Trends in environmental law scholarship: marketisation, globalisation, polarisation, and digitalisation

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Trends in Environmental Law Scholarship: Marketisation, Globalisation, Polarisation, and Digitalisation

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1. INTRODUCTION

As one of the former Editors of the Journal invited to take stock of the current state of environmental law, I found myself drawn to thinking about trends in environmental law scholarship. After all, to assess the current state of the discipline, one needs to have a sense of where it has come from and how fashions have moved on or perhaps remained the same. Trends might be looked at in a number of different ways. It is possible to examine what the trends in substantive topics examined in environmental law scholarship actually are and to do so on an empirical basis by counting, for example, law journal publications under relevant topics for a given time period.[1] One could then explore what causes trends or fashions in certain topics to emerge and indeed what causes topics to go out of fashion and drop off the radar. Potential causes of new trends in scholarship would obviously include new legislation or Treaties being introduced, significant new case law, new environmental problems that have emerged and attracted public attention and a demand for a political and legal response, or indeed new regulatory responses to problems that have been around for some time. Similarly, topics may drop off the radar because the relevant law has been around for a long time, and the academic literature on the topic has become saturated and well-worn. In a UK REF[2] context which privileges novelty of contribution to the existing academic literature and also significance, ploughing the same furrow when everyone else has moved on is a risky business. That said there are also the 'perennials' of environment law scholarship which never seem to go out of fashion because they are core to the discipline. These are likely to differ from jurisdiction to jurisdiction, and may be substantive in nature (for example environmental rights, and, somewhat self-reflexively, the nature of environmental law scholarship as a topic), or else more a matter of a broader legal approach to the

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1 Richard Lazarus, 'Environmental Scholarship and the Harvard Difference' (1999) 23 Harv Envt'l L Rev 327; Ole Pedersen, 'The Evolution and Emergence of Environmental Law Scholarship—A Perspective from Three Journals' (2022) 34 JEL. Of course, there are interesting methodological questions with such an approach, including whether journals alone are sufficient to capture trends or whether monographs, edited collections, textbooks and blogs should also be included, and what counts as 'environmental law' for inclusion.

2 Research Excellence Framework—the means by which the UK Government assesses research in higher education and which has funding consequences.

discipline (law and economics, administrative law, federalism).[3] As Lazarus observes of these broader, more-cross-cutting approaches, one might perhaps explain their persistence by reference to career imperatives, with environmental law academics keen (and needing) to demonstrate their credentials to the wider legal academy, with approaches that speak beyond just the narrow confines of environmental law.[4] When the generalist[5] journals are often seen as the 'best' ones (at least from this academic careers perspective, if not always from a target audience one), then that too may drive people more towards broader, cross-cutting topics that such journals tend to favour over more subject-specialist articles.

It is surprising that we do not have more of these empirical articles looking at scholarship trends.[6] Or perhaps that itself reflects the fact that they may not be regarded as quite scholarly enough beyond the first ones that do it in relevant jurisdictions and are therefore novel. However, such studies undoubtedly need to be empirical. I started out thinking what to write in this piece and came up with my own perceptions, deliberately based on gut-feeling rather than any serious methodological trawl, of what topics were in fashion and what had gone out of fashion. I am also writing as a UK and European academic—albeit one who tries to keep more broadly tuned in—and that inevitably influences the musings that follow. In my own mind, obvious topics that had gone out of fashion in environmental law included GMOs, fracking,[7] the precautionary principle and public perceptions of risk, EU trade/environment case law, economic instruments, cost-benefit analysis, environmental impact assessment, environmental integration, enforcement, and acid rain. Topics clearly in fashion would include the Paris Agreement (although scholarship there has arguably peaked, at least as far as direct coverage is concerned), rights of nature, and obviously climate change litigation (query whether that too is running out of steam—saying something new on the never-ending stream of new cases is increasingly challenging). You might of course add topics that you think should be in fashion but aren't—plastics would be one I would put into that category, and also nitrate, phosphate and sewage pollution. What is in fashion in terms of public and media interest (reasonably high in the UK in both instances) does not always translate into scholarly attention, or at least not rapidly so.

Of course, lists like the above are bound to reflect not only geographical location, but also all sorts of personal interests and biases (as well as age, and memory recall) and will further depend on where, as a researcher, you tend to look in order to keep abreast of new scholarship. I was reminded of this when casually raising two topics with environmental law friends—topics that in my own head had gone out of fashion in environmental law scholarship. These were public participation on the one hand, and environmental courts on the other. With public participation, we agreed that there are a couple of 'classics' in the literature,[8] and there was perhaps a need for a contemporary piece. On further reflection though, my perception was based on more generalist articles (which had, interestingly, made their way into generalist journals). I had missed out some excellent, more specialist work on public participation which had continued to appear

3 Ibid.
4 Ibid.
5 For discussion of generalist UK and EU journals and environmental law scholarship, see Pedersen (n 1).
6 And from this point of view, Ole Pedersen's recent JEL contribution (n 1) is obviously welcome.
7 Though not in wider social science study in the UK, where despite the seismicity-based UK moratorium on fracking (a research fashion dampener), a major research council funding programme has kept the topic alive. Funding can therefore be added as another potential causal variable of trends. Recent UK Government announcements on resurrecting fracking and watering down the seismicity controls may also stimulate new scholarship, depending on where, if anywhere, these developments lead.
8 Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21 OJLS 415; Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 MLR 80.

in environmental law journals (and which I had read and already knew of).[9] And textbooks, monographs or edited collection works on the area did not get a look in either, although there is also good material in those on public participation. With environmental courts, again I had a sense of some early UK-based work,[10] and some articles on the Indian and Australian experience with specialist environmental courts or tribunals,[11] but of a fallow period recently. And then I read Emma Lees' review[12] of Ceri Warnock's 2020 Hart monograph on environmental courts and tribunals[13] and realised I had missed that. Not long after that I also discovered, via LinkedIn, a UNEP report on environmental courts and tribunals.[14] Some may of course query to what extent reports count as environmental law scholarship, lacking as they typically do an argument as such, or a novel theoretical contribution, but they have often been entered as UK REF submissions and are perhaps more likely to have 'Impact' beyond academia in a REF-sense than journal articles. My point here though is more that personal perceptions of trends in the academic literature—while interesting (to me at least) and potentially something to research empirically in their own right—are likely to be prone to errors. Empirical study of trends themselves is thus advisable. Public participation and environmental courts and tribunals are much better regarded as perennials—my initial impressions were wrong or had come from a different angle.

However, rather than simply analysing micro-level trends in topics in environmental law scholarship, I want to spend the rest of this piece analysing trends from a more macro-level perspective, focusing on four broader dynamics at work. As Ole Pedersen has observed, given that environmental law scholarship is 'co-produced' with society in that we as academics live in it, our work therefore inevitably reflects (and in some cases hopefully shapes) wider trends in society.[15] With that in mind, in the sections that follow, I will be examining the four trends of the marketisation, globalisation, polarisation, and digitalisation of environmental law scholarship. All of these are societal macro-level trends of our time. In applying them to the field of legal scholarship below, I will be exploring not just the macro-trends themselves, but also the outcomes of such trends, and possible causal explanations for trends in environmental law scholarship.

2. MARKETISATION OF SCHOLARSHIP

As Higher Education (HE) has become increasingly marketised globally, with league tables, research assessment exercises, reduced direct state funding, and competition for staff, students, and research funding all playing a part, academic environmental law scholarship is not immune from such forces. One can also see scholarship through such a lens, as a competition of ideas in a marketplace. There is, on this account, an economic incentive to publish novel

9 Eg Margherita Pieraccini, 'Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England' (2015) 27 JEL 45; Chiara Armeni, 'Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms' (2016) 28 JEL 415; Joanne Hawkins, '"We Want Experts": Fracking and the Case of Expert Excess' (2020) 32 JEL 1; Chiara Armeni and Maria Lee, 'Participation in a Time of Climate Crisis' (2021) 48 J Law Soc 549.

10 Patrick McAuslan, 'The Role of Courts and Other Judicial Type Bodies in Environmental Management' (1991) 3 JEL 195; Harry Woolf, 'Are the Judiciary Environmentally Myopic?' (1992) 4 JEL 1; Malcolm Grant, *Environmental Court Project: Final Report to the Department of Environment, Transport and the Regions* (DETR 2000); Richard Macrory and Michael Woods, *Modernizing Environmental Justice: Regulation and the Role of an Environmental Tribunal* (UCL 2003); Ceri Warnock, 'Reconceptualising Specialist Environment Courts and Tribunals' (2017) 37 LS 391.

11 For example, Gitanjali Gill, 'A Green Tribunal for India' (2010) 22 JEL 461; Sudha Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' (2015) 17 Envt'l L Rev 169; Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 JEL 365.

12 Emma Lees, 'The Legitimacy of Specialist Environmental Courts: Integrity as Capacity' (2022) 34 JEL 387.

13 Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart 2020).

14 United Nations Environment Programme, *Environmental Courts and Tribunals—2021: A Guide for Policy Makers* (2022), available at <https://wedocs.unep.org/20.500.11822/40309> accessed 10 October 2022.

15 Ole Pedersen, 'Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law' (2013) 33 OJLS 103.

and significant work, because that will match university expectations (themselves often set by government assessment metrics) and doing that will enhance promotion or mobility prospects. What counts as novel and significant obviously changes over time and academics will supply outputs on topics where they perceive there is demand. Of course, in large part they also form the demand side for such outputs. This view sees academic scholarship as an organic, bottom-up process which, in Hayekian fashion, involves the invisible hand determining the relevant topics, including which are trending and which are falling out of fashion. Naturally, this assumes that academics are perfectly rational actors, whereas behavioural and narrative economics tell us that like all humans, they are prone to biases and the power of narratives,[16] which means that academic scholarship may, for example, cluster around certain topics with a powerful narrative. Trends, in other words, may be contagious and not always fully rational.

Critics of the market explanation of academic scholarship argue that it ignores the key role of power in academia—especially the power of academic gatekeepers such as journal editors and referees. It also underplays the role of identity and framing in topic choice. David Kennedy has written on the emergence of 'new thinking' in international law. His article involves an exploration of 'the struggles through which transformations in the disciplinary vocabulary are generated, and through which one or another set of ideas comes to be dominant at a particular moment'.[17] As he argues:

> our conventional pictures of this process-as a struggle of individuals in a marketplace of ideas, as pragmatic responses to a shifting problem set-are off the mark. Disciplinary renewal-no less than disciplinary stasis-can best be understood as a complex interaction among groups of individuals pursuing intellectual, political, and personal projects. Relations among these efforts over time can better be grasped in the vocabularies of power, commitment, and identity than in the vocabularies of merit or pragmatic functionalism.[18]

Beginning with power, what this means is that trends in environmental law scholarship cannot be seen as reflecting a spontaneous, changing and responsive bottom-up marketplace for ideas; rather, academic gatekeepers have power to determine what counts as good scholarship which deserves publication.[19] They therefore help to shape trends and to influence whether they endure or fade away. Of course (with limited exceptions for commissioned work), they cannot easily control what is actually submitted in the first place, so one can easily overstate their role. Nevertheless, they clearly have an important influence on what trends emerge and are maintained.

I will be examining identity and framing in more detail in the following section. However, for now, it suffices to say that how scholars feel about what they are writing about, and how it fits with their framework of interpretation and their identity, will have an important bearing on trend formation. If someone frames[20] environmental problems via an ecological lens and identifies as an ecological lawyer, for example, then they are less likely to write using a law and economics approach to environmental law, however fashionable and economically rational for them personally that may be at the time.

What we have seen in this section then, is that environmental law scholarship is largely situated within a marketised HE context and that this helps to shape what topics are chosen for

16 Robert Shiller, *Narrative Economics* (Princeton University Press 2019).
17 David Kennedy, 'When Renewal Repeats: Thinking Against the Box' (2000) 32 NYU J Int'l L & Pol 335, 338.
18 Ibid.
19 A point recognised by previous JEL Editor Liz Fisher, who has discussed the need for gatekeepers to take 'epistemic responsibility': Liz Fisher, 'Environmental Law, Scholarship, and Epistemic Responsibility' (2021) 33 JEL 521.
20 On framing in this sense see eg Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Harvard University Press 1974).

research and publication. These sector dynamics have acted to concentrate and supercharge the economic supply and demand model that was always there to some degree. And while that market model can help to causally explain trends in environmental law scholarship, it cannot provide the full explanation because other factors like gatekeeper power and academic identity and framing clearly also play a role.

3. GLOBALISATION

Natasha Affolder has written in this journal about the rise of 'contagious lawmaking', which she conceives of as a complex set of processes involving the movement of 'legal ideas' (and not the movement of 'laws' as such).[21] As she notes, legal scholars are among those who 'are active, consciously or not, in the practice of law's contagion.'[22]

Affolder's principal argument is that those who are engaged in moving legal ideas around, especially but not just transnationally, should be wary of losing the local context of the law in the process. In doing so they may, for example, erase the background of important historical injustice, or fail to acknowledge the rootedness of ideas in particular indigenous worldviews. It is this aspect which I want to pick up on in thinking about the trend of the globalisation of at least some fields of environmental law scholarship. Perhaps the best two contemporary examples of such fields are climate change litigation and rights of nature. With climate change litigation, case law has sprung up all over the world and the academic scholarship that has followed has largely tended to adopt a distinctly transnational approach, drawing on judgments from numerous jurisdictions.[23] This then often translates into research-led teaching. Is it possible to conceive of a module on purely UK climate litigation for example? It is, but it is much more likely that such a module will reflect the existing scholarship which adopts a globalised, contagious approach, including references to landmark climate litigation cases such as *Urgenda*[24] from the Netherlands, *Leghari*[25] from Pakistan, and *Juliana*[26] from the USA. Because the case law has been strategically designed to be contagious[27] (after all, we need such cases to spread like a virus in order to help tackle the climate emergency globally), it is perhaps no surprise to find that legal scholarship has ended up both sharing and in some cases no doubt also helping to shape this contagious attribute. We find much the same situation with rights of nature.[28] While human rights and the environment work has tended to be more jurisdictionally specific (in Europe, with the European Convention on Human Rights or EU law rights for example),[29] coverage of rights of nature is more likely to involve discussion of various jurisdictions transnationally where

21 Natasha Affolder, 'Contagious Environmental Lawmaking' (2019) 31 JEL 187.

22 Ibid 210.

23 From a voluminous literature, see eg Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 TEL 37; Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 JEL 483; Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 AJIL 679; Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9 Climate Law 244; Joana Setzer and Lisa Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) WIREs Clim Change 10:e580; Juan Auz, 'Human Rights-Based Climate Litigation: A Latin American Cartography' (2022) 13 Journal of Human Rights and the Environment 114.

24 *The State of the Netherlands v Urgenda Foundation*, Supreme Court of the Netherlands, 20 Dec 2019, ECLI:NL:HR:2019:2007.

25 *Asghar Leghari v Federation of Pakistan* (2015) WP No 25501/2015.

26 *Juliana v US*, 947 F 3d 1159 (9th Cir 2019).

27 Emily Barritt, 'Consciously Transnational: Urgenda and the Shape of Climate Change Litigation: *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation*' (2020) 22 Envt'l L Rev 296.

28 Mihnea Tănăsescu, 'The Rights of Nature: Theory and Practice' in M Wissenburg and D Schlosberg (eds), *Political Animals and Animal Politics* (Palgrave Macmillan 2014); Joel I Colón-Ríos, 'On the Theory and Practice of the Rights of Nature' in Paul Martin (ed), *The Search for Environmental Justice* (Edward Elgar 2017); Louis Kotzé and Erin Daly, 'A Cartography of Environmental Human Rights' in Emma Lees and Jorge E Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (OUP 2019).

29 Human rights and climate change obviously does not fit this description, being much more consciously transnational, especially in academic articles considering the role of human rights in climate change litigation: Peel and Osofsky (n 23); Setzer and Vanhala (n 23); Savaresi and Auz (n 23).

such rights have taken root.[30] Again, bringing it back to teaching to emphasise the point, even if we are teaching environmental law in a jurisdiction without any rights of nature in domestic law, many of us are likely to draw on examples from countries around the world, not least because they help to sharpen the differences and limitations of existing domestic rights jurisprudence.

What I am suggesting is that, in certain areas of environmental law, there is a trend in environmental law scholarship towards more globalised or transnational approaches which look well beyond the national. Climate change litigation and rights of nature both provide good examples of that. Other areas, such as contaminated land, are perhaps more likely to remain domestically focused, although even there, if adopting a universalising environmental justice lens, legal research may also adopt a transnational outlook.

In this section, I am merely seeking to identify this trend in scholarship as a trend—I am not trying to explain it, although some of the explanation no doubt lies in ideas of novelty, markets, and framing and identity, which have already been discussed above. Neither am I making any normative points about the process, like Affolder's important ones. What is worth noting, however, is that this approach might well equally mark environmental lawyers out, in former UK Conservative Prime Minister Theresa May's words, as 'citizens of nowhere'. That nationalist statement was of course made in the context of Brexit and a suspicion of cosmopolitan elites who were unhappy with the outcome of the referendum. However, Affolder's work demonstrates that the left too has legitimate concerns over globalising forces that paper over important issues of national and sub-national history and identity. And environmental lawyers should be conscious of the scope for backlash from the right for trying to import legal ideas that are painted as alien to the domestic legal culture. We have seen this recently with sustainable finance law for example, where ESG (environment, social, and governance) has also become a globalised, free-floating legal idea in much the same way as we saw above with climate change litigation and rights of nature. US Republican critics of the proposed ESG-related Securities and Exchange Commission (SEC) rule on climate disclosure have argued that it is aimed at introducing European ideas on using securities law for political, Green Deal-type climate change capital reallocation purposes, rather than protecting investor risk and return in line with narrower US legal culture on securities regulation.[31] Of course it is nothing of the sort—the SEC proposal is carefully and firmly rooted in US legal culture and the attempt to say that it is something else is a cynical political exercise to derail the proposal.[32] However, the point is that in modern populist times, lawyers need to be alive to the fact that both left and right can see legal culture as something that does not and should not travel.[33] Nationalism, including legal nationalism may be defended by some in place of legal cosmopolitanism and globalisation.

4. POLARISATION AND GROUPTHINK

The point about populism in the previous section provides a useful segue into the current section, which examines a trend in environmental law of polarisation[34] and groupthink. I should

30 Cf. Paola Villavicencio Calzadilla and Louis Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7 TEL 397.

31 See eg Hester Peirce, a Republican SEC member appointed by former US President Donald Trump, whose suspicion is that calls for 'enhanced climate disclosure are motivated not by an interest in financial returns from an investment in a particular company, but by deep concerns about the climate'. Hester M Peirce, 'We Are Not the Securities and Environment Commission—At Least Not Yet' (21 March 2022), available at: <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321> accessed 27 June 2022.

32 Kate Aronoff, 'The Deranged Demands of the "Anti-ESG" Movement', *The New Republic*, 29 August 2022. As Aronoff writes, 'Republicans have begun to embrace the fight as an election issue, as well, turning "ESG" into a base-rallying bogeyman much like CRT, or "critical race theory"'.

33 I am not suggesting that this is Affolder's view: she too seems to be in favour of transnationalism but is stressing the need to be cautious about its risks as well as its benefits.

34 On the risk of polarisation over legal responses to climate change, see eg Liz Fisher, 'Climate Change, Legal Change, and Legal Imagination', UCL Climate Change and the Rule of Law Blog (13 Dec 2021), available at: <https://www.ucl.ac.uk/law-environment/blog-climate-change-and-rule-law/climate-change-legal-change-and-legal-imagination> accessed 10 October 2022.

state at the outset that I do not mean the latter word in a pejorative sense. In any case, I am just as guilty of groupthink as the next person (although I have a slight Groucho Marx-type tendency not to want to join any ideas club that would have me as a member, I appreciate that this is a naïve view and that others will no doubt mentally pigeonhole my work into some category or another). We all have our bubbles. That is again a feature of our times—and one that has been exacerbated both by a manipulative and narrowly owned traditional media, and by social media. We are constantly in danger of only reading what already confirms our own views, and of talking to our own echo chamber and not engaging with those who do not share our opinions. This has made society feel much more polarised and has made the sort of political compromise that is needed for effective democratic governance much harder to come by.

Legal scholarship in environmental law is not immune from this societal trend and (I put it no higher than this) is, if not careful, at risk of going down a similar polarised path where different sides of environmental law no longer seriously engage with each other. Not that this is this an entirely new risk. There has long been a broad division in environmental law scholarship between 'critical' and more conventional work. My own sense is that this division has broken down to some extent, especially in the last decade. Critical approaches have arguably become more mainstream and accepted by the gatekeepers across many environmental law journals.

Nevertheless, I wonder whether we are beginning to see more of a defined cleavage developing between those who identify as Anthropocene or Earth System Governance or Wild lawyers (the contest for ideas that best capture the space there is ongoing) and those who do not subscribe to this ontological turn in environmental law as a necessary part of their scholarship. This brings us back to issues of framing and identity discussed earlier. It was discussed there as a further possible explanation for trends in environmental law scholarship. The point I am making here is that framing, and an identity politics that comes with it, may become a powerful defining marker of a trend in environmental law scholarship, with an ontological identity of a oneness with the Earth and other living organisms becoming foundational to one's scholarship. There is, I think, a logic to that—after all, the legal responses called for are very different with that background assumption in mind. However (and conscious of the fact that by making this point I could end up exacerbating this risk rather than preventing it), there is also a risk that the discipline may eventually splinter because each side no longer believes it has anything to learn from the other and with both sides talking past each other. I believe that would be a great shame for environmental law as a discipline—not least because it has many wonderful people[35] in it. There is almost always something to learn from the other side.[36]

I should also be clear that I am not arguing against the rise of identity politics in general,[37] or indeed against the ontological variety at issue above, which is a worldview I largely share myself—albeit one that I do not necessarily believe should always shape my own scholarship. Space precludes a detailed discussion of the reasons for the latter, but the main one involves the likelihood of getting buy-in from the wider public or from policy audiences. As we have seen with political parties, ideological purity, while attractive in many ways, is no guarantee of electoral success and indeed may well be one factor preventing it. While a Deep Green by instinct, I am more of a centrist in practice. I believe that you can change things more effectively by meeting people on their own territory with their own concerns.[38] Ultimately

35 On how environmental law scholarship is apt to erase 'people' (albeit noting some change in terms of more personalised scholarship), see Natasha Affolder, 'Transnational Environmental Law's Missing People' (2019) 8 TEL 463.

36 See further Fisher (n 19), who emphasises the need for a diversity of knowledge, voices, and methods in maintaining the health of the body of environmental law scholarship.

37 Itself a loaded term.

38 As in the views of Katharine Hayhoe: Katie O'Reilly, 'Katharine Hayhoe Reveals Surprising Ways to Talk About Climate Change', Sierra, 20 March 2018, available at: <https://www.sierraclub.org/sierra/katharine-hayhoe-reveals-surprising-ways-talk-about-climate-change> accessed 10 October 2022.

though, neither do I think that academic environmental law scholarship is always necessarily all about changing things, important though that is (and however indirect the impact may be). Scholarship and knowledge are also goods in themselves beyond their instrumental value. And while I think there is excellent work within the ontological turn literature, it is not a style of scholarship that comes naturally to me in law. I like reading it when done well, and I like to incorporate aspects of it into my own work, but it does not draw me to doing it myself as a full-time scholarly project within environmental law. In the end, that choice is also an issue of academic identity. For some of us, academic identity may not be singular, but plural. The identity we present may not always fully match our deep-seated worldview or personal framing of environmental problems: we may present different identities frontstage to what we believe backstage in private.[39] That may be an instrumental normative choice. For others, it may be important that the frontstage and backstage always match and they may be more deeply committed to presenting the ontological turn as a singular normative necessity that informs all their work.

It is also possible to make a broader point about identity politics in environmental law. This is not to do with how this plays out within electoral politics. I make no comment on accusations made by some that the left has become overly-focused on issues of identity politics around race, sex and gender, sexuality and so on at the expense of traditional political cleavages based on class and that this explains why left wing parties in countries like the USA and the UK enjoy electoral success with metropolitan liberal elites, but have lost the political support of their traditional working class voters.[40] Except to say that both sets of concerns are important, especially to lawyers conscious of the fact that rights struggles have been central to all of these categories. My concern at this point is more with how identity politics operates in environmental law scholarship. This needs to be placed in a context in which populist forces on the right have accused HE institutions of being hotbeds of 'woke' activism with academics portrayed as brainwashing students with left wing ideology, including critical race theory (CRT).[41] Critics have rightly pointed out that the right in the USA has tended to (mis-)use CRT as a catch-all term to represent their concerns with university and school teaching across a range of social issues involving the historically disadvantaged.[42] However, looking at environmental law scholarship, such attacks from the right would in any event have a straw person quality to them. While environmental law has, it is true, particularly in the USA, long considered issues of race via the environmental justice lens—and rightly so—it has only relatively recently begun to pay attention to other voices which have historically received little space in the literature.[43]

5. DIGITALISATION: CHANGING PRODUCTION AND OVERPRODUCTION?

My final societal trend which I would argue, has inevitably fed through into environmental law scholarship, is digitalisation, by which I mean the way in which publication of such scholarship

39 Erving Goffman, *The Presentation of Self in Everyday Life* (Anchor Books 1959).

40 Red wall voters in the UK, and rust belt voters in the USA.

41 See eg Nick Anderson and Susan Svrluga, 'College Faculty are Fighting Back against State Bills on Critical Race Theory', *The Washington Post* (19 Feb 2022).

42 '"Critical Race Theory" is Being Weaponised. What's the Fuss About?', *The Economist* (14 July 2022).

43 Louis Kotzé, 'Reflections of the Future of Environmental Law Scholarship and Methodology in the Anthropocene' in Ole Pedersen (ed), *Perspectives on Environmental Law Scholarship Essays on Purpose, Shape and Direction* (CUP 2018). These perspectives include eg TWAIL ones from international environmental law, considering previously colonised communities and also eg LGBT+ identities in environmental law: Usha Natarajan and Kishan Khoday, 'Climate Change' in Jean d'Aspremont and John Haskell (eds), *Tipping Points in International Law: Commitment and Critique* (CUP 2021); Steven Vaughan and Brad Jessup, 'Backstreet's Back Alright: London's LGBT+ Nightlife Spaces and a Queering of Planning Law and Planning Practices' in Maria Lee and Carolyn Abbot (eds), *Taking Planning Law Seriously: New Research in English Planning Law* (UCL Press 2022).

has increasingly left behind the old paper-based versions housed in libraries and on academic bookshelves and become digitised. Most of what we now read, publish, and search for, we do via the Web.

There is also a trend towards posting environmental law scholarship in blog form on websites. Indeed, the Journal of Environmental Law itself pioneered the use of this format under Liz Fisher's Editorship. Blogs allow for a much more rapid response to new developments.[44] They also enable a wide range of pieces to be organised around a particular topic or theme—offering a range of perspectives that otherwise only special issues or edited collections can provide. Nevertheless, blogs find themselves in a scholarly grey area. As scholarship they are typically not peer reviewed and are unlikely to be 'counted' for official research purposes. However, they certainly raise the question of what we are trying to do and who we are trying to reach in our scholarly endeavours.[45] They can be a very effective way of flagging up ideas that will appear in a forthcoming paper or capturing the essence of an argument in one that has just been published. The latter, in particular, may enable an author to publicise their work to a readership in a neighbouring discipline for example, or, with Impact in mind, to aim it at professional lawyers, judges or policy makers.

Digitalisation has, along with marketisation, undoubtedly also led to an increase in the amount of environmental law scholarship produced. There are now numerous journals in the field, with many of them under commercial pressure to publish more issues and therefore more articles per year, particularly in the light of Open Access funding models. The question is whether there is now an over-supply or overproduction of scholarship in environmental law (based on an increasing demand for scholarly output publication from a more globalised HE sector combined with publisher incentives to increase supply). Just as Julian Kirchherr has written of the social science literature on sustainability and transitions, does this ever-increasing production inevitably mean that environmental law is producing not only excellent academic outputs, but also copious quantities of 'scholarly bullshit' on topics in vogue?[46] Kirchherr defines this as 'scholarship that is so pointless and unnecessary that even the scholar producing it cannot justify its existence. In essence, it is scholarship that does not contribute to the advancement of scientific knowledge on a subject at question. However, because of the current set-up of the academic system, the scholar feels obligated to pretend otherwise and to continue churning out this kind of work'.[47] Kirchherr then also provides a typology of such pieces, placing them into the following categories: 'boring question scholarship, literature review of literature reviews, recycled research, master thesis madness, and activist rants'.[48]

Aileen McHarg has similarly written in disparaging terms of the 'academic hyper-activity and hyper-innovation'[49] on the topic of energy justice within the field of energy law, observing that it is 'seemingly driven by the desire to stake a claim in an exciting new field, rather than to engage in the hard intellectual labour of developing properly grounded and defensible theoretical claims or thinking through the implications of securing just energy decisions in practice'.[50] What both Kirchherr and McHarg are highlighting can be seen from two perspectives. On the one hand—and reflecting the market for ideas view—one can argue that some weak scholarship which does not add much to the existing literature is inevitable in a global marketplace for such

44 More rapid even than for example JEL's Analysis section, which while peer reviewed, has a more expedited process.

45 Duncan French and Lavanya Rajamani, 'Climate Change and International Environmental Law: Musings on a Journey to Somewhere' (2013) 25 JEL 437.

46 Julian Kirchherr, 'Bullshit in the Sustainability and Transitions Literature: A Provocation' (2022) Circ Econ Sust, available at <https://doi.org/10.1007/s43615-022-00175-9> accessed 10 October 2022.

47 Ibid.

48 Ibid.

49 Aileen McHarg, 'Energy Justice: Understanding the "Ethical Turn" in Energy Law and Policy' in Iñigo del Guayo and others (eds), *Energy Justice and Energy Law* (OUP 2020) 30.

50 Ibid. This criticism has attracted some defensive criticism of its own: Raphael Heffron, 'Energy Law in Crisis: An Energy Justice Revolution Needed' (2022) 15 The Journal of World Energy Law & Business 167.

scholarship. On this view, the good work will in the end stand out and influence future scholarship, with citation count being one indicator of this (again aided by digitalisation and platforms such as Google Scholar).[51] On the other hand, accusations of hyperactivity and overproduction are perhaps at risk of under-appreciating the iterative and ultimately collective nature of academic scholarship. Very few pieces of work manage to capture the full analytical weight of a new topic at first go. It is much more of a collective enterprise, where numerous academics pile in and, with any luck, each adds a new piece to the overall jigsaw puzzle. Some of these pieces will be poor scholarship, but even those can often be useful in showing what something is not, or in acting as a foil to better see the correct picture.

6. CONCLUSION

The Covid pandemic has made many academics question the nature of what they do. That includes work–life balance issues and of course scholarship is often the thing that encroaches into personal and family time. Since scholarship is typically a significant part of our identity, and often enjoyable, this makes it all the harder to resist this pressure. But maybe we will start to see more of an emphasis on less being more and on quality rather than quantity and overproduction. That may be a forlorn hope unless the institutional expectations[52] around academic probation and promotion change and move away from a science-based model involving numerous publications. The fact that the recent UK 2021 REF only required a minimum of one output from each member of staff entered was a useful start.

As we hopefully leave the Covid crisis behind us, recent extreme weather events such as heatwaves in India, the UK, and California, wildfires in Europe, and floods in Australia, Nigeria and Pakistan, should also give us pause for thought about the climate crisis (and the associated biodiversity crisis), which has not gone away. Perhaps the trend in ever-increasing scholarship on climate law, including climate change litigation should continue because we all have a moral responsibility to do what we can in response to an existential crisis of this kind. And legal scholarship and teaching on climate law is part of what, as academics, we can do.[53] But if that is the case, then we also have a duty to make our voices heard outside the academy when we are able.[54] Environmental law scholarship should, in other words, be the starting point and part of the journey, but not the end point. Piecing all of this together, one might term this a call for a 'climatisation' trend as a normative imperative. In other words, this is fashion we should all be wearing.

That inevitably also raises the issue of the nature of the scholarship that best serves the tackling of the climate emergency. Do reformist approaches that work within dominant existing rationalist legal frameworks, such as EIA, or CBA, or ETSs, work best? Or do we need the sort of wholesale change envisaged by the ontological turn approach, or even a change in political economy away from capitalism on which so much of our environmental law is premised?[55] Is there a place for injecting the romanticism of art, beauty, emotions and storytelling to soften the hard edges of environmental law's rationalism?[56] My answer, which some will no doubt see as a cop-out, is that we probably need scholars to be doing all of these. While I am convinced that

51 Although of course poor scholarship may also end up being cited, especially if it is among the first on the topic.

52 Actual and not just formal—the rules do often reflect separate discipline expectations, but there is still typically a reluctance to accept that these can really be so different.

53 Because, to echo the title of a previous reflection piece of mine; Chris Hilson, 'It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law' (2013) 25 JEL 359.

54 And I appreciate that people will be very differently positioned in this respect.

55 On incremental versus systemic change, see eg Fisher (n 34); and George Monbiot, 'This Heatwave Has Eviscerated the Idea That Small Changes Can Tackle Extreme Weather', *The Guardian* (18 July 2022).

56 Chris Hilson, 'The Role of Narrative in Environmental Law: The Nature of Tales and Tales of Nature' (2022) 34 JEL 1; Benjamin Richardson, Emily Barritt and Megan Bowman, 'Beauty: A Lingua Franca for Environmental Law?' (2019) 8 TEL 59; Katie Woolaston and Afshin Akhtar-Khavari, 'Extinction, Law and Thinking Emotionally About Invertebrates' (2020) 29 Griffith L Rev 585.

global heating changes everything[57] and it has made me lean further towards an instrumental view of environmental law scholarship, I think that non-instrumental scholarship is important for the 'legal imagination'[58] that it can set free. These ideas are then often taken up by more instrumental work, even if that is sometimes only at the margins. Those margins can also make a difference to ways of thinking about environmental law. Ultimately, that is what good scholarship is about.

57 To borrow from Naomi Klein, *This Changes Everything: Capitalism vs. the Climate* (Simon & Schuster 2014).
58 Fisher (n 34).