

CHANGING CLIMATE, LAW AND NON- ECONOMIC DAMAGES

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Making Law Matter: Environmental Protection and Legal Institutions in Brazil

- Brazilian Ministério Público as an enforcer of an “environmental rule of law”

What role does law play in addressing broader social issues? What law should law play in addressing broader social issues





Non-economic damages

- Can a loss of history be compensated?
 - Can a loss of community be compensated?
 - Can a loss of language be compensated?
 - Can a loss of spirituality be compensated?
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- What role does law play in non-economic damages?
 - What role should law play in non-economic damages?

Climate Change Related Loss and Damage Is an Ongoing Reality

- UN University Report – Institute for Environment and Human Security- Evidence from the frontlines of climate change: loss and damage to communities despite coping and adaptation (2012)
 - Bangladesh coastal district
 - Eighty-one per cent of the survey respondents reported high salinity levels in their soils, compared to just two per cent 20 years ago
 - Gambia
 - Sixty-three per cent of community survey respondents indicated that they had to modify their food consumption because of the drought and low harvest caused by low rainfall patterns over the last decade
- Solomon Islands- Nuatambu island, home to 25 families, has lost 11 houses and half its inhabitable area since 2011, (“**Interactions between sea-level rise and wave exposure on reef island dynamics in the Solomon Islands**” Environmental Research Letters [2016]).



History of Loss and Damage- UNFCCC

- Alliance on Small Islands Developing States (37 countries) understood that sea level rise would have profound impacts on the ability of coastal communities to adapt.
 - *proposed the introduction of an insurance pool to compensate the vulnerable developing countries who might experience loss and damage due to sea-level rise*
 - *funded based on a formula calculated based on a combination of a nation's gross national product and its contribution to total greenhouse gas emissions*
- No traction



United Nations
Framework Convention on
Climate Change

Continued momentum on “loss and damage”

- 2008-
 - *Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts* calling for a renewed focus on insurance, rehabilitation, and risk management
- 2010 at the Cancun COP-16
 - *Decision to include “loss and damage” for developing countries as part of a work program that might include the development of a climate risk insurance facility and/or rehabilitation from the impacts such as sea-level rise*



Legal concept of Loss and Damage

- Response to a failure to achieve mitigation and adaptation is “loss and damage”
- Loss and Damage has been part of a “Legal myth” of “being made whole” partially perpetuated by courts and partially perpetuated by insurance industry
- Some losses are non-compensable- family photographs, family heirlooms, or the previous sense of personal security that natural disaster can only be a once-in-a-lifetime event



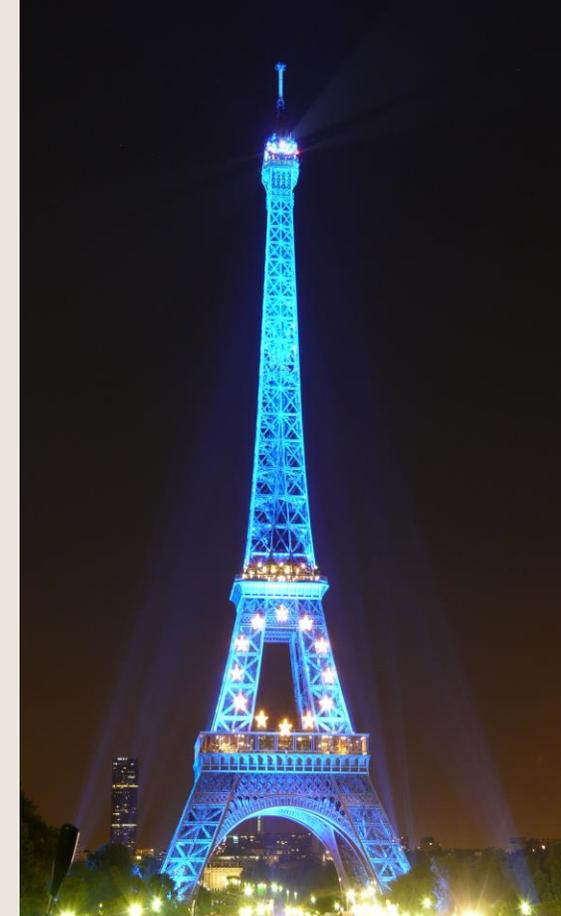
Non-economic loss and damage

- 2012- at the Doha COP-18
 - *Recognition that “loss and damage” must address non-economic loss and damage*
- 2013- States agreed to adopt the Warsaw International Mechanism for Loss and Damage
 - *Acceptance that “Loss and Damage” is not an adaptation strategy*
 - *Mechanism includes an executive committee comprised of representatives from developing and developed States who will deliver reports to two of the institutions established under the UNFCCC: the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation.*
 - *Expected to promote “action to address gaps...in the approaches to address loss and damage” including non-economic losses.*



Article 8 of the Paris Agreement

- Re-recognition of the value of the Warsaw International Mechanism
 - 3. Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.
 - 4. Accordingly, areas of cooperation and facilitation to enhance understanding, action and support may include: (a) Early warning systems; (b) Emergency preparedness; (c) Slow onset events; (d) Events that may involve irreversible and permanent loss and damage; (e) Comprehensive risk assessment and management; (f) Risk insurance facilities, climate risk pooling and other insurance solutions; (g) *Non-economic losses*; and (h) *Resilience of communities, livelihoods and ecosystems*.



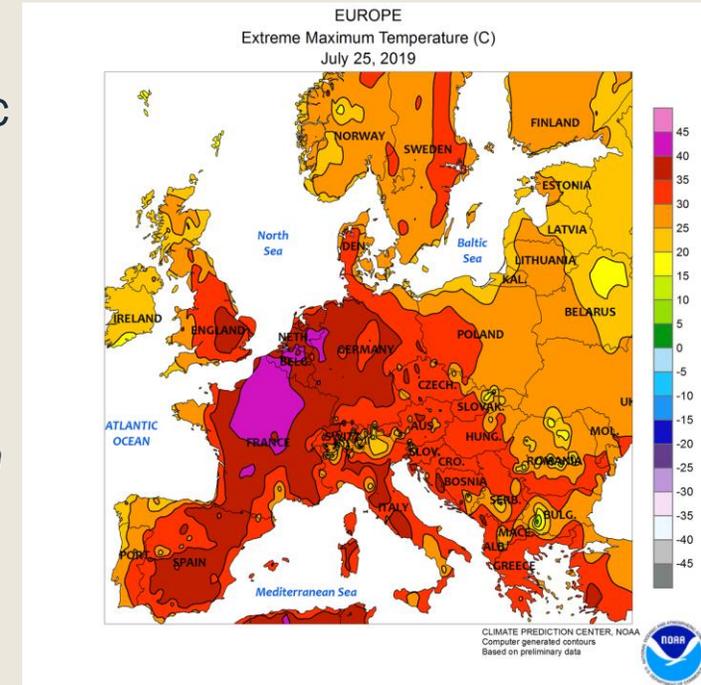
Post-Paris

- Fiji Clearing House for Risk Transfer
 - *case studies on how to create inclusive insurance programs and how to consider various risk transfer options including bonds, indemnity insurance, disaster risk pooling and index-based climate risk insurance*
- November 2017, the InsuResilience Global Partnership for Climate and Disaster Risk Finance and Insurance Solutions was officially launched at the UN Climate Conference COP23 in Bonn
- G7 Climate Risk Insurance Initiative



Index-based approaches avoid attribution problems associated with Loss and Damage

- Debates about how to link specific weather events to anthropogenic drivers
- Debates about how to link particular loss and damage to anthropogenic drivers of climate change rather than other drivers including natural variability
- Requires presumptions by legal decisionmakers of the accuracy of certain types of complex modeling
 - *Fractional attributable risk framework- Found that 2003 European heat wave was 75% caused by anthropogenic drivers of climate change*
 - *Probabilistic event attribution- Found that flood risk in 2000 in England and Wales was 20% “very likely” driven by anthropogenic drivers and 90% “likely” driven by anthropogenic drivers*



Non-economic losses and damages

- What about those losses operating outside of the “logic of the market”?
 - *Variety of potential losses*
 - Individual human losses
 - *exposure to health risks*
 - *loss of nourishment,*
 - *loss of connection to a place, particularly a place with deep spiritual or ancestral ties.*
 - Social losses
 - *loss of governance structures*
 - *abandonment of territory*
 - *loss of language*
 - Non-human losses
 - *loss of species*



NELD as Hyper-Local

- A loss of a cow for a villager is not simply a loss of dairy commodities (which can be quantified) but a loss of autonomy
- NELD is a subject of international discourse, but the impacts are frequently experienced at the household and community level. State decisionmakers often fail to understand the extent of disruption associated with smaller scale impacts.



Proposed international responses to address NELD

- Technical response
 - *Training for New Livelihoods*
 - Train a coastal fishermen in aquaculture-
 - Trade-off in NELD- Instrumental values of having something to do for a livelihood may be protected at the expense of intrinsic values including self-identity
- Administrative response
 - *UNFCCC Technical Paper 2013- “Incorporating non-economic values into economic decision-making is an important first step towards ensuring that non-economic systems are properly managed and are robust and healthy.”*
 - Accepts the existing market system as a given in spite of the current market system being the source of the loss and damage



National Law and NELD-How has the law/national policy responded to NELD?

Individual Human Losses

- Calculation of a ‘statistical life’”
- Legal systems such as the United States provide for family or next-in-kin compensation in a wrongful death action when an individual is killed negligently or recklessly. Attempts to quantify (however imperfectly) costs of a loss of consortium.



Law and NELD

- Social losses

- *Relocation of communities- Kiribati government's purchases in Fiji*
 - Addresses one reality without
- *There is no market value assigned to the relationship of community solidarity or to intimate knowledge of a landscape linking past generations with existing generations. It might be possible to create an economic model based on “non-use” or existence values but this may only compound the experience of loss*



Law and NELD

- Non-human damages
 - *Natural Resource Damages- Statutorily available- CERCLA and OPA*
 - *Assume that there will be recovery within a system that might resemble the baseline condition for an ecosystem.*
 - *What do we do about extinctions?*



What role should law play in non-economic damages?

- Aldo Leopold as a conservationist realized that “conservation” was not the answer to the crisis in healthy lands
 - *“If the public were told how much harm ensues from unwise land use, it would mend its ways.’ This was once my credo....Behind this deceptively simple logic lie three unspoken but important assumptions (1) that the public is listening, or can be made to listen; (2) that the public responds, or can be made to respond, to fear of harm; (3) that ways can be mended without any important change in the public itself. None of the three assumptions is, in my opinion, valid.”*
(1940s unpublished writing of Leopold)
- Need for something more radical than just “Incorporating non-economic values into economic decision-making “

Where do we go from here?

- Law and policy is not the answer- NELD does not seem a proper subject for law, so we need alternative approaches that are not grounded in legal frameworks of redressability.
- Beyond technical fixes
 - *“To the extent that law is a product of a State and is limited in its scope of application to legal subjects, it will not be able to address the intrinsic concern of citizens e.g. loss of real community. What is needed is behavioral change in the form of community compassion for others.”*
 - *“Individuals need to seek cross-border connection in pursuit of re-humanization process that recognizes “interdependent co-arising” where we understand that our destinies are tied to others who will never meet. We materially thrive in our lives because someone in another part of the world is able to survive. “Interdependent co-arising” is a Buddhist concept that recognizes interconnections. A slice of bread is not simply a slice of bread but is connected to a wheat field and to the sun and to water and to a farmer and a shopkeeper.”*
 - *Moving from action to some “non-action”- Returning our lives to our communities. Investing our lives in our communities.*