The Critical Functions of Scholarship in Climate Law

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Abstract

What are we trying to achieve through our scholarship? It appears that most scholarship in climate law seeks to describe ongoing developments by using, inter alia, doctrinal and comparative methodologies. This article argues that, in addition to these 'mainstream' scholarly interventions, a critical scholarship in climate law should be, and is, developing. By questioning the assumptions on which climate law is developed, assessing the relations between law and power, or revealing long-overlooked paradoxes, among other topics, critical scholarship could provide innovative and interesting insights which help to achieve a more complete understanding of climate law.

Keywords

Critical legal scholarship; legal discipline; social functions of legal research.

1. Introduction

Climate law has been developing over three decades or so. It has been developing, first and foremost, in the 'real world', through activities that seek is to develop, implement, or alter legal instruments addressing climate change and its impacts, for instance through international negotiations and domestic lawmaking, as well as litigation and policy advocacy. But climate law has also been developing in the intellectual realm, as a field of study, the main objective of which is not to affect reality as much as to understand it. The development of a field of study is perhaps best evidenced by the establishment of dedicated journals, such as *Climate Law* and *Carbon and Climate Law Review*, and dedicated academic events, such as the annual Climate Law and Governance Day,[1] which draw together a community of mutually acquainted persons.

While we—scholars in climate law—have widely commented on the development of climate law, there have been few opportunities for us to turn back attention on ourselves and reflect on the development of this field of study. I take this special issue to be such an opportunity for introspection and for questioning the functions of scholarship in climate law.

'What to write', 'for which audience', and 'why', are certainly some of the most essential questions that any scholar must ask oneself. A career may be a personal goal, but most scholars have greater ambitions than bread-winning or self-promotion. We hope, and, for all but the most pessimistic, expect, that our scholarship will justify the resources that society provide us with. But what are the services that our research seeks to offer society? Are our publications supposed only to help in the training of new

[1] Climate Law and Governance Days have been organized by the Centre for International Sustainable Development Law since 2015, and are held annually at COP sessions.

practitioners? Are we expected to inform lawmakers and society of the effectiveness of climate law, including through empirical studies looking at what becomes of climate law 'on the ground'? Are we also to advise lawmakers, law practitioners, and even the world at large about (what we consider to be) desirable developments in the field? Are we to support and promote the interests of particular stakeholders—and, if so, which ones, and why? How does our exercise of academic freedom complement studies carried out or commissioned by international agencies, government agencies, or advocacy organizations?

These and related questions not only touch on an individual soul-searching process, they also orient our own work and inform the decisions we make on one another's scholarship, for instance as peer-reviewers, journal editors, or members of a selection committee. They relate to debates taking place far beyond the field of climate law, although I would suggest that they deserve to be addressed anew in our emerging scholarly community. In thinking about these questions, I revisited a long-lasting debate that took place in the United States, when 'law schools' were becoming 'faculties of law' and were struggling to reinvent their social function as one that goes beyond professional training.[2]

In this brief article I can only offer a perspective on these questions. I will argue that, while many publications in climate law have sought to *describe* the field of climate law, often by reporting on the most recent developments, fewer scholarly endeavours have taken a sufficient distance from the law to engage critically with it. For the sake of the argument, I draw a line between what I call 'mainstream scholarship', characterized by its intellectual proximity to the law, and a more 'critical scholarship' which takes a step back and questions—without necessarily opposing—the common assumptions underpinning the law. While I recognize that both mainstream and critical endeavours fulfill important scholarly functions in climate law, I claim that there is a dearth of critical endeavours in the current literature.

In section 2, I contend that much of what is published on climate law in academic forums aims to describe or explain climate law, for instance by reporting or documenting current legal developments, reviewing or comparing developments taking place in other sites of law, or proposing new steps which are seen as desirable. Without denying the essential role of mainstream scholarship, I suggest that other forms of scholarly intervention are also needed in order to question some of the key assumptions on which climate law builds. Thus, in section 3, I argue that a critical scholarship needs to be developed further to promote a more complete understanding of climate law. Critical scholarship in climate law should help us to understand not just *how* climate law operates but *why* it operates in that way. While mainstream scholarship helps us to train current practitioners, critical scholarship constitutes an essential step towards laying the foundations of an academic discipline.

[2] I was inspired, in particular, by Fred Rodell, 'Goodbye to Law Reviews', 23(1) *Virginia Law Review* 38 (1936); Richard A. Posner, 'The Present Situation in Legal Scholarship', 90 *The Yale Law Journal* 1113 (1981); Roger C. Cramton, 'Demystifying Legal Scholarship', 75(1) *Georgetown Law Journal* 1 (1986-87); Deborah L. Rhode, 'Legal Scholarship', 115 *Harvard Law Review* 1327 (2002); and Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', 97 *Georgetown Law Journal* 803 (2009).

2. Brief Overview of Mainstream Scholarship

Scholarship in climate law has largely developed in response to the development of the law on climate change. As *Climate Law* noted in its first editorial, in the face of fast-paced developments, 'we are challenged to see what we have and to imagine what we want'.[3] In an attempt to take up this challenge, our scholarly community has since the start been primarily concerned with seeing and imagining climate law. Thus, most of today's literature on climate law seeks to describe, explain, compare, and/or instigate legal developments, without calling climate law, as such, into question.

Mainstream scholarship is often, in part or in whole, of a doctrinal nature. Works in this category seek to give an account of what climate law says, usually focusing on the more recent developments. Such scholarship plays an important function in communicating complex developments to an interested audience of practitioners, students, and even scholars. Clarity and accuracy are the central virtues of scholars when pursuing descriptive endeavours. For instance, Daniel Bodansky's excellent commentary on the UNFCCC, published in mid-1993 in the *Yale Journal of International Law*, explains in great detail, in over more than a hundred pages, the origins, content, and significance of each of the treaty's provisions.[4] Other doctrinal studies provide a thorough treatment of particular legal questions, often following the ebb and flow of political developments. Examples include Rajamani and Brunnée's discussion of the legality of lowering the ambition of NDCs under the Paris Agreement,[5] or my own discussion of the nature of obligations arising in relation to NDCs.[6] Naturally, the need for doctrinal scholarship is not inexhaustible: after the first two or three authoritative commentaries have been published about a legal development or a legal question, there is little value in additional writings on the same topic.

Mainstream scholarship sometimes contains a comparative component, whereby scholarly works seek to find parallels between practices taking place in different sites of law (e.g. different countries, different regimes). Michael Mehling highlighted the important function of 'the comparative law of climate change', by noting that,

> if law is to expand our understanding of the possibilities for addressing climate change, we should broaden the analysis to encompass as many different experiences and circumstances as possible, fostering a high level of policy learning and diffusion, and helping avoid costly mistakes.[7]

[3] 'Editorial', 1(1) *Climate Law* 1 (2010), at 1.
[4] Daniel Bodansky, 'The United Nations Framework Convention on Climate Change', 18(2) *Yale Journal of International Law* 451 (1993).
[5] Lavanya Rajamani and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement', 29(3) *Journal of Environmental Law* 537 (2017).
[6] Benoit Mayer, 'International Law Obligations Arising in Relation to Nationally Determined Contributions', 7(2) *Transnational Environmental Law* 251 (2018).
[7] Michael Mehling, 'The Comparative Law of Climate Change: A Research Agenda', 24(3) *Review of European Community and International Environmental Law* 341 (2015), at 347.

Comparative scholarship is already developing,[8] and it may be facilitated by the development of an international database on legal and policy instruments on climate change,[9] but it remains generally hindered by practical difficulties, such as language barriers and the difficulty of understanding different legal systems. Comparative research is best seen as a means to an end; namely, for the most part, policy prescription.

Like comparative studies, mainstream scholarship sometimes provides advise on what negotiators or lawmakers ought to do. For instance, a book chapter by Joséluis Samaniego and Christiana Figueres suggests that flexibility mechanisms, such as the Clean Development Mechanism, could be applied to subsidize entire economic sectors instead of only discrete projects.[10] The virtue of such scholarship lies in its ability to help improve climate law. In general, such pieces are best written by 'insiders'—individuals closely associated with ongoing negotiations or municipal lawmaking processes, with a clear view of the constraints and opportunities facing various proposals. At times, however, there has been a regrettable confusion between the aim of scholarly projects—the production of knowledge—and the aim of political advocacy—which can involve a distorted use of knowledge for political ends. Writings which suggest alternative objectives for climate law cannot dispense with a careful examination of their normative premises and should therefore engage with the (rich) literature in moral philosophy; those which claim to propose a workable pathway towards substantial changes cannot avoid engagement with theories of political science or international relations on how law and policy change.

Taken together, these different endeavours pursued in mainstream scholarship are directed mainly towards an audience of treaty negotiators, lawmakers, legal practitioners, or students and professionals seeking to join these professions. Mainstream scholarship seeks to inform practitioners about current developments and their significance, as well as suggest desired developments, including those based on comparisons with other legal systems. In this manner our field of study follows the pulse of the treaty negotiations, with COP sessions being used as venues for scholarly meetings, such as the Climate Law and Governance Day, from which issue waves of publications. In a manner reminiscent of historical chronicles which record facts on an almost daily basis, mainstream scholarship hovers too close to its object—climate law—to be capable of discerning some of its more meaningful features.

It is worth reiterating that I do not deny the importance of mainstream scholarship for climate law, but only seek to highlight its incompleteness: other important functions of scholarship have not yet been sufficiently explored. In next section I argue that, in

[8] See, for instance, Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation* (Cambridge: Cambridge University Press, 2015), which compares climate change litigation in Australia and the United States; Xiangbai He, 'Legal and Policy Pathways of Climate Change Adaptation: Comparative Analysis of the Adaptation Practices in the United States, Australia and China', 7(2) *Transnational Environmental Law* 347 (2018).

[9] See 'Climate Change Laws of the World', a database developed by the LSE's Granthan Research Institute on Climate Change and the Environment and Columbia Law School's Sabin Center for Climate Change Law, <www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/>.

[10] Joséluis Samaniego and Christiana Figueres, 'Evolving to a Sector-Based Clean Development Mechanism', in *Building on the Kyoto Protocol: Options for Protecting the Climate*, edited by Kevin A. Baumert et al. (Washington DC: World Resources Institute, 2012).

following developments in climate law, scholarship has tended to neglect its other functions: to offer an independent view of the field that may, if only indirectly, suggest fundamental re-orientations in the development of climate law.

3. The Dearth of Critical Scholarship

At its most basic, critical scholarship on climate law seeks to reconceptualize the field.[11] It may, for instance, reveal paradoxes or tensions underlying the field, or use insights from other disciplines, such as the social sciences or moral philosophy, to assess the effectiveness of climate law or question its values. However, the distinction I posit between mainstream and critical scholarship is not so much about methodology as about the function of scholarship. While mainstream scholarship is interested in tidying up information on climate law—most often within the UNFCCC regime—for immediate use by a professional audience, critical scholarship has a commitment to a deeper truth, even when its quest for truth is of no immediate practical relevance.[12] While mainstream scholarship seeks to *know* climate law, critical scholarship is also interested to *understand* climate law—for instance, to identify what climate law is achieving on the ground, how it is impacting particular stakeholders, or how it is transforming our conception of the law. Critical scholarship on climate law does not confine itself to answering questions about the ebb and flow of political developments but seeks to leave no stone unturned in its quest for understanding climate law. This form of scholarship is therefore characterized by a greater distance from its object of study, which in turn facilitates greater intellectual independence and the exercise of scholarly counterpower. The virtue of critical scholarship is its ability to question dominant narratives, to contribute to a more complete understanding of climate law, and perhaps, indirectly, to spur new developments in climate law. While critical scholarship could be relevant to some negotiators, lawmakers, or legal practitioners, it is more directly intended for the scholarly community interested in climate law.

A few examples illustrate the project of critical scholarship.

Regarding the sources of international law, critical scholarship could question and, if need be, address the scholarly neglect of international law sources other than treaties. In my own research, I have tried to analyse the relevance of general international law, and in particular the no-harm principle and the law of state responsibility, to the issue of climate change.[14] I certainly do not claim to have provided an exhaustive treatment of

[11] For a more systematic definition of critical scholarship in the context of international law, see Sebastien Jodoin and Katherine Lofts, 'What's Critical about Critical International Law? Reflections on the Emancipatory Potential of International Legal Scholarship' in *Critical International Law: Postrealism, Postcolonialism, and Transnationalism*, edited by Prabhakar Singh and Benoit Mayer (Oxford University Press, 2014) chapter 14.

[12] This distinction parallels the distinction between applied and fundamental research which is often made in scientific disciplines.

[14] See Benoit Mayer, *The International Law on Climate Change* (Cambridge: Cambridge University Press, 2018). See also Benoit Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics', 19 *Asia-Pacific Journal of Environmental Law* 79 (2016); Benoit Mayer, 'Construing International Climate Change Law as a Compliance Regime', 7(1) *Transnational Environmental Law* 115 (2018).

all the complex questions regarding the sources of international law—in particular, customary international law and the principles of general international law.[15]

Regarding key concepts developed in climate law, critical scholarship could question what concepts they replace, who they benefit, and at whose expense. For instance, has the concept of 'mitigation' displaced discussions about 'cessation', and how do the concepts of 'adaptation' and 'loss and damage' relate to the more general notion of 'reparation'?[16] Why does international climate law usually talk about 'compliance' when many other fields of law, including international law, prefer the term of 'enforcement'?

Regarding the tools and methods used in climate law, there has been very little discussion about the principle of state sovereignty and its relevance in the context of in international cooperation to address climate change, since the principle was mentioned in the UNFCCC preamble.[17] Does this principle mean that there ought to be some restraint in international cooperation—despite repeated calls for the 'widest possible cooperation'—and that each state should be left to decide what tools to use to achieve its objective on climate change mitigation and to protect its population and its environment from the impacts of climate change? While some legal scholars have questioned the effectiveness of particular tools[18] and the legitimacy of policy transplants,[19] there have been many more mainstream (uncritical) scholarly interventions calling for one-size-fits-all 'solutions', such as carbon market mechanisms or insurance mechanisms.

Regarding participation, important work has been done on the functioning of the consensus rule in UNFCCC negotiations.[20] Critical inquiries may also be needed in order to question common assumptions about the legitimacy of the system of observers in the UNFCCC process—given, in particular, the lack of regional diversity—and to seek to measure the system's impact on international negotiations. Empirical research could also be carried out to document a number of cases where non-state observers to the UNFCCC process have allegedly nominated 'representatives' to attend and participate in COP negotiations in exchange for financial remuneration.[21]

[15] In his review of my book in this volume, Alexander Zahar suggests the relevance of the polluter-pays principle as a core principle to the international law on climate law. I am not aware of any authoritative treatment of the relevance of the principle of cooperation. Another intriguing question regards the applicability of the obligation to conduct an environmental impact assessment in a transboundary context in relation to projects likely to result in massive greenhouse gas emissions.
[16] See, generally, E. Lisa F. Schipper, 'Conceptual History of Adaptation in the UNFCCC Process', 15(1) *Review of European Community and International Environmental Law* 82 (2006), retracing the genealogy of the concept of adaptation in climate law and highlighting some of its key paradoxes.
[17] UNFCCC, preamble recital 10.
[18] See eg Michael Mehling and Endre Tvinnereim, 'Carbon Pricing and the 1.5°C Target: Near-Term Decarbonisation and the Importance of an Instrument Mix', 12(1) *Carbon and Climate Law Review* 50 (2018).
[19] See, e.g., Anatole Boute, 'The Impossible Transplant of the EU Emissions Trading Scheme: The Challenge of Energy Market Regulation', 6(1) *Transnational Environmental Law* 59 (2017).
[20] See Antoo Vihma, 'Climate of Consensus: Managing Decision Making in the UN Climate Change Negotiations' 24(1) *Review of European, Comparative and International Environmental Law* 58 (2015).
[21] This was pointed out to me by three independent sources which I consider reliable.

Regarding implementation, there is a need for empirical research to assess the impact of the international law on climate change on the ground. Legal scholars seldom do empirical research, in part for lack of institutional support,[22] even though a thorough understanding of the law may help in assessing its implementation. A remarkable exception is Sebastien Jodoin's study of the impact of REDD+ on the recognition of the rights of indigenous peoples in Indonesia and Tanzania. In a break with the policy advocacy that dominates scholarship at the intersection of human rights and climate change, Jodoin put political agendas aside. He concluded, somewhat unexpectedly, that REDD+ projects and the accompanying international scrutiny they attract have furthered the recognition of indigenous rights in the two countries examined, even beyond the scope of the (non-binding) UN Declaration on the Rights of Indigenous Peoples.[23] This finding should lead other critical scholars to question the legitimacy of expecting recipients of international climate finance to comply with human rights standards which are not universally accepted as a form of aid conditionality.

Other articles in this special issue highlight some other important questions that could contribute to critical legal scholarship. Anna Huggins emphasizes the importance of approaching international climate law in its geopolitical context, which, I believe, relates closely to a critical analysis of the relations between law and power.[24] Likewise, Laura Mai highlights the increasing importance of empirical legal scholarship and interdisciplinarity in her discussion of the implications of transnational initiatives for scholarship in climate law. Such initiatives challenge our conception of the law, which is a premise of any discussion about climate law.[25] Along similar lines, Ronald Mitchell calls for more cross-fertilization between law and other disciplines, and between climate law and other fields of law.[26] David Driesen highlights the need for adequate theories of the law—ways to understand what climate law *is* beyond characterizing what it *says*.[27]

4. Conclusion

This article has distinguished in a summary fashion two types of legal scholarship on climate change. What I have called 'mainstream scholarship' helps negotiators, lawmakers, and law practitioners by describing, explaining, comparing, and/or instigating legal developments. Its focus is on what climate law says. What I have called 'critical scholarship', by contrast, pursues a more complete understanding of climate law through a wide, open-ended list of questions, including those relating to the nature, core, key assumptions, beneficiaries, legitimacy, and consequences of climate law.

As scholars take a step back and look not just at the technical intricacies but also the outlines of climate law, they will undoubtedly acquire innovative and interesting insights about the field. Such insights are what is currently missing from climate law

[22] Other influential empirical studies were often conducted in other disciplines. See for instance Philip M. Fearnside, 'Tropical hydropower in the clean development mechanism: Brazil's Santo Antônio Dam as an example of the need for change', 131(4) *Climatic Change* 575 (2015).
[23] Sebastien Jodoin, *Forest Preservation in a Changing Climate: REDD+ and Indigenous and Community Rights in Indonesia and Tanzania* (Cambridge University Press, 2017).
[24] Anna Huggins (this issue).
[25] Laura Mai (this issue).
[26] Ronald Mitchell (this issue).
[27] David Driesen (this issue).

scholarship to enable it to extend beyond being a branch of knowledge and help it to mature into a full-fledged discipline.