

A new approach to the concept of environmental law

Green Legal Theory

Green thinking has been established both in theory and practice in Europe for decades, far ahead of North America. Few on the western side of the Atlantic understand that “green” is much more than just progressive public policy. It is about a new social framework.

By Michael M’Gonigle

Over the past weeks, the world has undergone what an Icelandic commentator recently called the third systemic shock in the past 20 years: the fall of the Berlin Wall, 9/11, and now the financial meltdown. We are told that we will never be the same again. But what we will become is another matter. World leaders work relentlessly to put Humpty Dumpty back together again. To stabilize, rebuild and, above all, to re-ignite the fires of production and consumption. To a green critic, what is at stake is not just financial restructuring, but the hegemony of the unsustainable model of development that this financing underpins. The body of work that is represented by the present paper is not about the financial debacle, although it is certainly implicated in it. My work attempts to do something similar though. It helps to move legal and political discourse beyond the dead end of a paradigm of environmental law as prop to an unsustainable political economy. Instead, I propose a transformative paradigm that I call “green legal theory”.

Beyond the limits of environmental law

One only needs to read the daily paper to realize that the promise of environmental regulation has been about as successful as that of financial regulation. Political leaders scramble to contain the sudden crisis of the latter while they not only ignore the chronic crisis of the former, but encourage financial solutions that will actually exacerbate this deeper crisis. This situation points to limits that are inherent to the very conception of environmental law. Environmental regulation is a bust on substantive grounds, because at every level, the planet’s environment is on a critical downward trajectory. The superficial attention being paid to climate change ironically reinforces this situation as it is now virtually equated with the environmental problem: solve climate change, and we can go back to business as usual. Never mind the disappearing species, loss

of agricultural land, collapsing fisheries, habitat destruction, and so on. But we can’t go back to business as usual; climate change as a problem isn’t solvable, especially in light of reduction in emissions that scientists suggest is necessary. Solving such problems through state-based regulation is the false premise of the environmental law paradigm. How, after all, is one to resolve the fact that the state itself is as dependent on environment-destroying economic behaviour as any corporation or consumer? As a result, the very existence of the environmental law paradigm reinforces a false ideology. Even worse, this paradigm has an essentially monopolistic status, “occupying the field” of discourse so as to exclude completely more critical understandings. The primary strategic goal of green legal theory (GLT) is to shift this debate as a precursor to action.

Given the above critique, green re-formation starts not with a realistic need to reform the current environmental regulatory regime but with an investigation of what might actually underpin a sustainable world. In other words, GLT is essentially about backcasting from an understanding of what is necessary, and then to consider what we need to do now to begin the tasks that might get us there. GLT does and can not take existing and unsustainable political and economic practices as the given on which new regulations are constructed. To do so has fatally bracketed what law is able to achieve. Instead, GLT necessarily examines what a green world would look like, what alternative social practices might be sustainable. That investigation demands that we problematize many processes that are now mere background.

This green tack points to a redefinition of the field of law. For example, a green legal enquiry must address a broad array of material practices. This comprises not just the creation and use of energy or wood or fish, but also of capital and labour and technical knowledge. One must also address the ideal side of these practices, for example, what forms and institutions of intellectual discourse and political dialogue are needed before we can even consider such changes. This shift in focus quickly moves thinking from law as a practice of problem-based regulation to law as a process of cultural, material or ideal reconstitution.

Law and political economy

When one begins to critique environmental law from such a perspective, one is immediately struck by its sub-theoretical character. Environmental law internalizes the essentials of liberal democratic theory, and it does so implicitly. The state is the source of the environmental regulatory progress; few lawyers, in North

America at least, are even aware of the historic trade off between the state's essential commitment to capital accumulation and its variable commitment to democratic legitimation. Environmental lawyers certainly do not import this contradictory situation into their legal analysis. What is one to do where industrial regulations entail a reduction in consumer demand that, in turn, has negative economic and political costs for growth-dependent governments? The attitude is that the problem is simply an absence of political will. Similarly, environmental constraints are seen to exist within an enhanced market process, one that can simply be made more efficient were it to internalize externalities, with few lawyers ever considering the contradictions to corporate competitiveness that such internalization poses.

As its name suggests, GLT is above all a theoretical field because it uncovers the assumptions and dynamics embodied by existing processes of regulation, and takes them apart in order to work past them. As a theoretical enquiry, therefore, GLT eschews the limited focus of environmental law on the physical environment in favour of a critical and more complete understanding of the social and institutional dynamics of unsustainability. In comparison with this challenge, environmental law has become an essentially technical discourse operating within the very forces it should be challenging. Activist environmental lawyers feel these limits and the associated frustration in their bones. But they treat these feelings as reflecting their personal values rather than as integral to a field that simply cannot address the problems of capitalist growth and bureaucratic rationality.

Wealth, space and place

Instead, as a theoretical enquiry, GLT must try to explicate the dynamics of that world as a socio-cultural construction. What is at stake is the constitution of this world if you will. To understand its systemic dynamics, GLT can draw from political ecology or, more precisely, ecological political economy. Classically, political economy has addressed, in Adam Smith's lovely formulation, "the nature and causes of the wealth of nations." This field has long been concerned with the contributions of labour and capital to economic wealth and, to a lesser degree, land and the rents that can be generated from it. When you preface political economy with the word ecological, you emphasize what has long been neglected in the analysis of where our wealth comes from, the contribution of nature. This contribution has long been minimized, for example, in the foundational "labour theory of value" where nature has no economic value until it is transformed by labour, a valuation process that is problematic for many reasons not the least of which is its purely social character. In an example of the performativity of theory, this exclusion of nature from the insights of 18th and 19th century economic theory translated historically into the 20th century consumer and throwaway society.

Today, a pervasive lack of awareness, indeed lack of respect, exists for the real physical and social realities from which our daily wealth emerges. In exploring nature's contribution to the cre-

ation of economic wealth, political ecology analysis can take many tacks. My own perspective has been shaped by my activist experience in numerous resource battles in western Canada that dramatically illustrate the spatial character of our treatment of nature and wealth. Explicating this perspective is a special contribution that geographers bring to political economy (Lefebvre 1991). Such theorists think about the environment less as a set of disembodied resources than as a broader orientation to how we demarcate space, set cultural and territorial boundaries, and establish flows of power horizontally across distance and vertically up and down social and institutional structures. As Marx long ago remarked about the globe-shrinking effects of capitalist technology, capitalism represents the conquest of space through time. That conquest is not only environmental, but social.

Of special significance is the evolution of place, particularly insofar as that term might connote historically self-maintaining, eco-cultural spaces (M'Gonigle / Starke 2006). In the quest for the spatial transfer of resources, pursuant to a globalizing model of economic development, one can see how such places have been historically deconstructed. This deconstruction, including to longstanding processes of governance and representation, was the flip-side to the constructed character of an unsustainable modernity. The centralizing effect of state law is directly relevant here. This is widely noted in the hundreds of acts of legislation that allowed for the enclosure of the commons, a spatial change that re-defined land as physically bounded, that is socially exclusionary, private property. This change provided the underpinning for the rise of mercantilist trade upon which the European state was built. Another example might be how, in the English common law world, the emergent state gradually transferred lay or communal regulation from local authorities to an expert judiciary that substituted national for local customs in their decisions (Blomley 1994).

Yet another example has been demonstrated in a recent study of how the conception of property has evolved from one replete with internal obligations and responsibilities to one that views ownership as exclusive, without embedded social obligations. This loss of internal controls necessitated the development of external (state-based) regulation that is then seen as constraining what is otherwise a natural freedom, rather than inherent to it (Coyle / Morrow 2004). Again, as a North American activist, my analysis has been influenced by the eco-anarchist critiques of scholars such as Murray Bookchin, as well as the American bioregional movement that focuses on eco-culturally delineated regional configurations as a natural basis for governance. From a legal perspective, an important lesson is to understand that the modern state is merely the embodiment of a recent 400 years set of spatial configurations and, in emasculating place, not a particularly natural set at that!

A pluralist perspective

The advent of GLT comes at an interesting time in legal theory. In the 1970s, legal theory was encompassed by the field →

of jurisprudence, a somewhat dry and overly analytical field lacking in political and economic critique. In North America, the late 1970s saw the rise of the critical legal studies movement, that then gave way to a diversity of new forms of critical scholarship: feminist, critical race, postmodernist, and indigenous legal theory to name but a few. These new forms all challenged the positivist, liberal frame of legal education and jurisprudential analysis. One of the more interesting theoretical innovations in recent years is legal pluralism, a field that challenges the notion of law as being exclusively the domain of the state. Rather, families, religious orders, the shop floor, prisons; a plurality of social structures have internal legal orders that function in a compelling regulatory fashion.

From a green perspective, legal pluralism opens up the meaning of law in important ways. For example, in light of the spatial analysis above, an ecologically sensitive pluralist analysis casts fresh meaning on the legal conception of terra nullius by which colonial powers have been able to displace indigenous cultures on the basis that they do not constitute organized societies with a claim to exclusive sovereign control over invaded lands. This legal construction, unacceptable to today's legal pluralists, underpins the legal order through which unsustainable economic, political and legal practices have been instantiated within the modern state system. Yet, in many formerly colonial states such as Canada, the recent process of treaty-making and land claims resolution remains predicated on this legal conception, insofar as aboriginal groups must establish their rights to land according to criteria that emanate from Western conceptions of sovereignty, exclusivity, ownership and control. An ecologism that is sensitive to the importance of the historical construction of space and flows thus sees law as growing out of and, in turn, reinforcing larger forms of eco-cultural organization. In other words, modernist legal systems enshrine the state both as a facilitator of economic colonization and as an exclusive source of political legitimacy supported by a structured system of formal laws, in Marxist terms, "modes of regulation" that supports a larger cultural context characterized by complementary "modes of production".

Law as culture

Rather than taking these modes as the assumed context of environmental work, GLT's central focus is on the ecological character of their nature and operation, and on their alternatives. As a body of critical legal theory, GLT analysis is also necessarily sensitive to contemporary Foucauldian insights. These situate regulatory power as extending beyond formal conceptions of the state and government, that is, governmentality, to include more subtle forms of internalized patterns of normalized behaviour and obedience, that is, biopower. In this broad complex of considerations, GLT inevitably expand the concepts of legal. It is neither simply the laws of the state nor even the laws of other groups referred to in the literature on legal pluralism. Instead, this analysis suggests that regulation exists at a cultural

level, certain practices and behaviours are socially allowed, even mandated, while others are not. To live without an automobile, especially in North America, or even without a clothes dryer is aberrant behaviour. Even more difficult would be to attempt to self-manage the collective resource uses of your local neighbourhood or region, something that was common practice in indigenous nations or even in many medieval communities but which confronts countless obstacles in modern societies, such as private property, individual choice and a raft of legal impedimenta. These larger cultural and spatial constructions are effectively the laws of the consumer society. To encompass how society is fully regulated, I would expand the definition of law to refer to the "authoritative processes of cultural self-constitution". To put it another way, we cannot change many legal rules, in the narrow sense, without first changing the practices that authoritatively constitute culture.

A new natural law?

To act differently, we need to think differently. To date, however, western societies have largely reacted to systemic decline, and not debated, let alone acted for, systemic re-formation. For the green theorist, this situation poses a problem insofar as one might believe that a sort of meta change is necessary. To make that suggestion, one confronts the charge of making an insensitive, universalizing claim. Instead, it is safer to suggest that green thinking is just another competing perspective that needs to be added to the mix.

Yet this situation sits uncomfortably with ecologists who take seriously the massive scale and frightening pace of environmental decline. Not only are these changes global in scope, and are undoing millions of years of evolutionary diversity and systemic complexity, but they are already having significant adverse impacts on the world's poorest peoples and some of its most subtle bioregional cultures. It is thus not uncommon to hear environmentalists argue that modern society must still obey the laws of nature. But therein lies the problem, just what are these? And what are their implications? Population control in India or a reduction in the levels of consumption in the United States? How are we to know, and who is to say? These are difficult questions, but any theory of socio-cultural regulation that seeks to address global ecological problems cannot avoid dealing with them.

Take, for example, the word nature itself. Such concerns about universalized meaning bedevils that word. It has many meanings: the nature of things, the natural world, natural law, things following naturally. In recent years, the word has been the source of much controversy, social theorists arguing that nature is socially constructed while natural scientists, not surprisingly, dismiss such arguments as poppycock. Of course, they say, there are forests and fires, hurricanes and viruses, lakes and water, life and death. Indeed. And most cultures have words for most of these things. But not all, and it would not be easy to be certain that what one culture's word for tree or snow was understood by others in the same way. Forests there may be; but how

one thinks about it, defines it, relates to it is certainly a product of one's social circumstances. And many cultures have no word for nature itself, and ours would be hard pressed to identify it. For some theorists, such as Bruno Latour, the very idea is a symptom of the modernist compulsion to separate humans from the natural world (Latour 2004; Castree / Braun 2001).

It is no coincidence that positivism arose in the Western world, and did so at the expense of naturalist philosophy, in parallel with the ecologically-devastating political and economic developments discussed above. This new philosophical development promised human liberation, not such a bad thing to the extent that naturalist thinking in, say, the 16th century was largely dictated by a repressive institutional theology. Yet positivist philosophy is, above all, a philosophy of social separation from nature: the elevation of scientific reason above mystical experience, of method over substance, of man over nature. Descartes' dictum "I think, therefore I am" is justly famous as it encapsulates this movement so well. Yet the socially self-referential character of positivist thinking, "I", was, and continues to be, a problem for ecological thought. Indeed, the greatest loss with the displacement of natural law thinking was not just its rich diversity of socio-natural ways of knowing, but the more general loss of the cultural duty to make society accountable to something outside of itself.

Two related elements of positivism, however, point to a way beyond this modern or postmodern quandary, that is, to a new way of thinking that might overcome the socio-natural split without doing so in a dangerously universalist manner. First is positivism's commitment to truth; to scientific facts that can be verified through rational procedures. Second is a social linearity, a commitment to ongoing progress which these facts and truths and neutral processes are seen to serve and, which in turn justifies their importance. Economic growth is one of the best examples of this ongoing commitment to progress. But the world doesn't quite work that way. Facts are contextual, we have more facts about the ozone layer than ever before in human history, but we only needed them because we have been destroying it. We have material progress on a scale that was unimaginable to anyone only a few generations past, but achieved by undermining the conditions for life itself. Reason isn't absolute; nor is the individual. They are relational. In this light, the recovery of dialectical thinking is, perhaps, the signal challenge for a naturalist ecological philosophy. This is not the dialectics of a simplistic Marxism that is still committed to some linear progress to a proletarian utopia, even if getting there was to take place through the dialectic of historical materialism. Instead, as has become better understood with the rise of systems theory, the essence of essence is not one fact or thing or direction, but relationships, and complex, subtle ones at that.

Thus, for humans, there is no nature out there to be understood better and better so that we can progress; there is only a socio-nature wherein we are always involved in the world we study or manipulate, and from which we can never stand apart. There is no separation of one's place, only the continuing dia-

lectic of space and place. There is no material world that underpins the ideal ways in which we think; only a mutual penetration of one with the other (1). There is no complex system that can be managed; there will always be surprise from the unknown. Thus, a way of thinking that is truly naturalist today would be one that recognizes the inevitable limits of a detached reason and pure science, and that situates knowledge not only in the pure mind of reason and science, but in the body of emotions, feelings, and physical experiences. This discussion helps explain, for example, both the appeal to ecologists and the controversy for scientists and regulators, of the German-inspired precautionary principle that tells us to act even on the basis of uncertainty, but act in a precautionary manner. This is the principle that points us away from and industrialism of a hubristic risk assessment and toward a post-industrialism of a respectful risk reduction. Similarly, the challenge of a new ecological rationality is less about bringing nature into some form of representation in the social sphere, as (still) rationalist philosophers such as Bruno Latour suggest and more about bringing society into nature – whatever that might be.

This inevitable contradiction is, I would suggest, at the heart of a new natural law to which ecologists are drawn and for which GLT can offer some guidance. We now know enough to know that we cannot know. Thus the human animal of the ecological age is less the wise species with the final answer, homo sapiens, than the questing one that always seeks to understand how better to situate social truths in natural ones, knowing that there is no answer. That is in the nature of things, and a new natural law demands that we become accountable again to that nature. If consciousness has led some cultures to become distanced from the natural world, the social and natural challenge that results is to work to overcome that distancing in the shaping of our social and inevitably natural worlds. In contrast to centuries of social progress based on the centralizing compulsion to deny or override contradiction, indeterminacy and surprise, the challenge of the age of ecology is to devise more diverse and grounded ways of living and being that can work with, not against, the physical world. We do not, and cannot, know the truth. But we do know enough to act. It is time for a leap of reason. But leap to where?

R-Evolution and Re-Formation

The great American poet, T.S. Eliot, has been oft quoted for his dialectical insight that humans will "not cease from exploration and the end of our exploring will be to arrive at where we started from, and know that place for the first time." If the planet, and all that it sustains, is to be around in a fashion that humans will wish to explore in the future, it is time to begin our exploration of new futures that can reshape our modernist cultures. Despite our dire circumstances, this is not a call for revolution – though given the resistance of existing power structures, many will be tempted – because revolution is often but a challenge to specific legal structures within an unchanged →

cultural context. Our task is instead to foster a diverse “r-evolution”, that is, a radical new future which does not seek primarily to change laws or power structures within an existing cultural context, but to reshape culture in more profound ways. To do so, we must change social experience.

It is beyond the scope of this paper to consider the specific strategies of this r-evolution (2). I will only do so briefly. However, the premise of these strategies must be a skepticism of ambitious centrally administered social engineering based on the claims to expert knowledge. This sort of self-referential, self-aggrandizing planning is what we are now witnessing with the G20 industrial nations working to reinflate the very financial, production and consumption systems that are responsible for the ecological crises that these leaders ignore. Instead, any strategies must be based on the dangers of contexts that distance the mind from the body, that recognize instead the limits to centralist knowledges, that seek to operationalize the socio-natural truth of social humility, and to do so by working with, rather than against, the physical world of which we are a part and which is manifest in cultural and natural diversity.

In some ways, by advocating reforms, GLT risks returning to the environmental legalisms that it seeks to displace. This conundrum is inevitable, and is irresolvable if it asks existing structures of power to make changes that would undermine the sources of their power. GLT's re-formation program is thus, first, a deconstructive one against those self-reinforcing structures. This perhaps inherently marginalizes the value of GLT or, at least, makes it realistically dependent on some degree of systematic collapse before it can have an effect. Many thoughtful, and mainstream, critics have come to a similar conclusion, that systemic rebuilding awaits catastrophe, what Homer-Dixon calls “catagenesis” (Homer-Dixon 2007).

Reduce, reduce, reduce

The new economic era into which we are heading provides unusual opportunities. But it is highly questionable that, without extensive even catastrophic decline, this context will allow us to address what is truly needed, a cultural consensus to grow into a world of non-growth. This re-formation would be legal in the broad sense of the word as I have used it above. It would be constitutional, looking beyond the historic structures of the centralized state and the capitalist economy that are both implicated in the creation of a global culture of unsustainability. In a new eco-constitutionalism, new forms of political organization will be needed that are much more attentive to the dialectics of space and place as well as the material and ideal worlds that these contextual constructions allow. It would look to new forms of economic innovation that, drawing on the vast literature in ecological economics, would radically decrease demand, maintaining a stock of capital with a minimum of entropic economic flows. Unlike the growth economy, its mantra would be to “reduce, reduce, reduce”. To achieve this would necessitate a foundational commitment to social equity and equality; inequity being a driving

force for growth that must be overcome as a prerequisite to dramatically reduced growth. There would be far less attention to more efficient automobiles and much more to creating carfree cities, and to transforming the labour force to achieve this. And, of course, it would be radically democratic at all levels to allow such socio-ecological innovations to emerge from the diverse experiences of people living collectively in place. After a while, because it would be situated in more sustainable, equitable, and calmer economic processes that were not always chasing after, or cleaning up behind, new growth, it might actually be able to reduce the chaos and the noise of modernity so much that we might even decrease politics itself. Reduce, reduce.

But devising workable strategies for change is actually the easy part. Before that, we must do the seemingly impossible. Environmental law has long defined the problems to be solved according to what might be acceptable to the structures that have created these problems in the first place. And it has failed. The first challenge is to overcome the cultural closure on meaningful dialogue. In this regard, it is hoped that green legal theory can help to make it possible to consider what the problems we face actually might be.

Annotations

- (1) If the current financial crisis tells us anything it is the reverse of this, how a structure of belief, faith and confidence underpins our constructed economic and material world. The dangers here are obvious when reality can be made so remote from the checks and balances of grounded social experience.
- (2) These reforms will be more extensively addressed in my forthcoming book: Michael M'Gonigle: R-evolution: law, culture and green transformation.

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