

5-5-2019

# Contagious Environmental Lawmaking

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## Citation Details

Natasha Affolder, "Contagious Environmental Lawmaking" (2019) 31:2 J Envtl L 187.

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# Contagious Environmental Lawmaking

Natasha Affolder\*

## ABSTRACT

It is rare to find an environmental law development or ‘innovation’ announced or celebrated without some discussion of its transferability. Discourses of diffusion are becoming increasingly central to the way that we develop, communicate and frame environmental law ideas. And yet, this significant dimension of environmental law practice seems to have outgrown existing conceptual scaffolding and scholarly vocabularies. The concept, and intentionally unfamiliar terminology, of ‘contagious lawmaking’ creates a space for both fleshing out, and problematizing, the phenomenon of the dynamic and multi-directional transfer of environmental law ideas. This article sets the stage for further study of the global diffusion of environmental law. It does so by identifying the phenomenon of contagious lawmaking and by making explicit some of the terminological and methodological challenges implicated in its study. The article draws on narratives of the ‘global’ diffusion of environmental impact assessment, cited as ‘the most widely adopted environmental management tool in the world’.

**KEYWORDS:** Diffusion, transplants, environmental law methodologies, environmental policy transfer, environmental impact assessment, environmental law scholarship

## 1. INTRODUCTION

New Zealand’s recognition of the legal personhood of Te Awa Tupua (the Whanganui River)<sup>1</sup> is celebrated as a revolutionary and transferable phenomenon.<sup>2</sup>

Ghana develops a corporate environmental performance ratings program to reflect Ghanaian concepts of the environment, using an Indonesian model.<sup>3</sup>

A rights-based climate change litigation victory in Pakistan<sup>4</sup> is proclaimed a model for other jurisdictions.<sup>5</sup>

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1 Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017 No 7, s 14 (New Zealand).

2 David Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press 2017).

3 Adwoa Darko-Mensah, ‘Can Environmental Performance Rating Programmes Succeed in Africa?: An Evaluation of Ghana’s AKOBEN Project’ (2013) 24 *Management Env’tl Quality* 599, 600.

4 *Ashgar Leghari v Federation of Pakistan*, WP No 25501/2015 (Lahore High Court, 4 September 2015, Pakistan).

5 Jacqueline Peel and Hari Osofsky, ‘A Rights Turn in Climate Change Litigation’ (2018) 7 *TEL* 37, 377.

Ecuador's Recognition of 'Rights of Nature'<sup>6</sup> emerge from a project to construct a transposable paradigm of constitutional rights.<sup>7</sup>

A Global Judicial Institute for the Environment<sup>8</sup> is created to share and transfer judicial experiences in applying and enforcing environmental laws.

A multilateral treaty on persistent organic pollutants<sup>9</sup> 'borrows' a Swedish concept of 'sunset periods' for toxic chemicals.<sup>10</sup>

A group of climate legislation 'advocates' seek to advance the spread of climate legislation in Costa Rica, China, Columbia, Nigeria, Peru, Mexico, and Micronesia.<sup>11</sup>

The World Bank draws on strategic environmental 'pilot programs' in countries including Malawi and Sierra Leone to promote the practice of legal model transfers.<sup>12</sup>

Commentators suggest the EU earns climate law leader status precisely by creating models capable of transplantation elsewhere.<sup>13</sup>

Environmental law is on the move. This reality is not lost on scholars who, using diverse discourses of transplantation, spread, transmission, diffusion, cross-fertilisation, dissemination, and even impregnation, document multiple manifestations of a similar idea—environmental law ideas travel. Indeed, it is rare to find an environmental law development or 'innovation' announced or celebrated without some discussion of its transferability. Discourses of diffusion are becoming increasingly central to the way that we develop, communicate, debate and frame environmental law ideas. This matters for both environmental law scholarship and for the practice of environmental law.

The rapid expansion and multi-level nature of these developments suggest that this increasingly significant dimension of environmental law practice has outgrown existing conceptual scaffolding and scholarly vocabularies. As a result, the visual field through which these developments are contemplated and analyzed is artificially narrow and risks obscuring the complexity of legal mobility on view. The concept, and intentionally unfamiliar terminology, of 'contagious lawmaking' creates a space for both fleshing out, and problematising, the phenomenon of the dynamic and multi-directional transfer of environmental law ideas. Such transfers are not restricted to

6 2008 Constitution of the Republic of Ecuador, pt 2, Ch 7, arts 71–74 (Ecuador).

7 Maria Akchurin, 'Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador' (2015) 40 *L & Soc Inq* 937, 944–8.

8 International Union for the Conservation of Nature, 'Global Judicial Institute on the Environment' (IUCN webpage accessed 18 June 2018) <<https://www.iucn.org/commissions/world-commission-environmental-law/our-work/global-judicial-institute-environment>>.

9 Stockholm Convention on Persistent Organic Pollutants, 2256 UNTS 119; 40 *ILM* 532 (2001).

10 Jonathan Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 *Ecology LQ* 1295, 1297.

11 Michal Nachmany and others, 'The GLOBE Climate Legislation Study: A Review of Climate Change Legislation in 66 Countries' (LSE Research Online Report 2014) <<http://eprints.lse.ac.uk/63656/>> accessed 20 March 2019, xii.

12 World Bank, *Strategic Environmental Assessment in Policy and Sector Reform* (World Bank 2011) 2.

13 Kati Kulovesi, 'Climate Change in the EU External Relations: Please Follow my Example (or I Might Force You to)' in Elisa Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Dimensions* (CUP 2012) 115.

the spread of ideas and models across national borders. Rather, they permeate supra-national<sup>14</sup> and sub-national lawmaking processes,<sup>15</sup> transnational legal orders,<sup>16</sup> private environmental governance,<sup>17</sup> sites of Indigenous lawmaking,<sup>18</sup> legal cultures and traditions,<sup>19</sup> judicial discourse<sup>20</sup> and international organisational practice.<sup>21</sup>

The task of describing the extent and significance of contagious environmental lawmaking is not an article-length endeavour.<sup>22</sup> This article serves as an exploratory attempt to identify the phenomenon of contagious environmental lawmaking and to make explicit some of the terminological and methodological challenges this practice poses for scholars. While acknowledging that potential labels may seem frustratingly inadequate for what is far from a singular phenomenon, this article suggests that the language of ‘contagious environmental lawmaking’ might effectively define a space for discussing the ways in which legal ideas spread, and are being spread, across diverse jurisdictions and sites of lawmaking. The article pivots around the story of what has been labelled ‘the international spread of . . . the most widely adopted environmental management tool across the world’—environmental impact assessment (EIA).<sup>23</sup> The dominant discursive patterns surrounding EIA’s spread offer a launching pad for an exploration of the terminological and methodological impediments to seeing and understanding the practices through which legal ideas move.

Critically engaging with the phenomenon of contagious lawmaking offers an opportunity to consider anew environmental law’s place-based and culture-based fulcrums. The very practices of contagious lawmaking demand interrogation of the implications of thinking about environmental law ideas as inherently transferable and transposable. The ambition of this article, and the reason for its focus on terminology and scholarly methods, is to encourage such questioning to emerge in a way that is attentive to what is at stake in defining and describing these practices and, in so doing, in both naming law’s past and prescribing its future.

14 Sanja Bogojević, *Emissions Trading Schemes: Markets, States and Law* (Hart 2013).

15 Sofie Bouteligier, *Cities, Networks, and Global Environmental Governance. Spaces of Innovation, Places of Leadership* (Routledge 2013) 2.

16 Terrence Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015).

17 Jodi Short, ‘Transplanting Law in a Globalized World: Private Transnational Regulation and the Legal Transplant Paradigm’ in Francesca Bignami and David Zaring (eds), *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar 2016).

18 Akchurin (n 7) 944–8.

19 See Scotford’s invocation of ‘internal’ legal cultures. Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2017) 19.

20 Peel and Osofsky thus contemplate existing rights-based judgments as offering a ‘model or inspiration’ for climate litigation decisions in ‘other jurisdictions’: Peel and Osofsky (n 5) 37.

21 Alogna suggests that the ‘oblique circulation of legal models, through means of, or directed by supra-national institutions, have largely replaced the one between individual states.’ Ivano Alogna, ‘The Circulation of the Model of Sustainable Development: Tracing the Path in a Comparative Law Perspective’ in Voker Mauerhofer (ed), *Legal Aspects of Sustainable Development: Horizontal and Sectorial Policy Issues* (Springer 2016) 13, 21.

22 This article is thus a small piece of a larger project. Its contribution focuses on problematizing scholarly approaches to naming, and engaging with, contagious lawmaking. The larger project problematizes the practices of contagious lawmaking themselves.

23 Tseming Yang and Robert Percival, ‘The Emergence of Global Environmental Law’ (2009) 36 *Ecology LQ* 615, 627.

## 2. THE 'GLOBAL SPREAD' OF ENVIRONMENTAL IMPACT ASSESSMENT

### 2.1 Dominant Narratives and Hidden Assumptions

The international spread of environmental impact assessment (EIA) is celebrated as a landmark example of what this article identifies as contagious lawmaking. The roll-out and uptake of EIA is cited as an important step in the development of 'modern' environmental law.<sup>24</sup> Its ubiquity means that any countries that have not introduced EIA are now seen as outliers; there are 'probably no more than ten countries where EIA has not been introduced, and these include countries at war as well as some of the small island states'.<sup>25</sup>

Environmental impact assessment is a fascinating legal practice to contemplate in a transnational context. Its very framing raises some flags about the quite distinct ways in which it might be conceptualised, despite a common label.<sup>26</sup> EIAs are used around the world for assessing the types and extent of environmental impact likely to be caused by a given human action or activity on a species, habitat, or ecosystem (and also sometimes on the human environment). National EIA laws typically specify the circumstances under which certain prescribed projects will undergo a specified level of review before approval is granted, involving the disclosure of specific risks, proceeding within specified time periods, and conducted by a specific agency, as well as involving (sometimes) specified public or private participants.<sup>27</sup> While the focus of legal EIA regimes is heavily procedural, such a procedural focus belies the fact that EIA serves as an entryway into deeper, substantive legal understandings of public participation, standing, concepts of state authority, expert rule, evidentiary standards, and wider concepts of rights and obligations in any legal system.<sup>28</sup>

A close look at some of the dominant narratives that feature in accounts of EIA's global spread reveals how easily passive, de-contextualised, and ahistorical interpretations of law's movements creep into accounts of contagious lawmaking.<sup>29</sup>

24 Nicolas de Sadeleer, *Environmental Principles: From Political Solutions to Legal Rules* (OUP 2002) 87.

25 Arend Kolhoff and others, 'Environmental Assessment' in Roel Slootweg and others (eds), *Biodiversity in Environmental Assessment: Enhancing Ecosystem Services for Human Well-Being* (CUP 2010) 125, 127.

26 Transnational debates about EIA and its effectiveness thus need to be grounded in the reality that EIA can be conceived very differently in different contexts, reflecting diverse understandings of state authority, of the division of rights and obligations, of the purpose of EIA, of what counts as public participation, and of whom those relevant 'publics' might be. For a useful synthesis of many of the underlying theoretical and conceptual debates, see Barry Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in Donald Zillman, Alastair Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Natural Resources* (OUP 2002) 77.

27 For a revealing look into the texts of some (quite randomly selected) national EIA laws and how they vary in their level of detail and procedural requirements, see alternately Environment Protection (Amendment) Act 2008, Mauritius Acts 2008, Act No 6 (Mauritius), Law of Republic of Kyrgyzstan on Environmental Protection, 1991, 91WN0681A (Kyrgyzstan), Environmental Impact Assessment, Laws of the Republic of Paraguay 1993, Law No 294/93 (Paraguay).

28 For an examination of the wider significance of the European Court of Justice's rulings on the EIA Directive, for example, see Vanessa Edwards, 'A Review of the Court of Justice's Case Law in Relation to Waste and Environmental Impact Assessment, 1999-2011' (2013) 25 JEL 515.

29 To identify these discourses, literature surveys were initiated to isolate any books or articles making reference to EIA's spread, movement, dissemination, transfer, diffusion. Particular attention was paid to

Identification of these narratives is not intended to disparage existing environmental law scholarship. Rather, isolating such narratives permits awareness of the significant hurdles and challenges implicated by the study of the movement of environmental law in what is inherently a comparative and transnational space. Drawing attention to narrative defaults highlights how environmental law's 'creation myths' (including its treatment of the birth and spread of EIA) develop, and are institutionalised, sometimes without a robust empirical base.

The very adoption of a 'transnational' lens, one that allows efforts to introduce EIA across the globe to come into view, itself imports biases and assumptions as to the appropriate unit of analysis. Such a lens allows us to see the movement of an idea such as EIA as the product of 'flows, networks, and governance assemblages' rather than to see this movement as the work of individual people.<sup>30</sup> Such a lens might work well for liberal theorists and activists who are comfortable with the idea of universal models, slightly adapted 'by giving them a local paint job'.<sup>31</sup> But, for other scholars, including postcolonial and anthropologically minded scholars who emphasise historical specificity and contextual particularity, the very activity of seeing and 'mapping' the diffusion of a universal idea like EIA is problematic.<sup>32</sup> The terminological and methodological traps that emerge in accounts of EIA's spread thus speak to the core argument of this article—that environmental law's mobility has outgrown the terminology and conceptual scaffolding necessary to robustly engage with it. Building out from the example of EIA, the article moves to tackle these terminological and methodological 'traps' head on.

## 2.2 Passive Accounts: A Common Sense Idea Whose Time Had Come

EIA is frequently described as one of the most 'successful policy innovations of the 20th Century'.<sup>33</sup> It is applauded as a 'common sense' approach that has now permeated law in all but a handful of countries.<sup>34</sup> Indeed, this 'common sense' framing is suggested by Craik to be the reason for its near universal acceptance, as it seems clear that 'decisions about activities that have some likelihood of adversely affecting the environment ought to be made in light of a comprehensive understanding of those impacts'.<sup>35</sup> Thus, permeating accounts of EIA's spread is a dominant idea that EIA is simply a good idea whose time had come.

Scholars such as Yang and Percival suggest EIA is an 'important innovation in US environmental law' that has 'been widely adopted and uploaded into international

finding examples of scholarship emerging in countries that were the recipients of EIA models and practices as well as those providing inspiration for models adopted elsewhere. This literature search included references to EIA beyond environmental law in international law, development bank practice, and private transnational regulation.

30 Mariana Valverde, *Chronotopes Of Law: Jurisdiction, Scale and Governance* (Routledge 2015) 106.

31 *ibid* 110.

32 *ibid*.

33 Barry Sadler, *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance* (Canadian Environmental Assessment Agency 1996) i.

34 Virginia Alzina, 'Environmental Impact Assessment Systems in Developing Countries: A Study of Success and Failure in Latin America and the Caribbean' (PhD Thesis, George Washington University 2001) 10–12; Alastair Neil Craik, 'Environmental Assessment: A Comparative Legal Analysis' in Jorge Viñuales and Emma Lees (eds), *Oxford Handbook of Comparative Environmental Law* (OUP 2019).

35 Craik, *ibid* 1.

treaties'.<sup>36</sup> They frame EIA as a flagship example of the emergence of global environmental law, and note that national responses to environmental problems have been 'surprisingly progressive: Countries are transplanting law and regulatory policy innovations of other nations, even when they have very different legal and cultural traditions'.<sup>37</sup>

Many histories of EIA trace the global spread of EIA to an origin in the US passage of the National Environmental Policy Act (NEPA) at the end of the 1960s. From these origins in US legislation, scholars document its 'globalized' spread (an apparent reference to EIA's geographic ubiquity) by citing long lists of countries and international institutions where EIA laws and practices have emerged. Discussion of how this 'globalization' came about and how EIA operates under globalisation is often curiously absent.

In looking closely at how scholars describe the spread of EIA beyond the USA,<sup>38</sup> one finds a sense of inevitability that implies that EIA was adopted quickly and broadly because it was, simply put, a good idea. Christopher suggests that the US experience was 'noticed by the international community', resulting in the development of EIA in one hundred other countries.<sup>39</sup> Wiener and Ribeiro attribute the dissemination beyond the United States to a 'growing demand around the world for *policy foresight*'.<sup>40</sup> Notions of 'common sense' and 'inevitability' also permeate Alzina's description of the proliferation of EIA in developing countries of Latin America and the Caribbean, which attributes the acceptance of EIA to the 'common sense' idea that good planning leads to good decisions, as well as to the fact that 'developed countries recognised EIA as an effective tool'.<sup>41</sup> The assertion that EIA quickly spread from one piece of legislation (NEPA) to 'one hundred examples' of EIA laws becomes the template for describing and understanding EIA's movement in dozens of articles.<sup>42</sup>

Also permeating the literature, and implied by the oft-repeated story of EIA's rapid expansion from one to one hundred countries, is the sense that EIA's proliferation involved a singular 'version' of law being spread.<sup>43</sup> However, the lack of detailed histories on its spread make this impossible to verify. The narrative, moreover, obscures the fact that EIA not only differs in its form between different

36 Yang and Percival (n 23) 615.

37 *ibid* 616.

38 See eg Christopher Barrow, *Environmental and Social Impact Assessment: An Introduction*, (John Wiley 1997) 170–1.

39 Caleb Christopher, 'Success by a Thousand Cuts: The Use of Environmental Impact Assessment in Addressing Climate Change' (2008) 9 Vermont J Envtl L 549, 553.

40 Jonathan Wiener and Daniel Ribeiro, 'Impact Assessment: Diffusion and Integration' in Francesca Bignami and David Zaring (eds), *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar 2016) 159, 159.

41 Alzina (n 34) 10–2.

42 While the source for this number of '100 nations' is often unattributed, it seems to trace to a 1996 study of EIA by Barry Sadler. Sadler's exact claim was that, since EIA had been introduced, 'it is estimated that more than 100 countries have national EA systems in place'. Sadler (n 33) 25 (emphasis mine).

43 Often the 'version' of EIA being spread closely resembles, if not directly mimics, the law of the US. See eg José Castaneda, 'The World Bank Adopts Environmental Impact Assessment' (1992) 4 Pace YB Int'l L 241.

places, but also in the role it occupies between different decision making frameworks.<sup>44</sup> While EIA processes may possess the same name, they work very differently in different places with different histories and legal cultures.<sup>45</sup> This is powerfully illustrated by recent scholarship on China's EIA system and demands 'a different way of story-telling'.<sup>46</sup> The message that EIA was a natural idea whose time had come de-emphasises the distinctiveness of EIA regimes situated in different geographical and institutional locations.

The 'common sense' theory of EIA's spread problematically masks the work of agents of transmission.<sup>47</sup> It thus neglects the fact that EIA has spread because of the intentional work of institutional 'evangelizers'.<sup>48</sup> A handful of scholars expressly credit specific institutions, including the United Nations Environment Programme, the World Bank, the European Union, and the Organisation for Economic Cooperation and Development (OECD), with developing and spreading EIA.<sup>49</sup> In other accounts, the role of these institutions can be deduced from references to institutional and financial sources of pressure.<sup>50</sup> These scholarly contributions hint at various intentional roll-outs of EIA that have yet to be fully documented and merit scholarly attention. They suggest the need for legal scholars to populate accounts of law's spread with the *people* advancing this spread, a topic explored in Section 4 of this article.

### 2.3 De-contextualised Accounts: Spreading Best Practices

A second dominant narrative that pervades scholarship addressing the spread of EIA emerges from the fact that much of this scholarship adopts a prescriptive or normative, rather than descriptive approach, to EIA. This literature seeks to capture 'best practices' of EIA and prescribe ways in which EIA systems can be improved.<sup>51</sup> The

44 Craik (n 34) 2.

45 For two useful examples of scholarly work that is attentive to the social and cultural context of EIA, see Jørn Holm-Hansen, 'Environmental Impact Assessment in Estonia and Norway' (1997) 17 EIA Rev 449, and A Cherp, 'EA Legislation and Practice in Central and Eastern Europe and the Former USSR: A Comparative Analysis' (2001) 21 EIA Rev 335. Recent scholarship has added valuable nuance to this observation by showing that assessment practices can also differ significantly *within* jurisdictions as a result of different training, professional orientations, and disciplinary world views of the professionals active in impact assessment work. See Richard Morgan and others, 'Practitioners, Professional Cultures, and Perceptions of Impact Assessment' (2012) 32 EIA Rev 11.

46 Yun Ma, 'Dynamics in Central-Local Division of the Authority of EIA Approval in China' (2019) 31 JEL 29, 30.

47 Craik (n 34) 2 thus notes that the US was active in 'promoting the export of EIA as a regulatory model', including through the participation of US State Department officials in developing the *UNEP Draft Principles of Conduct*. Wiener suggests that the process of national diffusion of EIA has been assisted 'by the attention given to EIA in international institutions such as UNEP' as well as references to EIA in international treaties. Wiener (n 10) 1306.

48 Credit for the term 'evangelizers' goes to Craik (n 34) 4.

49 A rare example of this work is Fabrizio de Francesco, *Transnational Policy Innovation: The OECD and the Diffusion of Regulatory Impact Analysis* (ECPR Press 2013).

50 Kolhoff and others (n 25) 126 (noting these sources of institutional and financial support for EIA).

51 The rhetorical device of 'lessons learned' is frequently adopted for these purposes. See eg Jiri Dusik and Barry Sadler, 'Reforming Strategic Environmental Assessment Systems: Lessons from Central and Eastern Europe' (2004) 22 Impact Assessment and Project Appraisal 89, 92.

significance of this approach, for our purposes, manifests in the fact that EIA is conceived in this literature as a ‘tool’ that can be seamlessly transported from jurisdiction to jurisdiction, and context to context.<sup>52</sup> This is emphasised by the prevalent language calling for the isolation of ‘best practices’ and ‘models’. This contemplation of EIA as a legal technique or technology that divorces it from its legal and institutional origins serves to exaggerate transferability.

Current studies of EIA are particularly motivated by a quest for examples of ‘successful models’ capable of replication.<sup>53</sup> Sadler’s frequently cited study thus searches for ‘examples of excellence’ and guidelines for ‘sound practice’.<sup>54</sup> Development bank and development agency financed studies frequently adopt a comparative approach, surveying the state of practice of EIA in a number of different countries at once, while identifying areas for improvement.<sup>55</sup> Curiously, this work does not explore the possibility of links between the current dysfunctions of EIA that are explored in subsection 2.4 below, and the ways in which EIA was initially introduced to specific countries, whether imported or imposed.

Such scholarship also reveals the significant ways in which scholars contribute to the transnational dissemination of knowledge and ideas about EIA law and practice. In particular, scholars often approach writing about EIA through the lens of ‘effectiveness’ studies.<sup>56</sup> This invites a ‘spotlighting’ of certain well-worn examples of successful and unsuccessful EIA models. It reinforces a tendency in the literature to de-contextualise EIA law and to reduce such law to a management technique capable of seamless transmission to other jurisdictions, and contexts.

## 2.4 Ahistorical Accounts: Implementation Failures

A third narrative pervading the scholarship on EIA’s spread contrasts the exhilarating ‘explosion’ of EIA with the reality of widespread disappointment from implementation failures.<sup>57</sup> A rich scholarly literature now documents the failure of EIA to ‘take hold’ in many jurisdictions. Ogunba discusses the Nigerian context, in which EIA practices drew upon North American and British models, having produced distinct and independent EIA processes that failed to be effectively integrated.<sup>58</sup> Similarly,

52 Indeed, the concept of ‘law as tools’ (transposable or not) is particularly prevalent in environmental law literatures. For a problematization of the use of this metaphor, see Natasha Affolder, ‘Beyond Law as Tools: Foreign Investment Projects and the Contractualisation of Environmental Protection’ in Pierre Marie Dupuy and Jorge Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection* (CUP 2013) 355, 358.

53 See Cherp (n 45) 335; A Chaker and others, ‘A Review of Strategic Environmental Assessment in 12 Selected Countries’ (2006) 26 *EIA Rev* 15.

54 Sadler (n 33) 4.

55 See eg Dieudonné Bitondo, Reinoud Post and Gwen Van Boven, *Evolution of Environmental Impact Assessment Systems in Central Africa: The Role of National Professional Associations* (Netherlands Commission for Environmental Assessment 2014).

56 On the prevalence of studying EIA through the lens of ‘effectiveness’, see Stephen Jay and others, ‘Environmental Impact Assessment: Retrospect and Prospect’ (2007) 27 *EA Rev* 287, 290.

57 See eg Chung-Lin Chen, ‘Institutional Roles of Political Processes, Expert Governance, and Judicial Review in Environmental Impact Assessment: A Theoretical Framework and a Case Study of Taiwan’ (2014) 54 *Nat Res J* 41.

58 Olusegun Ogunba, ‘EIA Systems in Nigeria: Evolution, Current Practice and Shortcomings’ (2004) 24 *EIA Rev* 643, 648–9.

EIA in Ethiopia is described as plagued not only by the weak capacity of enacting authorities, but also by a perception that the institution is too expensive for that African nation, and is thus hindering the country's development.<sup>59</sup>

Much of the literature on EIA in Africa focuses on 'failures'.<sup>60</sup> A recent study of EIA in Central African countries concluded the key weaknesses affecting EIA in this region to be 'the inadequacy of the implementation laws, standards, and directives'.<sup>61</sup> But only rarely is a causal path isolated, and the history of the introduction of EIA in a country linked to its current diagnosis of implementation failure.<sup>62</sup> Historicised accounts of EIA's adoption, spread, and evolution are needed to evaluate the sort of claims that are beginning to circulate and which offer opportunities to connect origin stories with failed practices. These claims suggest that EIA 'meets its objectives predominantly in Western democratic countries . . . [as] copying Western systems does not work and is even counterproductive'.<sup>63</sup> They suggest the fact that EIA was 'conceived in and for a developed Western situation' matters in explaining the mixed results of its transfer into very different countries.<sup>64</sup> Yet detailed place-based histories of EIA's emergence and spread have yet to emerge that might provide an empirical backing for these claims.

A final consequence of adopting largely ahistorical and under-contextualised approaches to tracing the dynamics of EIA's spread is that what is seen to be transferred is 'the system' of EIA unencumbered by an 'informed critique of the system'. Thus, though Canadian EIA processes have inspired developments in Nigeria,<sup>65</sup> this cross-border communication of legal ideas neglects to acknowledge the fact that Canadians themselves remain sufficiently skeptical of their own processes that Canada has just announced a major overhaul of its own approach to environmental assessment.<sup>66</sup>

59 Adujna Feyissa Gubena, 'Environmental Impact Assessment in Ethiopia: A General Review of History, Transformation and Challenges Hindering Full Implementation' (2016) 6 *J Envtl Earth Sci* 1, 7.

60 Habib Alshuwaikhat, 'Strategic Environmental Assessment Can Help Environmental Impact Assessment Failures in Developing Countries' (2005) 25 *EIA Rev* 307, 311–2.

61 Bitondo, Post and Van Boven (n 55) 117.

62 One such exception is Tomoszkova's study on the Czech Republic, tracing the impetus for EIA to the particular allure of EU membership. Veronika Tomoszkova, 'Implementation of the EU Directive on Environmental Assessment in the Czech Republic: How Long Can the Wolf Be Tricked?' (2015) 6 *Wash & Lee J Energy, Climate & Envt* 451, 453.

63 Kolhoff and others (n 25) 136.

64 Holm-Hansen (n 45) 449.

65 Ogunba (n 58) references Canadian experience as inspiration for the quick implementation of Nigerian legislation at 649, and employs an evaluative framework based on Canada at 645–6.

66 Minister of Environment and Climate Change, 'Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to Make Consequential Amendments to Other Acts' (Bill in First Reading, Canadian House of Commons, 8 February 2018) <<http://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/first-reading>> accessed 20 March 2019. See generally Jocelyn Stacey, 'The Environmental, Democratic, and Rule-of-Law Implications of Harper's Environmental Assessment Legacy' (2016) 21 *Review of Constitutional Studies* 165.

### 3. CONTAGIOUS ENVIRONMENTAL LAWMAKING

The above exercise of fine-grained sifting through the specific narratives that shape discourses of EIA spread is intended to foreshadow the tricky terrain that scholarship on contagious lawmaking inhabits. Ahistorical, de-contextualised and passive accounts of law's movements represent but a few of the 'traps' around which accounts of legal mobility in the broader literature must navigate. Before more fully exploring such traps, and with a base for thinking about environmental law's movements now established through the example of EIA, this article turns to the challenge of naming the complex processes of movement of legal ideas. This section thus situates scholarly labels for describing environmental law's movements within their wider intellectual history and seeks to make a case for what the concept of 'contagious lawmaking' might add to such existing metaphor-rich intellectual traditions.

#### 3.1 The Revealing Nature of the Terminological Disarray

Although the fact that law is 'on the move' has been noted by many scholars, the trend in the literature has been for scholars to approach this phenomenon in different ways, using different vocabularies, and employing different methodologies to study it. This is evident in the way that the spread of EIA has been cited as evidence of the emergence of global environmental law,<sup>67</sup> of transplantation,<sup>68</sup> of diffusion and integration.<sup>69</sup> The lack of an agreed-upon nomenclature for discussing law's movements creates a risk that scholars are talking past each other rather than benefitting from each other's work.<sup>70</sup> It equally prevents *legal* scholars from demonstrating the value of *legal* analysis to complement the dominant tools of and lenses from policy diffusion studies. As suggested above, terminologies of diffusion and dissemination can re-direct the focus of inquiry away from individual people, by centring processes and flows. Terminological choices can also privilege a view of law as transportable, as concerning 'abstract rights possessed by rather disembodied legal subjects', and in the process de-emphasise the specificity and particularity of local contexts.<sup>71</sup>

Before examining some of the terms used to capture the 'spread' of environmental law ideas, it is important to understand why it is *legal ideas* that are being tracked here, and not *law*. As I discuss in more detail in Section 4, the attempt to understand environmental law's movements is contaminated and impeded by false claims of universalism that conflate different manifestations of legal ideas. In these processes, certain abstract labels are used to suggest that a singular version of 'law' is being

67 Yang and Percival (n 23).

68 Louis Kotze and Caiphas Soyapi, 'Transnational Environmental Law: The Birth of a Contemporary Analytical Perspective' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar 2016) 82, 94.

69 Wiener and Ribiero (n 40) 159.

70 In legal scholarship, those tracking the transnational flows of environmental law ideas do so within distinct literatures—capturing these phenomena as extraterritorial lawmaking, as international law, as comparative law, as 'rule of law' promotion, as transnational governance, as comparative constitutional law, as transnational legal orders, as law and globalisation. Outside law, these ideas are explored by, among others, constructivist international relations scholars (contemplating the movement of norms through 'epistemic communities'), political scientists, and sociologists (contributing understandings of norm socialization and the significance of social movements).

71 See Valverde (n 30) 109–10.

transported.<sup>72</sup> Such abstractions allow certain concepts to go by the same name when they are, in fact, quite distinct. Law is challenging to disentangle from legal culture, and what is ‘on the move’ may simply be an idea assumed to represent a certain version of law.<sup>73</sup> Framing these movements in terms of legal ideas allows one to approach their study with greater humility, and, perhaps, to be more alert towards the complicated reality of what is actually in motion. Adopting a lens that foregrounds the movement of legal *ideas* may also help reveal the importance of starting points in studies of law’s movements. Does one begin with a universal idea and trace how it is vernacularised in different local settings?<sup>74</sup> Or, instead, is the starting point the local manifestation and the research challenge one of understanding how and why that particular version is such a let-down compared to the idealised model?<sup>75</sup>

There is no agreed-upon vocabulary to describe border-crossing interactions by which similar legal ideas develop in different spatial and political locations. The fact that a single term effectively capturing this phenomenon fails to emerge is in itself revealing. It suggests that scholars are perhaps talking about different things when they use the same words. Others may also be using different words to describe the same things. The absence of a satisfactory label is itself suggestive of the messy, boundary-lacking, and less-than-fully-developed nature of this subject. What insights emerge from thinking about why existing labels are less than satisfactory?

First, something needs to be said about the terminology of *transplants*, which continues, despite mounting critique, to be adopted by legal scholars.<sup>76</sup> While the transplant metaphor has been aptly criticised as ‘too crude’<sup>77</sup> and inadequate,<sup>78</sup> it has proven to be extraordinarily resilient. Thus, while scholars increasingly caution against a ‘simplistic view of legal transplantation of norms’,<sup>79</sup> the terminology continues to be readily adopted.<sup>80</sup> The consequence of the continued widespread use of the transplant metaphor is a restricted visual field that prevents the scholarly gaze from moving much beyond two snapshot images: the uprooting of law from one national context and its resowing in another.

The ‘transplant’ mindset thus tends to trap understandings of law’s diffusion within a positivist framework. It restricts thinking about legal diffusion to a

72 For a concrete manifestation of this practice, ‘precaution spotting’, see Elizabeth Fisher, ‘Precaution, Precaution Everywhere: Developing a “Common Understanding” of the Precautionary Principle in the European Community’ (2002) 9 MJ 1, 7.

73 Recent scholarship on topics as varied as environmental law principles and emissions trading systems warns against claims of universality and culturally neutral transposition. See Scotford (n 19) and Bogojević (n 14).

74 See eg Sally Engle Merry, *Human Rights & Gender Violence* (University of Chicago Press 2006) 134.

75 See eg Ma (n 46).

76 See eg Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2 edn, U Georgia P 1993).

77 Annelise Riles, ‘Comparative Law and Socio-Legal Studies’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 802.

78 Maximo Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure’ (2004) 45 Harv Int’l LJ 2, 29.

79 Scotford (n 19) 56–7.

80 Wiener (n 10); Jonathan Miller, ‘A Typology of Legal Transplants: Using Sociology, Legal History and the Argentine Example to Explain the Transplant Process’ (2003) 51 AJCL 839; Sean Whittaker, ‘The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing’ (2017) 6 TEL 509.

discussion of primarily doctrine-infused transfers of laws, institutions and legal ideas. The limitations of such a mindset, and its accompanying framework for analysing diffusion, are well illuminated in the ‘post-positivist’<sup>81</sup> contributions of William Twining.<sup>82</sup> The study of ‘transplants’ often privileges large scale transfers, such as the movement of entire civil or commercial codes. Such studies have been less attentive to the ‘pathways and processes of diffusion of particular products, techniques or ideas’ that socio-legal studies might bring into view.<sup>83</sup> The terminology of ‘transplants’ thus risks missing some of the ‘suppler’ aspects of legal migrations.<sup>84</sup>

Missed by typical attempts to identify ‘transplants’, and to name ‘donors’ and ‘recipients’, are the more complex migrations of ideas and thoughts that legal pluralists seek to illuminate.<sup>85</sup> Transfers of non-state law, informal processes, and unofficial law are neglected. The complex overlaps and interactions of legal norms are obscured. Thinking of law’s movement in terms of ‘transplants’ also risks erasing what was there before, implying that transfers fill ‘a vacuum’,<sup>86</sup> or treating what previously existed as non-law.

Given the multiple sites and vectors of travel implicated in the practice of spreading legal ideas, it is possible something is afoot that is both *quantitatively* and *qualitatively* distinct from what is suggested by the transplant metaphor.<sup>87</sup> A hint that this is the case appears in the way environmental law has been harnessed as an element of ‘rule of law’ reforms, becoming a proxy for good governance claims. Jonathan Miller thus suggests that: ‘most countries . . . cannot claim good records in areas such as international human rights, *protection of the environment*, and anti-corruption efforts without importing some foreign or international models.’<sup>88</sup> Widespread, snowball-style legal roll-outs are being produced in response to the demands of rule-of-law agendas. These involve practices of transfer that differ in both magnitude and mechanism from those the transplantation metaphor has been developed to describe.<sup>89</sup> Despite such limitations, this article does not advocate abandoning the transplant metaphor, only acknowledging these constraints and their character. The term is

81 Kyle McGee, *Bruno Latour: The Normativity of Networks* (Routledge 2014) 95.

82 In a pair of essays, William Twining illuminates the contributions of law and social science literatures to legal diffusion. He maps the problematic assumptions and omissions underlying the ‘paradigm case’ of legal diffusion, and usefully unpacks some of the biases reproduced by thinking of diffusion through the model of ‘transplants’. William Twining, ‘Diffusion of Law: A Global Perspective’ (2004) 49 *J Legal Plur* 1, 3; William Twining, ‘Social Sciences and Diffusion of Law’ (2005) 32 *JLS* 203.

83 Twining, ‘Diffusion of Law’, *ibid* 9.

84 McGee (n 74).

85 Paul Schiff Berman, ‘The Evolution of Global Legal Pluralism’ in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Edward Elgar 2016).

86 Twining, ‘Diffusion of Law’ (n 83) 35. This links to what Rogers calls more generally the ‘empty vessel fallacy.’ Everett Rogers, *Diffusion of Innovations* (4 edn, Free Press 1995) 240–2.

87 This is perhaps unsurprising given that many of the paradigmatic scholarly contributions on the possibility and impossibility of legal transplants drew upon theory, rather than basing their argument on observed practices of legal change. See Michele Graziadei, ‘Comparative Law as the Study of Transplants and Receptions’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 442, 442.

88 Miller (n 80) 840 (emphasis mine).

89 The role of the World Bank in such roll-outs of EIA is explored in Section 3.

valuable because of its intellectual history, and for the debates it has ignited, including foundational debates about the relationships between law, society and culture, and law's autonomy from its social context.

The terminological problems identified above are not easily resolved by producing a new term or aligning with a more inclusive metaphor. Terminological re-framings of legal spread have already been extended to include studies of 'reception, transplants, spread, expansion, transfer, exports and imports, imposition, circulation, transmigration, transposition, and transfrontier mobility of law'.<sup>90</sup> In scholarship tracing the movement of constitutional law ideas, a migration metaphor has become popular.<sup>91</sup> The terminology of migration, however, seems to remove the legal subject and to imply that legal ideas move by themselves. Other terms attempt to capture critical perspectives, with the aim of elucidating that the transfer task can be complex, unpredictable and sometimes ill-designed. Moving law thus involves 'legal irritants'<sup>92</sup> and practices of 'interbreeding'.<sup>93</sup>

A single, satisfying terminological replacement for 'transplant' is ultimately unlikely to emerge because the processes of legal migration invoked by this terminology are so multiple. Diffusion is the term that is currently favoured in much of both law and social sciences.<sup>94</sup> Diffusion is far from the perfect term, however. It connotes a dissatisfying sense of passivity, which fails to conjure the entrepreneurship, dynamism and intentional activity that mark 'diffusive' practices. It also risks suggesting that what is being diffused is a singular idea. This may obscure the fact that different environmental law developments, while appearing related, actually operate quite differently and have very different histories. To some significant extent, the scholarship lacks robust categorisation because the subject defies it.

### 3.2 The Value of the Contagion Metaphor

In spite of these difficulties, naming and framing the spread of environmental law ideas is itself a critical practice. Terminology helps make the starting points and biases associated with the study of environmental law's spread more transparent. Thus, I have developed the concept of 'contagious lawmaking' in this article as it creates space for dissecting the multiplicity of processes at work, of directions of travel, and of levels at which the 'influence' of legal ideas can be detected or imagined. My motivation here is to find a name, even as a place-holder, to describe what I see as a significant aspect of environmental law practice that my own legal education has not prepared me to adequately describe. Neither international law, with its dominant focus on *state* implementation of international law norms, nor comparative law, which 'grew up within a vision of the world as divided into "water tight" legal

90 Twining, 'Diffusion of Law' (n 83) 5.

91 See eg Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006).

92 Gunther Teubner, 'Legal Irritants: Good Faith in British Law; or How Unifying Law Ends Up in New Divergences' (1998) 61 MLR 11.

93 Wiener (n 10) 1307.

94 Frank Dobbin, Beth Simmons and Geoffrey Garrett, 'The Global Diffusion of Public Policies: Social Construction, Coercion, Competition or Learning?' (2007) 33 Ann Rev Soc 449; Erin Graham, Charles Shipan and Volden Craig, 'The Diffusion of Policy Diffusion Research' (2013) 43 Brit J Poli Sci 673.

systems<sup>95</sup> provide adequate intellectual roots for this work. I have turned to the language of science in an attempt to both see and understand underexplored dimensions of the dispersal of legal ideas. While the terminology of ‘contagion’ has been used on occasion by political scientists describing the transnational ‘contagion’ of military coups<sup>96</sup> and patterns of urban disorder in the US during the 1960s,<sup>97</sup> its potential explanatory power in the context of transnational lawmaking has not previously been explored.<sup>98</sup>

‘Contagion’ connotes a multiplicity of vectors and directions of travel that ‘diffusion’ does not. It also implicates the internal status of both the original host and the contracting host in relation to the transferred substance, as well as the environment in which they interact. In the context of transnational lawmaking, it thus implicates the histories and sociopolitical realities of the places and peoples involved in a given policy transfer, as well as the global institutional and economic power structures that define the transfer environment. This understanding of policy movement directs focus away from the substance that is moving (the focus of the ‘diffusion’ metaphor) and towards the complex variables that ultimately determine the manner in which a legal idea takes hold and operates. It also suggests the possibility that local factors may cause legal ideas to ‘mutate’ in unforeseen ways, and have unpredictable impacts. It thus necessarily engages a consideration of factors that tend to hide in the methodological ‘blind spots’ that will be identified in Section 4 of this article.

Furthermore, ‘contagion’ does a more satisfying job of encompassing the breadth of theorised transfer mechanisms than more passive metaphors. The dominant mechanisms discussed in the scholarship include social construction, coercion, competition and learning.<sup>99</sup> By implicating deliberate, dynamic and interactive processes, these mechanisms demand focus on the interests and characteristics of the agents involved in policy movement. Thus, similar to the contagion metaphor, these theoretical approaches discourage excessive focus on the transferred policy itself, and direct it towards vectors and variables that better represent the complex multi-directional ‘informational network’ that defines the international system.<sup>100</sup>

Contagious outbreaks are complex, often defy understanding, and occur even absent known agents of transmission. The metaphor of contagions, like Teubner’s language of ‘legal irritants’, bring to the surface the problematic aspects of uncritical approaches to the spread of environmental law ideas.<sup>101</sup> Contagious lawmaking is far from a definitive label. That is, however, perhaps useful. That the term is both jarring and unfamiliar serves as a reminder of the value in problematising terminology and

95 Horatia Muir Watt, ‘Globalization and Comparative Law’ in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 579, 579.

96 Richard Li and William Thompson, ‘The “Coup Contagion” Hypothesis’ (1975) 19 *J Confl Resolution* 63.

97 Manus Midlarsky, ‘Analyzing Diffusion and Contagion Effects: The Urban Disorders of the 1960s’ (1978) 72 *Am Pol Sci Rev* 996.

98 The ‘contagion’ metaphor has also been used to help explain how changes in societal behaviors occur. See Damon Centola, *How Behaviour Spreads: The Science of Complex Contagions* (Princeton 2018).

99 Dobbin, Simmons and Garrett (n 94).

100 David Lazer, ‘Regulatory Capitalism as a Networked Order: The International System as an Informational Network’ (2005) 598 *Annals Am Academy of Pol & Social Sci* 52.

101 Teubner (n 92).

speaks to the conceptually challenging nature of what needs to be labelled. In describing something that is complex and multi-faceted, I have been eager not to erase the complexity and messiness that surround the practices being described, but rather to illuminate that complexity and confusion. This, of course, exposes me to the critique of mounting an untidy argument, and of adopting imprecise terminology. Both of these critiques have merit. Contagious lawmaking reminds us that legal ideas are spreading, leaking and infecting in ways that are still poorly understood.

#### 4. CONTAGIOUS LAWMAKING AND ENVIRONMENTAL LAW SCHOLARSHIP: FIVE TRAPS FOR THE WARY

One of the intentions of grounding this engagement with terminology and methodology in a concrete example—a study of discourses surrounding the spread of environmental impact assessment—is to offer a rich site for exploring the significant hurdles and challenges implicated by the study of the movement of environmental law in what is inherently a comparative and transnational space. The necessarily comparativist project of understanding the practices of contagious lawmaking demands methodological introspection and engages concerns about terminology, categorisation, and scale of comparison that have occupied comparative law scholars for years.<sup>102</sup>

The methodological observations that follow emerge from the view that facts, events, vocabularies, outcomes, processes and people can all be erased by methodological choices and starting points. The importance of starting points is highlighted by recent scholarship that reveals how ‘transnational’ inquiries, investigations that privilege physical space, tend to de-emphasise temporality and to hide colonial encounters that happen in contexts other than physical spaces, such as economic contexts.<sup>103</sup> Critical awareness of methodological choices is particularly valuable to transnational law research that involves stepping out of one’s own legal culture and finding and labelling legal developments in less familiar places.<sup>104</sup>

Moving beyond description, this article problematises scholarly practices of engagement with contagious lawmaking through the mapping of five particular ‘traps’. Precisely because environmental law scholarship has not been traditionally dominated by methodological scepticism, there is value in identifying how issues of method ‘remain inseparable from those concerning the politics and the “project” of any comparative undertaking’.<sup>105</sup> These ‘traps’ are significantly interrelated—the quest for policy relevance may lead to practices that de-contextualise and ignore history given the urgency of finding transportable ‘solutions’ to environmental

102 Annelise Riles, ‘Introduction: The Projects of Comparison’ in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart 2001) 2.

103 Gayatri Chakravorty Spivak and Robert Young, ‘Neocolonialism and the Secret Agent of Knowledge’ (1991) 13 *Ox Lit Rev* 220; Valverde (n 30) 112–13.

104 This article nudges along the project of promoting frank and self-critical methodological awareness and debate in environmental law scholarship. See Elizabeth Fisher and others, ‘Maturing and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21 *JEL* 213.

105 Peer Zumbansen, ‘Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance’ in Maurice Adams and Jacob Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012) 186, 188.

problems. Obscuring the identity of key agents disseminating environmental law ideas transnationally may be a consequence of the fact that the individual writing about dissemination is the same person moving legal ideas, or writing judgments, or advocating for legal reform across jurisdictions.

This section is structured around five ‘traps for the wary’. They are called such because these methodological landmines do not only lie in wait for those unaware of such risks. Rather, these are traps that scholars are aware of and still struggle to avoid. Making these risks explicit, as I do here, invites discussion and awareness of these challenges, even if it cannot make them go away.

#### 4.1 Disguised Policy Agendas

As much of the intellectual work on EIA reveals, environmental law scholars deeply intermingle their normative and descriptive projects. This is not to suggest that empirical projects are somehow not normative, or that scholarly literature framing itself as description is not simply hiding its ambitions for prescription.<sup>106</sup> Rather, the point is that, in analysing scholarship on contagious lawmaking as a whole, it is possible to identify a dominant compulsion to advance a particular ‘project’ of environmental law, to promote legal reform in a particular direction, or to encourage further and widespread adoption of a specific legal development.

This can be seen, first, through the intentional selection of specific vocabularies and rhetorical devices to describe legal developments.<sup>107</sup> Gift-wrapping law in the ideologically neutral language of ‘best practices’ or ‘successful models’ (language that dominates narratives on the spread of EIA) may facilitate and encourage transfer and uptake. While scholars have particularly directed this charge against those disguising neo-liberal agendas within law reform prototypes,<sup>108</sup> this is an ideologically ecumenical practice—‘deep green’ agendas can also be packaged using the neutral language of ‘successful’ or ‘best’ practices.

Literature on the spread of environmental courts provides a further example of the widespread use of this ‘best practices’ framing. Significant scholarly work on green courts describes the ‘explosion’ of green courts in terms that advocate for further dissemination of a particular vision of such courts.<sup>109</sup> The very fact that these legal developments have been successfully adopted in other jurisdictions and by

106 Pierre Bourdieu, ‘Décrire et Prescrire: Note sur les Conditions de Possibilité et les Limites de l’Efficacité Politique’ (1981) 38 *Actes de la Recherche en Sciences Sociales* 69.

107 The widespread use of the language of innovation described in the previous section on EIA is one such example.

108 Tom Bührs, ‘From Diffusion to Defusion: The Roots and Effects of Environmental Innovation in New Zealand’ (2003) 12 *Envtl Poli* 83, 84.

109 See eg the pioneering study of George and Catherine Pring on environmental courts and tribunals that pivots around a search for identifying ‘best practices’. This study, identifying 350 specialized environmental courts and tribunals, involved extensive field work and interviews to identify the ‘building blocks’ of effective courts and tribunals. This influential study is framed within a literature and an advocacy movement on access to justice. Although decision points are framed as requiring some tailoring based on the particular circumstances of local jurisdictions, there is a fairly clear subtext here on the contents and parameters of ‘what counts’ as an inaccessible or accessible court. George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Access Initiative 2009) 11, Figure 2.

other institutions is thus used as a rhetorical device in advocating for further dissemination. The ‘global dissemination’ argument thus features prominently in domestic law reform submissions.<sup>110</sup>

Bührs offers a useful critical reading of the ways in which three of New Zealand’s environmental law ‘innovations’—the Resource Management Act, the Individually Transferable Quota management system for fisheries, and the Parliamentary Commissioner for the Environment—have served as models for emulation outside New Zealand.<sup>111</sup> He argues that the language of ‘lessons’ and ‘learning’ from these models obscures the neo-liberal ideology underlying their creation, and the politics at stake.<sup>112</sup> This instrumentalism and resulting de-politicisation are reinforced by the fact that ‘borrowing’ is often treated as an aspect of ‘improvement’ or convergence with international standards in environmental law scholarship.

Thinking about the prescriptive focus of much environmental law scholarship, as well as its embeddedness in advocacy projects, promotes renewed attention to the value of self-awareness. This includes alertness to the particular project being advanced and to the relationship between that project and its methods. It also promotes deliberate consideration of the possibility of alternative methodologies. Anne Orford thoughtfully develops this point in her article ‘In Praise of Description.’ She notes how ‘the turn to description also offered a means of countering the tendency of the dominant mode of critique to flatten everything, so that the world and all the people in it turned out to be describable in terms of an extremely limited set of characteristics’.<sup>113</sup> This ‘flattening’ creeps into work that attempts to describe legal developments emerging in distinct places, and increases the risk of erasing the particularities of place, history, and Indigeneity.

## 4.2 Ignoring History

Detailed histories of the production and circulation of relevant legal practices are absent in most areas of environmental law just as they are for EIA. However, the few well documented examples of environmental law developing through colonial imposition, international financial institution-mediated mandate, and misguided legal ‘transplantation’ illustrate why tracing ‘missing histories’ is a particularly urgent task for environmental law scholars. They also underline the particular value of recent contributions by scholars whose work carefully elucidates the historical development of environmental law ideas.<sup>114</sup>

110 See, eg David Boyd, ‘Bill C-469: The Canadian Environmental Bill of Rights’ (Brief prepared for the House of Commons Standing Committee on Environment and Sustainable Development 27 October 2010) <<http://davidrichardboyd.com/wp-content/uploads/Bill-C-469-brief-in-English.pdf>> accessed 20 March 2019 (citing global examples of constitutionalised rights in submissions advocating for an environmental right in Canada).

111 Bührs (n 108) 84.

112 *ibid.*

113 Anne Orford, ‘In Praise of Description’ (2012) 25 LJIL 609, 622.

114 Joshua Gellers, for example, draws out examples of the constraining role that international norms occupy in domestic constitution drafting processes, which serve to ‘socialize’ countries into including environmental rights in their constitutions. He does so in careful field-based study of environmental rights in Nepal and Sri Lanka. Joshua Gellers, *The Global Emergence of Constitutional Environmental Rights* (Routledge 2017) 2.

This need for attentiveness to the particular histories of environmental law developments that are the subject of ‘contagious lawmaking’ narratives becomes most apparent when one considers the consequences of circulating ahistorical understandings of environmental law’s development. For example, the privileging of ‘snapshot’ accounts over more complex, temporal and historical analyses promotes a ‘normative managerialism’ evident in EIA promotion efforts that tether EIA to the managerial concepts of objectivity, rationality, and utility.<sup>115</sup> EIA processes thus become judged based on whether they achieve performative norms, with the effect of down-playing the ways in which EIAs are the product of both place and politics.<sup>116</sup>

Snapshot views of EIA regimes that emphasise implementation ‘failure’ may obscure the fact that it can be intentional politics that underlie weak EIA systems. Such politics are brought into the foreground by Bravante and Holden in their analysis of EIA in the Philippines:

The shortcomings of the EIA system are not an oversight, or a result of faulty judgment, rather they reflect a policy direction shaped by those with a vested interest in the continued mismanagement of natural resources (Broad 1995). This is not a demonstration of *policy failure*; it is a demonstration of *political success* in managing natural resources for the benefit of those who control the state. . . the problem is not the *absence* of political will to implement a more meaningful EIA system; rather, the problem is the *presence* of political will representing elite interests (Broad 1995).<sup>117</sup>

Equally concealed in ahistorical accounts of environmental law’s circulation are the dominant myths and assumptions embedded in the act of creating law for export. While increasing attention is being paid to the EU as an exporter of legal norms,<sup>118</sup> less attention is being directed to the *needs* of local law-importing communities. Postcolonial tendencies to consider forms of Western law as the only worthy sources of inspiration and replication persist, often unnoticed.<sup>119</sup> Today’s ‘idealistic exporters’ of law may employ ‘unconscious attitudes’ of universalism that avoid looking behind the ‘good ideas’, and thus unwittingly privilege certain ideals over others.<sup>120</sup> Thus, ahistorical narrations of environmental law serve the purpose of making ‘cut and

115 For a development of this critique that extends the argument to ecological training more generally, see Timothy Luke, ‘Eco-Managerialism: Environmental Studies as a Power/Knowledge Formation’ in Frank Fisher and Maarten Hajer (eds), *Living with Nature: Environmental Politics as Cultural Discourse* (1999) 103.

116 See Richard Morgan, ‘Environment Impact Assessment: The State of the Art’ (2012) 30 *Impact Assessment and Project Appraisal* 5, 7.

117 Meriam Bravante and William Holden, ‘Going through the Motions: The Environmental Impact Assessment of Non-Ferrous Metals Mining Projects in the Philippines’ (2009) 22 *Pacific Rev* 523, 542.

118 See eg Joanne Scott, ‘From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction’ (2009) 57 *AJCL* 897.

119 With the consequence, for example, of ignoring customary law and Indigenous law as a source of environmental wisdom. Saskia Vermeylen, ‘Comparative Environmental Law and Orientalism: Reading beyond the “Test” of Traditional Knowledge Protection’ (2015) 24 *RECIEL* 304.

120 Yves Dezalay and Bryant Garth, ‘Legitimizing the New Legal Orthodoxy’ in Yves Dezalay and Bryant Garth (eds), *Global Prescriptions: The Production, Exportation, and Importance of a New Legal Orthodoxy* (University of Michigan Press 2002) 320.

paste' methodologies of legal diffusion *feel* less odious by ignoring the challenging, yet vital, complexity of historical accounts.

What histories are needed and what models are on offer? Importantly, environmental law scholars are uncovering the loaded agendas of historical and ongoing colonial legal transplants.<sup>121</sup> They are also advancing the understanding of *global* phenomena such as environmental rights' constitutionalisation, using field work to elucidate, in a deeply contextualised way, legal processes in particular places.<sup>122</sup> Their work adds to the insights of multi-sited ethnographic studies. It provides methodological inspiration for legal scholars eager to better illuminate the transnational flows of legal ideas.<sup>123</sup>

Despite the general framing of universalism as permeating the literatures on global circulation of environmental law 'innovations', certain subtle messages do implicitly run counter to that dominant structure. In these messages, the influence of the 'international' or the 'foreign' on domestic environmental law succumbs to differential narratives depending on whether the 'receiving' nations might be thought of as developed or less developed countries. Writing on EIA diffusion, Hironaka thus suggests that 'the international system is often the primary motivator of environmental protection policies in *less developed countries*.'<sup>124</sup>

Disparate treatments of different parts of the world are also evident in the unevenness of the scholarly coverage of 'directions of travel.' It is easy to find examples of legal borrowings from European environmental law. Thus, we know that the EU E-Waste directives were influential in China,<sup>125</sup> and that the EU Emissions Trading Scheme has been used as a model for Kazakhstan and influenced China's emissions trading policy.<sup>126</sup> The international reach of the EU Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) is both acknowledged<sup>127</sup> and contested, respectively, by scholars.<sup>128</sup>

Discursive privileging of the 'developed world' obscures the fact that flows of environmental law ideas and 'innovations' move not only in a North-South direction, but in the opposite and other directions as well.<sup>129</sup> We can see these other

121 See, eg Mario Prost and Yoriko Otomo, 'British Influences on International Environmental Law: The Case of Wildlife Conservation' in Robert McCorquodale and Jean-Pierre Gauci (eds), *British Influences on International Law, 1915-2015* (Brill Nijhoff 2016).

122 See Gellers (n 114).

123 Carol A Heimer and Jaimie Morse, 'Colonizing the Clinic: The Adventures of Law in HIV Treatment and Research' in Heinz Klug and Sally Engle Merry, *The New Legal Realism: Studying Law Globally. Volume II* (CUP 2016).

124 Ann Hironaka, 'The Globalization of Environmental Protection: The Case of Environmental Impact Assessment' (2002) 43 *Intl J Comp Soc* 65, 65 (emphasis mine).

125 Xin Tong and Lin Yan, 'From Legal Transplants to Sustainable Transition: Extended Producer Responsibility in Chinese Waste Electrical and Electronic Equipment Management' (2013) 17 *J Industrial Ecology* 199.

126 Anatole Boute, 'The Impossible Transplant of the EU Emissions Trading Scheme: The Challenge of Energy Market Regulation' (2017) 6 *TEL* 59, 60–1.

127 Scott (n 106).

128 Dirk Heyen, 'Influence of the EU Chemicals Regulation on the US Policy Reform Debate: Is a "California Effect" Within REACH?' (2013) 2 *TEL* 95.

129 For a thoughtful challenge to the 'Americanization' thesis see Toby Goldbach, Peter Katzenstein and Benjamin Brake, 'The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating' (2013) 20 *Indiana J of Global Legal Studies* 141.

directions in the judicial citation practices of leading courts, including Australian and Canada courts.<sup>130</sup> Explicit judicial citation is far from the only indicator of the intellectual influence of the global South on the environmental law and legal processes of the global North. Scholars are illuminating, for example, the way in which Indian and South Asian courts have acted as trailblazers in advancing environmental law developments including rights' protection paradigms.<sup>131</sup> Judges similarly show an alertness to the influence of non-Western examples in their scholarly writings.<sup>132</sup> Thus, while it is easy to succumb to the power of dominant narratives' picture of one-way flows of ideas and influence, alternative accounts can and must be explored.

### 4.3 Risks of 'False Universalism' and Misappropriating Indigeneity

A challenge that permeates scholarly attempts to draw attention to the presence of similar legal concepts in different spaces is seeing universalism, or perceiving convergence, where legal ideas and concepts might in fact be quite distinct on the ground. At this more fine-grained level of analysis, legal ideas that are treated as categorically equivalent may reveal themselves to be products of specific legal histories and cultures. This challenge relates directly to the point made earlier about the link between descriptive work and advocacy because false universalisms are, perhaps often, produced deliberately if unknowingly. The very use of universalism or convergence as terminology may be an intended part of a rhetorical strategy to imply that the movement of a particular legal development is unstoppable.

One issue of methodology that universalisms raise is that of language. Language serves both as a practical obstruction *within* research projects, and as a limitation on the flow of ideas *between* scholars. Projects mapping the movement of legal concepts across jurisdictions must consider how well the concepts transcend translation efforts. For example, such analysis is vital when studying how foreign rules have been translated into Chinese and subsequently formed the basis for Chinese laws.<sup>133</sup> Scholars, including Marina Timoteo, reference the fact that German law was a significant basis for China's 2009 Tort Law provisions on environmental liability, yet these rules were inaccurately translated from German into the Chinese language.<sup>134</sup> An interesting question, given the larger argument here, is what amounts to an 'inaccurate translation'. While Timoteo's critique of the translation

130 For example, the Land and Environment Court of New South Wales, in Australia, has considered the opinions of the Supreme Court of India, as well as the High Court of Kenya, in elaborating the polluter pays principle: *Environment Protection Authority v Waste Recycling and Processing Corporation*, [2006] NSWLEC 419 [232]. The Supreme Court of Canada also referenced their colleagues in the Supreme Court of India when first giving significant consideration to the precautionary principle in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 [32].

131 See Michael Anderson, 'Individual Rights to Environmental Protection in India' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon 1998) 199.

132 See Lord Carnwath CVO, 'Judges and the Common Laws of the Environment – At Home and Abroad' (2014) 26 JEL 177, 180–1; Meredith Wright, 'The Vermont Environmental Court' (2010) 3 J Court Innovation 201, 203.

133 See Marina Timoteo, 'Law and Language: Issues Related to Legal Translation and Interpretation of Chinese Rules on Tortious Liability of Environmental Pollution' (2015) 4 China-EU LJ 121, 122.

134 *ibid* 125.

of liability concepts into the environmental pollution rules of Chinese Tort Law focuses on word choice and over-generalisation, there is clearly the potential for much deeper ‘translation problems’ between the German and Chinese systems at stake. Timoteo’s scholarship flags the additional layer of complexity, and potential for misunderstanding, that emerges when English-speakers read ‘Chinese law in English’.<sup>135</sup>

Beyond language, the risk I want to draw particular attention to here arises from recent attempts to emulate developments regarding the ‘rights of nature’. These rights emerge, above all, from legal recognitions of Indigenous worldviews. The associated danger of misappropriating Indigeneity is thus of growing significance for environmental law, particularly in the wake of recent legislative developments such as New Zealand’s recognition of *Te Awa Tupua* (the Whanganui River) as a legal person.<sup>136</sup>

Even within a single jurisdiction, the translation of an Indigenous concept into the public policy of a state involves deliberate and political acts of transformation.<sup>137</sup> An erasure of Indigenous law in relation to the rights of nature may occur, for instance, when Indigenous environmental law concepts are equated with and universalised through Western conceptions of nature. Much of the ‘rights of nature’ movement attempts to incorporate these Indigenous conceptions of environmental rights within liberal rights structures which promote an understanding of nature as external to humanity.<sup>138</sup> This nature construct, tied to concepts of both environment and wilderness, risks erasing Indigeneity as a connection to or kinship with the non-human world.<sup>139</sup> Indigenous worldviews often contemplate land and water ‘as intimately related ancestors, not simply physical forms’.<sup>140</sup>

Linking this argument back to questions of language, Thompson-Fawcett, Ruru and Tipa suggest that Indigenous knowledges and laws often involve realities and

135 *ibid* 129.

136 For a thoughtful analysis of the ways in which the grant of legal personality to Te Urewera and the Whanganui River are ‘deeply embedded in Aotearoa New Zealand’s legal culture’ and aim to regulate ‘human relationships relating to the land and river’ see Katherine Sanders, ‘“Beyond Human Ownership”: Property, Power, and Legal Personality for Nature in Aotearoa New Zealand’ (2018) 30 *JEL* 207.

137 Saskia Widenhorn, ‘Towards Epistemic Justice with Indigenous Peoples’ Knowledge? Exploring the Potentials of the Convention on Biological Diversity and the Philosophy of Buen Vivir’ (2014) 56 *Dev* 378, 379.

138 Exceptionally, the Ecuadorian Constitution is cited as an example of the possibility of blending the Western construct of ‘rights of nature’ and indigenous ‘cosmovisions’. Louis Kotzé and Paola Villavicencio Calzadilla, ‘Somewhere Between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador’ (2017) 6 *TEL* 401, 415.

139 Jocelyn Thorpe and Stephanie Rutherford, ‘National Natures in a Globalized World: Climate Change, Power and the Erasure of the Local’ (2010) 90 *Dalhousie Rev* 127, 129–30. The *Te Awa Tupua Act* (n 1) s 13(c) states one aspect of ‘the essence of *Te Awa Tupua*’ to be an ‘inalienable connection’ between Māori communities and *Te Awa Tupua*.

140 Michelle Thompson-Fawcett and Robin Quigg, ‘Identity, Place, and the (Cultural) Wellbeing of Indigenous Children’ in Christina Ergler, Robin Kearns and Karen Witten (eds), *Children’s Health and Wellbeing in Urban Environments* (Routledge 2017) 223, 226.

imaginaries that are not even describable in the English language.<sup>141</sup> It is this categorical difference from hegemonic global norms that makes Indigenous worlds so powerful as a source of learning. Thus, while false universalisms inflict damage upon Indigenous peoples, they also hinder scholarly work by allowing scholars to forget that it is precisely because Indigenous knowledges are ontologically distinct that we seek to learn from them.<sup>142</sup> Acknowledging this distinctiveness fosters awareness of the dangers in taking control of knowledges and legal orders away from Indigenous peoples via transnational movement and packaging of Indigenous law constructs. It also invites an appreciation of the contributions being made by Indigenous scholars who navigate the ways in which processes of appropriation and universalisation rupture Indigenous law from rights of self-determination.<sup>143</sup>

#### 4.4 Law's Anonymous 'Actors'

The level of careful contextualisation given to legal developments in the Indigenous scholarship just cited inspires methodologies that take close account of concrete contextual circumstances surrounding legal ideas' emergence and spread. This is an area in which theoretical literatures from outside law inform explanations of legal diffusion.<sup>144</sup> Studies of the agents and entrepreneurs active in moving law from location to location elucidate the connective tissues between legal developments in different spaces.

While comparative law scholarship in the 'transplant' tradition was preoccupied with country-level legal transfers, this lens has been significantly widened to acknowledge the diversity of agents of diffusion from 'colonists, missionaries and merchants, . . . slaves, refugees, believers, and jurists',<sup>145</sup> to clinical staff,<sup>146</sup> lawyers, and other professionals.<sup>147</sup> Linking the movement of law to the movement and actions of people engages the realities of the spread of legal ideas through commerce, education and religion.<sup>148</sup>

It is, of course, 'people', and not just 'ideas', that shape patterns of contagious law-making.<sup>149</sup> While the influence of 'individual people' rarely becomes the unit of analysis in environmental law scholarship, individual roles and contributions can be

141 Michelle Thompson-Fawcett, Jacinta Ruru and Gail Tipa, 'Indigenous Resource Management Plans: Transporting Non-Indigenous People into the Indigenous World' (2017) 32 *Planning Prac & Res* 259, 271.

142 Annette Watson and Orville Huntington, 'Transgressions of the Man on the Moon: Climate Change, Indigenous Expertise, and the Posthumanist Ethics of Place and Space' (2014) 79 *GeoJournal* 721.

143 Nicolas Wheen and Jacinta Ruru, 'Providing for Rāhui in the Law of Aotearoa New Zealand' (2011) 120 *J Polynesian Soc* 169.

144 See eg Louisa Parks and Elisa Morgera, 'The Need for an Interdisciplinary Approach to Norm Diffusion: The Case of Fair and Equitable Benefit-Sharing' (2015) 24 *RECIEL* 353.

145 Twining, 'Diffusion of Law' (n 82) 22.

146 Heimer and Morse (n 123).

147 Yves Dezalay and Bryant Garth (eds), *Lawyers and the Construction of Transnational Justice* (Routledge 2012).

148 Twining, 'Diffusion of Law' (n 82) 22.

149 Dezalay and Garth, for example, highlight the role of self-interested individual legal actors in migrating ideas about law and legal institutions from one context to another. Yves Dezalay and Bryant Garth, *The Internationalization of Global Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (University of Chicago Press 2002); Yves Dezalay and Bryant Garth (eds), *Global*

gleaned from the ‘acknowledgements’ section of new legislation and policy initiatives.<sup>150</sup> Focus on the influence of ‘people’ emphasises the need for research on factors shaping those people, including graduate legal education, sources and languages of instruction, and leading scholarly texts.<sup>151</sup>

Little is known, for example, about judges’ efforts to influence law and policy as opinion leaders, network builders, publicists and law reform advocates<sup>152</sup>—efforts referred to as off-bench judicial mobilisation<sup>153</sup>—or about judicial practices of off-bench resistance.<sup>154</sup> However, a strong sense of the common ‘project’ of environmental protection being advanced through the judiciary can be gleaned from articles like Lord Carnwath’s ‘world tour’ of exceptional environmental law judicial decisions,<sup>155</sup> and his celebration of the crucial role that ‘judges for the environment’ have to play, both individually and collectively.<sup>156</sup>

Illuminating the ‘people’ involved in environmental law’s diffusion involves careful parsing of the complex roles and responsibilities that occupy, visibly and not, a place in the work of individuals. Targets of such analyses include, but certainly are not limited to, judges, legislative drafters, and scholars. Explicit acknowledgement of individual legislative drafters’ influence on legislation is rare,<sup>157</sup> as is wider study of the processes of legislative drafting that lead to core environmental law developments. Yet, given the central place of legislative drafting assistance in programmes of environmental rule of law ‘promotion’ and environmental law ‘modernisation,’ legislative drafters and drafting practices are a valuable area for new environmental law research.<sup>158</sup> Such research can build on the isolated

*Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press 2002).

150 For example, the National Environmental Action Programme of Georgia for 2012–2016 thanks ‘international experts’ for assisting with the resulting Plan, as well as acknowledging financial and technical assistance from the government of the Netherlands. Ministry of Environment Protection of Georgia, *National Environmental Action Programme of Georgia 2012-2016* (Ministry of Environment Protection of Georgia 2012).

151 These sources are richly examined in Anthea Roberts, *Is International Law International?* (OUP 2017) 46–7.

152 For a fascinating study of international judicial education, see Toby Goldbach, ‘From the Court to the Classroom: Judges’ Work in International Judicial Education and Training’ (2016) 49 *Cornell Intl LJ* 617.

153 Onur Bakiner, ‘Judges Discover Politics: Sources of Judges’ Off-Bench Mobilization in Turkey’ (2016) 4 *J L & Courts* 131.

154 Alexei Trochev and Rachel Ellett, ‘Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance’ (2014) 2 *J L & Courts* 67.

155 Carnwath (n 132) 182.

156 Robert Carnwath, ‘Judges for the Environment: We Have a Crucial Role to Play’ *The Guardian* (London, 22 June 2012) <<https://www.theguardian.com/law/2012/jun/22/judges-environment-lord-carnwath-rio>> accessed 20 March 2019.

157 But see Twining’s acknowledgement of the ‘specific ideas of a British draftsman (David Maxwell Fyfe)’ on the origins of the UK Human Rights Act. Twining, ‘Diffusion of Law’ (n 82) 13.

158 For an example of a substantial investigation into drafting practices in US congressional practice, see Abbe Gluck and Lisa Schultz Bressman, ‘Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I’ (2013) 65 *Stan L Rev* 901.

existing examples where legislative drafters explicitly acknowledge transnational influences on their work.<sup>159</sup>

A focus on environmental law's 'people' also invites closer critical attention to the roles of scholars, many of whom are active, consciously or not, in the practice of law's contagion. Few scholars explicitly investigate the way that scholarship, conference presentations, and 'practice' advance the dissemination of 'law' and particular versions of law. However, some examples of this refreshingly self-conscious writing do exist.<sup>160</sup> For scholars, and others called upon to be 'rule doctors'<sup>161</sup>—whether they are private legal consultants, members of global law firms, staff in NGOs, legal drafters for hire, or in-house counsel in international financial institutions—there is also an opportunity here. This involves more self-consciously situating one's work in one's place in the world, being ever-cognizant of the fact that 'law cannot be considered merely a matter of technology to be acquired off the shelf as the best or most efficient practice'.<sup>162</sup>

Centring the identities of the 'people' engaged in transporting legal norms is one way by which to re-politicise both 'the legal' and the very activity of 'description'. The 'practice turn' in legal scholarship challenges scholars to contemplate the value of adding description to categories of legal actors, thus better populating theories of individual and group influence with names and faces.<sup>163</sup> Socio-legal scholars are responding to this turn by using qualitative methods and discourse analysis to illuminate not only texts, but also power relationships including those which inform EU environmental law 'in action'.<sup>164</sup>

#### 4.5 Making Money Visible

Funding is a theme that is neglected by legal scholars, and environmental law scholars are no exception. Whether called 'aid', 'rule of law' promotion, 'capacity building', 'law reform assistance', 'development', 'market access', or even 'cohesion funding',<sup>165</sup> the flow of money is fundamental to understanding how and why law moves. Interest groups have built on this insight in the USA, entering the 'business' of

159 Examples of such acknowledgements include Conseil d'État, *Études et Documents du Conseil d'État* (Documentation Française 2006) (a report drawing on 'international best practices' to reform French regulatory processes); Larry Parker, *Climate Change and the EU Emissions Trading Scheme (ETS): Looking to 2020* (Congressional Research Service 2010) (materials on the EU ETS informing the US legislative process); and Jernej Stritih and Barbara Simonič, 'Drafting a Climate Change Act: Lessons Learned' (2012) 42 *Envtl Poli L* 46 (documenting Slovenia's 'study tour' of Britain and review of British legislation to produce climate change legislation).

160 See eg Sol Picciotto, 'Critical Theory and Practice in International Economic Law and the New Global Governance' (2016) 7 *Euro Ybk Intl Econ L* 3; Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 562.

161 Dezalay and Garth, 'Global Prescriptions' (n 149) 1.

162 Dezalay and Garth, 'The Internationalization of Global Palace Wars' (n 149) 5.

163 See eg Gráinne de Búrca, 'Human Rights Experimentalism' (2017) 111 *AJIL* 277.

164 See eg Bettina Lange, 'Researching Discourse and Behaviour as Elements of Law in Action' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005).

165 On this last element, cohesion funding is explained as a mechanism for creating a territorialised environmental law in the EU. Antonia Layard and Jane Holder, 'Seeking Spatial and Environmental Justice for People and Places within the European Union' in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge 2011) 171–2.

judicial training by providing ‘free’ judicial training, which brings with it an opportunity to influence judicial decision-making.<sup>166</sup> An awareness of money, and its absence, is also vital to understanding a significant dynamic of the creation of new laws, new institutions to implement them, and new courts.

Making monetary influence visible may also be critical to explaining apparent ‘implementation’ failures such as those involving EIA in numerous non-OECD countries. When law crosses borders, it meets novel resource constraints. This reality is revealed quickly to scholars who move away from texts and employ interview methodologies.<sup>167</sup>

The importance of thinking seriously about money thus has methodological implications for legal scholars. It invites empirical work that might be challenging to pursue because of the hurdles in gaining access to financial data and by implicating quantitative methodologies that might be unfamiliar. It also involves tricky causative relationships between funding and results. But these hurdles are not insurmountable for legal scholars, and have been successfully crossed by some law and economics scholarship.<sup>168</sup> Given how easy it is to be unwittingly blind to the influence of funding, despite the fact that funding is so fundamental to shaping even the research agendas that can be pursued, there seems to be value even in highlighting the absence or inaccessibility of information on funding patterns. Such work might build upon efforts by international law scholars who are working to make visible the ‘background law’ of global markets and market principles and the significance of the cross-border movement of financial flows for law.<sup>169</sup>

## 5. CONCLUSION: CONTAGIOUS LAWMAKING AS A PROJECT FOR ENVIRONMENTAL LAW SCHOLARS

Dezalay and Garth have elsewhere highlighted the unresolvable paradox of so-called legal transplants: ‘most of the legal transplants either fail outright or are largely unsuccessful, yet the process of transplanting continues apace – and has done so in varying degrees for centuries’.<sup>170</sup> Thinking about the particular significance of this observation for environmental law scholarship, it is clear that practices of contagious environmental lawmaking are not about to end, even if our understanding of their complexity and potentially problematic nature is only beginning to develop.

166 Douglas Kendall and Eric Sorkin, ‘Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public’s Trust’ (2001) 25 *Harv Envtl L Rev* 405.

167 Resource constraints thus emerge in interviews with environmental court judges and staff as a critical element in explaining implementation failure of these courts in many countries. See Pring and Pring (n 109).

168 See eg Jeffrey Dunoff and Joel Trachtman, ‘Economic Analysis of International Law’ (1999) 24 *Yale J Intl L* 1; Takis Tridimas and George Tridimas, ‘The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?’ (2002) 14 *EJLE* 171.

169 See eg Odette Lienau, ‘Law in Hiding: Market Principles in the Global Legal Order’ (2017) 68 *Hastings LJ* 541.

170 Dezalay and Garth, ‘*The Internationalization of Global Palace Wars*’ (n 149) 246.

Asking why practices of contagious lawmaking might fail, or might be prone to failure, invites a line of inquiry that might itself be contagious, and at least instructive for environmental law scholarship. Scholarship on legal transplants alerts the reader to the need to explore precise reasons why this kind of lawmaking goes wrong. Those particular reasons have been generalised into sometimes grandiose critiques of processes of legal diffusion that are mounted to rebut assertions, for example, that transplantation is ‘impossible’.<sup>171</sup> But is there really a difference in prevalence and degree between transplanted law and other lawmaking processes going wrong? The task is not to reduce law’s circulation to questions of success or failure,<sup>172</sup> but to flag the very importance of asking these questions.

To date, the somewhat self-contained ‘transplant/diffusion’ literature has a tendency to link its successes and failures to validating the very idea of law’s spread, perhaps because of the intellectual tradition’s deep scepticism towards the process it invokes. When we discuss most other kinds of environmental lawmaking, though, we do not spend so much time parsing out the ‘mine-filled’ nature of choices of scholarly method, the traps that lie in wait for the suspecting and unsuspecting scholar. Why?

This article seeks to identify that something significant is afoot here. The right label for it might not yet be found. Contagious lawmaking, with its potentially pejorative connotations, and its lack of familiarity, is a placeholder that signifies that both tracing law’s movements and struggling to label them are projects worth the attention of environmental law scholars. The methodological critiques which animate this article seek to invigorate and energise future scholarship willing to engage with the reality of an environmental law that is both ‘local and transnational at the same time’.<sup>173</sup>

Beyond description, there is an opportunity here to question, ever more thoughtfully, environmental law’s very tradition of borrowing. There is space to contemplate environmental law’s creation myths and what aspects of environmental law’s birth and spread are missing from such accounts. For scholars and practitioners alike, this work invites intentional ‘navel gazing’ and self-awareness around personal and political agendas and practices. Contagious environmental lawmaking presents us ultimately with an intellectual challenge—that of imagining ‘export quality’ environmental law ideas.

#### ACKNOWLEDGEMENTS

I am grateful to many colleagues for their ideas and inspirations on this work and to the anonymous reviewers whose comments strengthened not only this article but also the larger research project. I thank Nicholas Healey for invaluable research assistance.

171 Pierre Legrand, ‘The Impossibility of Legal Transplants’ (1997) 4 MJ 111.

172 David Nelken, ‘The Meaning of Success in Transnational Legal Transfers’ (2001) 19 Windsor Ybk Access Just 349.

173 Peer Zumbansen, ‘Law & Society and the Politics of Relevance: Facts and Field Boundaries in “Transnational Legal Theory in Context”’ (2014) 11 NoFo 1, 3.