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EDITORIAL

Transnational Environmental Law in an Era of Radical Rethinking and Widespread Law Reform

1. INTRODUCTION

Certain periods in environmental law are characterized by the frenzied development of new norms and legal tools. The development of early domestic and international environmental law in the 1970s, the burst of activity surrounding the Rio Earth Summit in 1992,[1] the unveiling of the United States (US) Clean Power Plan in 2015,[2] and even the rapid negotiation and coming into force of the Paris Agreement[3] exemplify these moments of high-profile development. At other points, environmental law is pushed and pulled and evolves in a quieter and more incremental fashion. During these periods, the hard work of shaping systems of environmental governance continues. Treaties are amended, domestic regulatory regimes are shaped, litigation progresses, and local entities whittle away at a variety of energy and environmental challenges.

At the time of writing, we are concluding a month of high-profile blows to existing systems of environmental law. In August 2018, President Trump took dramatic steps to reshape US climate change law; the United Kingdom (UK) government warned of the far-reaching impacts of a no-deal Brexit; the French environment minister resigned in frustration over climate inaction; and Australia failed to pass legislation to limit greenhouse gas emissions. Less visibly, during the same month, the stock of e-cars sold in Europe reached one million; California's legislature adopted a new, more aggressive renewable energy mandate; the Trump administration faced multiple setbacks in court that impeded efforts to roll back domestic environmental laws; and a revision of the North American Free Trade Agreement (NAFTA)[4] was negotiated to include stronger environmental enforcement provisions. Amidst these legal challenges and incremental changes, China and Europe experienced record heat this summer;

[1] United Nations Conference on Environment and Development (UNCED), Rio de Janeiro (Brazil), 3–14 June 1992.

[2] 80 FR 64662 (23 Oct. 2015). The Clean Power Plan was promulgated under s. 111 Clean Air Act, 42 U.S.C. 7411.

[3] Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: http://unfccc.int/paris_agreement/items/9485.php.

[4] Ottawa, ON (Canada), Mexico City (Mexico), Washington, DC (US), 17 Dec. 1992, in force 1 Jan. 1994, available at: http://www.international.gc.ca/trade-commerce/assets/pdf.

devastating floods swept through India and Japan; toxic algal blooms exploded along the Florida coast; and wide swathes of forests on the US and Canadian West Coast burned.

We find ourselves in an era of environmental law where the stakes of responding to environmental challenges are greater than ever and where both high-profile and incremental modes of change are on the upswing and, often, are in tension. Populist movements and radical governance shifts push against the normative foundations and institutional contours of environmental law systems worldwide. Meanwhile, efforts are under way at every level of governance to evaluate and refine existing approaches to environmental challenges.

The articles in this issue of *Transnational Environmental Law* (*TEL*) are a microcosm of the contemporary field of environmental law. They explore an array of topics such as the radical rethinking of the rights of nature; the role that contracts, public interest litigation, standards of judicial review and the common law play in shaping legal systems; and a basin-level review of a nutrient run-off governance regime. Together, they reflect the breadth of the environmental challenges we face, the range and sophistication of tools that are being deployed to address these challenges, and the intensity of conflict between ongoing, high-level efforts to reshape systems of environmental law and increasingly prolific and innovative efforts to engage in significant, widespread law reform.

2. CONTESTED VALUES AND NORM DIFFUSION IN ENVIRONMENTAL LAW

As a result of the Trump administration's vociferous efforts to dismantle and reshape US environmental law and the intense debate about the impacts of Brexit on European Union (EU) and UK environmental law,[5] much of the recent conversation around the radical rethinking of environmental law has focused on apparent efforts to reverse or, at least, complicate the implementation of progressive environmental laws and policies. Amidst these seemingly disruptive changes, however, an altogether different conversation is evolving about the radical rethinking of environmental law. This parallel dialogue is not interested in interrogating how changing legal and political administrations complicate mainstream efforts to respond to environmental challenges. Rather, the focus is on a more fundamental challenge to the normative foundations of modern environmental law and a different vision of the relationship between humans and the environment. This vision pushes against the deeply anthropocentric perspective that characterizes existing systems of law and offers an alternative perspective premised on notions of ecocentrism. Burgeoning efforts to translate ecocentric views into law reveal 'deep-seated conflicts among visions of the world and the human place in it'.[6]

[5] See, e.g., C. Hilson, 'The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship' (2018) 7(1) *Transnational Environmental Law*, pp. 89–113.

[6] J. Purdy, 'Understanding Environmental Law as Public Provision', *Law & Political Economy Blog*, 29 Nov. 2017, available at: https://lpeblog.org/2017/11/29/understanding-environmental-law-as-public-provision.

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In their contribution, Paola Villavicencio Calzadilla and Louis Kotzé[7] offer one of the most thorough and thought-provoking explorations to date of this normative countertrend in environmental law. They explore the nature and impact of the law reform efforts in Bolivia that provide for the rights of Mother Earth. Building on their earlier publication in *TEL*, in which they examined Ecuador's constitutional experiment with the rights of nature,[8] the authors offer a careful review of the factors that led to, and shaped, Bolivia's law reform efforts, and they explore both the substantive and symbolic impact of these efforts. In key part, Villavicencio Calzadilla and Kotzé suggest that, in Bolivia and elsewhere, efforts to reframe law to recognize the rights of nature 'have significant potential (especially symbolically, but also otherwise) to frame political, legislative and academic debates on ways to confront the persistent anthropocentrism of law that legitimizes and perpetuates the neoliberal development model the world over'.[9]

After sketching the socio-political dynamics that led to a crisis of statehood in Bolivia, Villavicencio Calzadilla and Kotzé detail the manner in which the new Bolivian Constitution[10] constitutionalizes the protection of nature, here framed in terms of Mother Earth. Importantly, the Constitution positions ecological integrity as a cornerstone of the new constitutional democracy that is envisioned. This ambitious framing is complicated, however, by the compromises that were made during the negotiating period for the new Constitution as well as by subsequent legal developments. In the third part of the article, Villavicencio Calzadilla and Kotzé meticulously explore how early compromises and subsequent attempts at reform reveal continuing tensions between efforts to reflect and ingrain the rights of Mother Earth in Bolivian law with the deep and pervasive economic ties the country has with extractive industries.

Villavicencio Calzadilla and Kotzé demonstrate that the struggle in Bolivia, like other efforts at radical law reform, reflects the challenges inherent in resolving deep-seated social and political tensions. They emphasize, however, that despite 'clear contradictory objectives and provisions'[11] and the absence of 'improvement in environmental quality *per se*',[12] Bolivia's efforts are domestically and globally significant. In key part, the reforms positioned Bolivia as 'a global champion', and created 'an opportunity to shape perceptions about the country and to influence the global political discourse on ecocentric approaches to environmental protection'.[13]

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7 P. Villavicencio Calzadilla & L.J. Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) *Transnational Environmental Law*, pp. 397–424.

8 L.J. Kotzé & P. Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6(3) *Transnational Environmental Law*, pp. 401–33.

9 Villavicencio Calzadilla & Kotzé, n. 7 above, p. 399.

10 Constitution of the Plurinational State of Bolivia, 2009, available at: https://www.constituteproject.org/search?lang=es&q=Bolivia&status=in_force.

11 Villavicencio Calzadilla & Kotzé, n. 7 above, p. 414.

12 Ibid., p. 415.

13 Ibid.

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A key theme that emerges from the interrogation by Villavicencio Calzadilla and Kotzé of the reconfigured legal relationship between humans and nature is a 'radical opposition to the neoliberal consumerist, growth-without-limits paradigm'[14] that promoted past patterns of natural resource exploitation in Bolivia and elsewhere in the Global South. Bolivia's law reform efforts, in this regard, reflect an emergent international trend that pushes back against the 'anthropocentric hierarchies' that frame systems of environmental law worldwide. Notwithstanding the symbolic importance of these efforts, the substantive challenges Bolivia confronts in displacing existing patterns of economic development reveal the persistence of the dominant paradigm. Ultimately, Villavicencio Calzadilla and Kotzé suggest, the vital test for the success of law reform efforts taking place in Bolivia, Ecuador, and elsewhere in the world will be the ability to use law 'to continuously challenge, over a period of time, those deeply vested neoliberal economic, political and social interests that threaten Earth system integrity'.[15]

Natasha Affolder examines a very different and more subtle way through which legal norms are being challenged and diffused: environmental contracts.[16] In an important contribution to an underexplored domain of environmental law, Affolder examines three key ways in which environmental contracts influence the substance and movement of environmental norms. Specifically, she suggests that environmental norms are diffused via the movement from contract to contract and from contract into legislation, and that contracts also play a central role in spreading and entrenching private standards. In each of these three contexts, Affolder uses case studies to interrogate and demonstrate how these patterns of diffusion are occurring.

Affolder argues that 'the significance of environmental contracting lies not only in the aggregated content of individual contracts and relationships but, more profoundly, in the *practices* of contracting which encourage legal norms to migrate and multiply between distinct project and transactional settings'.[17] In common with Villavicencio Calzadilla and Kotzé, Affolder explores the role that innovative instruments of law can play in influencing perceptions and responses to environmental challenges. In contrast to the radical rethinking of human-environment relationships that Bolivian law reform proposes, however, Affolder focuses on how contracts can more subtly but, perhaps, more pervasively influence change from the inside out. As traditional instruments of private ordering, environmental contracts tend to reflect and embed existing distributions of power and raise important questions of consent and transparency. Yet, at a moment in time when 'in some countries, the potential for broad and progressive environmental regulation seems implausible, if not impossible, [Affolder suggests that] contract holds promise as a new religion'.[18] The power of contracts, above all, must be more

[14] Ibid., p. 403.

[15] Ibid., pp. 423–4.

[16] N. Affolder, 'Looking for Law in Unusual Places: Cross-Border Diffusion of Environmental Norms' (2018) 7(3) *Transnational Environmental Law*, pp. 425–49.

[17] Ibid., p. 426.

[18] Ibid., p. 447.

carefully interrogated so that the ways in which environmental contracts interact with and shape 'other sites of legality'[19] are better understood, more thoroughly theorized, and more openly debated.

Villavicencio Calzadilla and Kotzé and Affolder offer two very different visions of how instruments of law are being used to rethink and influence relationships of power and law reform in the environmental field. The two articles, however, share an interest in illuminating the sometimes visible, sometimes hidden, but always important role that environmental law plays in channelling and responding to contested and evolving values.

Evan Hamman and Felicity Deane[20] examine a localized, ongoing effort at law reform. Their article focuses on the specific question of how to rethink a regional governance regime to protect the Great Barrier Reef from nutrient run-off originating from the Australian sugarcane industry. While the focus is local, nutrient run-off from agricultural activities is, of course, a challenge that countries all over the world face. To this end, the authors suggest that there are three key transferable lessons. Namely, governance systems designed to control agricultural run-off (i) must have a regulatory backbone, (ii) must include regular and rigorous systemic evaluations, and (iii) be culturally appropriate, particularly with regard to the relevant regulated industries.

The governance lessons offered by Hamman and Deane draw on a detailed examination of the interaction between the regional government entities and the sugarcane industry in Queensland. Like Villavicencio Calzadilla and Kotzé and Affolder, however, Hamman and Deane are also interested in larger questions of how environmental law responds to and channels contested values. They offer critical insight into how the persistent 'neoliberal economic agendas' have led to a preference for industry-driven self-regulation coupled with 'a considerable fear of regulatory oversight' and to the perception that rules are 'a practice of last resort'.[21] The challenge, therefore, is not merely to develop a better understanding of the physical processes that lead to environmental degradation, but also to develop a more sophisticated understanding of how local culture and local needs influence perceptions of law and thus the viability of different governance approaches. As the authors point out, 'regulatory and governance frameworks never operate within a social vacuum'[22] and environmental governance regimes that are 'culturally appropriate' are more likely to be sustainable and successful in the long term.

These first three articles in this issue take on very different topics. From radically rethinking the relationship between humans and the environment, to exploring the role of contracts in shaping and diffusing environmental norms, to examining how socio-cultural context influences the shape of governance regimes, each contribution

[19] Ibid., p. 448.

[20] E. Hamman & F. Deane, 'The Control of Nutrient Run-Off from Agricultural Areas: Insights into Governance from Australia's Sugarcane Industry and the Great Barrier Reef' (2018) 7(3) *Transnational Environmental Law*, pp. 451–68.

[21] Ibid., pp. 460–1.

[22] Ibid., p. 466.

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examines a very distinct law reform effort, whether those efforts are purposeful and focused, as is the case in Bolivia and Queensland, or more circumstantial and diffuse, as is the case with environmental contracts. Each of these highly individualized studies, however, also reveals how, from radical efforts at the global level to nuanced efforts at the basin level, environmental law reform attempts are not only persistent and pervasive at every level of governance, but are also a conduit through which 'deeply held and sharply clashing values'[23] are continually aired and exercised.

3. COMPARATIVE ENVIRONMENTAL LAW IN A TIME OF POLITICAL FLUX

Legal disruptions often lead to generative periods in environmental law scholarship. Such is the case right now in the US and Europe. Amidst the chaos instigated by the transition from the Obama to the Trump administration and the uncertainty prompted by the UK's Brexit vote, scholars are exploring the implications and the range of possible responses to these shifts. In one such piece, Anne Richardson Oakes explores the role of the common law in filling gaps that might emerge from the potential failures and dismantling of systems of environmental law in the US and the UK.[24] Focusing on the public trust doctrine, Richardson Oakes explores the question of 'whether common law judicial resourcefulness can transform a transatlantic hybrid of uncertain parentage into a powerful tool of environmental protection'.[25]

In the US, during the early to mid-2000s, federal efforts to address climate change lagged. In the absence of federal legislation or regulation, there were a number of high-profile attempts to use common law tort lawsuits as a mechanism to fill perceived legal gaps and compel federal action on climate change.[26] After more than three decades of efforts to develop a comprehensive federal environmental statutory and regulatory regime, the return to tort-based lawsuits to address a complex environmental challenge was remarkable and revealed the depth of concern about climate change and the lengths to which states and other actors were willing to go to try to redirect federal climate policy. These efforts, however, largely proved ineffective and, ultimately, redundant once President Obama initiated efforts to develop a more comprehensive federal response to climate change.

The interest in using common law tools as gap fillers, however, persisted. In 2011, an organization called Our Children's Trust initiated a new set of lawsuits against the US government grounded in both constitutional and common law claims. In key part, the common law dimension of the litigation is grounded in the public trust doctrine and rests on the basis that the atmosphere is a common resource which the

[23] J. Purdy, 'American Natures: The Shape of Conflict in Environmental Law' (2012) 36(1) *Harvard Environmental Law Review*, pp. 169–228, at 170.

[24] A. Richardson Oakes, 'Judicial Resources and the Public Trust Doctrine: A Powerful Tool of Environmental Protection' (2018) 7(3) *Transnational Environmental Law*, pp. 469–89.

[25] Ibid., p. 469.

[26] See, e.g., K.H. Engel, 'Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies (2007) 155(6) *University of Pennsylvania Law Review*, pp. 1563–603.

government holds in trust for the good of the public. In her article, Richardson Oakes explores the substance of the claims and the likelihood of the public trust doctrine being used successfully in the US and the UK to bolster environmental protection regimes.

To this end, she offers a thorough history of the emergence of the public trust doctrine in its contemporary form in the US. In so doing, she seeks to unravel the 'often repeated claim that the doctrine is an attribute of sovereignty inherited from the English common law'.[27] This claim, she suggests, is 'largely myth'.[28] Richardson Oakes' central argument is that English law, as it currently stands, does not recognize a doctrine of public trust and yet commentators in the US 'continue to rehearse in mantra-like fashion a narrative that ties the doctrine to asserted roots in English common law'.[29] US public trust doctrine thus emerged from a misunderstanding or a misinterpretation of English common law. From these confused origins, the doctrine has evolved and taken on its own life in the US legal system. As Richardson Oakes demonstrates through a careful historical analysis of English and US case law, this 'initial misunderstanding of English law has given rise to a myth of common law origin that is now firmly established at both state and federal level and has received the imprimatur of the US Supreme Court'.[30]

Having concluded that contemporary understanding of the public trust in the US evolved from dubious English law roots, Richardson Oakes then explores the implications of these tangled origins for future reliance on the doctrine in both the US and the UK. She suggests that remodelling the public trust doctrine to fit the atmospheric trust cases requires a rethinking, or expansion, of the already historically precarious doctrine. In light of these daunting conditions, success before a higher court would turn such litigation into 'the case of the century' in the US.[31] Regardless of whether the doctrine proves malleable in the US, Richardson Oakes suggests that it is 'unlikely to become a lynchpin for environmental litigation in the UK in the foreseeable future', given the absence of historical precedent for the doctrine in English law.[32]

Moving from the malleability of the common law to the relative ability to use litigation to enforce species protection law, Yaffa Epstein offers a similarly careful comparative analysis of an important and evolving area in US and EU environmental law. She examines ongoing conflicts over the legal protection of wolves to compare some key aspects of laws governing species protection in the US and the EU.[33] Epstein begins her analysis by framing the historical differences between how the US and the EU employ litigation in the lawmaking and dispute resolution process. In key part,

27 Richardson Oakes, n. 24 above, p. 472.

28 Ibid.

29 Ibid., p. 477.

30 Ibid., pp. 478–9.

31 Ibid., p. 486.

32 Ibid., p. 488.

33 Y. Epstein, 'Adversarial Legalism and Biodiversity Protection in the United States and the European Union' (2018) 7(3) *Transnational Environmental Law*, pp. 491–513, at 492.

she emphasizes that, historically, litigation has been used more frequently in the US to influence and shape law. In contrast, litigation – and, in particular, public interest litigation – is more constrained in the EU, with Member States retaining significant power and responsibility for the administration and enforcement of EU law. From there, Epstein reviews the relevant domestic legal regimes, focusing on the US Endangered Species Act[34] and EU Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive),[35] before examining the similarities and differences in US and EU legal efforts to protect wolf populations.

Using a three-part frame that examines against whom claims can be brought, who can bring claims, and the types of claim that can be brought, Epstein offers a detailed analysis of the evolving rules on standing in US and EU conservation law. She adds complexity to the analysis by focusing on the application of EU law in one particular Member State, Sweden. Through her detailed review of Swedish standing law, she unveils the complex set of factors that shape an evolving understanding of the relationship between the EU and Member States in carrying out conservation policy. Ultimately, Epstein suggests that the American system of adversarial legalism is gradually pervading the European legal terrain, and pushing the EU and thus Member States towards expanded use of litigation as a principal policy-making and dispute settlement tool.

Read together, the contributions by Richardson Oakes and Epstein exemplify both how much shared legal history and culture there is between the US and the EU, as well as where and how these systems diverge. Equally, both pieces reveal the dynamic and ever evolving nature of environmental law and the important role that environmental litigation plays in this regard. In an era of great political flux, these comparative analyses also offer insight into the legal tools available to respond to direct challenges and institutional undermining of systems of environmental law.

The complex interplay between EU law and the idiosyncrasies of Member State legal systems that underpin Epstein's analysis of EU and Swedish conservation law is similarly the focus of review in the final contribution to this issue. Áine Ryall maps the development of the 'web of principles' that shape standards of judicial review with respect to the enforcement of environmental impact assessment (EIA) law in Ireland.[36]

Through a highly nuanced review of Irish case law involving questions of the timing and scope of judicial review of EIA cases, Ryall reveals how the failure on the part of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)[37] and EU Directive 2011/92/EU on the Assessment of the Effects of Certain Public and

[34] 16 U.S.C. § 1531 et seq. (1973); Pub. L. 93-205 (28 Dec. 1973).

[35] [1992] OJ L 206/7.

[36] Á. Ryall, 'Enforcing the Environmental Impact Assessment Directive in Ireland: Evolution of the Standard of Judicial Review' (2018) 7(3) *Transnational Environmental Law*, pp. 515–34, at 515.

[37] Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/treatytext.html.

Private Projects on the Environment (EIA Directive)[38] to articulate standards of judicial review creates complex questions of interpretation at the Member State level. Similarly, the evolving jurisprudence of the Court of Justice of the European Union (CJEU), while offering some guidance, leaves ample room for interpretation by Member States concerning the appropriate standard of review. In particular, CJEU jurisprudence both 'confirms that, by virtue of the principle of national procedural autonomy, Member States enjoy a degree of discretion in implementing the obligations' in the EU EIA Directive,[39] and directs that the 'litigant has the broadest possible access to review by the courts' on both questions of substantive and procedural legality,[40] forcing Member State courts to navigate the space between discretion and compliance with EU legal expectations.

Ryall's thoughtful review of Irish EIA jurisprudence reveals a persistent adherence on the part of Irish judges to the dominant, conservative test for determining when judicial review is appropriate, even when the compatibility between this test and EU law remains unclear. Ultimately, however, despite rigid adherence to the traditional test for judicial review, Ryall suggests that other areas of Irish judicial review law and practice 'have evolved significantly' and that the Irish judiciary 'appear[s] keen to give effect' to EU obligations 'in practice, notwithstanding the potential for disruption to well-established features of the national legal system'.[41]

Above all, in common with Epstein's analysis of EU conservation law, Ryall's review of Irish EIA judicial review cases highlights the complexity that continues to underpin the relationship between the EU and the Member States on numerous questions of environmental law and the copious amounts of resources that are spent in trying to clarify the roles and responsibilities of the various actors in the EU system.

4. CONCLUSION

The current narrative of environmental law is dominated by stories of daunting challenges to existing systems of law. These vivid events at times eclipse the range of radical and nuanced law reform efforts that persist behind the scenes. Yet, as the articles in this issue of *TEL* reveal with great depth and clarity, environmental law has entered an era of complexity. The challenges which environmental law seeks to confront are massive, intertwined, and complex, but the evolving set of governance tools and the ongoing conversations and law reform efforts that are taking place are equally diverse, innovative, and layered.

Since its inception, *TEL* has provided a venue for fostering creative thinking and engaged conversation on a wide range of transnational environmental challenges. The current issue is no different. The breadth and depth of the articles in this issue are a

[38] [2012] OJ L 26/1, as amended by Directive 2014/52/EU [2014] OJ L 124/1.
[39] Ryall, n. 36 above, p. 521.
[40] Ibid., p. 522; Case C-137/14, *Commission* v. *Germany*, EU:C:2015:683, para. 80.
[41] Ibid., pp. 533–4.

testament both to the increasing sophistication of the field and the strength of the journal in fostering critical thinking across the full range of issues that we confront.

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