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EDITORIAL

Expanding the Scope of Transnational Environmental Law

Transnational Environmental Law provides a platform for scholarly debate on environmental law and governance beyond the state, with a focus on the contributions of non-state actors to the development of law and regulation.

The contributions in this issue build on these themes by expanding the scope of transnational environmental law in two ways. The first four articles shift the focus towards entities that are, or arguably should be, even more central to the development of transnational environmental law and governance than non-state actors, yet they face formidable barriers to recognition: the entities that constitute the 'environment' itself. The second set of articles considers more traditional actors of environmental regulation – the United Kingdom (UK), the United States (US), and China – but explores new ways in which they may be able to interact and learn from each other in the area of environmental law and governance. While very different in focus and approach, both sets of contributions highlight the unique challenges and opportunities of transnational environmental law and scholarship.

Most modern legal systems have developed out of a need to structure the relationships between governments and their people, and between people *inter se*. The ideal of a society governed by the rule of law tends to be juxtaposed to Hobbes' 'state of nature', where the lack of a social contract between individuals results in the absence of rights and duties and the dominance of 'freedoms'.[1] However, neither the societal models shaped by legal rules nor, ironically, the state of nature have meaningfully incorporated the relationship between humans and their environment. Instead, environmental law focuses on the impact of human behaviour upon the environment.

Most jurisdictions preclude the possibility of the environment speaking on its own behalf or making claims based on its own interests.[2] However, as demonstrated by the first four articles in this volume, important changes may be afoot regarding the legal agency of 'the environment', implicating a shift that might move the human–environment relationship closer to other legal relationships. The first two articles – by Louis Kotzé and Paola Villavicencio Calzadilla, and Roderic O'Gorman – discuss the rise of environmental constitutionalism and the relation between a constitutional

1 T. Hobbes, *Leviathan* (1651).

2 See, inter alia, S. Gordon, 'The Legal Rights of All Living Things: How Animal Law Can Extend the Environmental Movement's Quest for Legal Standing for Non-Human Animals', in R.S. Abate (ed.), *What Can Animal Law Learn from Environmental Law?* (Environmental Law Institute, 2015), pp. 211–41, at 226–8, as cited by Staker, n. 28 below, n. 21.

recognition of environmental rights and enhanced environmental protection. The second set of contributions – by Werner Scholtz and Alexia Staker – discuss the rights of non-human animals and the different ways in which these rights can be pursued and shaped.

The two final contributions to this issue of *TEL* highlight the importance of appreciating the legal, cultural and economic contexts in which environmental law develops. The social, political and economic contexts of environmental laws not only shape our understanding of 'the environment' but also determine how environmental rights and duties are implemented, enforced, and invoked. Many past contributions to *TEL* show that the specific context can create obstacles for effective environmental governance, especially in relation to transboundary problems that require collaboration or coordination. The development of transnational environmental law and the inclusion of non-state actors is at least partially a response to these challenges and the need for alternate, suprajurisdictional responses. On the other hand, interjurisdictional differences also allow for experimentation and learning.[3] In their articles, Sean Whittaker, Huiyu Zhao and Robert Percival highlight the ways in which environmental law may benefit from interjurisdictional comparison and learning. In doing so, they underscore the importance of comparative methodologies for the development and enrichment of transnational environmental law.

In expanding the scope of transnational environmental law in these two ways, the articles in this issue address three distinct themes:

- the rise of environmental constitutionalism;
- non-human animal rights: welfare and rights-based approaches; and
- comparing environmental laws: federalism and access to information.

1. THE RISE OF ENVIRONMENTAL CONSTITUTIONALISM

In keeping with the anthropocentric nature of law and the legal system,[4] the 'environment' – broadly referring to non-human animals and non-sentient entities, such as ecosystems, mountains and rivers – has been historically incapable of acquiring legal personhood. By extension, the environment cannot acquire legal rights and duties, or claim standing before a court of law.[5] In 1972, Christopher Stone wrote a seminal article arguing for the recognition of the legal personhood of natural objects so as to empower them to vindicate their own interests, separate from human interests.[6] The idea of the environment having intrinsic value and therefore intrinsic interests, *apart from human interests* that may be legally expressed and protected, was and continues to be controversial.

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3 See in detail Zhao & Percival, n. 47 below, pp. 539–41.

4 As underlined by the contributions to this issue by Kotzé & Villavicencio Calzadilla (n. 8 below), O'Gorman (n. 22 below), Scholtz (n. 27 below), and Staker (n. 28 below).

5 See also Staker, n. 28 below, on the specific question of standing.

6 C.D. Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review*, pp. 450–501.

The growing constitutionalization of environmental rights, encompassing rights *to* and in some cases rights *of* the environment, has been a powerful move towards Stone's ambition to provide legal rights for nature. Against this backdrop, Kotzé and Villavicencio Calzadilla study the Ecuadorian Constitution of 2008 as the only example (so far) of a constitution that includes enforceable rights of nature. These 'rights of nature' must be distinguished from more common, anthropocentric, human rights relating to environmental protection. Whereas the latter continue to take the value of the environment for human beings as a starting point for environmental protection,[7] the former rely explicitly on the intrinsic value of nature and its potential to be an independent rights holder.[8]

Kotzé and Villavicencio Calzadilla consider the Ecuadorian decision an 'historical and potentially transcendent step' as it demonstrates that 'an ethical acknowledgement of nature's rights could manifest concretely in the legal sphere'.[9] However, for this potential to be realized, a close inspection of the rights themselves is warranted, as well as consideration of their effectiveness in terms of increased environmental protection. The basis for the Ecuadorian approach can be traced back to its indigenous culture, specifically the Andean concept of *Buen Vivir*:[10] the idea that people can (and should) only live 'well' if they are in harmony with nature. The authors identify this as a key shift towards a non-anthropocentric, or ecocentric, worldview.[11] Although not the focus of the contribution by Kotzé and Villavicencio Calzadilla, it is worth noting that by making *Buen Vivir* a central concept of its Constitution, Ecuador has also incorporated indigenous traditional knowledge and perspectives into its constitutional fabric – a parallel development that has been encouraged within international environmental law since the late 1980s.[12]

Substantively, the Ecuadorian Constitution confers several specific rights: broad *locus standi* to enforce rights of nature;[13] an explicit, independent and inherent right to restoration;[14] the principle of prevention, which obliges the government to restrict activities that might endanger species or habitats;[15] and the right of free access to justice.[16] Among these rights of nature features the provision that humans are entitled

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7 These rights are also incorporated in the Ecuadorian Constitution, in Title II, Ch. 2.

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, at 404 ('an ethical acknowledgement of nature's rights could manifest concretely in the legal sphere').

9 Ibid.

10 While this contribution is not a comparative one, this very specific cultural paradigm underlines the importance of specific social, cultural and legal contexts in which environmental norms develop, as discussed more explicitly by the last two contributions to this issue.

11 Kotzé & Villavicencio Calzadilla, n. 8 above, p. 406.

12 See, e.g., World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), pp. 114–5, and for general commentary, B.J. Richardson, 'The Ties that Bind: Indigenous Peoples and Environmental Governance', in B.J. Richardson, S. Imay & K. McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart, 2009), pp. 337–70.

13 Ecuadorian Constitution, Art. 71.

14 Ibid., Art. 72. This right imposes corresponding duties on the government.

15 Ibid., Art. 73.

16 Ibid., Art. 75.

to benefit from environmental and natural wealth, provided that they do so in keeping with the principle of *Buen Vivir*.[17] This may seem to go against the ecological grain of the Constitution but can be explained by the ecocentric nature of the *Buen Vivir* principle itself. In addition to these specific rights, the Ecuadorian Constitution provides some general forms of protection – for example, the explicit guarantee that full protection derives from the Constitution itself without the need for additional statutory provisions.[18]

After explaining the ecocentric constitutional vision, the authors offer an initial assessment of the effectiveness of constitutionally enshrined rights of nature as a means of environmental protection. Several challenges can be identified within the Ecuadorian constitutional document itself: firstly, the lack of hierarchy between nature rights; and secondly, the potential for the limitation of rights.[19] Beyond the text of the Constitution, the authors identify various implementation challenges and cite many examples of ecologically damaging development being promoted, despite legal provisions stating the opposite. They also draw attention to the inability of the judiciary to successfully operationalize nature rights.[20] Despite the authors' optimism as to the symbolic importance of the Ecuadorian Constitution as a move away from the traditional anthropocentric worldview of legal systems, these problems lead to the conclusion that, thus far, an ecocentric constitution does not necessarily lead to more or better environmental protection. It provides a 'starting point' rather than an end point 'on the journey towards an ecological constitutional state'.[21]

Roderic O'Gorman's article builds on the work of Kotzé and Villavicencio Calzadilla through a systematic study of 196 constitutions and their inclusion of rights and duties related to the environment.[22] One of the key contributions of this rich study is O'Gorman's ability to retrace several thus far untested hypotheses regarding the factors that have led to the rise of environmental constitutionalism, and their link to constitutional reform more generally, as well as the factors that are most likely to lead to the successful inclusion of nature rights.

O'Gorman finds that 148 constitutions contain some reference to environmental constitutionalism – meaning any constitutional reference to 'environmental care'.[23] In this group, the presence of a 'crisis situation', such as the need to create a new state, explains the majority of constitutional changes, some of which were successfully used to include a measure of environmental constitutionalism.[24] The inclusion of

[17] Ibid., Art. 74.

[18] Kotzé & Villavicencio Calzadilla, n. 8 above, p. 419. See also Art. 83 Ecuadorian Constitution as to the duties these rights impose on the government and private actors.

[19] Kotzé & Villavicencio Calzadilla, n. 8 above, p. 419. As the authors emphasize, the lack of criteria for such justifications is worrying.

[20] Ibid., pp. 427–9.

[21] Ibid., p. 433.

[22] R. O'Gorman, 'Environmental Constitutionalism: A Comparative Study' (2017) 6(3) *Transnational Environmental Law*, pp. 435–62.

[23] This definition is based on earlier work by Kotzé: L.J. Kotzé, 'Arguing Global Environmental Constitutionalism' (2012) 1(1) *Transnational Environmental Law*, pp. 199–233, at 208 (as cited in O'Gorman, ibid., p. 438, at n. 16).

[24] O'Gorman, n. 22 above, p. 442.

environmental constitutionalism was furthered by factors such as learning from external consultants; national political leadership on the issue; public pressure on political actors; the prevailing constitutional ideology (common law countries were found to be less likely to adopt environmental constitutionalism); and the extent of national environmental damage. One of O'Gorman's main findings is that tying environmental care to other issues, such as national values or human rights, makes its constitutional inclusion far more likely.[25] The important downside of such a strategy, O'Gorman notes, is that this may not lead to actual improvements in the environmental situation and undermines the protection of the environment as a goal in its own right.[26] This is in line with the findings of Kotzé and Villavicencio Calzadilla as to the danger of including rights of nature without meaningful methods of protection and with the potential to limit these rights without significant justification.

As illustrated by these first two articles, the rise of environmental constitutionalism may be considered a net positive for the environment, but for those hoping for meaningful environmental constitutional protection the main challenge remains their effective implementation and enforcement. The contributions by Scholtz and Staker on non-human animal rights shed further light on existing avenues to secure these goals.

2. NON-HUMAN ANIMAL RIGHTS: WELFARE AND RIGHTS-BASED APPROACHES

The recognition of nature rights, be it constitutionally or otherwise, is an important step towards a more ecocentric legal system. However, even when rights are formalized, the lack of legal personhood and the inability of non-human animals and other non-sentient natural bodies to gain standing before courts present obstacles for the vindication of these rights. The articles by Werner Scholtz and Alexia Staker present different but related challenges in this respect. Scholtz critiques existing wildlife conservation law from the perspective of individual animal welfare,[27] while Staker adopts a rights-based approach to discuss questions of standing for non-human animals in several jurisdictions.[28] The further development of non-human animal rights thus raises at least two questions: firstly, an ethical or theological question regarding the basis on which these rights should be created and shaped and, secondly, a practical and legal question regarding the best way to ensure access to whichever rights are granted.

Taking the rights of non-human animals seriously requires a change in existing attitudes towards the relationship between humans, the environment and animals, and

[25] Ibid., pp. 458–9.

[26] Ibid., p. 459.

[27] W. Scholtz, 'Injecting Compassion into International Wildlife Law: From Conversation to Protection?' (2017) 6(3) *Transnational Environmental Law*, pp. 463–83.

[28] A. Staker, 'Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals' (2017) 6(3) *Transnational Environmental Law*, pp. 485–507.

the hierarchy between them. Scholtz strongly advocates a welfare-centric approach, which focuses on the moral worth of individual animals as opposed to species, which tend to be the focus of wildlife conservation law.[29] This stance, he argues, would 'inject ethics into wildlife law'.[30] Scholtz considers the latter to be particularly significant as it responds to Purdy's concern that environmental law and ethics are currently separated.[31] This perspective is in line with earlier discussions regarding the overly anthropocentric nature of (environmental) law,[32] but the welfare-centric approach does not seek to remedy this problem by replacing it with an ecocentric approach.[33] Instead, the shift to a welfare-centric ethic explicitly recognizes that animals are *sentient* beings with an interest to be free from pain and the capacity to experience the benefit of being free from pain. The recognition of these animal characteristics, so similar to the human experience, is what calls for different treatment and rights.[34]

Although the turn to a welfare-centric approach does not necessitate the adoption of a particular legal technique, Scholtz's broad ambition to change the underlying aims of wildlife conservation law makes legislative change the most effective path. Several international soft law instruments and developing legal regimes could be used for this, including the proposed Universal Declaration on Animal Welfare (UDAW) and the International Convention for the Protection of Animals (ICPA).[35] This approach may be contrasted with the legal solutions explored by Staker, which focus on the role of the judiciary in developing the rights of non-human animals. Through three American and European case studies, Staker identifies continuing barriers to obtaining standing in cases concerned with animal interests. The question of standing raises interesting issues, such as the soundness of the current requirement to link animal suffering with human injury in order to establish standing,[36] and simultaneously opens the door to broader questions regarding the possibility of 'transform[ing] animals into rights holders'.[37]

Notwithstanding the potentially powerful arguments in support of a reconsideration of standing rules, none of the plaintiffs in Staker's case studies were successful in establishing standing.[38] Staker suggests that the 'unsuccessful outcomes are likely to be attributable to the simple fact that society is not yet ready to

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29 Scholtz, n. 27 above, p. 464.

30 Ibid.

31 Ibid., p. 471.

32 Ibid., p. 483 ('Conservation without welfare is overtly anthropocentric and ultimately cruel').

33 Ibid., p. 471.

34 By extension, a welfare ethics approach does not necessarily call for changes in the position of non-sentient natural entities, which lack a similar capacity and interest to be free from pain. See also Scholtz, ibid., p. 472. There is nevertheless an interrelationship between humans, wildlife and their habitats, which indirectly also calls for the protection of the latter: ibid., p. 475.

35 The UDAW, initially proposed by the World Society for the Protection of Animals (WSPA) in 2000, is available at: https://www.globalanimallaw.org/database/universal.html; and the draft texts of the ICPA and its protocols are available at: https://www.animallaw.info/treaty/international-conventionprotection-animals. See Scholtz, n. 27 above, pp. 480–1.

36 Staker, n. 28 above, p. 490.

37 Ibid. p. 492.

38 See in detail ibid., pp. 494–8.

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abandon the human–animal divide'.[39] Nevertheless, the overall effect of these cases may be positive as they are an essential step in changing societal views on non-human animal rights and may contribute to a faster acceptance of legal personhood for animals.[40] By emphasizing this role of the courts and litigation, Staker embraces a rights-based approach towards achieving better protection for non-human animals, and presents it as a 'promising alternative' to a welfare-centric approach.[41] Though not necessarily mutually exclusive – the two approaches are united in purpose[42] – a rights-based approach could conceivably perpetuate the separation between environmental law and ethics, which a welfare-centric approach tries to overcome.[43] On the other hand, welfare-based approaches continue to deprive non-human species of agency, and hold out limited promise for the protection of non-sentient nature. This is resonant of a familiar dilemma in the literature on the use of human rights for environmental protection: while human rights can be a powerful tool to pursue environmental objectives, many critique such effort as perpetuating the anthropocentric focus of law.[44]

3. COMPARING ENVIRONMENTAL LAWS: FEDERALISM AND ACCESS TO INFORMATION

The final two articles by Sean Whittaker, and Huiyu Zhao and Robert Percival, engage in comparative analysis of environmental regulation in the UK and China, and the US and China, respectively.

Whittaker focuses on the ways in which the right to environmental information, as safeguarded by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[45] has been incorporated into English and Chinese law.[46] Zhao and Percival look more broadly at how different models of federalism have affected the implementation and enforcement of environmental law in the US and China.[47] Each analysis relies on the assumption that the respective legal systems can learn from each other and perhaps even use legal tools developed in one system to remedy flaws in the environmental law regime of the other. Whittaker explicitly espouses Watson's

39 Ibid., p. 501.

40 Ibid., pp. 501–6.

41 Ibid., p. 493.

42 Ibid.

43 Ibid., p. 491.

44 See, e.g., A. Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (2016) 5(1) *Transnational Environmental Law*, pp. 25–53; and N. Naffine, 'Legal Personality and the Natural World: On the Persistence of the Human Measure of Value' (2012) 3 *Journal of Human Rights and the Environment*, pp. 68–83. See, conversely, S. Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law*, pp. 113–43.

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

46 S. Whittaker, 'The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing' (2017) 6(3) *Transnational Environmental Law*, pp. 509–30.

47 H. Zhao & R. Percival, 'Comparative Environmental Federalism: Subsidiarity and Central Regulation in the United States and China' (2017) 6(3) *Transnational Environmental Law*, pp. 531–49.

theory of legal transplants, stating that legal transplants are facilitated by systems where laws reflect preferences of the ruling elites, notwithstanding the systems' institutional differences.[48] His analysis focuses on two shortcomings with respect to implementation: definitional implications of the terms 'public authority' and 'government department', and the circumstances under which public authorities may withhold information.[49] Whittaker finds that, despite the theoretical possibility for England and China to learn from each other, cultural and political barriers are likely to hinder the adoption of proposed transplants.[50]

These cultural and political differences also influence the findings of Zhao and Percival as to whether the US and China can learn from each other's models of environmental federalism. Here the focus is not on legal transplants but rather on the workings of environmental federalism itself: one of the enduring questions regarding environmental federalism is whether regulatory competition in a decentralized system leads to a 'race to the bottom' or a 'race to the top' in terms of environmental regulation and quality.[51] The authors find that China's experience with environmental federalism, characterized by lax enforcement of national environmental laws at lower levels of governance, indicates that a race to the bottom is more likely than a race to the top. In the US, experiences with environmental federalism have been more mixed, and some were positive, which may be explained by the ability of the federal government to oversee and control state implementation and enforcement more effectively.

Apart from these institutional differences, China and the US find themselves in different stages of economic development. In China, this means that environmental and economic goals may directly conflict. As economic targets are easier for national regulators to assess and enforce, they gain greater prominence in local decision making while environmental goals receive less attention. Simultaneously, China is undergoing rapid change and is under significant pressure to improve its environmental quality,[52] which has caused legislators to turn to other jurisdictions for tools to improve environmental governance.[53] Whether a US style of environmental federalism would work is not so much a matter of fit but rather a question of political willingness to put in place the mechanisms of oversight needed. Interestingly, as environmental politics and policies in the US are shifting under the Trump administration, strong federal targets may disappear and be replaced with more ambitious state targets, causing a reversal in the current environmental federalism dynamic. In light of China's very serious local environmental problems, this dynamic may eventually also find its way to China.

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48 See in detail, Whittaker, n. 46 above, pp. 513–6.

49 Ibid., pp. 518–29.

50 Ibid., p. 532.

51 Zhao & Percival, n. 47 above, pp. 541–7.

52 Ibid., p. 510.

53 Some of the tools suggested by Zhao & Percival include greater public participation, more administrative powers to the Chinese Ministry of Environmental Protection (MEP) for enforcement, and the central supervision of local authorities. See in detail ibid., p. 548.

4. *TEL* EDITORIAL BOARD DEVELOPMENTS

It is with great pleasure that we welcome Melissa Powers, of Lewis & Clark Law School (US), as *TEL*'s new Book Reviews Editor. Melissa replaces Rakhyun Kim. We wish Rak the best in his future endeavours.

Finally, we are delighted to report that *TEL* has achieved a further increased Impact Factor of 1.080 for 2016, according to the Journal Citation Reports of Clarivate Analytics (previously Thomson Reuters). With this new IF, *TEL* has consolidated, for the third year running, its position among the top three highest-ranked environmental law journals worldwide, in both the law journals and environmental studies journals categories. This continued upward trend for *TEL* in the citation index rankings is a wonderful compliment and motivation for the entire *TEL* team, as well as our referees and certainly our contributors.

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