Max-Planck-Institut für ethnologische Forschung
Max Planck Institute for Social Anthropology

Max Planck Fellow Group Environmental Rights in Cultural Context

Environmental Rights in Cultural Context (ERCC) 2019-2023
A CONCEPTUAL OUTLINE
Author: Dirk Hanschel (Max Planck Fellow)
Halle (Saale), 26.09.2019

I.   Subject and aim of the project

In what has been called the "environmental rights revolution", constitutions and statutory provisions in many countries around the world have combined environmental protection with rights by stipulating individual or collective guarantees relating to a sound or healthy environment.[1] Similar guarantees can be found in a number of international documents.[2] Environmental rights are normally granted to human beings, but sometimes to nature itself (earth rights or rights of nature), thereby putting human beings in the position of trustees.[3] By conducting selected case studies, the ERCC project aims to examine the extent to which environmental rights provide protection and serve as a tool of resilience in the face of challenges to local cultural identity and autonomy resulting from environmental threats such as climate change, degradation through harmful economic activities, so-called land grabbing, etc. At the same time, the project recognizes the need for economic development and prosperity and the tensions that result from this. The analysis aims to show to what extent environmental rights as fundamental rights may constitute a powerful tool of protection whilst allowing for the necessary flexibility to help local communities adapt to changing circumstances.[4]

Using case studies, the fellow and his team will generate insights as to how environmental rights may be designed appropriately in their specific cultural contexts.[5] This entails in-depth analyses of legal guarantees and how they can be operationalized in response to the needs of local communities.

---

[1] See Boyd (2012), who uses the term "environmental rights revolution".

[2] For an overview of environmental rights at the international level, see Boyd (2012), Chapter IV. Such rights were already included in the 1988 Protocol of San Salvador as well as the 1981 African Charter on Human and Peoples' Rights (see Merrills (2017), p. 664). For an overview of compliance mechanisms at the international level, see OHCHR, http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last accessed on 26 Sept. 2019).

[3] E.g. the Pachamama concept that was codified in Chapter 7 of the Ecuadorian Constitution, https://therightsofnature.org/wp-content/uploads/pdfs/Rights-for-Nature-Articles-in-Ecuadors-Constitution.pdf (last accessed on 26 Sept 2019) and in the preamble of the Bolivian constitution, https://www.constituteproject.org/constitution/Bolivia_2009.pdf (last accessed on 26 Sept. 2019). For a recent assessment see Boyd (2017).

[4] For an overview of the somewhat controversial interconnections between environmental protection and human rights law, see for instance UNEP, http://web.unep.org/divisions/delc/human-rights-and-environment (last accessed on 26 Sept 2019); see furthermore the environmental rights database, http://environmentalrightsdatabase.org/ (last accessed on 26 Sept. 2019), as well as the report http://srenvironment.org/wp-content/uploads/2014/11/Johannesburg-consultation-report-final1.pdf (last accessed on 24 Jan. 2018); on the work of the Special Rapporteur on Human Rights and the Environment, see http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx (last accessed on 26 Sept. 2019); on the concept of adaptation from an anthropological perspective, see for instance Oliver-Smith (2017), p. 206 et seq.; Isenhour (2017), p. 230 et seq.; Pokrant (2017), p. 242 et seq.

[5] Within anthropology, the concept of "culture" is quite controversial. In this outline, the terms "culture" and "cultural" are meant to reflect phenomena including beliefs, customs, norms, economic activities, etc., that the members of a community are assumed to share.

The aim is to generate deeper insights into whether it is justified to reformulate environmental concerns as rights claims,[6] and what consequences could ensue from this in a very practical sense. Notably, such rights may not always emanate from state law, but could well flow from other sources, such as indigenous local practice. The question is whether environmental rights, whatever their source and regardless of whether they are of a more substantive or more procedural character, are sensitive to cultural circumstances and can help communities protect and stabilize their ways of life in the face of threats to their local environment. Finding answers requires close consideration of the specific cultural contexts, which is why an abstract legalistic approach will not suffice.

On that basis, the ERCC project examines to what extent environmental rights are by their very nature fundamental rights, in spite of their seemingly broad character and the difficulties of bringing them in line with the individualistic foundations of classical human rights doctrine. In light of the multitude of already existing guarantees and the apparent challenges regarding their implementation, the onus placed on those arguing in favour of the emergence of new fundamental rights has become quite substantial.[7] In this regard, one important question is whether environmental rights constitute a distinct category or, alternatively, can be derived from well-established human rights guarantees of the so-called first and second dimensions.[8] Furthermore, the analysis addresses challenges to the universality argument from anthropological perspectives.[9] It also needs to deal with the criticism that claiming environmental rights as human rights might simply be a strategy to elevate certain needs or interests to a higher level, hence unduly enhancing the chances of asserting them in distributional conflicts that would otherwise require a give-and-take through negotiation.[10] The project serves to tackle these concerns by revealing the added value and the fundamental character of environmental rights claims when communities are threatened in their very existence and find it impossible to maintain their cultural identity without relying on such rights. A further question is to what extent *earth* rights (which may constitute a reflection of spiritual beliefs on the relationship between human beings and their environment) are also environmental rights in the sense of *human* rights, or, rather, constitute their own category of fundamental (in the sense of entrenched) rights. Finally, the ERCC project aims to establish how environmental rights can be operationalized. This depends on their precise content and requires distinctions between individual and collective guarantees as well as between rights holders and claimants. Collective guarantees might be claimed by individuals (either for the individual as part of the community or for the community as a whole) or through collective action. The trusteeship model may translate into specific models of legal standing, allowing for representative action or agency situations.[11]

---

[6] See Boyle (2012), 613 et seq.

[7] On the shift of paradigm towards implementation, see the results of the World Conference on Human Rights in Vienna in 1993, http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx (last accessed on 26 Sept. 2019).

[8] On the distinction between different dimensions of rights see Riedel (1989); for attempts to derive environmental rights from the European Convention on Human Rights, see, for instance, the factsheet published at http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf (last accessed on 26 Sept. 2019).

[9] See for instance the analysis by Goodale (2013), p. 144 et seq.

[10] Generally on various criticisms of environmental rights, see Boyd (2012), p. 33 et seq.

[11] Generally on these issues see, for instance, Merrills (2017), p. 679, who identifies three questions: "(1) the need to establish who can be a rights-holder; (2) the need to identify who is under corresponding obligations; and (3) the need to consider the scope of a given right and its relation to other rights." Genuine earth rights might respond to the scepticism vis-à-vis an essentially anthropocentric approach to environmental protection, as expressed by Woods (2016), p. 344: "Invoking human rights affords the theorist access to a powerful normative architecture, but one which puts human value at the center of the environmental story – it is for the sake of current and future humans (not non-humans nor its own sake) that the environment must be protected or maintained."

II.   Identifying the research gap

There is a substantial amount of legal research on environmental rights at the international and the domestic levels, both *de lege lata* and *de lege ferenda*.[12] More recent law and political science publications have mapped the proliferation of environmental rights in domestic legal orders, in particular at the constitutional level, including comparisons of various facets of such rights.[13] Conversely, anthropological research has focused on the interaction and interdependence of the cultural expressions of ethnic communities and their environment, as captured by the sub-discipline of environmental anthropology.[14] The current debate appears to suffer from a partial disconnect between these two disciplines: more doctrinal or philosophical legal analyses of environmental rights at international and national levels coincide, but are not sufficiently connected with detailed ethnographic studies of the interaction between local practices and the environment. The ERCC project serves to fill that gap by carrying out in depth-case studies that *combine* law and anthropology in order to inquire into how such rights correspond to and communicate with the cultural settings of particular communities.[15] The term "communication" implies that this combination should not be perceived as a one-way street, but that it operates in a mutual way: On the one hand, lawmakers can recognize and protect the ways of life of certain recognized communities, such as indigenous groups, when shaping appropriate guarantees under the law. On the other hand, the question is to what extent such communities will be in the position to effectively rely on such guarantees before state authorities, in particular the courts, in order to protect their way of life. This becomes particularly important when, as is increasingly the case, they are challenged by climate change, economic pressure, competing claims for land, etc., revealing connections to topics such as climate justice, sovereignty over natural resources, minority rights, and related issues. One key contribution of this research may thus be to learn more about how environmental rights can help in the process of adaptation to climate change and the aggravating conflicts and stress that such need for adaptation may cause to a local community. One consequence might be to help empower indigenous communities in their struggle to gain resilience and to protect and maintain the basis of their ways of life, thereby ensuring environmental self-determination.[16]

---

[12] See, for instance, Boyle (2012); Boyd (2012); Boyd (2017); Merrills (2017), p. 663 et seq., e.g. at p. 680: "The value of a rights-based approach to the legal and policy challenges posed by the environment is, of course, also a subject for continuing debate"; see furthermore Boer (2015); Grear/Kotzé (2015); Hayward (2004); May/Daly (2012).

[13] See Boyd (2012), Fn. 1; Leib (2011); Hayward (2004); Gellers (2017).

[14] See, e.g., Kopnina/Shoreman-Ouimet (2017). As the editors put it in their introduction (p. 5), "Environmental or ecological anthropology is a specialization within cultural anthropology that studies historic and present human-environment interactions." They emphasize that the sub-discipline has to deal with multiple challenges due to rapid environmental changes and occurring damage and that it "is responding to cultural adaptations and responses to environmental changes in multiple and complex ways" (p. 3). Environmental challenges range from "climate change to biodiversity loss, and from pollution to the depletion of natural resources", and "tensions exist between local livelihoods and international conservation efforts, between communities and wildlife, and finally between traditional ways of living and 'modernity'" (p. 4). One pressing question is how to establish sustainability "at a time when efforts to conserve biodiversity and reduce carbon emissions that cause climate change correspond with land grabs by large corporations, food insecurity, and human displacement" (p. 4). Another part of the work focuses on "injustices suffered as a consequence of environmental destruction", in particular on the "vulnerability of structurally weaker and marginal communities, including many indigenous groups during the appropriation of natural resources by industrial developers, as well as on the effects of climate change, natural hazards, and the increasingly frequent incidence of migration induced by climate change" (p. 4).

[15] Substantial research has also been conducted in the fields of political ecology (Bryant (2015), Perreault et al. (2015)), environmental political theory (Gabrielsen et al. (2016)), "environmental management of the anthropocene" (Schlossberg (2016)), and environmental justice (Vanderheiden (2016), Di Chiro (2016), Martinez-Alier (2016)). This research will inform the analysis, but cannot fill the gap, as the focus of this project is on the specific contributions that *law* can offer to help local communities deal effectively with environmental challenges. The research on environmental justice is most closely intertwined with this approach, whilst traditionally placing a greater emphasis on the distribution of environmental burdens than on the fundamental rights perspective.

[16] See Craig (2015), p. 309 et seq., in particular at p. 313 et seq.

III.   Methodology

The research, which combines empirical fieldwork and doctrinal analysis, is placed firmly at the junction of legal analysis and environmental anthropology and hence draws on methods developed by and pertaining to the field of law and anthropology as discussed and applied in the Department 'Law and Anthropology' at the Max Planck Institute for Social Anthropology.

Empirical fieldwork is focused on specific case studies of communities facing grave environmental challenges. The selection of communities will be based on a combination of the criteria of diversity, comparability, and accessibility. Diversity and comparability entail a certain tension: Cases have to be dissimilar enough to generate fresh insights that lend themselves to conclusions of a more general nature. This entails selecting cases that display a range of cultural settings and legal frameworks within and across the countries that the ERCC project will focus on. At the same time, for comparisons to be possible in the first place, some common denominator must be found. That common denominator will consist of comparable types of environmental challenges and a particularly high vulnerability to such challenges, as may be typical of communities that live in close interaction with their immediate environment and the natural resources it provides, such as the land or the water. At the same time the research must avoid potential pitfalls of a flawed romanticised view of indigenous peoples living in perfect harmony with nature who do not pursue other (e.g. economic) interests. Establishing a suitable mix of cases requires a substantial amount of preliminary research into the character of various local communities and their environmental challenges and an assessment of the content and suitability of locally accepted and available environmental rights. Accessibility, in a rather pragmatic sense, indicates that carrying out case studies requires the availability of data in a language that the research team can access. It also means putting the focus on case studies that can be studied with the help of local academic partners, non-governmental organizations operating in the field, and members of the respective communities. As part of this endeavour, it will be pivotal to find communities that invite ERCC researchers to live and engage with them in a respectful spirit. The idea is not to "examine" such communities, but to learn about their ways of life and environmental rights discourses and to ensure that such learning processes are mutually beneficial.

By focusing on cultural identity, autonomy, and sustainability, the ERCC team will examine how environmental rights provide protection to collective entities, whether by empowering the group itself or its individual members. In order to do this, the first task will be to understand the fundamental needs of the group in relation to its environment and its assumptions about the rights and duties governing or expressing this relationship. To this end, the study will employ tools of ethnographic analysis, undertaken by scholars trained in both law and anthropology. Second, environmental rights as guaranteed by state law will be mapped, which essentially requires conventional legal scholarship. Third, institutions, methods, and results of conflict resolution will be examined, including an in-depth analysis of litigation through local practice and through state courts and tribunals. To maximize the findings of the comparative study, a common framework of relevant issues will be developed in the form of a matrix and a set of questions that each of the ERCC researchers will use for their fieldwork and for subsequent analysis of data. The matrix and related questions will address, for instance, the different origins and categories of environmental rights, their degree of justiciability, the resulting effectiveness of protection for the local communities, as well as the flexibility to adapt to changing circumstances.

Further analytical work will be based essentially on desktop study, but entail occasional visits to the communities that ERCC team members will engage with. This work includes scanning international jurisprudence regarding environmental rights, thereby adding an important dimension to the constitutional discussion. Towards the end of the project, the results generated through the case studies will be used to gain broader insights into how environmental rights may help people adapt to changing circumstances whilst building resilience to threats to their cultural identity and autonomy in light of environmental challenges. Building on these insights, more abstract conclusions will be drawn regarding the nature of environmental rights within the setting of national

and international fundamental rights discourses. This will entail elements of conventional legal analysis, e.g. when interpreting (case) law, but also methods that allow for the translation of empirical evidence into more theoretical conclusions, e.g. by employing methods from legal theory and philosophy.

IV.   Bibliography

Boer, Ben (2015) (ed.): Environmental Law Dimensions of Human Rights, OUP, Oxford.

Boyd, David (2012): The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment, UBC Press, Vancouver.

Boyd, David (2017): The Rights of Nature – A Legal Revolution that Could Save the World, ECW Press, Toronto.

Boyle, Alan (2012): Human Rights and the Environment – Where Next? , European Journal of International Law 2012, p. 613 et seq.

Bryant, R. (2015) (ed.): International Handbook of Political Ecology, Edward Elgar Publishing, Cheltenham.

Craig, Donna (2015): Legal Strategies to Expand Indigenous Governance in Climate Change Adaptation, in: Martin, Paul et al. (eds.): The Search for Environmental Justice, Edward Elgar Publishing, Cheltenham, p. 309 et seq.

Di Chiro, Giovanna (2016): Environmental Justice and the Anthropocene Meme, in: Gabrielson, Teena, et al. (eds.): The Oxford Handbook of Environmental Political Theory, OUP, p. 362 et seq.

Gabrielsen, Teena, et al (2016) (eds.): The Oxford Handbook of Environmental Political Theory, OUP, Oxford.

Gellers, Joshua C. (2017): The Global Emergence of Constitutional Environmental Rights, Routledge, Oxford.

Goodale, Mark (2013): Anthropology and the Ground of Human Rights, in: Shelton, Dinah (ed.): The Oxford Handbook of International Human Rights Law, OUP, Oxford, p. 144 et seq.

Grear, Anna/Kotzé, Louis J. (2015): Research Handbook on Human Rights and the Environment, Edward Elgar Publishing, Cheltenham.

Hayward, Tim (2004): Constitutional Environmental Rights, OUP, Oxford.

Isenhour, Cindy (2017): Taking Responsibility for Climate Change: On Human Adaptation, Sustainable Consumption, and Environmental Governance, in: Kopnina, Helen/Shoreman-Ouimet (eds.): Routledge Handbook of Environmental Anthropology, Routledge, Oxford, p. 230 et seq.

Kopnina, Helen/Shoreman-Ouimet, Eleanor (2017): An Introduction to Environmental Anthropology, in: idem (eds.): Routledge Handbook of Environmental Anthropology, Routledge, Oxford, p. 3 et seq.

Leib, Linda Haijar (2011): Human Rights and the Environment – Philosophical, Theoretical and Legal Perspectives, Brill, Leiden.

Martinez-Alier, Joan (2016): Global Environmental Justice and the Environmentalism of the Poor, in: Gabrielson, Teena, et al. (eds.): The Oxford Handbook of Environmental Political Theory, OUP, Oxford, p. 547 et seq.

May, James R./Daly, Erin (2012): Global Environmental Constitutionalism

Merrills, John G. (2017): Environmental Rights, in: Bodansky, Daniel, et al. (2007): The Oxford Handbook of International Environmental Law, OUP, Oxford, p. 663 et seq.

Oliver-Smith, Anthony (2017): Adaptation, Vulnerability, and Resilience: Contested Concepts in the Anthropology of Climate Change, in: Kopnina, Helen/Shoreman-Ouimet (eds.): Routledge Handbook of Environmental Anthropology, Routledge, Oxford, p. 206 et seq.

Perreault, Tom, et al (2015) (eds): The Routledge Handbook of Political Ecology, Routledge, Oxford.

Pokrant, Bob (2017): Climate Change Adaptation and Development Planning: From Resilience to Transformation, in: Kopnina, Helen/Shoreman-Ouimet (eds.): Routledge Handbook of Environmental Anthropology, Routledge, Oxford, p. 242 et seq.

Riedel, Eibe (1989): Menschenrechte der dritten Dimension, in 16 Europäische Grundrechte-Zeitschrift, p. 9 et seq.

Schlossberg, David (2016): Environmental Management in the Anthropocene, in: Gabrielson, Teena, et al. (eds.): The Oxford Handbook of Environmental Political Theory, OUP, Oxford, p. 193 et seq.

Vanderheiden, Steve (2016): Environmental and Climate Justice, in: Gabrielson, Teena, et al. (eds.): The Oxford Handbook of Environmental Political Theory, OUP, Oxford, p. 321 et seq.

Woods, Kerri (2016): Environmental Human Rights, in: Gabrielson, Teena, et al. (eds.): The Oxford Handbook of Environmental Political Theory, OUP, Oxford, p. 333 et seq.