of its impact on a whole range of basic human rights. Climate change has implications for national and international governance, for relations between states, for social justice, human rights and equality. Climate change also raises very challenging questions about the environmental ramifications of human activity and consumption, how these compare with the ecological limits and assimilative capacity of the biosphere, how these burdens should be shared more equitably and how they threaten the feasibility of sustainable development. I strongly believe that a climate justice approach is the best way to respond to these challenges.

In this regard, the decision by the UN Human Rights Council to appoint an Independent Expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment is an important development.

The application of law offers a potentially forceful weapon in the fight to tackle climate change, both in terms of how targets, policies and measures can be enshrined in supra-national and national law and also in the potential use of human rights litigation to enforce substantive and procedural rights. The commitment made at COP-17 in Durban to develop 'a new protocol, another legal instrument or an agreed outcome with legal force' by 2015, which would come into force by 2020, offers real hope that a legally binding agreement can be reached, one which will legally enshrine greenhouse gas emission reduction commitments. However, much work needs to be done to reach

agreement on issues such as equity, the right to development, access to finance and common but differentiated responsibilities.

The second section of the book deals with what is termed 'the integration challenge': this examines how environmental policy can be integrated into other EU policies, for example trade, competition and agriculture, to strengthen and re-enforce the impact of sectoral policies through horizontal integration. The integration principle is an important aspect of EU law; integration of environmental concerns into other policies must be deepened if we are to move towards sustainable development.

The third section deals with the 'enforcement challenge', that is, how EU environmental law can be enforced at Member State level following transposition of EU Directives into national law. Enforcement may be required where the provisions of a Directive are not implemented, either in fact or in law. This is important because EU law which is incorrectly or inadequately implemented or not implemented at all will not achieve the desired effect. It is imperative that EU law is both adequately transposed and subsequently applied through consistent and harmonious interpretation in order to ensure the full protection of the earth's natural resources.

This book is a welcome contribution to the corpus of academic literature on European environmental law and governance and will be useful as a *vade mecum* both for academics and for policy-makers and practitioners. I commend the editor and authors for contributing to the volume and I wish them every success on its publication.

Mary Robinson

President, Mary Robinson Foundation – Climate Justice

Acknowledgements

This book arose out of a conference entitled 'Frontiers in European Environmental Law and Governance', which was held in Newman House, University College Dublin on 25 February 2011. Almost all contributions are based on papers presented at the conference, which have since been updated and edited in the light of the valuable discussions that took place on the day of the conference itself, and developments since.

Sincere thanks go to each of the contributors to the book, who gave so generously of their time on the day of the conference and subsequently, and to Dr Mary Robinson for speaking at the conference and kindly agreeing to write the Foreword. Thanks also go to UCD School of Law, which sponsored the conference, and especially Angela Ennis, UCD School of Law, and Donal Casey, PhD student at UCD School of Law, for excellent assistance in organising the conference. Finally, special thanks are due to Katie Carpenter and the team at Routledge for their support throughout the production process.

Editing this book has been an exciting venture, and a great pleasure, particularly given the outstanding calibre of the contributors. At a time when the need to focus on environmental protection has never been greater, it is hoped that the book will inspire further debate on the future of environmental law and governance within Europe and beyond.

Dr Suzanne Kingston BL
Dublin, 15 February 2012

Contents

<i>Notes on contributors</i>	vii
<i>Foreword by Mary Robinson</i>	x
<i>Acknowledgements</i>	xii
1 Introduction	1
SUZANNE KINGSTON	
PART I	
The climate change challenge	21
2 Linking planetary boundaries and overconsumption by individuals: a new frontier for (EU climate) law?	23
JAVIER DE CENDRA DE LARRAGÁN	
3 The challenge of climate change: international law perspectives	55
ALAN BOYLE	
PART II	
The integration challenge	81
4 Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies	83
LUDWIG KRÄMER	
5 The CAP in 2020: vision or hindsight?	102
JOSEPH A. MCMAHON	
6 The integration challenge: integrating environmental concerns into other EU policies	125
OWEN MCINTYRE	

PART III

The enforcement challenge	145
7 Mind the gap: difficulties in enforcement and the continuing unfulfilled promise of EU environmental law SUZANNE KINGSTON	147
8 Commission enforcement of EU environmental legislation in Ireland: a 20-year retrospective LIAM CASHMAN	177
9 Delivering the rule of environmental law in Ireland: where do we go from here? ÁINE RYALL	197
10 Environmental enforcement in Ireland: the need to get a piece of the multi-party action JOANNE BLENNERHASSETT	215
<i>Index</i>	236

1 Introduction

Suzanne Kingston

From small beginnings, when environmental law tended to be viewed as a rather minor sub-species of public international or tort law, the subject has grown to become a huge area within Europe, both in practice and in the academic literature. As the quantity and breadth of research in the field expands rapidly, and much of the literature becomes increasingly specialised, there remains a need to take a step back at frequent intervals, to attempt to identify some predominant cross-cutting trends, and to fit these trends into broader patterns emerging within European law and governance.

This book seeks to contribute to this process. The aim of the book is to provide a single-volume collection of views from some of the leading environmental academics and practitioners active in Europe today on three of the most serious cross-cutting contemporary challenges in environmental law, viewed from a European perspective. It is undoubtedly the case that there are many such challenges to choose from. At the conference giving rise to this book, held in Dublin in February 2011, the sense of urgency in the quest to improve the effectiveness of European environmental law was palpable among contributors and participants. Yet, at the same time, the magnitude of this task escaped no-one, particularly in the thick of one of the greatest financial crises that Europe and Ireland have ever witnessed. It is against this background that the present volume was produced.

1.1 Three critical challenges in environmental law and governance within Europe

The present book is split into three main themes, constituting some of the most pressing cross-cutting issues presently facing environmental law and governance within Europe. These are:

- the challenge posed by climate change for law and lawyers within Europe;
- the challenge of integrating environmental concerns into other fields of European law;
- the challenge of improving enforcement of European environmental law.

2 *European perspectives on environmental law and governance*

The business of selecting just three overarching themes for inclusion in the book is, by its nature, a thankless task. It is impossible to cover every important cross-cutting theme – or even all of the most important themes – presently emerging in environmental law within Europe in a single volume, at least in any useful depth; inevitably, therefore, this necessitates a process of selection. The three themes identified in the present book are those which, in the editor's view, pose perhaps the most considerable challenges to the structure and effectiveness of environmental law within Europe at present. They do so for differing reasons.

In the case of the first theme – *the legal challenges posed by climate change* – there can hardly be a better contemporary illustration of a challenge demanding a re-thinking of conventional approaches to environmental regulation, on a number of different levels. A fundamentally global problem requires effective concerted action at the international level, yet pending such action, state and non-state actors within Europe and beyond face difficult choices about how best to use law to promote their goals in this field. As the contributions in Part I of this volume highlight, this demands a careful reconsideration of some fundamental issues in how we view the relationship between law, human behaviour and the environment. How best should we construct regulation so as to incentivise the decarbonisation of economic activity, and the reduction of consumption, within a society whose very foundations seem to rest on carbon usage and increasing consumption?¹ In constructing this regulatory framework, how should the balance be struck between creating regulatory incentives for behaviour that is desirable in order to mitigate or adapt to climate change, and using law to prohibit certain behaviour outright? To what extent, for instance, are human rights approaches useful in building a body of law appropriate to deal with climate change, given that it will be the most vulnerable in society who will be hardest hit by the problem?²

In addition to being a stand-alone theme in its own right in this volume, in many ways the climate change challenge represents one – albeit critical – illustration of the second theme identified in this volume as a key overarching challenge in European environmental law at present – *the challenge of integrating environmental concerns into broader areas of law and policy*. Within the EU, the integration of environmental protection requirements into the 'definition and implementation' of all other EU policies has been a legal requirement since the entry into force of the Single European Act in 1987,³ which obligation is now contained in Article 11 of the Treaty on the Functioning of the European Union (TFEU), as well as in Article 37 of the EU's Charter of Fundamental

1 See the contribution of Javier de Cendra de Larragán in Chapter 2 of this book.

2 See the contribution of Alan Boyle in Chapter 3 of this book.

3 A version of the duty was contained in the newly inserted environmental title at Article 130r of the Single European Act (requiring that environmental considerations be 'a component of the Community's other policies'). Its wording was later amended and it was promoted to Part One of the Treaty on the Principles of the Community by the Treaty of Amsterdam. See, further, the contribution of Owen McIntyre in Chapter 6 of this book.

Rights. The integration obligation carries enormous potential implications for a wide range of EU policy areas and, if taken seriously, could transform the way we think about environmental governance and the achievement of environmental (and other) goals.⁴ Yet, despite this, the integration obligation's status and practical implications remain unclear, as the contributions in Part II of this volume demonstrate. In reality, in many EU policy areas, environmental requirements continue to receive scant attention. After so many years on the EU's law books,⁵ does this show that the integration obligation is, at its heart, unworkable (and therefore of little practical use)? Or is there still potential for resurrecting the obligation to achieve real change in the way that EU law and policy is made and implemented?

If the book's first two themes constitute difficulties raised by the inherent interrelation between all areas of human activity and the environment, its third theme – *the challenge of improving the enforcement of European environmental law* – arises from the fact that the geographical scope of Europe's environment is vast, and the resources available for enforcement limited. Left unenforced, even the most carefully crafted environmental law is of little use, of course. Yet serious shortcomings persist in environmental enforcement across the EU,⁶ not least in Ireland,⁷ which ranks amongst the worst performers in terms of timely implementation of ECJ judgments finding a failure to comply with environmental obligations.⁸ This unsatisfactory situation demands innovation and creativity in the way we look at traditional methods of enforcement of EU law and, in particular, requires that enforcement of EU environmental law by non-state actors be embraced and encouraged as a means of supplementing public (state) enforcement in this field.⁹

1.2 Beyond environmental law: the implications (and benefits) of a governance-focused approach

This volume emphasises not only trends in environmental *law*, but also trends in environmental *governance*. While much has been written about

4 See the contributions of Ludwig Krämer, Joe McMahon and Owen McIntyre to the present volume in Chapters 4, 5 and 6, respectively.

5 On the history of the integration principle, see the contributions of Ludwig Krämer and Owen McIntyre to the present volume in Chapters 4 and 6, respectively.

6 See the contributions of Suzanne Kingston and Áine Ryall to the present volume in Chapters 7 and 9, respectively. In 2010, environmental cases constituted 61 of the 619 cases (i.e. almost 10 per cent) lodged before the Court of Justice of the European Union based on causes of action flowing from the TFEU: see *Annual Report of the Court of Justice of the European Union* (Luxembourg: Publications Office of the European Union, 2011), at p. 85.

7 See the contribution of Liam Cashman to the present volume at chapter 8.

8 See, for instance, the Commission's 28th Annual Report on Monitoring the Application of EU Law COM (2011) 588 final, Annex V, which reports that environmental cases constituted eight of the eleven ECJ judgments not yet implemented by Ireland in the period up to 31 December 2010.

9 See the contribution of Joanne Blennerhassett to the present volume in Chapter 10.

European governance more broadly,¹⁰ relatively little attention has been paid (with certain notable exceptions)¹¹ to European environmental governance as such, despite major changes in the way we conceive of environmental regulation and the nature of the actors involved therein. Given this, it is worth pausing for a moment to recall the ongoing debate about the direction of European governance more generally, and asking where environmental governance fits in to this debate. Can a governance-focused perspective add anything to our analysis of the three selected environmental themes?

1.2.1 *The European governance debate*

To begin, despite the fact that the concept of governance has a long history in the political science literature,¹² its meaning and definition remain contested¹³ and often differ depending on the context in which they are discussed.¹⁴ While this is not the place to revisit the debate on such meaning, efforts to define governance often focus on the distinction between law, on the one hand, and governance, on the other, with the former denoting a far narrower and more formal body of rules and norms than the latter.¹⁵ This is exemplified by Keohane and Nye's classic definition of governance as:

10 See, for instance, I. Bache and M. Flinders (eds) *Multi-Level Governance* (Oxford: Oxford University Press, 2004); B. Kohler-Koch and B. Rittberger, 'The "Governance Turn" in EU Studies' (2006) 44(1) *Journal of Common Market Studies* 27; T. Börzel, 'European Governance: Negotiation and Competition in the Shadow of Hierarchy' (2010) 48 *Journal of Common Market Studies* 191.

11 See, for instance, A. Weale, G. Pridham, M. Cini, D. Konstadakopulos, M. Porter and B. Flynn, *Environmental Governance in Europe: An Even Closer Ecological Union?* (Oxford: Oxford University Press, 2000); J. Scott, *Environmental Protection: European Law and Governance* (Oxford: Oxford University Press, 2009); G. Winter (ed.) *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (Cambridge: Cambridge University Press, 2006); R. Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Oxford: Hart Publishing, 2010); S. Kingston, 'Developments in EU Law: Environment' (2010) 59 *International & Comparative Law Quarterly* 1129.

12 See, for instance, M. Bevir, *Encyclopedia of Governance* (Thousand Oaks, CA: Sage, 2006).

13 D. Wincott, 'Looking Forward or Harking Back? The Commission and the Reform of Governance in the European Union' (2001) 39(5) *Journal of Common Market Studies* 897; D. Curtin and I. Dekker, 'Good Governance: The Concept and its Application by the European Union' in D. Curtin and R. Wessel (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Antwerp: Intersentia, 2005), at p. 3.

14 See, for instance, the illustrations given in United Nations Economic and Social Council, *Definition of Basic Concepts and Terminologies in Governance and Public Administration* (Committee of Experts on Public Administration, 2006, E/C.16/2006/4).

15 See the discussions in D. Osborne and T. Gaebler, *Reinventing Government* (Reading, Massachusetts: Addison-Wesley, 1993); J. Pierre and G. Peters, *Governance, Politics and the State* (New York: St. Martin's Press, 2000); J. Pierre, *Debating Governance* (Oxford: Oxford University Press, 2000); H.-P. Bang (ed.) *Governance as Social and Political Communication* (Manchester: Manchester University Press, 2003); C. Harlow, 'Deconstructing Government?' in T. Ginsburg and R. Rabin (eds), *Institutions and Public Law: Comparative Approaches* (New York: P. Lang, 2005).

the processes and institutions, both formal and informal, that guide and restrain the collective activities of a group. Government is the subset that acts with authority and creates formal obligations. Governance need not necessarily be conducted exclusively by governments and the international organizations to which they delegate authority. Private firms, associations of firms, non-governmental organizations (NGOs), associations of NGOs all engage in it ... to create governance.¹⁶

In this sense, while legal rules refer to rules emanating from formal (government) institutions, typically in a hierarchical context, governance refers to the way in which political, economic and administrative power or authority is exercised at all levels, going beyond the bureaucratic state.¹⁷ An important advantage of employing a governance perspective, therefore, is to give a more complete picture of the actors, norms and processes influencing how power is exercised, whether within a nation-state context or beyond.¹⁸ Thus, the scope of a governance perspective encompasses an appreciation of the influence of non-state actors from the private sector and civil society, in a hierarchical but also a non-hierarchical context. A further significant advantage in the European context, of course, is that a governance perspective is not confined to the nation-state, but may be employed within the context of a society or, indeed, at the regional or global level.¹⁹

This long-running global dialogue on the meaning and utility of the governance concept has been mirrored by a debate on the nature of European governance, which debate was revisited and revived in the run up to, and following the publication of, the Commission's 2001 White Paper on European Governance.²⁰

16 R. Keohane and J. Nye, 'Governance in a Globalising World', reprinted in R. Keohane, *Power and Governance in a Partially Globalised World* (Abingdon: Routledge, 2002) 193, at p. 202.

17 See, for instance, the definition of governance adopted by the United Nations Development Programme, 'the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences' (United Nations Development Programme, *Governance for Sustainable Human Development*, New York: UNDP, 1997). See also, the World Bank's definition of governance as the method through which power is exercised in the management of a country's political, economic and social resources for development (*Governance*, Washington, DC: World Bank, 1993).

18 See generally, H.-P. Bang (ed.), *Governance as Social and Political Communication*.

19 For an illustration of the huge literature that has developed on global governance, see, for instance, M. Hewson and T. Sinclair (eds), *Approaches to Global Governance Theory* (Albany: SUNY Press, 1999); A. Ba and M. Hoffmann (eds), *Contending Perspectives on Global Governance: Coherence, Contestation and World Order* (Abingdon: Routledge, 2005).

20 White Paper on European Governance COM (2001) 428 final. See further, Wincott, 'Looking Forward or Harking Back?' and M. Jachtenfuchs, 'The Governance Approach to European Integration' (2001) 39(2) *Journal of Common Market Studies* 245, who defines governance as 'the intentional regulation of social relationships and the underlying conflicts by reliable and durable means and institutions, instead of the direct use of power and violence' or, more simply, 'the ability to make collectively binding decisions' (at p. 246).

The White Paper remains the principal policy document specifically setting out the Commission's vision of European governance. In it, the Commission defines governance in the EU context as 'rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence'.²¹ By focusing on the question of 'how the EU uses the powers given [to it] by its citizens', the White Paper placed the EU institutions at the heart of the European governance debate.²² At that stage, the goal was to make policy-making more inclusive and accountable, thereby increasing the legitimacy of the EU's policies by reducing alienation between the EU and its citizens (increasing input legitimacy) and enhancing the quality of the output of EU policy-making (increasing output legitimacy),²³ so as to 'connect the EU more closely to its citizens and lead to more effective policies'.²⁴ In essence, the need to improve the EU's legitimacy may be traced back to the gradual broadening of the EU's aims far beyond the economic goal of achieving the internal market to encompass the fields of competence now covered in the EU Treaties, including social, employment, immigration and, of course, environmental policies. The need for increased legitimacy has become even more pressing since the defeat of the Constitutional Treaty and the reversion to the intergovernmental treaty-making method with the Lisbon Treaty.²⁵

In the White Paper's vision, the key to improving governance within Europe centred around five principles: openness; participation; accountability; effectiveness; and coherence.²⁶ The Lisbon Treaty reaffirms the centrality of these principles by giving them – in some instances for the first time – a constitutional foundation. Thus, many of the Articles contained in the TEU's new title headed 'Provisions on Democratic Principles' reinforce the White Paper's approach,²⁷ including the Articles on the principles of openness and

21 White Paper on European Governance, at p. 8.

22 Contrast, for instance, the Report of the UN Commission on Global Governance, *Our Global Neighborhood* (Oxford: Oxford University Press, 1995), at p. 2.

23 White Paper, on European Governance, at pp. 21–22.

24 White Paper, on European Governance, at p. 8.

25 See M. Tsaktika, 'Claims to Legitimacy: The European Commission between Continuity and Change' (2005) 43 *Journal of Common Market Studies* 193.

26 This vision of good governance may be contrasted with other perspectives on governance, such as those adopted by the OECD, World Bank and the EU Council. See, for instance, the definitions provided by the OECD in *DAC Guidelines and Reference Series Applying Strategic Environmental Assessment: Good Practice Guidance for Development Co-operation* (Paris: OECD, 2006); by the World Bank in its World Governance Indicators project, which reported on six dimensions of governance during the period 1996–2009 (see <http://info.worldbank.org/governance/wgi>); and by the EU Council of Ministers' resolution on human rights, democracy and development of 28 November 1991 (Bulletin of the European Communities 11/1991; Council Press Release 9555/91).

27 These changes mirrored those that would have followed from the Constitutional Treaty. See Article III–115–122 of the Treaty Establishing a Constitution for Europe OJ 2004 C 310/1.