Right Use of the Earth Symposium

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Introduction

The Symposium was organized by Luca d'Ambrosia and other colleagues as part of a legal research project on Environmental Humanities in the Age of the Anthropocene.

Alliance-Respons was represented by Adrian Macey, Betsan Martin, Linda Te Aho, who gave presentations. Pierre Calame, Alain Supiot, Mireille Delmas-Marty also attended.

A major theme for the Right Use of the Earth was that law in general has been developed to support the transactional system of economic development. Environmental law and labour law are, in essence, ways of mitigating the externalities of industrial development, and as such cannot address the need for integrative law to bring human and nature/biological systems together. There is potential for responsibility, as a relational paradigm and as a basis for accountability and social solidarity to achieve this integrative role. Luca d'Ambrosia proposes systemic transformation through the acupuncture points of the system such as removing fossil fuel subsidies. Read more….

Article by Betsan Martin

Transactional law and the externality of environmental law

The centre point of thinking for this symposium was on the role of law in sustaining the transactional economy. In this economy environmental law, and also labour law serve the purpose of addressing the externalities of the transactional system. This analysis was brought into bold relief by Jorge Viñuales, Professor of Law and Environment, University of Cambridge, UK. He elaborated on law as enabling the forms of social organization and economic production that have resulted in humans as a geological force – now referred to as the Anthropocene.

The transactional system is composed of many dimensions – property rights, corporate law including laws of limited liability, and trade law which all support the industrial system of production and consumption. The use of human labour and environmental resources are side effects of economic production; labour laws and environmental laws are aimed at mitigating the exploitative human and environmental side effects.

Ethics, Slavery and Inequality

Professor Viñuales said that existing law could accommodate responsibility, but is not designed for it. He referred to Hans Jonas's focus on the ethical dimension of relations in society in recognition of the immense powers in the hands of humans due to technological invention with the capability of altering both social order and the earth system at unprecedented time scales as we know it. In this sense, the ethical transcends law.

At a deeper level we can connect law to ontological dualism. The externalities of labour conditions and inequality are expressions of ontological dualism. The extreme maldistribution of wealth operates at global scales and within states – both in developed and developing nations so the notion of the Anthropocene and the geological force of human influence needs much more fine-grained thinking. Not all humans are responsible for the Anthropocene – while a few contribute to and benefit from unsustainable standards of living, many suffer in the schemes of productivity. The fact that humans are ~~in~~valuable to production rests on the exploitation of labour in developed *and* developing economies alike.

Inequality is a core mechanism that led to the Anthropocene. Rather shockingly, Professor Viñuales drew on the idea that slavery lies at the origins of the Anthropocene saying that slaves allowed the UK to live beyond its means. Law to abolish slavery encroached upon the economy of industrial development – the fight against such law was because to block the slave trade was to block the mechanism that fed development. However the imperative of industrial development found a new expression by replacing slavery with labour, with the mitigation of the right to strike and other subsequent law on the organization of labour. Professor Anna Tsing, University of Santa Cruz, also drew on the same long bow of the legacy of slavery to direct her analysis to a landscape perspective of the wrong way to use the earth that plantation agriculture made possible with slave labour.

Plantations produced wealth under conditions of the alienation of slaves and habitats – the undergirding conditions of capitalism. Plantations cause havoc on adjacent land and disrupt the ecosystems where, amongst many 'services' non-plantation fungi have one of the highest rates of carbon storage. This does not do justice to Professor Tsing's remarkable work of investigating the ecological stripping and degeneration that comes with genetic homogeneity and the cultivation of one species. Plantations are emblematic of the ecological ruins of development to which the monocultures of industrial agriculture are fundamental contributors.

Professor Viñuales' and Professor Tsing's and other references to slavery at the symposium have their parallel in the colonial alienation of indigenous peoples and the expropriation of their lands in the Americas and the Australia Pacific region. Here the law was used as a mechanism to introduce and embed the transactional economy and exclude Māori from the benefits of economic development.

In Aotearoa New Zealand there was scope for a system of shared authority with Māori as the indigenous people of Aotearoa, through the 1840 Treaty of Waitangi. However the lawmakers transplanted English laws to facilitate settlement and the acquisition of land. The agenda of civilizing and Christianizing the 'natives' was combined with turning the land into private property as a basis for a capitalist economy. in present day New Zealand, and other such societies, the same overall maldistribution of wealth and legacy of inequality includes a profile of persistent and disproportionate disadvantage of Indigenous peoples. The logic of externalities is extended to indigenous people(s) and also to the parallel crisis of biodiversity loss and degraded rivers that come directly from intensified agricultural development – in this case, dairy farming.

The quest for new law was brought a step forward with the outline of the innovative vesting of the Whanganui River and Te Urewera Forest in Aotearoa New Zealand, as legal persons.

Innovative Law

Māori Professor of Law Linda Te Aho from Aotearoa New Zealand drew on Māori traditions of rivers and all forms of nature as living entities – understood as kin. The Whanganui River, in 2017 was recognized as an ancestor. Te Awa Tupua, the name of this legal 'person' is defined as a living whole which flows from the mountains to the sea. Two guardians, one Māori and one from the Crown represent the river and give effect to the legal standing of the river. The recognition of the river as a whole is significant in overcoming regimes of fragmented jurisdiction; for example, the Crown took ownership of the riverbed under law for navigational rivers in 1903 and ownership of the riverbed is now returned to Te Awa Tupua. This acclaimed vesting of a river as a natural entity has since been applied in India, Ecuador, Columbia, parts of the US and other places.

Professor Te Aho reminded us that this vesting the river as a legal person is a compromise for Māori. Their claim to the river was to have their authority, as an expression of ownership, restored as it stood before 1840.

We have still to ask whether legal personhood of a river or forest is any guarantee against the ontological master/slave system. Presenters from the US Dr Ellen Kohl and Dr Jayme Walenta used a case study to show that the promise of overcoming human/nature binary through legal personhood for nature may be compromised by who gets to represents nature.

Professor Mireille Delmas Marty took another line of thought on the theme of the human/nature separation. She saw the paradox of the Anthropocene –on one hand the quest for law in the logic of genocide to criminalize the destruction of our common home, through the criminal consequences of damage. On the other hand, the urgency of relational ethics for the interaction between humans and nature/biology, the reorganization of society for solidarity and the idea of protection of common goods with the need for development of this category in law.

Responsablity

The many diverse approaches of the symposium led to reflection of rights as another form of ameliorating the effects of the transactional economy and law. The potential of responsibility as a legal framework for the Right Use of the Earth gathered momentum.

The Paris Agreement heralds a universal agreement which rests to a considerable extent on common but differentiated responsibilities. The concept of Nationally Determined Contributions was shown by Professor Adrian Macey to have opened a pathway forward for global governance, and in a parallel process non-state actors have stepped forward with business, corporates, cities and local government pledging to reduce carbon emissions. Dr Betsan Martin spoke on respons*ability* from the context of Aotearoa New Zealand and her experience of working globally with the Alliance for Responsible and Sustainable Societies. She referred to the recently published book *ResponsAbility: Law and Governance for Living Well With the Earth* (edited by Betsan Martin, Linda Te Aho and Maria Humphries-Kil)

'Responsability for Living Well with the Earth' expresses a paradigm shift required universally to transition from irresponsible exploitation of the earth, to relational custodianship. Law is a key to the transition to recognizing the interdependence of humans and nature but it requires law that is integrative and capable of penetrating the complex interactive dynamics of different fields – such as between rivers, forests, agriculture and climate change.

Dr Betsan Martin mentioned the history of law in which duties for public good interests were the foundation of liberal systems. However Limited Liability laws from 1600, were introduced to protect investors from undue burdens of liabilities from investments, especially in the colonies. This began the trajectory of western interests towards economic development at the expense of safeguards for the earth. Betsan's presentation had a philosophical orientation on the relational and accountable dimensions on responsibility – signaling a paradigm shift as an underlying reference for law for responsability. While legal personhood has potential for integrative law, public trusteeship is another form of law for public good that is effective in Hawai'i where water is held as a public trust. There is evidence that this is working to integrate indigenous interests, ecosystem health and commercial use. Public trust of the atmosphere and other global commons is also being advocated for as the basis for a Universal Declaration of Human Responsibilities and Earth Trusteeship.[1]

As long as we create law for the externalities of development by mitigating the side effects we will not succeed with environmental safeguards. It will remain as a cosmetic adjustment to transactions. An ethics of respons*ability* requires law that addresses the transactional system alongside a world view with jurisprudence that integrates human and ecological systems.

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[1] Hague Principles for Universal Declaration of Human Responsibilities and Earth Trusteeship: http://www.alliance-respons.net/bdf_fiche-document-529_en.html

Dr Luca d'Ambrosia proposed we find the acupuncture points for reform that will unleash a systemic revolution – such as removing fossil fuel subsidies from the lines of production such as for fisheries, trade and agriculture.