Political Science
Legal Studies 217

LAW AND
ECONOMIC LIFE

Importance of Law in Economic Life

- *Lex mercatoria*
- Law as a vehicle for insuring rationality
  - Max Weber and economic development
- Centrality of law in shift from planned to market economy in post-socialist countries of Europe
  - Contract law vs. central planning
  - Enforcement vehicles of contract law

Elements of Legal Influence in Economic Life

- Legal texts: what the law "says"
- Legal decision makers: what the courts say the law says
- Legal agents: what the lawyers say the courts will say the law says
- Legal style: how the lawyers come to say what they think the courts will say what the law says
Legal Style

- The style of legalism varies from country to country and culture to culture
  - Civil law vs. common law vs. Islamic law
- Bureaucratic legalism
  - Hierarchical authority
  - Formalistic decision making
- Adversarial legalism
  - Participatory authority
  - Formalistic decision making

American Adversarial Legalism

- Robert Kagan
  - “Competing interests and disputants readily invoke legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation, and/or judicial review.”
  - “A style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers”

Contradictions ...

- Americans disparage adversarial legalism
  - We are overly litigious
  - We rely too much on lawyers
- Americans embrace adversarial legalism
  - Administrative process is modeled on adversarial legalism
  - Expectations of “due process”
Implications of Adversarial Legalism

- Privileging of lawyers
- Reification of due process
- Potential for using law in counter productive ways
  - Emphasis on sanctions rather than results
- Over reliance on law and legal process
  - Can there be too much of a good thing?

Is the U.S. “Overlawyered”?

- Legal solutions vs. technical solutions
- Do lawyers represent a drain on economic life?
  - Lawyers as “rent seekers” for themselves
    - Want to benefit (obtain rents) off capital that is not their rightful possession
  - Lawyers as agents for rent seekers (interests preferring nonproductive competition)

Lawyers as Leeches
So What Is a Lawyer?

Law and Environmental Regulation
- Environmental quality is a worldwide issue
- Countries differ in their approaches to environmental issues
- Environmental regulation has received a lot of attention from scholars
- Environmental regulation and growth
  - Delaware effect
  - California effect
The Rhine vs. the Great Lakes

- Laws and regulations pertaining to Great Lakes more stringent than the Rhine
- Industrial discharges into the Great Lakes have been more toxic than those into the Rhine.
  - The Rhine touches or passes through 4 countries vs. only 2 for the Great Lakes
  - 18% of the world’s chemical industry along the Rhine

Arrival of Environmentalism

- Epistemic community
  - A professional group that believes in the same cause and effect relationships, truth tests to accept them, and shares common values; its members share a common understanding of the problem and its solution.
- First Earth Day in 1970
  - Founded by Wisconsin Senator Gaylord Nelson
- Substantial decrease in pollution in the Great Lakes since 1970
  - Lake Erie no longer DEAD
The Puzzle

- Why is there more pollution in the Great Lakes today in spite of:
  - More stringent water laws
  - A long standing international treaty
  - Excellent U.S.-Canada cooperation
  - An influential international commission
  - Active environmental organizations
  - Strong agreement on what is necessary for the health of the Lakes

Corporatism vs. Pluralism

- Corporatism is the idea that the society and economy of a country should be organized into major interest groups
  - Representatives of those interest groups settle any problems through negotiation and joint agreement.
- Pluralism is the idea that the power in social systems is distributed among a wide variety of competing groups and individuals.

State-Society Relations

- Corporatism
  - Emphasis is on negotiation and cooperation
  - Communitarian: Everyone gets a piece of the pie
  - Seek out “positive sum” solutions
- Pluralism
  - Emphasis is on winning
  - Individualistic: I want my piece of the pie, to hell with yours
  - Routinely accept “zero-sum” solutions
Implementing Law in Pluralist and Corporatist Systems

- Corporatism
  - Hierarchical
  - Bureaucratic
  - Decisionmaker-centered
- Pluralism
  - Nonhierarchical
  - Adversarial
  - Party-centered

Issues

- The relative effectiveness of alternative approaches to regulation
- The monetary costs of alternative approaches to regulation
- The political and social costs of alternative approaches to regulation

More on Effectiveness

- U.S. approach to enforcement is deterrence-oriented
- Most other countries employ a more cooperative, negotiation-oriented mode
- Pulp mill study (Kagan et al)
  - No clear systematic differences among jurisdictions
  - U.S. better on some indicators, BC & NZ better on others
  - Increasing role of community pressure on management
Social & Economic Costs of Adversarial Legalism

- Unpredictability
- Lawyering costs
- Accountability costs
- Opportunity costs
- Divisiveness
- Side payments (blackmail?)
- Delay
  - Oakland harbor

Self-Reinforcement of Adversarialism

- Tends to emphasize sanctioning rather than solution seeking
- Leads to defensive measures and noncooperation with enforcement/regulatory authorities
- Requires enforcement authorities to design proactive systems rather than relying on cooperation of regulated industries
  - Police patrols
  - Fire alarms

Is a Nonadversarial Approach Possible in the United States?

- Can we overcome suspicion?
- Can we surrender our love of individualism for a communitarian approach?
- Can we accept something less than "due process" as we know it?
- If we won’t accept bureaucratic legalism, might there be market-based alternatives?