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The Culture of Environmental Law and the Practices of Environmental law Scholarship

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Ole W Pedersen

The first and most striking feature to emerge from this collection of essays is that environmental law scholarship is perceived by environmental law scholars themselves a encompassing a wide range of methodologies, topics, disciplines and considerations. Environmental law scholarship caters for a wide range of different approaches to scholarship and the scholars considering the discipline their home represent a diverse range of backgrounds. Not only do they come from different jurisdictions, carrying with them understandings of scholarship anchored in their unique legal cultures but these scholars also come to rely on and make use of a diverse sets of methodologies and understandings of what scholarship is. Whilst methodological rigour is seen as important, there is not an exclusive commitment to a specific methodology.[1] This 'internal diversity', to use Maldonado's phrase, might even be seen as calling into question whether we are at all talking about one coherent discipline.[2] In the least, it becomes clear that environmental law scholarship is highly contingent. Contingent in the sense that a given body of scholarship – and indeed each piece of scholarship – reflects a unique set of circumstances. These circumstances include, for example, the legal framework of environmental law and regulation

[1] See also Cecot and Livermore infra ch 8.
[2] E.g. Maldonado infra ch 4, Lee and others infra ch 8 and Farber infra ch 10.

of the jurisdiction at hand and the institutional drivers and pressures as well as lived scholarly experiences of each individual scholar.[3] In other words, the very understanding of what falls within the confines of environmental law will vary from jurisdiction to jurisdiction.

An added feature which underscores the permeable nature of the boundaries of environmental law scholarship as a discipline is the widespread understanding that environmental law scholarship is by its very nature interdisciplinary.[4] Whether this is asserted as a descriptive observation by reference to the strong links between environmental law and other disciplines in the social or natural sciences or whether it is put forward as a prescriptive claim, arguing that environmental law scholarship ought to learn from other disciplines, the interdisciplinary nature of environmental law scholarship is uncontroversial. That of course is not to say that engaging in interdisciplinary work is easy – the account put forward by Lee et al in chapter 8 evidently shows that interdisciplinary scholarship poses challenges for those scholars brave enough to expressly pursue scholarship through an interdisciplinary project. But it also highlights the centrality and importance of the environmental law scholar's ability to rely on considerations and frameworks ordinarily thought to be external to legal scholarship.

One important implication, however, emerges from this. If interdisciplinarity is so important to environmental law and environmental law scholarship, if it becomes a central or defining characteristic of the discipline, it arguably ceases to be interdisciplinarity as ordinarily understood.[5] That is, interdisciplinary scholarship becomes a disciplinary feature of environmental law scholarship – it is what environmental law scholars do (or at least a large

[3] E,g, Fisher infra ch 3 and Guneratne infra ch 11. On personal experiences see e.g. Angela Mae Kupenda, 'Personal Essay – On the Receiving End of Influence: Helping Craft the Scholarship of my Students and how their Work Influences Me' on https://jotwell.com/wp-content/uploads/2014/07/Kupenda-Personal-essay-on-influence.pdf (accessed April 20 2018).

[4] E.g. Chris Hilson, 'Editor's Foreword' (2008) 20 JEL 1 and Margherita infra ch 6. In making this argument, I take interdisciplinarity to include what is by some termed multi-disciplinary and trans-disciplinary scholarship. See Jerry A Jacobs, *In Defense of Disciplines* (Chicago: University of Chicago Press, 2013).

[5] Ole W Pedersen, 'The Limits of Interdisciplinarity and the Practice of Environmental Law Scholarship' (2014) JEL 423-441.

share of us do) – so much so that environmental law scholarship becomes synonymous with scholarly engagement with other disciplines. If this is the case, the strong reliance on external disciplines ultimately results in these disciplines being internalised into the discipline of environmental law.[6] Interdisciplinarity consequently becomes the disciplinary characteristics of environmental law scholarship.

On this reading, the broad focus of environmental law scholarship and its interdisciplinary nature results in environmental law scholarship reflecting its object of study - environmental law. Environmental law itself is often seen as defying traditional legal boundaries between the public and the private as well as between the international, the federal and the local.[7] Though this poses challenges for environmental law scholars when it comes to the ability to engage with and criss-cross jurisdictional boundaries which remain more firm in other disciplines of law and legal scholarship, purely as a matter of observation, a central characteristic of environmental law scholarship is the fact that those engaging in it must maintain a level of scholarly flexibility. Again, given that scholars from time to time have called into question whether environmental law itself constitutes an orderly discipline, scholars would be forgiven for pondering whether it is at all possible to conceptualise environmental law scholarship as a coherent whole.[8]

In response to the broad disciplinary confines and the contingency of its scholarship, the most constructive way to conceptualise environmental law scholarship is be as a practice embedded within a broader legal culture. The practice being environmental law scholarship and the culture being environmental law as a body of law. In defining environmental law scholarship and its antecedent object of study as a practice and a culture respectively, the point

[6] Louis Menand, *The Marketplace of Ideas* (New York: Norton & Company, 2010)119.
[7] E.g. Elisabeth Fisher, *Environmental Law: A Very Short Introduction* (OUP 2017).
[8] E.g. Zygmunt Plater, 'Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in which Everything is Connected to Everything Else' (1999) 23 Harv. Envtl. L. Rev. 359.

is not so much to prescribe a particular form of methodology for the discipline.[9] The point is simply – in a descriptive sense – to try and capture what it is environmental law is and what it is environmental law scholars do. The concept of legal culture is ordinarily used as a term to explain the differences between legal systems. Such differences are evidently important from the perspective of a comparative scholar who needs to be alert to the finer cultural differences between superficially similar rules and concepts found in different jurisdictions.[10] Conversely, the application of the term legal cultures here is applied on the level of a specific legal subject and discipline – that of environmental law. On this reading, a legal culture captures the values, ideas, habits and practices embodied in a given subject.[11] Environmental law defined as a culture is thus a domain 'with a distinctive history, terminology and personnel'[12] which is different from the history and terminology of, say, corporate law, constitutional law and contract law (though there might be overlaps).[13] Each legal culture (or sub-culture) thus contains and exhibits 'a repertoires of actions, practices and beliefs that are relatively flexible and open to change',[14] giving force to 'ideas, values, attitudes, and opinions'.[15]

Conceptualising legal domains as cultures in this way, explains the differences between legal subject areas when it comes to issues such as what constitutes sources of law and doctrines in each field of law and when it comes to the question of what constitutes valid reasons in the debates taking place within a subject area. For example, the answer to the question of what constitutes a valid source of law will vary from, say, contract law to environmental law though

[9] See for this e.g. Paul W Kahn, *The Cultural Study of Law* (Chicago: University of Chicago Press, 2009).
[10] Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Oxford: Bloomsbury, 2017).
[11] David Nelken. 'Thinking about Legal Culture' (2014) Asian Journal of Law and Society 255-274.
[12] Sally Engle Merry, 'What is Legal Culture? An Anthropological Perspective' (2010) 5 J. Comp. L. 40, 47.
[13] Similarly, defining environmental law as a culture and its scholarship community as a practice by way of reliance on ideas and concepts derived from scholars engaged in cultural studies of law does not necessarily mean that the attempt to do so is interdisciplinary. It simply means that, as a matter of description, that this is what environmental law and environmental law scholarship looks like.
[14] Merry 'What is Legal Culture?', 42.
[15] Lawrence M Friedman, 'Is there a Modern Legal Culture?' (1994) 7 Ratio Juris 117, 118.

there are likely to be some similarity. Environmental lawyers will likely hesitate little in invoking so-called environmental principles when discussing points of law (on the assumption that these principles are legally relevant) whereas lawyers in other areas of law might well hesitate invoking what they see as policy considerations.[16] The point is that each subculture of law stands apart from other subcultures by reference to its constituent parts.

Though the attempt to conceptualise law as a cultural with several subcultures is not necessarily new nor entirely problem-free, the main advantage from our perspective is that it provides a platform on which to explore the role of scholarship. Again, the point is that each legal culture will be host to not only different sources of law, values and doctrines but that these differences will give rise to and find expression in different practices, including a scholarly practice. Each practice (including a scholarly practice) will thus operate within and be shaped by the contours, histories and values of each culture. In addition to scholarly practices, wider legal practices within the culture of environmental law may include practices of adjudication (in which the main participants are judges and legal practitioners) and practices of legislative drafting and amendment (in which the main participants are legislators and administrative agencies). In each subculture of law, the constituent parts of each practice will vary slightly from subculture to subculture. The practice of environmental law before the courts (see Aagaard infra) will consequently vary from the practice of, say, human rights litigation not only in terms of the participants (e.g. differences in the types of adjudicators as well as adjudicatory institutions) but also when it comes to the ways in which the practice is practically conducted in terms of what arguments can be advanced and methods of litigation. Similarly, the practice of legislative drafting of environmental law texts will vary from the drafting of

[16] In saying this, the point alluded to above about the need to appreciate the finer differences in legal cultures between different jurisdiction remains highly relevant, considering the fact that the legal nature and thereby relevance of so-called environmental principles will vary from jurisdiction to jurisdiction, e.g. Scotford *Environmental Principles*.

commercial codes and legal texts as a result of the nature of the values, habits and beliefs within each practice. But what does it mean specifically to define environmental law scholarship as a practice?

A practice is necessarily an inherently social enterprise.[17] That is, the defining feature and genesis of a practice is the community of participants which sets out the 'agreed criteria of what are reasonable or unreasonable readings'.[18] On this reading, a practice facilitates what Fish calls a 'bounded-argument space' in which 'the arguments that can be made and the arguments that just won't fly are formally identified and known to everyone working in the field.'[19] Environmental law scholarship is thus 'an institutionalised social practice', and scholarship is validated by reference to its contribution to the practice and the value which the participants put on a given work of scholarship.[20] On this reading, disciplines defined as a practice stand apart from those disciplines (such as e.g. the natural and medical sciences) which are primarily defined by reference to their adherence to *a priori* established methodology. As seen in this collection of essays, a central feature of environmental law scholarship is its refusal to commit to a particular methodology. A practice is consequently a deliberative practice in so far as a central feature of it is, very basically, the writing, publishing and communication of scholarly outputs seeking to engage considerations of what the law is, what it ought to be and how it ought to work.[21] This self-regulating and self-referential nature of a scholarly practice

[17] Hans-George Gadamer, *Reason in the Age of Science* (Cambridge, Mass.: The MIT Press, 1996). See also Ian Ward, 'Literature and the Legal Imagination' (1998) 49 N. Ir. Legal Q. 167 and Fisher infra ch 3.
[18] Christopher McCrudden, 'Legal Research and Social Sciences' (2006) LQR 632, 634. Naturally, this boundary-setting by a practice's participants is not formalised through the creation of formal criteria but through the scholarly activities such as peer-review, mentoring, citations and the organisation of conferences.
[19] Stanley Fish, *Winning Arguments: What Works and Doesn't Work in Politics, The Bedroom, The Courtroom and the Classroom* (New York: Harper Collins, 2016) 72.
[20] Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)' (2009) 97 Geo. L. J. 803, 805. See also Edward L Rubin, 'The Evaluation of Prescriptive Scholarship' (1990) 10 Tel Aviv U. Stud. L. 101.
[21] Pierre Schlag, *Laying Down the Law* (New York: New York University Press, 1996) 4.

means that the practice itself defines 'whatever it is one has to know or believe in order to operate in a manner acceptable to its members'.[22].

A scholarly practice, moreover, serves the important purposes of providing a minimum level of stability in a given field of study.[23] In securing a level of stability, a practice is also an inherently practical endeavour.[24] Practical in the sense that the scholars participating in the practice will constantly make decisions and choices shaping the confines of the practice.[25] Such decision-making include, for example, decisions made in the context of a scholar's independent research as to what questions to engage with and how to answer these (i.e. questions of methodology) as well as decisions made in the context of other scholars' work in the process of commenting on and reviewing this scholarship. When making such decisions, scholars consequently execute individual plans and choices though this is done from within the confines of the communal practice simultaneously co-determining the collective concerns and priorities of the practice. To Gadamer, practice is consequently 'conducting oneself and acting in solidarity.'[26]

Central to the practice of scholarship is thus the commitment of those taking part in a practice to a common and mutually agreed set of understandings and ground rules (though often these rules remain unspoken). The practice is consequently a reflection of a perspective embedded within the practice. Importantly, however, the argument that scholarship is conducted from an internal perspective of a practice is not to be taken to mean that that the practice only engages in traditional doctrinal scholarship, excluding perspectives on the law

[22] Clifford Geertz, *The Interpretation of Cultures* (Fontana Press, 1973), 11. See also Menand *The Marketplace of Ideas*.
[23] Gadamer *Reason in the Age of Science*, 76 and Geertz *The Interpretation of Cultures*, 18.
[24] This is of course not to imply that a practice cannot engage with questions of theory.
[25] See also Thomas Kuhn, *The Structure of Scientific Revolutions* (2nd ed. Chicago: University of Chicago Press, 1970).
[26] Gadamer *Reason in the Age of Science*, 87. See also Richard J Bernstein, *Beyond Objectivism and Relativism* (Philadelphia: University of Pennsylvania Press, 1983).

and materials which are traditionally seen as external to the law.[27] As noted above, central to the practice of environmental law scholarship is the commitment to methods and considerations which may well be considered external in other practices and areas of legal scholarship. On this account, the practice of environmental law scholarship is very likely to be markedly different from practices in other areas of legal scholarship because the practice of environmental law scholarship maintains a commitment to external perspectives.[28]

If indeed the practice of scholarship is a social practice, it necessarily follows that the practice is not static. Instead it develops over time with the scholarly focus and inclinations of its participants. As Czarnezki and Schindler note the boundaries of the discipline and its scholarship will continue to expand.[29] Though commentators debate whether the ability of a scholarly practice to change and realign itself over time is desirable, the point made here is not so much a prescriptive assessment as it is a reflection of what has actually taken place in environmental law scholarship over the years. Freyfogle, for example, argues that 'when it began in earnest, environmental law scholarship was a value-drive enterprise….[this] characteristic has become less evident, with an increasing number of scholars in the field displaying little passion about environmental law ills.'[30] Though Freyfogle's observation is no doubt right, the question of whether the change in focus is something to begrudge is open to debate. To some, the idea that environmental law scholarship is necessarily wedded to pursuing a specific outcome goes against the very definition of scholarship.[31] Similarly, in response to those decrying the lack of conformity within the practice, it might even be argued that a 'function of scholarship is to afflict the intellectually comfortable', disturbing the

[27] McCrudden 'Legal Research and Social Sciences', 633-634.
[28] McCrudden does, however, suggest that this feature is one which is found in legal research more generally, ibid 642.
[29] Czarnezki and Schindler infra ch 12.
[30] Eric T Freyfogle, 'Five Paths of Environmental Scholarship' (2000) U. Ill. L. Rev. 115, 128.
[31] Elizabeth Fisher and others 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 JEL 213 and David Feldman 'The Nature of Legal Scholarship' (1989) 52 MLR 498.

scholarly tranquillity of those who desire a common outlook from within a practice.[32] This point is particularly important considering that one of the risks which emerge from the self-referential nature of conceptualising environmental law scholarship as a social practice is that it might result in conformist scholarship.[33] In response to this risk, any social enterprise, including practices of scholarship, might 'learn to value both having opinions and keeping an open mind, to mix the delights of winning an argument with the pleasures of being good listeners.'[34] Again, this highlights the argument central to a practice of scholarship is the collegial commitment of its participants to a common goal: the preservation and evolution of the practice.

More generally, the potential for the focus of a practice to diverge suggests two things.[35] First, either the practice of environmental law scholarship is so broad that it can accommodate divergent perspectives relating to its core purposes within itself or, second, several sub-practices emerge and form within the wider practice. The reality is likely to be a combination of both of these points. Notwithstanding the accommodating nature and diversity found in environmental law scholarship, the sheer depth and size of the practice suggests that within the broad confines of the practice, several smaller practices are found. Some of the sub-practices could for instance include scholarship engaging primarily with climate change law, environmental law and economics, environmental rights and environmental taxation (to mention just a few). Each of these sub-practices emerge as their own institutionalised social order with each of their own agreed criteria and understandings of what constitutes reasonable readings and vocabularies in the execution of the scholarship. This diversification does, however, take place within the confines of the broader practice that is environmental law

[32] McCrudden 'Legal Research and Social Sciences', 640.
[33] E.g. David Bryden, 'Scholarship about Scholarship' (1992) 63 U. Colo. L. Rev. 641.
[34] Albert O Hirschman, 'Having Opinions – One of the Elements of Well-Being?' (1989) 79 The American Economic Review 75, 78.
[35] Andreas Philppopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Cheltenham: Edward Elgar, 2017).

scholarship. The 'environmental' in environmental taxation and the 'environmental' in environmental rights is what set these subjects and practices apart from tax scholarship and human rights scholarship more generally.

From this it may well be argued that the practice of environmental law scholarship is more porous and less firm than other practices of legal scholarship.[36] The permeable nature of the practice may indeed explain why environmental law scholarship is perceived as immature by some commentators.[37] On this reading, immaturity is not the diagnosis but the symptom of the youth of the subject (relatively speaking) as well as the open-ended and multi-layered nature of the culture of environmental law and the practice of environmental law scholarship itself. To the extent it is at all desirable, the ability to firm up and solidify the confines of the practice is likely to only emerge with time. Charges of immaturity may therefore not be as unsettling as they are likely to be perceived by some participants in the practice of environmental law scholarship. In fact, imposing and contemplating anxiety over one's practice is one way to advance the practice and ultimately to pursue excellence.[38] Ironically, the willingness to reflect on and engage with concerns of immaturity, as attempted in this collection, in itself shows a presence of maturity.

To the extent an 'ideal environmental law scholar' (to use Austin's phrase) emerges from this, it seems that this scholar ought at least to maintain a commitment to the social practice that she is part of.[39] This commitment ought to, as a minimum, entail the reciprocal willingness to engage in a reflective manner with the scholarship being conducted within the practice with the view to maintaining the practice itself.[40] This means not only that the

[36] See also Fish *Winning Arguments*, 170, arguing, 'not all bounded spaces are the same; in some the boundaries are not as rigorously polices as they are in others.'
[37] Fisher et al 'Maturity and Methodology'.
[38] Edward L Rubin, 'The Evaluation of Prescriptive Scholarship' (1990) 10 Tel Aviv U. Stud. L. 101, 111-112.
[39] Arthur Austin. 'The Postmodern Infiltration of Legal Scholarship' (2000) 98 Mich. Law. Rev. 1504.
[40] See also Paul W Kahn, 'Freedom and Method' (2017) in Geert van Gestel et al (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (New York: Cambridge University Press, 2016) 499-524.

environmental law scholar ought to be prepared to engage meaningfully and rigorously with the work of other scholars in the practice but also that the scholar necessarily must tolerate a certain degree of scrutiny of her own work. Bruising as this can be, it is the price of admission to the practice of environmental law scholarship. This commitment to continuous engagement and reflection also means that the scholar is forced to constantly evaluate her own work against a benchmark which ideally does not stand still. If the participants in the scholarly practice continue to produce new scholarship and thereby re-configure the boundaries and agreements holding the practice together, the practice will as a result be a vibrant community. This vibrancy will in turn secure a less stale scholarly debate.

But the commitment to the practice also entails an obligation to the principle of contingency. A commitment to contingency of the scholarly endeavour and the law itself in the sense that the very nature of scholarship – as well as environmental law – will vary from scholar to scholar from jurisdiction to jurisdiction and from one political environment to another.[41] Whilst this variation contributes to vibrancy, it also makes it very difficult for scholars to identify and develop universal foundations for the discipline of environmental law which will be applicable across jurisdictional boundaries.[42] Consequently, when trying to do so, the environmental law scholar must keep in mind the principle of contingency and accept the inherently local nature of her endeavour.[43] With the commitment to contingency also comes an acceptance of the likelihood that the scholarly endeavour is likely to be 'messy' (much like environmental law itself).[44] The culture of environmental law thus exemplifies and embodies what Rubin has called 'the transformation of the law'. A transformation which Czarnezski and

[41] E.g. Guneratne infra ch 11, Czarnezki and Schindler infra ch 12 and Krämer infra ch 13.
[42] Scotford *Environmental Principles* and Ole W Pedersen, 'The Contingent Foundations of Environmental Law' (2018) JEL forthcoming.
[43] On this reading, environmental law scholarship does not necessarily constitute a *lingua franca* as suggested by Neil Duxbury 'A Century of Legal Scholarship' in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 950-974.
[44] Carol M Rose, 'Environmental Law Grows up (More or Less), and What Science can do to Help' (2005) 9 Lewis & Clark L. Rev. 273.

Schindler explicate in chapter 12.[45] This transformation has taken place over decades in response to the changing role and function of the state and its regulatory character in modern societies. As noted above, environmental law, in most jurisdictions, consists not just of traditional primarily law provisions enacted by legislative assemblies and enforced by impartial judiciaries but of policies, principles, rules, decrees and regulations, interpreted and enforced by administrative agencies and applied to a wide range of legal subjects. In this legislative diversity of law and rules, ideals of legal coherence and methodological unity are unproductive if not unsuitable if we as scholars aim to understand the law.[46] This 'messiness' need not, however, be perceived as something negative as long as the scholarship is conducted with rigour, diligence and commitment to the social practice of environmental law scholarship.

An additional theme to emerge from this collection is that there is a real potential (as well as desire) for environmental law scholars to shape societal debates and to impact on decisions made beyond the academy.[47] Indeed, as discussed by Pieraccini, in the UK, the ability to influence matters beyond the academy is increasingly required by higher education institutions. Against this, it is worth making the point that the quality nor the scholarly relevance of scholarship ought not to be conflated with its ability to reach out to policy-makers, law-makers or judiciaries. As Flexner reminds us: the 'great discoveries which had ultimately proved to be beneficial to mankind had been made by men and women who were driven not by the desire to be useful but merely by the desire to satisfy their curiosity.'[48] Of course Flexner's point is made not in the context of legal scholarship (he does in fact concede that the motive of usefulness is dominant in legal research by virtue of its historical link to the legal profession) but in the context of scientific work more generally. Nevertheless, the argument

[45] Edward L Rubin, 'From Coherence to Effectiveness' in Geert van Gestel et al (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (New York: Cambridge University Press, 2016) 310-350.
[46] Rubin notes that it might well be worthwhile 'simply to acknowledge that law means something different in the administrative state than it did before.' ibid, 328.
[47] E.g. Cecot and Livermore infra ch 7, Guneratne infra ch 11 and Krämer infra ch 13.
[48] Abraham Flexner, 'The Usefulness of Useless Knowledge' (1939) 179 Harpers 544, 545.

that the rigorous dedication to a given piece of scholarship – obsessive dedication to use Fisher's phrase – implies value of that scholarship irrespective of whether it has any wider utility.

As exemplified by this collection, the practice of environmental law scholarship is home to a wide variety of scholarly ways of doing scholarship. This is inevitable. As recently observed by Fisher: 'understanding the legal substance of environmental law requires understanding of the place of law and the environment in the world.'[49] Similarly, understanding environmental law scholarship requires an understanding of the place of scholarship and the role it plays in environmental law more widely. Whether scholarship is seen as being a purpose-driven exercise aimed at reforming the law or whether it is seen as something entirely self-contained, this chapter has argued that the most fruitful way to conceptualise environmental law scholarship is as a social practice conducted by the scholars whom self-identify with that practice.

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[49] Fisher *A Very Short Introduction*, 3.

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