

# Strathclyde Symposium

## Revisionist Ontologies for Law and Human Rights in the Anthropocene

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*Jointly organised by Strathclyde Centre for Environmental Law and Governance (SCELG), the Centre for the Study of Human Rights Law (CSHRL) and the Global Network for the Study of Human Rights and the Environment (GNHRE)*

*Date: Friday, 28 October 2016*

*Place: University of Strathclyde, Collins Building, Room CL205*

**08.30-09.00: Registration (Collins Building, Insight Institute)**

### **Keynote (09.00-10.00)**

**Nigel Clark (Lancaster University)**

*Provocations of the Anthropocene: Social Thought through the Earth*

### **Environmental Ethics (10.00-11.00)**

**Teresa Vicente Giménez (Universidad de Murcia)**

*The new paradigm of "Ecological Justice"*

**Antonio Cardesa-Salzmann (Strathclyde University)**

*Beyond Sustainable Development. Addressing Distributional and Governance Gaps through Global Constitutionalism?*

**11.00-11.30: Coffee and Tea (Collins Building, Insight Institute)**

### **International Environmental Law and Human Rights (11.30-12.30)**

**Duncan French (Lincoln University)**

*"Yeah but, no but, yeah but, no but...": international environmental law, state sovereignty and the Anthropocene*

**Louis Kotzé (North-West University)**

*Revisiting the Ontology of International Environmental Law: the SDGs and the Possibility of an Ecocentric Orientation in the Anthropocene*

**12.30-13.30: Lunch (Collins Building, Insight Institute)**

## **Epistemological and Ontological Revisions (13.30-14.30)**

**Saskia Vermeulen (Strathclyde University)**

*The Anthropocene and the Post-Human Condition: Exploring Ontological Revisions of Natural Law and Speculative Realism*

**Sam Adelman (Warwick University)**

*Epistemologies of Mastery*

## **Good Governance and ‘Lawyering’ (14.30-15.30)**

**Owen McIntyre (York University)**

*The Normativisation of Environmental Good Governance: The Promise of Order from Chaos?*

**Stephen Turner (Lincoln University)**

*The Anthropocene and the ‘Tragedy of the Environmental Lawyer’ – Considering Fresh Approaches*

**15.30-16.00: Coffee and Tea (Collins Building, Insight Institute)**

## **Discussion and Present and Future Research Agenda (16.00-16.30)**

*To be led by Aurélie-Zia Gakwaya & Peter Brown (McGill University)*

## **16.30-18.00: Wine Reception (Collins Building, Insight Institute)**

*Including a brief introduction to the vision, new members and new website of the Strathclyde Centre for Environmental Law and Governance (SCELG).*

## **Abstracts (in order of the programme)**

### **Nigel Clark (Lancaster University)**

#### *Provocations of the Anthropocene: Social Thought through the Earth*

If the Anthropocene thesis speaks of a certain socialisation of geology, so too does it invite a geologisation of the social: a rethinking of social histories, categories, potentialities through an understanding of the earth and its constitutive processes. In *The Natural Contract* (1992/95), a book that anticipates Anthropocene problematics in significant ways, Michel Serres speculates about the ordering processes that took place on the fertile alluvial plains of the ancient Middle East after the annual floodwaters receded. 'Thus was concluded a social contract...out of which politics and laws were born' he muses. What might it mean, I ask, to imagine politics and law emerging out of the watery dynamics of sedimentary geology – to imagine *all* social processes not only in terms of their socio-historical context, but also their geophysical context? In the late 18<sup>th</sup> - early 19<sup>th</sup> centuries, European savants were enthralled by the idea of 'revolutions of the earth'. And yet, even as social thought borrowed the notion of social formations from the concept of geological formations, it relinquished the idea of a dynamic planet. Two centuries later, revolutions of the earth are back on the agenda. We have a second chance - with better data, but higher stakes. Among other examples (the early modern European mining boom, south-west Pacific phosphate-based pastoralism) - I return to Serres' birth of politics and law in the ancient Middle East – which now also looks to be a moment of abrupt climate change. From here I return to the question of what an opening of the categories and concepts of the social to geological concepts and data might mean for confronting the geophysical transformations now on the horizon.

### **Teresa Vicente Giménez (Universidad de Murcia)**

#### *The new paradigm of "Ecological Justice"*

The analysis of current changes experienced by our planet has led the international scientific community to determine the evidence for a new geological epoch of the Earth, characterized by the fact that many human activities have altered much of the natural cycles and processes of the Earth, such as climate, hydrology, biodiversity, ecology, etc. This is a new period of our planet known as Anthropocene. The central question now is whether the law, politics and economics will take into account this new scientific premise, and whether they are able to cope with its demands. The new geological era of human dominance highlights the need to expand the responsibility of humanity to the natural environment, and orientates its demands towards a new legal, political and economic order that is compatible with the complexity of the ecological part of human relationships. The scientific evidence of the impact of humanity on the planet requires a radical change in human societies, in order to achieve a sustainable future for present and future generations.

The recognition of the environmental protection and human ecological rights, involves not only the development of the welfare state, it also overcomes the limitations of legal categories that respond to a patriarchal, patrimonialist and

anthropocentric conception that is anachronistic and ineffective in the resolution of the serious socio-ecological conflicts that threaten present societies. In this sense, the current subordination of the democratic state to market sovereignty and the dangers of neoliberal economic development for democracy and social and environmental rights, close possibilities for ecological sensitivity.

In a traditional sense, legal ontology has based the essence of law on the relations between human beings, often forgetting and excluding its relations with the non-human world. In this respect, our law is declared in crisis and there is a need for a new ontology and legal methodology, possibly new legal concepts, and a review of human rights, laws and legal institutions that must respond to changes in the Earth system. This paper explores a revisionist ontology of law in the Anthropocene as it relates to the foregoing issues.

### **Antonio Cardesa-Salzmann (Strathclyde University)**

#### *Beyond Sustainable Development. Addressing Distributional and Governance Gaps through Global Constitutionalism?*

This paper explores the potential of global constitutionalism as suitable normative paradigm to address structural imbalances in the post-modern world society that entrench the hegemony of the economic system over other social systems and the global environment. These imbalances give rise to economic, social and environmental distribution gaps that are increasingly perceived as major issues of global justice. Therefore, as the presently upheld normative concept, sustainable development needs to be fundamentally thought over in terms of justice. The main hypothesis is that more open and participative patterns of governance, combined with the progressive infiltration of the language of human rights in global economic, social and environmental governance structures are essential to global constitutionalism, understood as a 'critical and normative "shaping" activity that seeks to improve current and future constitutional conditions' (Brown 2012, 227).

The democratisation of global governance and the articulation of a human rights approach to environmental governance, however, only reflect the formal dimension of the challenge that shifts in the deep structure of the world society pose to international (public) law and governance. Therefore, the paper also builds upon specific extra-legal approaches, methodologies and concepts, like Fischer-Kowalski's global societal metabolism (Fischer-Kowalski and Haberl 1998), that allow an empirical appraisal of the advanced capitalism's socio-environmental impacts, while disentangling the underlying governmentality.

### **Duncan French (Lincoln University)**

#### *"'Yeah but, no but, yeah but, no but...": international environmental law, state sovereignty and the Anthropocene*

In reflecting on the ontologies of environmental law and human rights in the face of the challenges presented by the Anthropocene, there is an initial

methodological question; do we start from here? In the past two decades, the work on human rights and environmental law has taken significant strides forward but there remains a "normative gap" between the rhetorical and ancillary roles played by human rights on environmental matters and the actuality of intergovernmental environmental negotiations. The inclusion of human rights in environmental regimes and rules seemingly remains optional and, much more significantly, at the periphery. The Paris Agreement is a case-in-point; human rights were much discussed but arguably of limited effect.

In considering the challenges for law and institutions by the Anthropocene, and notwithstanding the meta-tension between ecological and anthropocentric perspectives, there are nevertheless certain fundamental trends that are likely to be the foundation for a normative restructuring of law, namely the paradoxical supranationalism and devolution of state sovereignty. State sovereignty will thus be challenged both by demands that it be aggregated at a global level by increased autonomous institutional / rule-making / decision-making organisations. And it will be challenged by a need to refocus state power away from the central executive towards alternatives (perhaps more devolved) forms of power (eg human rights courts) as representative of giving effect to principle of humanity and human rights.

However, for both political and, arguably more controversially, normative reasons, state sovereignty won't be - and shouldn't be - so easily assuaged. Whilst not seeking to uphold Vattelian sovereignty, the paper will caution against a dramatic shift in the political loci of legal and political power. But this seems a deeply unsatisfactory and troubling conclusion. As the title of the paper suggests, this desire for something new is tempered; "yeah but, no but...".

### **Louis Kotzé (North-West University)**

#### *Revisiting the Ontology of International Environmental Law: the SDGs and the Possibility of an Ecocentric Orientation in the Anthropocene*

Scientists suggest that we are entering a new human-dominated geological epoch called the Anthropocene, which will place increased demands on our ailing regulatory institutions, including that of international environmental law (IEL). IEL is significantly contributing to the events that are causing the Anthropocene and ironically is at once also a regulatory institution to counter Anthropocene exigencies. The failures and deficiencies of IEL are explicated by the Anthropocene's human-induced signatures which loosely characterize IEL as being: not compatible with Earth system complexities; unresponsive to Earth system changes; inflexible and not sufficiently reflexive; and state-centered which preserves sovereignty by shutting out alternative modes of ecological care. Related to the last point, most notably, the perceived failures of IEL are often attributed to the anthropocentric, instead of the ecocentric, ontological orientation of this body of law. Collectively these factors legitimize and reinforce the type of human behaviour that is causing the Anthropocene, while further exacerbating environmental destruction, gender and class inequalities, growing inter and intra-species hierarchies, human rights abuses, and socio-economic-ecological injustices. More recently the Sustainable Development Goals (SDGs)

have been developed and it is to be expected that these Goals will provide a roadmap for the future development of IEL. The SDGs are themselves fundamentally anthropocentric which could reinforce the anthropocentrism of IEL. Considering the anthropocentric orientation of IEL and the broader SDG framework, this paper sets out to argue the following thesis: the anthropocentrism inherent to the ontological orientation of IEL and the SDGs only exacerbates Anthropocene-like events and a more ecocentric orientation of both is urgently required to enable IEL to better mediate the human-environment interface in the Anthropocene.

### **Saskia Vermeulen (Strathclyde University)**

#### *The Anthropocene and the Post-Human Condition: Exploring Ontological Revisions of Natural Law and Speculative Realism*

Our ecological footprint on Earth is at such a scale that we find ourselves in a geological epoch called the Anthropocene. At the basis of this environmental crisis lies the long held belief that humans consider themselves to be different from nature and nature is seen as a resource for human use and consumption. An intricate system of property rights has provided the tools to appropriate and commodify nature. Environmental law and rights discourses often re-emphasise and arguably solidify the old dichotomy between culture and nature. Despite hundreds of environmental laws, nature is still in decline. One way of subverting nature as the subject of property is to establish rights of nature. However, the legal recognition that ecosystems have the right to exist is still embedded in a discourse that privileges anthropocentrism over the realities of these ecosystems. But the 'reality' of climate change forces us to tackle head on the tension that exists between normative human governance systems and metaphysical realisms. This paper will draw upon the concept of the post-human condition to establish a dialogue between theories of Natural Law and Speculative Realism. Drawing upon a diffractive methodological approach, as conceptualised by Karen Barad, Donna Haraway and Rosi Braidotti, this paper develops a legal manifesto proposing that an epistemological-ontological-ethical framework can bring a new understanding to the legal condition in the Anthropocene. Through a close reading of traditional and speculative philosophical tractata, mind and matter merges in order to come to a better understanding about the nature of nature and the (post-)human condition within it.

### **Sam Adelman (Warwick University)**

#### *Epistemologies of Mastery*

This paper will briefly outline and discuss epistemologies of mastery and hubris such as patriarchy and neoliberalism that have brought us to this critical juncture in the Anthropocene. As Einstein argued, no problem can be solved at the same level of consciousness that created it. We therefore cannot find viable solutions to the ecological and climate crises confronting us unless we abandon technology

fetishism – such as geoengineering - in favour of epistemologies of humility that enable us to restore respect for nature such as renewable energy technologies.

## **Owen McIntyre (York University)**

### *The Normativisation of Environmental Good Governance: The Promise of Order from Chaos?*

The first half of 2016 was a traumatic one for the palm oil industry, a sector with a notoriously poor environmental record. In March 2016 Unilever, one of the world's leading consumer goods firms, cancelled its contracts with IOI Group, a Malaysia-based palm oil producer and trader which was suspended the previous week by the Roundtable on Sustainable Palm Oil (RSPO), after a year-long investigation found that the company was contributing to deforestation in West Kalimantan, Indonesia. Unilever, which purchases nearly 3 percent of global palm oil production, is a founding member of the RSPO, and the decision to suspend IOI Group's contracts resulted from the supplier's breach of Unilever's 2016 Sustainable Palm Oil Policy. In May 2016 the Office of the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC), the private-sector lending arm of the World Bank Group, published the results of a compliance investigation into IFC's investments in Delta Wilmar Ltd, a palm oil refinery in Ukraine owned by the Wilmar Group, finding non-compliance in respect of IFC's obligation to supervise the environmental and social risks associated with the refinery's palm oil supply chain. Such developments, and the informal environmental and social performance standards involved in each case, are likely to have a significantly greater influence on the environmental and social conduct of key players in the palm oil industry than any formal legal framework has managed to date.

If one accepts that traditional, State-centred mechanisms for elaborating and enforcing legal frameworks for protection of the natural environment are inadequate due to their being unresponsive, inflexible and insufficiently reflexive, one might be encouraged by the increasingly important role of a wide range of novel, and often informal, rules and standards which function to normativise a broad and progressive understanding of 'environmental governance'. The system of global or transnational environmental governance that continues to emerge is quite unlike any previous regulatory framework. It is a hybrid field comprising an intricate mix of public and private (as well as quasi-public and quasi-private) normative mechanisms, which interact in a complex manner in a dynamic regulatory setting. In addition to formal legal instruments adopted under national, regional or global normative systems of a public nature, it also consists of a wide range of private transnational instruments or mechanisms including, *inter alia*, voluntary corporate codes (CSR codes), environmental management systems (ISO 26000), environmental labelling and certification schemes (ISEAL Alliance), environmental or sustainability reporting systems (Global Reporting Initiative) and safeguard policies of project lenders (IFC Environmental and Social Standards). In fact, there exists an almost endless variety of forms of novel transnational regulatory activity.

Many corporate actors, particularly multinational corporations, voluntarily agree to abide by established codes of conduct which expressly require compliance with environmental and sustainability norms. Most notably, the UN Global Compact, a voluntary initiative based on corporate commitment to a set of ten sustainability principles, includes three environmental principles addressing, respectively, a precautionary approach to environmental challenges, initiatives to promote greater environmental responsibility, and the development and diffusion of environmentally friendly technologies. Similarly, the Organisation for Economic Co-operation & Development (OECD) *Guidelines for Multinational Enterprises*, developed incrementally between 1976 and 2011, constitute another legally non-binding initiative which can operate to support application of key environmental requirements to private companies. They consist of recommendations providing voluntary principles and standards for responsible conduct for multinational corporations operating in or from states which adhere to the 1976 OECD Declaration on International Investment and Multinational Enterprises. The Guidelines cover the environmental conduct of businesses in some detail and provide for National Contact Points to handle enquiries and help resolve issues arising in relation to their effective implementation. Of course, these widely adopted and highly institutionalised codes of corporate conduct can play a significant role in the evolutionary development of formal, legally-binding environmental standards at the national level, both legislative and judicial.

This complex mix of environmental rules and standards adopted by State and non-State actors, and the interaction between such rules and standards, may be explained by the phenomenon of “global administrative law”, an analytical approach employed to address the rapidly changing realities of transnational regulation, which increasingly involves, *inter alia*, various forms of industry self-regulation, hybrid forms of private-private and public-private regulation, network governance by State officials, and governance by inter-governmental organizations with direct or indirect regulatory powers. While such novel forms of normative activity can clearly function to enhance the effectiveness, formation, and scope of application of formal rules, which can take considerable time to emerge, especially at the transnational level, concerns inevitably arise in respect of these regimes, particularly regarding their lack of democratic foundations and reduced policy control at the national and local levels, their distance of supranational decision-makers from the public or regulated community, and their lack of effective accountability. In order to address such concerns about the legitimacy of their norm-creating activities, the agencies involved appear, almost universally, to have adopted the principles of procedural rigour inherent to national systems of administrative law in order to help legitimise the exercise of supranational authority.

This paper seeks to examine the extent to which much modern environmental ‘regulation’ can be understood as normativised standards of ‘environmental good governance’ and as the creature of ‘global administrative law’. It also intends to explore the significance of the new reality of transnational regulation for our understanding of the ontology of environmental law.

**Stephen Turner (Lincoln University)**



## *The Anthropocene and the 'Tragedy of the Environmental Lawyer' – Considering Fresh Approaches*

The use of the term 'Anthropocene' has been helpful to indicate the sheer scale of the impact that humankind's intervention has had upon the functioning of the environment and earth systems. The recognition of this impact has catalysed a growth in the corpus of environmental lawyers addressing the issue. In spite of the increased level of attention given to the legal issues associated with the advent of the Anthropocene, a clear pathway towards a global legal architecture that would be predisposed to 'environmental sustainability' has not yet emerged.

This paper contends that a 'tragedy of the environmental lawyer' is in danger of occurring. It argues that it is the community of environmental lawyers who bear a significant responsibility in providing the answers to the problems that the international community faces. This is because they have the knowledge bases to produce the necessary models of global legal architecture that can provide the pathways towards 'environmental sustainability'. However, it argues that as a general rule the approaches that environmental lawyers adopt are characterised by 'micro' legal analysis rather than 'macro' legal analysis. In other words, environmental lawyers adopt approaches that are based on the specialisation of individual aspects of law and critiques of existing law rather than approaches that take into account the full range of laws and legal architecture that impact the environment with a view to developing comprehensive approaches that can truly achieve 'environmental sustainability'.

Therefore, as we enter the Anthropocene, it is argued that as environmental lawyers we should consider the way that we carry out our legal analysis and the work that we undertake so that we are in a position to create the models of global legal architecture that the international community should be considering for the future. It is argued that in this way we can avoid the 'tragedy of the environmental lawyer' and properly adapt our approaches to match the extraordinary challenges that we face.