

LSA New Orleans, 2-5 June 2016

INTERNATIONAL RESEARCH COLLABORATIVE (IRC) ON
NATURAL RESOURCE GOVERNANCE, INEQUALITY AND HUMAN RIGHTS

(cross-listed with CRN 23: International Law and its Politics)

Panel 1: Transnational Natural Resource Governance, Sovereignty and Human Rights

Friday June 3, 12:45 – 2:30pm, NOLA Marriott, Studio 4

This panel explores the increasingly transnational nature of resource governance. It addresses the tensions that arise as 'global' norms manifest in 'local' sites and the global legal connections that organize the worldwide circulation and production of resources. The papers in this panel highlight the ways such transnational governance structures both reflect and reproduce global inequalities. They also investigate where different possibilities for resistance and the promotion of environmental and social justice might lie. This panel also addresses the contested contours of sovereignty over natural resources, from both a theoretical and more concrete perspective, highlighting the pertinent domestic governance struggles over resources in the Third World. The paper by Amaya Alvez tackles the current Chilean constitutional process from the perspective of the political participation of indigenous peoples, looking at the limits imposed by international norms such as ILO 169 Covenant and how it has been co-opted by private transnational interests. Julia Dehm examines how the ways in which we understand nature as a 'resource' is already the product of a specific epistemological paradigm and of particular modes of authority and of law. She suggests that in order to develop just and decolonial frameworks for 'natural resource governance' socio-legal scholars need to pay more attention to the role of law in making 'nature' legible as a 'resource' and push towards more radical, pluralist, transnational ways of thinking about the legal organization of nature. Matias Guiloff's paper examines the Chilean water market case and offers theoretical observations about property rights over natural resources. He argues that the very existence and subsistence of such rights is grounded on property's social function, namely what is convenient for society at any given time. Michael Riegner examines the confluence and collision of local and global norms in discourses on forestry, climate change, and property rights through a socio-legal study of the internationally supported 'Terra Legal' program in Brazil. He shows how this project's effects differed from its intentions and uses this project to argue for the need to see development projects as sites of the 'everyday operation' of international law and as sites of global and local legal pluralism.

In conclusion, the paper by Bruce M Wilson, and co-authors Camila Gianella, and Lara Côrtes, offers an analysis of water rights-related cases decided by Constitutional or Superior courts and their impact on the ability of marginalized people to protect their access to clean water in Latin America.

Discussant & Chair: **Carmen Gonzalez**

Amaya Alvez

Sovereignty over Natural Resources in Chile: Indigenous Claims Neutralized through Judicialization

Julia Dehm

Pluralizing Transnational Resource Governance

Matias Guilof

The Rehabilitation of Aquatic Ecosystems in Chile and its Implications for the Right to Private Property: Property as Social Function

Michael Riegner

Can Law Save the Forest? Legal Traces in the Brazilian Amazon: Localizing Global Norms in the “Terra Legal” Reform Project

Bruce M Wilson (co-authors: **Camila Gianella & Lara Côrtes**)

Litigating Water as a Human Right: An Effective Strategy in Latin America?

Panel 2: Vocabularies of Environmental Justice

Friday June 3, 2:45 – 4:30pm, NOLA Marriott, Studio 4

Panel description:

This panel analyzes international law's shaping of environmental justice claims. Papers trace how legal discourse enables or constrains the ability of particular actors to articulate grievance and demand redress, and authors participate in discourse contestation to enable integration of heretofore silenced voices and worldviews. By considering the enclosure of the biotic commons into enclaves of intellectual property, Chandra argues that a new ethics of sustainable development and scientific innovation is reframing the commons, with a resultant change in how law understands the moral economy of the commons. Kotsakis revisits the history and political economy of the Biodiversity Convention, imagining the different legal and political structures that could have materialized, and on this basis calls for a critical international environmental law that abandons the veneration of rules and institutions and engages instead with the political project of international environmental law. Natarajan considers the relationship between the growth of rights-based discourse, ever-expanding fossil-fuel dependency, and the systemic devaluation of the non-human, arguing that human rights is antithetical to environmental justice and constitutes a barrier to such justice claims being meaningfully heard or addressed by international law. Kukovec develops a conceptual understanding of law and governance as a constant (hierarchical) struggle among people. He counterpoises this understanding with ideas of ecological justice in order to develop new ways of thinking about the distributional impacts of law and the role of law in social change.

Chair: **Karen Engle**

Discussant: **Sumudu Atapattu**

Rajshree Chandra

Old Tragedies, New Ethics: Reframing the Moral Economy of Commons

Andreas Kotsakis

Towards a Political Economy of Environmental Conflict: Some Remarks from the Genealogy of Biodiversity

Damjan Kukovec

Hierarchies as Law and Global Governance

Usha Natarajan

The Marriage of Human Rights and the Environment: From Mutual Convenience to Irreconcilable Differences

Matthew Nicholson

Nature's Mourning: On the Language of Law and the Muteness of Nature

Amaya Alvez

*Sovereignty over Natural Resources in Chile: Indigenous Claims Neutralized through Judicialization*¹

Recent theoretical researchers have studied the complex connections among indigenous peoples, their domestic constitutional status and the operations of international law. A common history of colonialism, marginalization and underdevelopment in international law in Latin America has resulted in the region being labeled critically under the “Third World” category. Even the term *Latin America* was coined only recently as a reaction to 19th century US imperial interventions in the region, as pointed out by Liliana Obregón.² Authors like Amar Bathia proposed that commonalities among the worldviews of indigenous peoples and their attachment to the land could be considered a “Fourth World” approach characterized by a common experience of colonialism, dispossession and attempted assimilation.³

Chile is starting (October 2015) a constituent process that could potentially serve the cause of social justice by shaping differently the constitutional power of ‘the people’⁴, using comparative examples from Latin America, Ecuador (2008) and Bolivia (2009), I would like to claim that political participation of indigenous peoples meant an improvement of their social and legal status. I also would like to establish links between this debate and the one on judicialization of sovereignty over natural resources, the possibility of indigenous peoples’ choice to interact directly with extractive industries as an emancipatory move and the limits provided by international norms such as ILO 169 Covenant and its cooptation by private transnational interests. Moreover, I would like to show how judicialization on community consultation and consent procedures in Chile, using a human right perspective, has been a way in which indigenous alternative legal claims has been neutralized. Linking both debates I would like to address the challenges of the current Chilean constituent *momentum*.

This paper addresses a global problem, the tension over water resources, from a local perspective, Chile as the concrete place where the international is articulated in our story.⁵ Water under the current constitutional order, which includes international law as one of the human rights possible sources (S5 of the

¹ This paper is the result of the work done as the Principal Researcher of Fondecyt Iniciación project N° 1121371, “The Misuse of Comparative Law by the Constitutional Court in Chile” and the work done as an associate researcher of the WATER RESEARCH CENTER FOR AGRICULTURE AND MINING (CRHIAM) led by the University of Concepcion, Chile, and funded by the National Research Fund CONICYT/FONDAP, Project N° 15130015 (2013 – 2018). I acknowledge both funds as a crucial help in developing my current work.

² Liliana Obregón, “Between Civilisation and Barbarism: Creole interventions in international law” (2006) *Third World Quarterly*, vol 27, N° 5, p. 815.

³ Amar Bathia, “The South of the North: Building on Critical Approaches to International Law with lessons from the Fourth World” (2012) 14: 1 *Oregon Review of International Law*, p. 133.

⁴ Zoran Oklopčić, “Three arenas of struggle: A contextual approach to the constituent power of ‘the people’”. *Global Constitutionalism*, 3,(2014) pp 200-235 doi:10.1017/S2045381714000069

⁵ Statistics for 2013 in Chile indicate that water consumption in mining is 5.6% and that the overall industrial use total of 13.6%, while agriculture accounts for 83% of water resource consumption. Water used for human consumption comes to 3.6%. UN Water Agency available at: http://www.unwater.org/fileadmin/user_upload/unwater_new/docs/Publications/CHL_pagebypage.pdf [accessed March 13, 2015].

1980 Constitution), has been considered only as a commodity under a market system, and not understood constitutionally in cultural or ritual terms as it is in worldview of indigenous communities. The rejection of the indigenous worldview occurs despite statistics from 2012 indicating that 1.8 million people (11.08% total Chilean population), self-identity as part of one the nine legally recognized indigenous groups.⁶

The human rights impacts of extractivism are relevant in a country that has become the main producer of copper in the world.⁷ Copper industry attains 40% of commercial balance, 30% of Gross Domestic Product (GDP) and 1 % direct employment (Ministry of Foreign Affairs, 2011). This is impacting the environment through the release of large solid waste deposits, sterile piles, and lixiviation piles, as well as large energy and water consumptions (Oyarzun & Oyarzun, 2011).⁸ The current situation is prone to conflicts due to the interaction and of increasing water demand for agricultural, industrial, mining and hydropower activities, high climate variability affecting water availability, disparate distribution of natural resources along the country, and a constitutional framework that forces water users to private water resource management system under the individual neo-liberal private property clause.⁹

The case study lead by CRHIAM refers to the first instance water cases for the entire country in 2013, 1009 judicial cases, using as territorial unity the county. The thesaurus searched, among other keywords, for ancestral and customary uses of water (229 cases). The current legal legislation regulates the procedure (S2 of the water code) but does not distinguish between ancestral use of water by indigenous communities (16 cases) and by Chilean peasants (12 cases). This is despite the Indigenous Peoples Act, that recognizes indigenous ancestral (ritual) use of water (S63, Law 19.253 of 1993) for Aimara and Atacameño Peoples. The situation could be potentially very relevant, because Aymaras and Atacameños inhabit the northern regions where extractive cooper industries are located. The judicialization struggles reached its climax in 2009 when the Supreme Court of Chile recognized that a collective indigenous ancestral use of water prevails over any individual property right formally established.¹⁰

The argument is that within the concrete landscapes in which the struggles over water plays out, indigenous peoples have been neglected, theoretically named but not recognized as political subjects. This paper tries to reflect on the Chilean constituent process, and found out if perhaps the time has come to, on one hand use international law to prevent or again resist a direct and formal subjugation¹¹, and on the other, to test if the cause of social justice could be potentially be serve through this political process.

⁶ Section 1, Law N° 19.253 published in the Official Gazette October 5th, 1993. Statistics available at www.ine.cl

⁷ See publication by CRHIAM researchers: "Mapping water conflicts in Chile by geo-tagging legal records: regulatory and geographical constraints", Authors: Diego Rivera, Alex Godoy-Faúndez, Mario Lillo-Saavedra, Amaya Alvez, Consuelo Gonzalo, Ernestina Menasalvas, Roberto Costumero, Ángel García-Pedrero (forthcoming, 2016).

⁸ Water consumption reached 7 % in 2015.

⁹ National Institute of Human Rights INDH, "Socio -environmental conflicts on water", Annual Report 2013 *Situation of Human Rights in Chile*, p. 207.

¹⁰ Supreme Court, Rol 2840-2008, "Alejandro Papic Domínguez vs Indigenous Aymara Community Chusmiza and Usmagama."

¹¹ A. Becker Lorca, "Alejandro Alvarez Situated: Subaltern Modernities and Modernisms that Subvert" (2006). *Leiden Journal of International Law*, Vol. 19, pp. 879-930, 2006. Available at SSRN: <http://dx.doi.org/10.2139/ssrn.1370351> at 20.

Keywords: Constitutional Law and Constitutionalism – Indigeneity and First Peoples – Water Rights

Julia Dehm

Pluralising Transnational Resource Governance

In recent years there have been attempts to bring a human rights analysis to bear more upon natural resource governance, with a particular focus on the human rights impacts of extractivism and models of resource-intensive export-orientated development. There have been calls for greater community consultation and consent procedures and more equitable distribution of the profits from resource extraction. This paper steps back from these immediate debates, in order to pose several prior questions necessary for developing just and decolonial modes of resource governance to ask questions concerning within what episteme is 'nature' understood, and through what law it is 'governed'?

This paper suggests that understanding nature as a 'resource' is tied to specific epistemological paradigms, particular modes of authority and also modes of law and that therefore to speak in terms of 'natural resource governance' is already to position nature within a specific episteme and to assume a specific jurisdiction and mode of law authorized to 'govern'. This paper argues that in order to develop just and decolonial framework for 'natural resource governance' these presupposition need to be interrogated and a much more radical, pluralist, transnational framework for addressing these crucial questions developed.

The concept of a 'resource' does not exist prior to the operations of power that exercise authority over nature for specific ends. The World Trade Report on Trade in Natural Resources (2010) refines 'resources' as 'stocks of materials that exist in the natural environment that are both scarce and economically useful in production or consumption, either in their raw state or after a minimal amount of processing'.¹ This definition shows that the characterization of nature as a 'resource' depends first upon nature being legible within a frame of economic utilization, subsequent to scarcity and demand. Work in the field of resource geographies has emphasized that "natural resources are not naturally resources" but that resources are the products of cultural, economic and political work.² In a review Gavin Bridge and Karen Bakker write that

... resources are an epistemologically specific outcome of competing claims over access to, control over, and definitions of nature. 'Resources' bespeak the operation of geographical networks of knowledge and control, through which a heterogeneous world of nature is order, fractured, and delivered up to the economy. Resource extraction, therefore, occurs as a process of social negotiation of access to, and control over, an already politicized landscape of uneven development and, as such, the production of nature as resource inevitably entails an exercise of power.³

Similarly, anthropologist Tania Murray Li writes that "what we call a resource or a 'natural resource' is a provisional assemblage of heterogeneous elements including material substances, technologies, discourses and practices".⁴

¹ "World Trade Report 2010: Trade in Natural Resources" (World Trade Organization, 2010) <https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report10_e.pdf>.

² Gavin Bridge, "Resource Geographies 1: Making Carbon Economies, Old and New" (2010) 35(6) *Progress in Human Geography* 820, 821.

³ Ibid.

⁴ Tania Murray Li, "What Is Land? Assembling a Resource for Global Investment" (2014) 39 *Transactions of the Institute of British Geographers* 589.

These writings draw attention to the way in which understanding an object as a “resources” is already the product of a specific governance regime. This analysis demonstrates that questions of natural resource governance are not limited to the way in which pre-existing resources are regulated. Rather, the examination of natural resource governance must also engage with the ways in which various objects come to be constituted as governable “resources”. That is, examination of the governance of resources needs to account for both the “background” conditions of international law, namely how land and nature come to be understood and defined as appropriable resources as well as the “foreground” questions that addresses “how we manage resources”.⁵ This requires attention to the way in which international law operates to “conceptually transfor(m) nature into what we today would call a natural resource”.⁶ Such enquires might take a historical form, for example Ileana Porras has described how it was “only in the moment that nature was articulated nature as a material thing, subject to appropriation, reducible to property, and capable of entering the stream of commerce that it first appeared became visible in in the early European accounts of international law”.⁷ However, similar questions arise today as new “resources” come to be considered economically valuable and as made appropriable and governable by law, such as for example carbon⁸ and biodiversity.

Other work demonstrates that way we think of natural resources is already tied to ideas of law and modes of authority and suggest a relationship of co-production between our understandings of resources and their modes of regulation. For example, anthropologist Nancy Peluso writes in relation to Indonesia that “the concept of a category of land call ‘forests’ and the assertion of state territorial sovereignty over this land emerged in tandem”,⁹ creating “new, almost inescapable means of imagining land, resources and people” as well as revolutionizing livelihoods.¹⁰ Relatedly, specific understandings of resources are linked to the assertion of specific administrative and governance categories and forms of authority and power. For example, the discourse and concept of ‘political forest’ or land declared by the state to be forest operated as “a critical part of colonial-era state-making both in terms of the territorialization and legal framing of forests and the institutionalization of forest management as a technology of state power.”¹¹ Another example is the fact that the term *forest* in English law didn't refer to an ecosystem, but to a jurisdiction, the word most likely derives from the Latin *foris* meaning ‘outside’ or *forestare* meaning ‘to keep out, to place off limits, to exclude.’ When the now mostly forgotten companion to the Magna Carta the Charter of the Forest called for *deforestation* it was not calling for trees to be cut down, but for their legal status of these spaces be changed and for authority over these spaces to be returned to the commons.

Yet there are also other legal conceptions of nature and other modes through which nature comes to be regulated by law. Understandings of nature as *pachamama* or Mother Earth, derived from Inca traditions,

⁵ Sundhya Pahuja, “Conserving the Worlds Resources?” in *Cambridge Companion to International Law*, eds. James Crawford & Martti Koskenniemi (CUP, 2012).

⁶ Ileana Porras, 'Appropriating Nature: Commerce, Property and the Commodification of Nature in the Law of Nations' (2014) 27(3) *Leiden Journal of International Law* 641.

⁷ *Ibid.*

⁸ See for example: Eva Lövbrand and Johannes Stripple, “Making Climate Change Governable: Accounting for Carbon Sinks, Credits and Personal Budgets” (2011) 5(2) *Critical Policy Studies* 187, Larry Lohmann, “Financialization, Commodification and Carbon: The Contradictions of Neoliberal Climate Policy” (2012) *Socialist Register* 85.

⁹ Nancy Lee Peluso and Peter Vandergeest, "Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand" (2001) 60(3) *The Journal of Asian Studies* 761., 762.

¹⁰ *Ibid.*, 762.

¹¹ *Ibid.*, 762.

similarly are linked to specific legal understandings and, obligations and responsibilities. This paper explores these questions in order to bring a more legal pluralist understanding to the questions of transnational 'natural resource governance'.

Matias Guilof

The Rehabilitation of Aquatic Ecosystems in Chile and its Implications for the Right to Private Property: Property as Social Function

No water rights are available in rivers at the North of Chile. Most of them currently belong to mining companies. Some of the northern watersheds have disappeared and others are heavily polluted. This makes it necessary to start thinking about how to undertake their rehabilitation. Existing Chilean Water Law provides no mechanism to rehabilitate these rivers. Moreover, to the extent the purpose is to rehabilitate flows, considering that the Chilean Water Legislation relies only in the market to allocate water rights, any proposed amendment must face the twin challenges of limiting the use patterns of those that have been already assigned (in order that there is a flow to rehabilitate), and altering their definition as solely extractive (to ensure that this flow is preserved)). Shortly put, property rights on water resources must be redefined and limited.

Remarkably enough, the Chilean Constitution extends the right to private property over water rights, without providing further details as to the kind of uses these rights admit. In addition to this, it allows the legislature to place those limits that the social function of property demands. Among other societal goals, these function encompasses the nation's utility and the conservation of the environment. Yet, the Constitution also provides that any deprivation of a property right or one of its essential attributions (such as the right to exclude) of powers (as the very right to use) must be compensated. Thus, at least in accordance to the Constitutional text, despite the protection provided to them therein, the legislature is allowed to place limits on existing water rights to protect the environment, and is free to define water rights for those purpose it deems convenient.

Yet, in policy debates concerning Chilean Water Law amendment proposals, some stakeholders have argued that water rights are meant to be extractive and that they cannot be limited without the payment of compensation. As to the first claim, they argue that the police power, and not water rights, is the means to accomplish environmental preservation purposes. The contention as to the impossibility to limit rights without compensation is grounded on the premise of the expectation to be bounded on the use of these rights only by those regulations that existed when they were acquired. What follows from this is that any amendment regarding water rights must be prospective and therefore apply only to rights that have yet to be granted, while those rights that have already been granted should be immune from its application.

Admittedly, in order to accomplish certain goals, a government might choose to choose either regulation or the market. Although there might be good reasons to use regulation to control the use of a resource that belongs to the public, one might also consider using markets if the circumstances at issue make it unlikely for the former to achieve valuable social goals. In more detail, this preference for regulation might be extremely difficult to translate into legislation in those systems that have relied on the market for allocate water. Under those circumstances, making environmental preservation a legitimate use for water rights might be the most attainable means. But can property rights be so defined?

Additionally, and particularly in those river basins where all water rights have already been granted, where would those water rights required to rehabilitate the environmental flow would come from? Of course, these rights can only come from those users in the river basin at issue that own them. This does not mean that these rights should be taken away from these owners; it only means that the government should compel the latter to reduce their use so as to allow the rehabilitation of the respective flow. Note that in doing so the government would engage in placing limits on the use of preexisting rights for environmental preservation. Is it possible to impose such limitations on old rights?

It is the aim of these paper to elaborate an important theoretical point concerning property rights over natural resources while arguing why the preceding questions should be answered affirmatively. This is that the very existence and subsistence of these rights is grounded on property's social function. In effect, how property rights are defined and later limited is a function of what is convenient for society at any given time. The very judgement of a society that its interest is best served through the creation and enforcement of extractive water rights is grounded on the premise that property rights are mechanisms to obtain societal goals to begin with. The circumstances under which the former judgment was taken might vary, and might call for granting rights for the purposes of environmental protection. Any argument to the contrary must necessarily rest on the assumption on which 19th century prior appropriation water regimes were based, that the only social function that property rights are to serve is to increase resource exploitation. Such an assumption was based on the contingent judgment that society's interest was best served by putting water rights into effective use. And it is not self evident that the influence of such a contingent judgment on the law might not be altered by more recent judgements.

The subsistence of preexisting property rights regimes on natural resources also depends on the judgement of its social function. As argued above, it might be the case that along with existing extractive rights, a new set of conservation rights must be created to adequately protect society's interest. Not only this, the judgment that society's interest is most likely achieved by relying solely on the market to allocate water rights might prove wrong, and the extension of the powers conferred to those right bearers can turn to be dysfunctional for the protection of society's interest under the current circumstances. If that is the case, it is reasonable for the legislature to limit preexisting rights so that society's best interest can be served by their reduced use. To argue the contrary leads to the flagrant contradiction that the functionality of property rights for the accomplishment of social goals should matter only to create them, but not to evaluate their performance and evaluate their revision.

Michael Riegner

Can law save the forest? Legal Traces in the Brazilian Amazon: Localizing Global Norms in the 'Terra Legal' Reform Project

Few things are more local than trees. Yet a system of global norms on forestry has been emerging over the past decades. This paper investigates how global norms are localized in internationally supported forestry governance projects in the Brazilian Amazon. It presents preliminary findings from a socio-legal research project and a field study conducted in Brazil in early 2016. The main argument is that the projects do not have the intended effects, and have other unintended effects, due to local administrative practices, political economy, and the local confluence and collision of global norms and discourses on forestry, climate change, and property rights. The research contributes to our understanding of the everyday operation of international law on the ground and of development projects as sites of global and local legal pluralism.

Deforestation and forestry conservation have become issues of global concern, not least because of their importance for climate change. Attempts at global regulation of forestry rely on various and fragmented sources (Eikermann 2015; Petsonk 2012): international treaties like the UN Biodiversity Convention; soft law such as UN declarations on sustainable development and on the rights of indigenous peoples, or the FAO guidelines on Responsible Governance of Tenure; the lending practices of international financial institutions like the World Bank's Operational Policy 4.36 on forests; and more recently the climate change-related program "Reducing Emissions from Deforestation in Developing Countries" REDD+. Besides, legislators in the US and the EU have banned the import of illegally logged wood, and global public-private schemes for legality certification have emerged (Meidinger 2006). Multilateral and bilateral cooperation projects seek to promote the implementation of these global standards in domestic settings. Existing literature has analyzed the impact on national legislation (Bernstein and Cashore 2010, McAllister 2008), but we know relatively little about the local effects on the ground among state officials, extractive industries, activists and local communities, including indigenous peoples.

The present paper starts to fill this gap by investigating the local effects of the internationally supported "Terra Legal" program in Brazil (Legal Land Program, law no. 11952/2009). Enacted in 2009, Terra Legal seeks to formalize land tenure for 200.000 small landholders and rural farmers in the Amazon. Formalization is seen as a solution for the weak land tenure system, which favors deforestation through forest conversion, illegal logging and land speculation (Hirakuri 2003, 53-4). International donors support Terra Legal mainly in the context of global climate change policies and the REDD+ initiative (Duchelle et al. 2014). Specifically, the German aid agency GIZ funds a capacity building project for the Brazilian agency administering the Terra Legal program, the *Secretaria Extraordinária de Regularização Fundiária na Amazônia Legal (SERFAL)*. One aim of this project is to integrate SERFAL into global networks for forestry management as well as FAO and World Bank initiatives.

The paper analyzes the cooperation project on Terra Legal and its impact on local administrative practices and communities. Interestingly, the initial effects of Terra Legal were disappointing, as only 4% of eligible land was formalized in the first four years. The cooperation project attributed this largely to capacity constraints in the implementing agency, as forestry management and formalization in line with national and international standards require complex administrative practices. Yet, another reason why the projects do not have the intended effects, and have other unintended effects, is that the effects of formalization also depend on local contexts and the respective political economy. Global norms are localized in the context of legal pluralism: local land tenure systems in the Amazonas are not only subject to national law, but also still influenced by indigenous practices and the legacy of the colonial Portuguese "Law of Sesmarias", according to which unused land should either be worked or transferred to productive purposes. This also accounts for a massively unequal distribution of land, in which small farmers hold 13% of land whereas large landholders own 80% (Hirakuri 2003, 54). This in turn shapes the political economy in which Terra Legal is implemented and appropriated for other purposes. It is in this context that Terra Legal also interplays with two other sets of global norms and discourses, namely climate change and property rights: the administration of market incentives under the REDD+ initiative depends on formal titles, and the property rights discourse conceives of formalized tenure as prerequisite for market-based economic growth (cf. Mitchell 2005). Hence, Terra Legal also serves to implement a neo-liberal logic of market-based development in the Brazilian Amazon. Resistance to this logic among local communities and indigenous populations may be another reason for the slow implementation of the project.

Methodologically, the research relies on a desktop analysis of the legal and administrative documentation concerning the Terra Legal program and the cooperation project. Besides, field research will be conducted in early 2016 in the Brazilian Amazon, involving interviews with officials and local landholders to test the hypothesis about the local effects of Terra Legal. The research builds on the literature in legal anthropology about localizing and vernacularizing international norms (Goodale & Merry 2007) and extends it beyond the field of human rights to issues of environmental law and governance. Besides, it contributes to our understanding of the factors that condition the diffusion of international norms (Sikkink and Finnemore 1998) as well as to the literature on development projects as sites of global and local legal pluralism (Benda-Beckmann et al. 2005).

Keywords: Forestry – international environmental law – natural resources – climate change - property rights – development cooperation – Brazil – anthropology of international law - international law and politics

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Bruce M Wilson, Camila Gianella, Lara Côrtes

Litigating Water as a Human Right: An Effective Strategy in Latin America?

In the last 24 years¹ the formal recognition of the right to water at the international and national levels has increased significantly; however, there is a paucity of knowledge regarding the relationship between the advent of international recognition of the human right to water and the empowerment of socially and marginalized people to protect and enforce that right. This paper partially fills the gap in our understanding through analysis of water rights-related cases decided by Constitutional or Superior courts and their impact on the ability of marginalized people to protect their access to clean water in Latin America.

¹ We considered 1992 a key year, because Agenda 21, Chapter 18 of the 1992 U.N. Conference on Environment and Development in Rio de Janeiro affirmed people's right to have access to drinking water in quantities and quality equal to their basic need. Furthermore, the right to access clean water and sanitation was recognized that year at the International Conference on Water and Environment in Dublin.

Background:

In 2010, the United Nations Human Rights Council and the United Nations General Assembly recognized the right to water as a full human right, marking a significant milestone in the strengthening of the international recognition of the right to water.^{2,3} Parallel to this growing international recognition, some countries also created legal frameworks requiring the protection and/or provision of clean water.⁴ The content of the right to water and the way in which it is protected and promoted in different countries varies according to legal frameworks and with respect to court design and behaviours. For example, South Africa's 1996 Constitution explicitly articulates an enforceable right to water, but after early successes, the courts are no longer the main arena where water rights are being demanded. Other countries, such as Costa Rica and India, lack an explicit constitutional right to water and yet courts routinely recognize it as an implicit, enforceable constitutional right. In other countries, such as Brazil, the constitution does not explicitly incorporate the right to water. Moreover, even if Brazilian law has among its fundamental principles the provision of universal sanitation services and it determines that in case of water scarcity priority must be given to human consumption and the needs of animals, access to clean water is not directly described as a right. Nevertheless, this does not prevent courts from referring to a right to sanitation services as a social and economic right by interpreting the content of health rights, environmental rights or even housing rights that are explicitly inscribed in the Brazilian Constitution (Barcellos, 2014).⁵

The importance of the right to water is even broader than just cases claiming a narrow right; it has also been used to bolster other related rights claims. For example, the right to water has been used in claims for clean environment, housing, education, and health. Other cases have involved property rights (and land rights), contractual rights, and indigenous population's right of self-determination and prior consultation. Our country case studies will be comprehensive and sensitive enough to catch and code all litigated cases involving a right to water (no matter the context it is used in) and to track the extent of success and compliance with positive court decisions from selected Latin American countries.

The development of this diverse universe of cases shows that access to water is a significant source of conflict. Despite the developments on the formal recognition of the right to water, globally, approximately 750 million people do not have access to clean water and almost 2.5 billion lack adequate sanitation (**Error! Hyperlink reference not valid.**), causing millions of deaths every year (approximately 1.5 million children below the age of five die every year as a result of water and sanitation-related diseases). These dire privations are borne largely by vulnerable and socially and economically marginalized populations. Women and girls, particularly those living in poverty in rural or urban areas, are especially vulnerable as they are usually responsible for collecting and transporting water to their households, preparing food, and taking care of their family. In a situation of water scarcity, women have to spend even more time and

² Previously, in 2002, the Committee on Economic, Social and Cultural Rights adopted General Comment 15, which states that the right to water is implicit in articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (covering the right to an adequate standard of living and the right to health).

³ *Access to water* was previously mentioned in the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons with Disabilities (2007).

⁴ E.g. both the Dominican Republic and Kenya enacted new constitutions in 2010 recognizing the right to water.

⁵ Barcellos, Ana Paula de. 2014. "Sanitation Rights, Public Law Litigation, and Inequality: A Case Study from Brazil." *Health and Human Rights Journal*. Vol. 16(2).

resources collecting water, which can adversely impact their health, nutritional status, and diminish the time they might spend on other important productive and/or educational activities, and precluded their engagement in water management discussions. In addition, social, political and economic power relations within countries shape access to water sources, and consequently, securing access to water can be particularly challenging for small holders, vulnerable, marginalized populations, and women (Van Koppen, 2000; HLPE, 2015). Moreover, irrigation planning projects commonly ignore domestic uses of water and women's water needs (**Error! Hyperlink reference not valid.**), or ignores the needs of rural populations, in many rural contexts domestic water use includes subsistence gardening and livestock (Langford, 2009). The construction of large water infrastructures (including dams) has been often characterized by the forced displacement of indigenous and non-white populations (e.g. black rural populations in Brazil), and expropriation of water rights without adequate compensation or consultation (**Error! Hyperlink reference not valid.**).

There is an intensifying competition for diminishing water supplies between water 'uses' and water 'users', where the most vulnerable and marginalized groups are usually the losers. In this competition, development policies and prioritization of activities such as extensive agriculture, mining, manufacturing, or energy production are crucial. Agriculture is the largest user of water resources, accounting for approximately 70% of all freshwater withdrawals globally and over 90% in most of the world's least-developed countries. A further 15% of the world's freshwater withdrawals are directed to energy production, which is expected to increase by 20% through 2035. Similarly manufacturing demand for water is expected to quadruple between 2000 and 2050 (**Error! Hyperlink reference not valid.**). These patterns, which are not stable over time, are in conflict with each other for the control over limited amounts of water, and are exacerbated by population growth, urbanization, industrial development, changing diets, and climate change, etc. In this scenario, securing access to clean water and sanitation becomes even more important and problematic.

The role of the courts:

Worldwide it is possible to find many examples of social mobilization to secure the access to water,⁶ but in this paper we focus on the role of courts in resolving cases based on a right to water and their diverse outcomes. This diversity reflects the interaction between local economic and political circumstances; global forces; the development of new ways of understanding and developing water supply and sanitation as a public service legal frameworks and institutional design of judicial systems and their operating rules concerning access, standing, and judicial formality (**Error! Hyperlink reference not valid.; Error! Hyperlink reference not valid.; Error! Hyperlink reference not valid.**).

Methodology:

This paper employs a content analysis of cases handled by Constitutional or Superior courts in Latin America in water-related conflicts that have the right to water as a significant component of their central claim. The analysis will provide a comprehensive description of the cases, including type of rights claimed,

⁶ E.g. In most Andean countries, grassroots communities and federations have largely halted privatization and marketization projects through *multi-scalar popular resistance* (Boelens, et al., 2014), while in South Africa popular resistance to water injustice has ranged from direct protests, to autonomist-style reconnections and destruction of prepayment meters, to a constitutional challenge over water services (Bond & Dugard, 2008).

how the right to water is framed or linked with other rights type of applicants, court level, and courts' use of previous jurisprudence (national and international), or agreements. The final part of the paper examines the compliance of defendants with the courts' water rights decisions and its impact on the claimants.

Rajshree Chandra

Old Tragedies, New Ethics: Reframing the Moral Economy of the Commons

Moral economy is, in a sense, a proto theory of indigeneity and systems of existence that are outside the fold of the market and its rationalist cost-benefit postulates. It is a moral arrangement of resources and institutions that, both locally and in larger policy frames, ought not to be breached. This paper proposes that enclosure of the biotic commons into enclaves of intellectual-propietary entitlements has been made possible through the reconstruction, rather an inversion of the Thompsonian moral economy,¹ which invests the commons with a new ethic and cosmopolitan goals of progress and sustainable development. The stated purpose of the enclosure of the commons is no longer to serve the individual, local or proximate interests but to serve the interests of mankind as a whole. This reversal no longer considers private interests to be antithetical to the idea of moral economy and no longer privileges the “subsistence ethic”, rather substitutes it with the normative global burden of disease, hunger, nutrition and pest control – in short, a “*progress ethic*” which enables mankind to progress from a world of disease, hunger, environmental instability to a world free of them.

The installation of biological entities into the IP assemblage rests on a reconstruction of the moral economy framings. There are certain processes which, to use DeLanda’s words, ‘consolidate and rigidify the identity of the assemblage’, which can be referred to as the process of “coding”.² A variety of mechanisms can instantiate the processes of coding. This paper views the “moral economy” frames as forming the expressive and ideational content of the techno-scientific-IP assemblage, a content that is critical for stabilizing and normalizing the material end of things, namely the laws and their jurisdictional content. It’ll examine how the “moral economy” rhetoric is invoked in public as well as expert forums, how the discourse of *propriety* – of “what is proper” – gets attached to networks of intellectual property and legitimates the idea of enclosing the commons.

How has law projected the enclosure of the commons as a normative strategy in the larger context of the subsumption, and often the disenfranchisement, of local, indigenous communities under regimes of national and international IP law? What legal structures of modernity have enabled the “uncommoning of the commons” (Milun, 2011) or the “Second Enclosure” (Boyle, 2003) or the “overcoming of the publicness of commons” (Rose, 2011)? What doctrines of collective good does it base itself on? What ethic of common good do enclosures draw upon? And most importantly, how does this propertization/enclosure of the commons come to be considered to be generally beneficial?

For the practice of law to be seen as “fair”, “objective” and “just”, it is imperative that law is seen as a moral agent, furthering those rules of observance that are allied with perceptions of *common good* and free from charges of particular or partial attachments. Law thus has a compelling need to be reflexively allied with what constitutes a moral course of action. This papers examines how the discourses of (a) *innovation and*

¹ See Thompson, E.P., “The Making of the English Working Class”, (Penguin Books, 1961), at p. 66. . See also, Scott, James C., “The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia”, (Yale University Press, 1977).

² Delanda, Manuel, “A New Philosophy of Society: Assemblage Theory and Social Complexity”, (Bloomsbury Academic, 2006), at p. 19.

(b) *environmentalism* reconstitute the idea of what is good for societies globally, inverting the idea that conventionally formed, in a sense, a global ethic for a moral economy.

The enclosure of the commons begins with the construction of a new “moral community” around the commons. The state, the environmentalist, the community, the biotechnologist – all agents in this moral community, perform roles that are animated by the idea of a “larger good of the mankind” that is to be served through sustainable and productive ways of enclosing the commons. Biotechnologists, by tapping into the vast resources of traditional knowledge and biogenetic resources, are able to create new cures, new agro products that are resistant to destruction by pests. The environmentalist is able to provide a framework of conservation and sustainable use of resources to save mankind from the fury of nature, climate change and to conserve resources for future generations. The national state is mandated to provide a regulatory framework for the just and optimal governance of the commons. The local community is to work with and alongside private and government actors to prevent overuse and misuse of resources. The stated purpose of the enclosure of the commons is thus to not serve the individual, local or proximate interests but to serve the interests of mankind as a whole. The commons come to be invested with a new ethic, that of progress and sustainable development. Enclosure of commons is meant to serve a global constituency that had a far greater numerical and normative weight than the local, indigenous communities and their “localized” concerns. Even when outcome of the enclosure is private gain – as in the case of patents over drugs or seeds – the operating discourse is the service of public good and service to humanity.

The narratives of innovation and environmentalism have had a defining impact on the epistemic imaginary of international law that relates to global commons. Together they help construct a new “moral economy of the commons” which advances and makes acceptable the idea that enclosures are, or can be, beneficial for mankind/humanity at large. The metaphor of a legally empty space, belonging to no-one, has enabled the space of biogenetic commons to be claimed and filled, not only with new legal understanding of what can be claimed as “property”, and who is entitled to this space, but more importantly, why enclosures are indispensable for the good of the “global society”.

Andreas Kotsakis

Towards a Political Economy of Environmental Conflict: Some remarks from the Genealogy of Biodiversity

During the last two decades of the 20th century, the concept of biodiversity encapsulated the high point of the project of international environmental law; a popular ‘buzzword’, grounded in sound biological science and reflected in an ambitious global regime seemingly tasked with power over all ‘life on Earth’. In the post-Rio Earth Summit world, it appeared to some scholars as if international environmental law would soon constitute a cornerstone of the new post-Cold War international system, and the biodiversity convention would in turn constitute a cornerstone of international environmental law. Beneath that particular legal promise however, the protean and dynamic characteristics of the concept also precipitated a series of North-South conflicts over its precise meaning and application. While the concept of biodiversity had emerged within Northern conservation practices, the reality of the South as the holder of the largest remaining reserves of valuable biodiversity forced the engagement with the political economy of Southern development. These conflicts followed a troubling orientalist pattern in environmental legal thought where the North always proposed first and the South was expected to react and adapt. At the same time however,

they also fused together meaning and application, thought and practice, knowledge and power. The environmental truth of biodiversity loss became entangled with the political truth of the global biodiversity regime.

The entry of biodiversity into international environmental law thus opened a wide historico-political field of engagement with questions of global distribution, responsibilities and justice, of encountering the colonial roots of the present environmental law; all in the context of an attempted holistic restructuring of the grid between scholarly activity, legal reform and political action on the environment, both domestically and internationally. But for both the treaty –and its subsequent protocols— and international environmental law in general, it eventually became apparent how disappointingly little they actually regulated or even influenced in terms of the links between scholarship and action; ‘marginalia complemented by effluvia’ is a recent damning assessment of international environmental law. Legal scholarship, oscillating between its positivist and pragmatist intellectual traditions, was quick to offer technical reasons for the perceived failure: that the intellectual property provisions of the agreement caused the US government to reject it; that priorities in terms of global action shifted due to the emergence of climate change as a far more prominent global environmental problem. But such causalities only served to close the wide historico-political field opened up by the quest to internationalise the concept of biodiversity. The corresponding regime never recovered and retreated into the background of both scholarly and political interest, like a film actor fading into obscurity after a few prominent roles.

In the second decade of the 21st century, we are witnessing the emergence of transnational environmental law, characterised by a number of complex phenomena, such as the increasing political, economic and regulatory role of nonstate actors, the fragmentation of the international legal system, and the emergence of hybrid norms and forms of governance. But the underlying rationality prevalent since the creation of the United Nations, and by extension our grid of intelligibility, remains largely the same: a series of legally binding framework international agreements forming issue-specific global regulatory regimes of collective targets supporting and supported by a discourse of clear separation of the political from the economic and scientific view of the world. The self-evident necessity and legitimacy of this structure accompanies contemporary scholarship on their operation. Along with all major international institutions, they simply constitute unchallenged ‘objects of cult-like veneration’ in the words of David Kennedy. The most recent Nagoya protocol to the biodiversity convention was adopted in 2010, with explicit goals regarding the redistribution of benefits from the sustainable utilisation of biogenetic resources, despite the fact that the pathway towards such a goal outside of international trade law remains murky.

The paper posits that the challenge to the perceived self-evident necessity of the political and legal structures of the project of international environmental law is too crucial to be left to fringe climate denialism and market-driven environmental scepticism, but should form part of mainstream critical environmental law scholarship. A composite grid of intelligibility is required for the study of the contemporary re-ordering of political, economic and social life through globalisation, a steady stream of financial and security crises, climate change and civil war. To initiate some thinking towards this significant task, the paper delves into the critical and intellectual history of biodiversity, seeking to reopen and reuse the contingent historico-

political field opened by the introduction of the concept, swiftly foreclosed by the double-bind of legal positivism and pragmatism.

What is at stake is the conception of an environmental regime, such as the one coalesced around the concept of biodiversity, as a heterogeneous apparatus of power; as an assemblage of substantive rules, administrative mechanisms, spatial arrangements, and knowledge structures. Using this assemblage as a guide, the analysis uncovers a series of conflicts over ecological truth that have produced our current understanding of global environmental issue, such as biodiversity, in predominantly scientific and economic terms. This environmental knowledge not only possesses its own historical evolution, but is in itself also a political truth that produces its own broader global pathology and political economy, with the related distribution of political authority, economic capital and natural resources. Consequently, a different configuration of the apparatus will produce different forms of environmental knowledge and, in turn, types of political truth.

By tracing these links between law, history and politics in environmental governance back to the perceived decline of the biodiversity regime, this historical-critical analysis of deployed in this paper abandons the obsessive veneration of rules and institutions and moves towards an transdisciplinary engagement with the political project of international environmental law and the imagining of different legal and political structures that could have materialised.

2016 Annual Meeting Keywords: international law and politics, social theory and law, environment & energy, Economy, Global Economy and Law, Legal History, Transnational Legal Orders, International and Regional Institutions, Colonialism and Post-Colonialism

2016 Annual Meeting Keywords: international law and politics, social theory and law, environment & energy

Damjan Kukovec

Hierarchical Structure of the World and Natural Resource Governance

My paper will address a general conceptual question of thinking about law and social change. Lawyers often claim that economists or social scientists do not have a good idea about law. But when thinking about social change, it turns out that existing ways of thinking about law do not necessarily give a sufficient account of the legal structure. I have argued that law and governance should be understood as a constant (hierarchical) struggle among people. In other words, law and governance should be understood in terms of management of a constant struggle between ourselves and within ourselves, rather than building an order – either a legal order or a natural order of things. I will contrast this thinking with the idea of ecological justice, which sets out the relationship of justice as between people and the rest of the natural world.

The purpose of this paper will be an inquiry into the analytics of thinking about law when addressing social change. The ultimate aim is a distributional inquiry into a particular legal regime of management – the European Union, that aims to serve as an example for analytical thinking that could open up avenues of thinking about governance generally.

Law and governance should be understood as daily hierarchical struggle.¹ In the constant hierarchical struggle, many hierarchies are reproduced. In order to understand the self-perpetuation of hierarchies, we need an understanding of law that is not based on an emanation of the spirit or the will of the people. We need an understanding that is different from law as a system of primary and secondary rules or from law as integrity. Law should not be understood as a simple embodiment of background rules and enforcement institutions that condition the social struggle, or as a background to another phenomenon such as political economy. Our understanding of law should be different from our understanding of the interplay between individualist and altruist considerations. We need an account of law that accounts for our daily lives and hierarchies.

To portray the deficiency of some of the existing thinking about law, consider Hohfeld. He argued for a reconceptualization of private law rules as products of interplay between “justice and policy,” rather than as conceptual derivations. Hohfeldian analysis led to a decomposition of the notion of property and contract into bundles of rights, privileges, power, and immunities—together, legal entitlements—without a common conceptual core. The focus of such analysis is not abstract concepts, such as property, contract, restitution, money, or sovereignty, but rather any legal doctrine as a set of freedoms and prohibitions, as juridical composites that enable us to imagine their reshuffling.

This focus is a staple of realist and post-realist analysis in contemporary legal thought, but is nonetheless deficient. Legal doctrines can be reimagined as a bundle of freedoms and prohibitions, but such analysis of the legal system is inapposite to explaining hierarchies and domination. Instead, every person represents a set of freedoms and prohibitions or of injuries and recognitions in every moment in time. Each of us is a constantly fluid bundle of injuries and recognitions that set us into a particular situation in the global hierarchical structure.

Law as background rules to another activity, such as bargaining over limited resources also suffers from several analytical deficiencies.² Law in action is the way we are hierarchically constituted by injuries and recognitions of others in every moment in time. The power of every person is a particular bundle of injuries, allocated to them by their own and other people’s action or inaction and liberated and constrained by our natural selves and our environment.

How does this idea of law square with the idea of ecological justice and of protection of natural resources or environment? Theories of justice are often conceptualized in the sense of justice for all or have an underlying idea of what justice should constitute. Universalization in the context of natural resource governance is often articulated in terms of the relationship between people in general and our natural environment.

Ecological justice is one such understanding of justice. It is an emerging form of justice – as between people and the rest of the natural world, and provides a stark comparison with more usual forms of justice which focus instead on relations between people.

Thinking in terms of ecological justice often leads to an inquiry into existing categories of environmental protection or to arguments for the development of sets of ecological criteria (e.g. integrity, coherence,

¹ See Damjan Kukovec, 21.1 COLUM J. EUR. L. 131 (2014).

² See Damjan Kukovec, Hierarchies as Law, 21.1 COLUM. J. EUR. L. 131 (2014).

resilience) that should address the protection of natural resources. This is said to promise thinking about justice in an entirely new way. We can look at this as a collective project of including all species in the biotic community within the realms of justice.

However, “ecological justice”, as anything else, cannot avoid the daily hierarchical struggle among people in the world. How do discussions about ecological justice obscure our daily governance and the diversity of costs of protection of environment borne by different sections of the population? Each of us is an actor in global governance in every moment. We all pollute and carry the costs of environmental change in one way or the other, yet more detailed investigations that there are several different ways of tackling it, depending on the specific structuring of environmental protection.

How does universalism prevent us from seeking new solutions in natural resource governance? The analytical unclarity of protection of natural resources when legal relationships are phrased in terms of the relationship between humanity and nature may create blind spots and may contribute to the reproduction of hierarchies among people. How may some policy proposals to protect environment and natural resources actually contribute to the reproduction of existing hierarchies, to inequality or even human rights violations?

European Union is often seen at the forefront of natural resource and human rights protection. I will explore the rule making of the European Commission and decisions of courts, such as the European Court of Justice in order to look for (missed) patterns of who carries the costs of environmental change and of proposals to tackle it. I will address regulatory mechanisms for environmental protection, particularly environmental assessment and its use as a means to assess whether negative environmental impacts of policies are borne disproportionately by certain sectors of the population. The relationship between the European Union’s center and its periphery will serve as context. This context promises to reveal insights about distributional consequences of regulation in terms of centers and peripheries globally.

The point of this inquiry is not only a study of distributive consequences of existing regulation. As I have argued in the past, when thinking about social transformation, we do not have a good idea about law, which limits our potential for social transformation in general. Rethinking law in terms of a daily hierarchical struggle promises to open up new avenues of thinking about law and governance in general.

Usha Natarajan

The Marriage of Human Rights and the Environment: From Mutual Convenience to Irreconcilable Differences

Each year, state representatives congregate in a chosen city to negotiate what they will do collectively to combat climate change. In December 2014 it was Lima; at the end of 2015 it will be Paris. Previous summits were held in Copenhagen and many other cities, but all these meetings appear to achieve is increasing frustration, disappointment and hopelessness as the international community fails again and again to reach a binding legal agreement to halt global warming. From climate change to the mass extinction of species, from desertification to deforestation, when faced with global environmental challenges the international community has been unable to cooperate effectively towards stemming harm.

While barriers to cooperation are manifold, they can be broadly characterized as falling into two categories: first, an unwillingness to address issues of environmental inequity and injustice between and within countries; and second, an inability to imagine alternatives to current patterns of economic development. In

the face of these two daunting problems, can the discourse of human rights assist in bridging the discord, or is it part of the problem?

The first category of environmental injustice has to do with the poor and vulnerable facing disproportionate and increasing impacts of environmental change and resource insecurity. Their sense of injustice stems from a history of western colonialism fuelled largely by inequitable and unsustainable use of colonial resources. This was followed in the modern era by the onset of post-industrial western lifestyles of mass consumption and waste causing serious global environmental harm. In the postcolonial era, as non-western states seek to replicate similar development pathways, a small but growing share of people in these states are also contributing to environmental degradation.

Environmental summits are characterized by a divide: on the one side those who caused the problem but insist that everyone participate in the solution; and on the other, those who did not cause the problem and thus refuse to tolerate any limits placed on their development choices. The inability to bridge this divide has meant that environmental problems keep worsening. As environmental impacts play out disproportionately, this serves to escalate the sense of injustice and further entrench divisions over time.

Within this context, human rights discourse operates in various ways. Developing countries have asserted their citizens' right to development, and peoples across the global south have asserted their right to a clean and healthy environment, their right to clean air, water and food, and their right to livelihoods. Rights-discourse is also harnessed to demand fair treatment. Further, the universality of human rights places environmental injustice in a global context instead of state-based assessments of environmental problems. For instance, today China and the United States are the two leading contributors to climate change due to high greenhouse gas emissions. But a rights-based discourse draws attention to the fact that the average Chinese citizen has a much smaller carbon footprint than his or her American counterpart.

Human rights discourse also points to disparities within states, where increasing economic inequality is accompanied by a huge disparity in ecological footprints along the lines of class, race, and other parameters. That is to say, if we all possess an equal right to development, and this inevitably entails a certain minimum 'right to consume and pollute', then this suggests a convergence between the ecological footprints of the rich and poor.

However, though initially appealing, articulating environmental struggles in the language of rights may not be helpful for more effectively addressing ecological concerns. The difficulty lies in the second of the barriers to cooperation noted above: the inability to imagine development alternatives. When dominant development patterns continue to demand infinite economic growth on a planet with a limited productive and adaptive capacity, the result is inevitable ecological decline. Alongside ecological degradation, current development patterns also exacerbate economic inequality between and within states, creating systemic global economic and environmental injustice. In such a context, articulating the problem in terms of achieving a balance between competing rights (the right to development and the right to a healthy environment) is unconstructive unless a substitute is found for the underlying economic system that demands limitless growth.

Thus, the human rights framework may not help to reconcile globalization with its ecological limits. A more serious concern, however, is whether this framework may be part of the reason we struggle to imagine sustainable ways of life. The phenomenal growth of rights-based discourse has happened alongside ever-

expanding fossil-fuel dependency, pollution and waste; modern freedoms are increasingly understood as being contingent on a resource-intensive, mass-consumption lifestyle. Today, increasing numbers of people understand themselves through a rights philosophy that privileges particular types of human entitlement and systemically devalues the non-human. Such a philosophy is the epitome of an obsessively anthropocentric world view. It helps to propagate and entrench a particular abstraction of the 'human' that is profoundly disconnected from knowing ourselves as a species inextricably interconnected with other organic and inorganic life.

In an intertwined state of being, where each entity's survival depends on its relationship with others within an ecosystem, the distinction between human and non-human is untenable; the non-human 'other' is essential for human life. Whatever we do to the other we are also doing to ourselves.

Environmental crises are leading to a collapse of the planet's ecosystems, posing an existential threat to the human species. The modern understanding of ideas such as law, economy, culture, and the 'human' take for granted the stability of the underlying natural order. But the consequence of these modern worldviews has been to destabilize some of the fundamental conditions for life. As such, the situation demands a reconceptualization of law, economy, and other disciplines, whereby humans are understood within the context of our environment, rather than separate from it.

Environmental crises may serve to do nothing more than accentuate the existing inequities of globalization, adding environmental degradation to the litany of sufferings already inflicted on the poor. Alternatively, if we meet environmental challenges with a fundamental reassessment of our assumptions about ourselves and our place in the world, then we may find that there is a link between the way we treat the non-human environment and the way we treat each other. If so, in seeking a solution to environmental crises we may also find our humanity.

Matthew Nicholson

Nature's Mourning: On the Language of Law and the Muteness of Nature

This paper extends and applies my previous work on general international legal theory – see 'Walter Benjamin and the Reimagination of International Law', forthcoming (to be published online October / November 2015 and in print early 2016) in *Law and Critique* – to international environmental law and questions concerning law's relationship, through language, with nature. Drawing on Walter Benjamin's 'On Language as Such and on the Language of Man' (in Marcus Bullock and Michael W. Jennings eds., *Walter Benjamin: Selected Writings: Volume 1 1913-1926*, The Belknap Press of Harvard University Press, 2004, 62), the paper explores the sense in which international environmental law presents itself as a 'language as such' – a 'paradisiacal language ... of perfect knowledge' (Benjamin 'On Language', p. 71). It argues that international environmental law is better conceived as what Benjamin labels a 'language of m[e]n [and women]' – a 'mediate' language, without 'perfect knowledge' of that which it conceives (Benjamin, 'On Language', p.71). For Benjamin language, including legal language, is 'fallen', a 'human language ... which has stepped out of ... the language of knowledge, from what we may call its own immanent magic, in order to become expressly, as it were externally, magic' (Benjamin 'On Language', p. 71). Keen to demonstrate its 'magic', its capacity to know and control nature, law denies and represses the sense in which it renders nature 'mute' with the consequence that 'nature mourns' (Benjamin 'On Language', p. 73).

Nature does not communicate and is not known through law and yet law responds to nature's 'muteness' by creating more law, intensifying its efforts to regulate nature. This, as I will show in the paper, is the story of

the development and expansion of international environmental law from the 1970s to the present day. Environmental law has consistently sought to extend its capacity to control, to judge and speak for nature (consider Christopher Stone's, 'Should Trees Have Standing?', (1972) 45 Southern California Law Review 450), asserting its connection or identity with nature despite repeated demonstrations of a disconnect or non-identity (on identity and non-identity see Theodor W. Adorno, *Negative Dialectics*, Continuum, 2007; first published 1966). We are living through repeated demonstrations of the non-identity of law with nature – consider, for example, the apparent impossibility of arriving at an effective global climate change 'deal' at the Paris Conference in December 2015, and the apparent impossibility of compensating for pure environmental damage within international oil pollution liability conventions (see International Convention on Civil Liability for Oil Pollution Damage (1969 / 1992), Article 6(a): 'compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken', and Dramé Ibrahima, 'Recovering Damage to the Environment per se Following an Oil Spill: The Shadows and Lights of the Civil Liability and Fund Conventions of 1992', (2005) 14(1) *RECIEL* 63). This paper argues that only by appreciating the non-identity of 'human language' and nature can we create a positive future for international environmental law. Without this appreciation we will continue to play out the 'immense irony [that] marks the mythic origin of law' - that '[t]he Tree of Knowledge stood in the garden of God not in order to dispense information on good and evil, but as an emblem of judgment over the questioner' (Benjamin, 'On Language', p. 72). It is by appreciating the impossibility of truly knowing nature through law that we can begin to construct a law that 'imperfect[ly]' reaches out to nature (Benjamin, 'On Language', p.74). A fundamental change in the way we conceive of law's linguistic relationship with nature is required. In place of a 'language as such' we need to foreground the limitations inherent in the conception of international environmental law as a 'human, a 'mimetic' language (Walter Benjamin, 'On the Mimetic Faculty' in Michael W. Jennings, Howard Eiland, and Gary Smith eds., *Walter Benjamin: Selected Writings: Volume 2, 1927-1934*, Rodney Livingstone tr., The Belknap Press of Harvard University Press, 2005, p. 720). The 'mimetic faculty' required to achieve this is 'a gift for seeing similarity', 'a capacity for producing similarities' (Benjamin, 'On the Mimetic Faculty', p. 720). A 'mimetic' understanding of law's language implies, as Beatrice Hanssen explains, a '[return] to the magical [pre-lapsarian] moment preceding the sharp division between object and subject in instrumental reason and technology' (Beatrice Hanssen, 'Language and mimesis in Walter Benjamin's work' in David S. Ferris ed., *The Cambridge Companion to Walter Benjamin*, Cambridge University Press, 2004, p. 54, at p. 66). Law, as a 'mimetic' language, is no longer an instrumental, technological device that renders nature 'mute' through its effort to govern it. This is not the language of the 'clean development mechanism' and 'carbon trading'. It is a language of 'inauthentic similarity' (Hanssen, p. 61), of the child who 'plays at being ... a windmill and a train' (Benjamin, 'On the Mimetic Faculty', p. 720), of 'dances' that imitate 'the processes ... in the sky' (Benjamin, 'On the Mimetic Faculty', p. 721). It is the language of 'the astrologer' who 'reads the future' in the stars, who 'reads the constellation from the stars in the sky' (Walter Benjamin, 'Doctrine of the Similar' in Michael W. Jennings, Howard Eiland, and Gary Smith eds., *Walter Benjamin: Selected Writings: Volume 2, 1927-1934*, Rodney Livingstone tr., The Belknap Press of Harvard University Press, 2005, p. 694, at p. 697).

This 'mimetic' language depicts meaningful patterns in nature, mediating the relationship between the human being and nature without assuming an identity between them; it 'imitates the environment' (Theodor W Adorno and Max Horkheimer, *Dialectic of Enlightenment*, John Cumming tr., Verso, 1997; first published 1944, p. 187). The present inaccessibility of such a language and such a concept of international environmental law is, as Theodor Adorno and Max Horkheimer explain, the product of the 'bourgeois mode of production' in which 'the indelible mimetic heritage of all practical experience is consigned to oblivion'

(Adorno and Horkheimer, p. 181): 'Civilization has replace the organic adaptation to others and mimetic behavior proper, by organized control of mimesis, in the magical phase; and, finally, by rational practice, by work, in the historical phrase' (Adorno and Horkheimer, p. 180). This paper, in summary, argues for a conception of international environmental law based on an understanding of law's language as a 'human', 'mimetic' language which reaches out to nature on the basis of the non-identity of the human and the natural. It is time for law to stop 'work[ing]' – see Adorno and Horkheimer quote immediately above – on the environment. It is time to start reading the environment's patterns and mimicking them in law.