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Towards an Ecological Legal Culture?

Law's Incapacity to Critically Reconfigure Itself

For anyone following current developments, whether in scholarly circles or in relation to 'the news,' it is evident on a daily basis that no national judiciary or legal system is effectively targeting, let alone correcting, ecological crimes. The same, or worse, holds true for international law. Although the number of laws aimed at protecting 'nature' grows, and more and more natural entities are afforded rights – with entities ranging from animals to rivers, mountains, and regions — ecological destruction has intensified and is widening in scope. Even while restricting myself in what follows to Dutch and Flemish cases as one example of European jurisprudence, the number of yearly cases is difficult to archive.

Cases like the following should be addressed by the judiciary. Dutch farms, that are financially backed or outright owned by a small number of agricultural concerns, have managed to poison much of Dutch soil, which, biologically speaking, is now nigh dead. Since this soil borders on interconnected waterways across the country, only 4 % of Dutch waters are now considered to be healthy. Consequently, The Dutch Compendium for the Environment calculates that biodiversity in the Netherlands is currently at only 15 % of its expected level. Still, this environmental degradation has been met by no substantial legal opposition. Even in instances of environmental degradation that is attributable to specific actors, there has been no effective legal response. In the fair cities of Dordrecht and Antwerp, two factories operating

under the names Chemours (formerly DuPont) and 3M (formerly the Minnesota Mining and Manufacturing Company) managed to severely contaminate vast territories and waters – including entire Dutch and Flemish provinces – with per- and polyfluoroalkyl substances (PFAS). Yet the culpable parties have faced no prosecution. Even successful court cases such as the independent grassroots organization Urgenda's multiple lawsuits against the Dutch state between 2015 and 2019, have had little effect. In December 2019, the Dutch Supreme Court ruled that by 2020 the Dutch state had to reduce its CO2 emissions by 25 % below 1990 levels. Thanks to Covid, this target was in fact reached. This isolated legal success, which pertains only to *annual* CO2 emissions, obscures the larger problem of total CO2 accumulation in the atmosphere – which is steadily growing.

Instead of considering ecological crimes in terms of the judiciary's failure to prosecute despite being equipped to do so, I propose that the regional and planetary scale of ecological criminality can only be rendered comprehensible if we acknowledge that existing legal systems are incapable of addressing ecological injustice. These systems were flawed from the outset and have expanded their jurisdiction on the basis of incorrect principles and inadequate practices. To show that this is the case, I briefly describe what is necessary to construct a judiciary that can adequately punish ecological criminals and correct ecological injustices. I then show the difficulty of realizing an alternative from within existing legal frameworks.

I take as my guide here Scott Veitch's *Obligations: New Trajectories in Law* (2022). In this fundamental study, Veitch argues that, since the Enlightenment, legal thinking and practice have come to be dominated by rights discourse, of which human rights are the most prominent. Both historically and conceptually, however, obligations are primary. Yet here is the pivotal issue. In themselves, obligations mean little if they are not embedded in or enforced by a collectively shared culture, understood as what

Raymond Williams called a "structure of feeling." If a people, for instance, feel obliged to treat animals justly, their culture will determine whether such an obligation also governs the treatment of animals that do not happen to have two eyes, or decide on whether certain animals are sacrosanct (i.e., pets) while others can be slaughtered for commercial purposes (i.e., most other animals). The requirement in Dutch law that cattle must be sedated (ironically, with CO2) before slaughter is embedded in a specific culture, as is the practice of rendering animals unconscious through electrical stunning in halal slaughter. Culture equally underpins the fact that in the Netherlands cattle who have grazed together in meadows are brought to the slaughterhouse at the same time, a practice that makes the animals easier to handle.

In the end, a critical ecological reconfiguration of law would require a full-scale reconfiguration of the legal culture it takes place in, as a structure of feeling. One could, of course, pose the question of whether critique per se is capable of such an endeavor. It is not. It may be equally clear that without critique an alternative legal culture is simply unimaginable.

I. A Shift from a Rights-Dominated Approach to an Obligations-Centered Approach

In 2021, Dutch legal scholars Laura Burgers and Jessica den Outer published *Rights of Nature: Case Studies from Six Continents*, a compendium showing that granting of legal rights to natural entities has become a global phenomenon. The expansion of legal rights documented in *Rights of Nature* provokes the question of what might *limit* this endeavor. Practically speaking, it is easy to see how expanding rights primarily serves to expand the workloads of the judiciary and law firms. These expansions will no doubt reinforce each other in an inflationary dynamic, generating an increase in legal cases that will complicate the already vexed

relationship between the judiciary and the executive or state governments. Conceptually speaking, meanwhile, the absurdity of this rights-dominated approach is that it turns entities into legal persons with rights but without obligations. Further, when a river is granted rights, this is ostensibly to protect it against abuse. One could just as much ask whether the air surrounding one's neighborhood should also be made a legal person to protect it against vehicle emissions and neighborhood residents' open hearths. The issue of what limits the volume of air, or the exact size of the neighborhood, cannot be a problem here; law is good at drawing arbitrary lines.

Instead of creating more and more legal absurdities, it makes more sense to recall Ockham's razor and consider human obligations (of all legal subjects and persons) as the basis of legal thinking, practices, and attitudes. Giving rights to a mountain to protect it against pollution is a complex substitute for imposing a simple obligation: that people should not pollute.

II. A Reconsideration of Organized Irresponsibility in Its Intrinsic Relation to Organized Responsibility

The vast majority of ecological crimes go unaddressed due to what can be called "organized irresponsibility." In a 2007 study called *Law and Irresponsibility: On the Legitimation of Human Suffering*, Veitch looked at this problem in the colonial context. As the subtitle suggests, the primarily issue is the consequences for *people* of colonial law's irresponsibility. Yet if we consider the full consequences of the colonial endeavor for the environment and for nature, the scale of law's "organized irresponsibility" becomes mind-boggling. In this context, we must always ask how the organization of irresponsibility can be critically assessed by means of its intrinsic relationship to organized responsibility. Let me emphasize that a reconsideration of this intrinsic relationship

does not imply that humans have to be the caretakers of the world. In an ecological context, responsibility means precisely saying farewell to the caretaker fantasy that is, at least within the parameters of existing legal systems, intrinsically patriarchal.

III. A Shift from an Isolated Case-Based Approach to a Relational Chain-Based Approach

Kimberlé Crenshaw coined the concept of intersectionality to challenge the law's habit of isolating cases relating to racial and gender-based discrimination and dealing with these forms of discrimination as if they were separate. Crenshaw looked at two specific cases in which black women brought their employer to court, but judges were not able to connect discrimination based on gender and discrimination based on color, let alone that they were able to take seriously the combination of the two. Analogously, the need for a logic of intersectionality in the ecological context is urgent. To give just one example, consider a Dutch company called OCI N.V., a producer of ammonia, fertilizer, and melamine. The company came to exist following the acquisition of DSM Agro and DSM Melamine, both subsidiaries of the Dutch State Mines (DSM) corporation, by the Egyptian corporation Orascom Construction Industries. In 2015, Orascom Construction Industries was split up, with its construction arm legally listed with Nasdaq Dubai and its fertilizer and chemical arm listed with Euronext Amsterdam as OCI N.V. Since then, OCI N.V. has taken over BioMCN, a producer of methanol, and has initiated a joint venture with the Abu Dhabi National Oil Company (ADNOC) under the name of Fertiglobe to become a global player in the fertilizer market. Tracing this corporate lineage demonstrates how legal responsibilities are displaced over time and distributed across different products. What appears to be one legal entity is in fact many, and a number of legal persons can be shown to be implicated in ecological chains of impact.

Fertilizer is produced by combining methane (found in natural gas) with CO2. This process also creates wastewater, which, in the Netherlands, is discharged into the rivers that supply the country with drinking water. Dutch farmers, almost all of whom use fertilizer, are well aware that rain rinses off up to 90 % of this fertilizer from the soil into waterways. From the perspective of ecological chains of influence, OCI N.V. is, in short, a disaster. Under current law, however, none of this company's activities are seen as being linked to one another. Time and again, the courts have adjudged potentially destructive behavior on the basis of isolated elements and situations, which may explain why a Dutch judge recently decided that OCI N.V. could continue to discharge wastewater in the Meuse River. The judge did not look at chains of linked relations and consequences.

IV. A Substantial Redefinition of Basic Concepts Regarding Nature

This is how soil (*bodem*) is defined in Article 1 of the Dutch *Soil Protection Act*, which was taken up in the new *Environmental Act* (*Omgevingswet*) on 1 January 2024:

"The solid part of the earth with the fluid and gasiform parts and organisms therein."[1]

This definition does not sound complicated unless we compare it with the definition of soil as *grond* (earth/ground). This second definition emerged after the Dutch minister of Housing, Planning, and Environment decided in 2002 that a uniform definition of ground was needed, because the term was defined differently in various laws. The result:

1 Article 1 of the Soil Protection Act, Rijkswaterstaat, Netherland 2013, accessible at https://wetten.overheid.nl/BWBR0003994/2022-05-01#HoofdstukI_Artikel1.

> Ground: solid material that consists of mineral parts with a maximum grain size of 2 millimeter and organic substance in a proportion and with a structure *such as* is found by nature in the soil, plus shells and gravel as they occur by nature in the soil with a grain size ranging from 2 to 63 millimeter, not being dredge spoil. (my emphasis)

Here, the phrase "such as" hides a conscious and shrewd choice by the responsible experts who coined the definition. If someone assumed that ground, by this definition, can be found in the soil, they would be disappointed to read a state report that explains: "So, there is no ground (*grond*) in the soil (*bodem*)." This 2002 definition explains why, juridically speaking, there is nothing alive in the soil: there are no "organisms" in soil when it is defined as *grond*. This is just one example of how legal definitions facilitate the instrumental use of natural entities and materials. Advancing an ecological legal culture will then require that all definitions be given critical reconsideration and related to one another.

V. A Collective Feeling for Law Based on Relationships Instead of Order

The historiography of European law is clear about the dominant role that Roman law has played in its development. And the historiography of Roman law is clear about its origin in private law, based on the *domus*, with the *pater familias* ruling his household and keeping it in good order. In this case, the Latin *domus* is the equivalent of the Greek *oikos*, which we recognize in both *economy* and *ecology*. Bearing this in mind, there is every reason to be critical of the fact that the term "household" underpins conceptualizations of the *economy* and of *ecology*. The fact that we speak so self-evidently about natural phenomena in terms of *ecology* implies that we somehow cling to the study of the natural environment as a *household*. If it remains a formidable task to unlink Western legal systems from their origins in ideas about

how a household is kept in good order by the father, it is an equally daunting challenge to not think about the planet and the natural environment as a human-centered household that must be kept in good order through the law.

The very architecture of Western law and jurisprudence generates a nearly limitless inflation of jurisdiction, which is intrinsically linked to an ever-expanding *domus*: from private to public, from urban to state, from state to globe. To address this inflation – and to work towards an alternative legal culture that lets justice be done to everything that exists and lives on this planet – is more than a matter of critically restructuring existing legal systems. So far, ecologically speaking, contemporary law has proven to be incapable of critically reinventing itself. What is required is a completely different form of what the German legal scholar Rudolf von Jhering called "*Rechtsgefühl*." In *Über die Entstehung des Rechtsgefühles* (1884), Jhering makes clear that in the end a people's feeling for law and justice is a matter of culture, which is not understood as a national culture but as a "structure of feeling." With respect to the independent existence, organic and inorganic, of entities on this planet, the current definitions of *domus* and "order" can no longer be the dominant categories through which affect is mobilized. Instead, the dominant categories should be relationality and planetarity.

In this context, the question is whether law can critique its own *domus*. So far, law has shunned away from this critique.

Literature

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