Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-Legal Series, v. 3, n. 5 (2013) – Human Rights and the Environment: In Search of a New Relationship
ISSN: 2079-5971

Actors or Spectators? Vulnerability and Critical Environmental Law

ANDREAS PHILIPPOPOULOS-MIHALOPOULOS*

Philippopoulos-Mihalopoulos, A., 2013. Actors or Spectators? Vulnerability and Critical Environmental Law. *Oñati Socio-Legal Series* [online], 3 (5), 854-876. Available from: http://ssrn.com/abstract=2247835

Abstract

The question of whether we as humans should remain spectators of the great theatre of ecological disaster or become actors is a false dichotomy. In this chapter, I argue that both are needed, since the critical distance of spectatorship does not annul the need for immersion in the ecological continuum. A tool in the realisation of this is the concept of vulnerability, which is here conceptualised as a space of 'the middle' (as opposed, emphatically, to 'the centre') and offers an opportunity to think away from the sterile debate on eco/anthropocentricity and from such limiting hierarchies as animal/human, human/environmental, natural/artificial. This new, vulnerable position of the middle allows the reconfiguration of ecological processes, and more specifically, the position of environmental law in relation to them. Environmental law now finds itself amidst a new, moving, 'open ecology' of social, biological and ecological processes. This is a new, radical conceptualisation of what I have called 'critical environmental law', based upon an epistemology of observation and an ontology of being part of this open ecology. Environmental law, in this light, is simultaneously reformulated as being an invitation to disciplinary and ontological openness and yet a call to remain immanent within existing legal structures. This finds expression in four critical environmental positions that set the stage for the further elaboration of a critical environmental law.

Key words

Critical environmental law; critique; Deleuze; immanence; Luhmann; middle; spectatorship; vulnerability; open ecology

Resumen

La cuestión de si nosotros, como seres humanos, debemos seguir siendo espectadores del gran teatro de la catástrofe ecológica o convertirnos en actores es una dicotomía falsa. En este artículo se sostiene que ambos son necesarios, ya que la distancia crítica del espectador no anula la necesidad de una inmersión en el

Article resulting from the paper presented at the workshop "Human Rights and the Environment: In Search of a New Relationship" held in the International Institute for the Sociology of Law, Oñati, Spain, 14-15 June 2012, and coordinated by Anna Grear (Cardiff University).

* Professor of Law & Theory at the University of Westminster and Director of The Westminster Law & Theory Centre. His recent books include the edited collection *Law and Ecology* and the monograph *Niklas Luhmann: Law, Justice, Society*. University of Westminster, School of Law. 4-12 Little Titchfield St. London W1W7UW. United Kingdom. andreaspm@westminster.ac.uk

continuum ecológico. Una herramienta para la realización de esto es el concepto de vulnerabilidad, que aquí se concibe como un espacio 'intermedio' (en oposición, con énfasis, a 'el centro') y ofrece una oportunidad para pensar fuera del debate estéril sobre eco/antropocentrismo y de tan restrictivas jerarquías como animal/humano, humano/medio ambiente, natural/artificial. Esta posición intermedia, nueva y vulnerable, permite la reconfiguración de los procesos ecológicos, y, más concretamente, la posición de la legislación ambiental en relación con ellos. El derecho ambiental se encuentra ahora en medio de una nueva mudanza, 'ecología abierta' de los procesos sociales, biológicos y ecológicos. Esta es una nueva conceptualización radical de lo que el autor ha denominado 'Derecho medioambiental crítico', basada en una epistemología de la observación y en una ontología de ser parte de esta ecología abierta. El derecho ambiental, de esta manera, se reformula como una invitación a la apertura disciplinaria y ontológica y, al mismo tiempo, como una llamada a permanecer inmanente dentro de las estructuras legales existentes. Esto se expresa en cuatro posiciones ambientales críticas que sentaron las bases para la posterior elaboración de una ley ambiental crítica.

Palabras clave

Ley ambiental crítica; crítica; Deleuze; inmanencia; Luhmann; intermedio; espectador; vulnerabilidad; ecología abierta

Table of contents

Oñati Socio-Legal Series, v.3, n. 5 (2013), 854-876
ISSN: 2079-5971

1. Vulnerability

The old dialectics between 'us' and the environment that has nurtured the West and has affected the rest of the world is not only outdated but positively dangerous. The polarisation has legitimised actions that have led to environmental degradation without, moreover, managing to explain how it is that the degradation affects human society. Since ecological disasters do not respect the conceptual limits of the polarisation, the latter had to be put on a more benign epistemological basis and reinvented along the lines of a new theoretical dialectics. Thus, instead of the rather grand ontological polarisation between 'us' and 'the environment', the debate has moved to an epistemological debate between anthropocentricity and ecocentricity. There are two problems with this move: first, this new theoretical language has provided the safety of a distance from the ontology of the human/non-human interaction, replacing ontology with an epistemology of supposed action; and, second, the new polarisation legitimised rather roundly, another perennial problem: that of 'the centre'. Indeed, while the ontological debate between 'us' and 'the environment' only insinuated the need for a centre (habitually assumed by humans), the epistemology of anthropo/ecocentricity plainly states that there is no alternative: However much we battle between extremes, we have no choice but to remain faithful to the soothing idea that there must be a centre. Why is this? It is largely because of fear. When Peter Sloterdijk (1998) talks of the need of human societies for 'immunity', he reveals the vast arsenal of concepts built around our fear of being exposed, of being thrown out in the open rather than hidden behind makeshift bubbles of immunity and spheres of fragile cohesion. Contrary to initial impressions, the centre is one such tool of avoiding exposure. While impressionistically in the limelight, the centre hides behind the blinding light and conceals its all-controlling position with a thick blanket of hinterlands, purely in the service of confirming centrality while avoiding exposure. There is no centre that is not surrounded by a floating periphery, capable of coating harsh edges in soft, invisibilising matter. One feels safe in a centre – the selective, controlled form of exposure that comes with it has the invigorating effect of full attention to 'us' as being the most important, most protected ones. Conceptualising the centre in this way, one quickly understands how the whole eco/anthropocentric debate builds on bravado rather than on the actual courage that a real exposure entails. This is the grand paradox of the centre: it looks exposed but it is actually the safest position to be in.

And there we have it: a continuous polarisation, fighting for a sound cause (if on the side of ecocentricity) but destined to fail in any transformative aim because of its reproduction of old dialectical, hierarchical semantics. Neither is this trap successfully resisted by environmental human rights discourses, since they are perhaps most acutely characterised by the tension between protecting the human centre while not divorcing this centre from an environmental consciousness. But the issue here is, once again, that all-too-human consciousness that trammels the 'surrounding' ecology in specific and, ultimately, anthropocentric ways. New semantics are needed that move away from the glib safety of the centre and these consequent, misaddressed dialectics. New semantics, I argue, must be sought on a surface of acentric continuum, traversed by velocities and pauses that do not easily subscribe to centralising generalisations. Following Gilles Deleuze and Félix Guattari (2004) on this, I would call this surface 'the plane of immanence', namely the all-embracing sum of folds and falls and connections that contains its own origin, causality and, teleology without transcendence. This plane operates on both an epistemological and an ontological level – it is both how we conceive of things and how things are. Just as it does not contain divisions between the observing spectator and the involved actor, this plane also offers no distinction along the lines of human/natural/artificial/technological. On the contrary, these categories fold into each other and constantly emerge as epistemological and ontological hybrids. It is in this sense that here, instead of actors, I would like to refer to actants, namely an

entity that goes beyond the distinction human/non-human and consists, most often, of a combination of both. Bruno Latour (1996, p. 370) defines them as "something that acts or to which activity is granted by others. It implies no special motivation of human individual actors, nor of humans in general. An actant can literally be anything provided it is granted to be the source of an action". It is clear that on a surface where the distinction between human and non-human is blurred, 'actant' conveys the complexity of the human much better than the rather fraught 'actor'. In the same vein, the concept of 'spectator' implies a privileged position that enjoys the critical distance of the spectacle of the world. It is a peculiar position that humans have managed to construct for themselves, where the world performs for them. Guy Debord was writing at the beginning of last century: "The society based on modern industry is not accidentally or superficially spectacular, it is *fundamentally spectaclist*" (Debord 2009, p. 4). The society of spectacle constructs a full economy of spectacle where the environment is variably dressed up as resource (with all the consequences of the economy of the spectacle), as source of romantic inspiration (a resource of a different, supposedly more elevated kind), as anthropomorphic and emotionally-reacting partner ('the angry sea'), or as a lab spectacle where the world is fully yet in a risk-free way reproduced in order to extract more arguments in support of spectatorship (see Igoe 2010). A slightly less fraught word might be the term 'observer', one who does not necessarily partake of the economy of the spectacle, while however retaining the distance thought to be needed for any epistemological judgement. In the remainder of this text, I shall be using both terms – although not interchangeably, since being in the centre of the economy of spectacle remains a position of privilege currently assumed and not easily absorbed by the predominantly epistemological distance that is implied in the term 'observer'.

One of the main tools in approaching this open yet immanent surface is the concept of vulnerability. Such a tool might seem counterintuitive (see Grear 2011). If anything, vulnerability is a weakness, not a strength. It hardly augurs well for the new semantics. Let me clarify, however, one thing: there is nothing soothing about this new surface and about the way in which this surface presents itself. The surface is precipitous, anti-gravitational, whirling. And the actant/spectator faced with it has not time or space from which to observe it. Any need for observational distance is swallowed up by the velocity at which the surface moves – from polarisation and dialectics to what Heidegger (1962) has famously called being thrown-into the world: a forceful abandonment into the world. This abandonment is full of momentum, surrounded by a world that folds around this throwing. There is no screen to hide behind, no distance afforded by epistemology, no negotiating moments of discourse. The surface is pure ontology, inescapably filled with a brutality of continuous, uninterrupted presence. This is the reason for which vulnerability is deemed here to be an adequate tool. To acknowledge this fundamentally precarious position of the surface is to acknowledge one's vulnerability. Further, acknowledging one's personal vulnerability is a condition of limits. One gets to accept the fact that one has limits and therefore limitations. It is precisely the awareness of the latter that is lacking in environmental legal discussions.

Vulnerability is understood here as the condition of finding oneself in a space in which the inevitability of being thrown-in and exposed to the draughts of the world becomes evident to the one who is thrown in. This ('thrown-in') 'one' might be a human being of 'the golden mean type', namely the human praised by Enlightenment as rational (I wonder where these humans are hiding); or a human that still grapples with her humanity, trying to find ways of delimiting herself in a technological or natural milieu; or even a non-human, an animal, plant or inorganic matter whose consciousness (or lack of) has never managed to place all the demands under which humans currently find themselves. Vulnerability does not require human consciousness but a mere instinct of risk of potential harm. It

unfolds in an open yet immanent space, situated right *in the middle* (of the surface, of the world, of the body), folded amongst the flesh of an infinite yet immanent plane, yet precipitously falling. Not in a theological sense, although the latter is inspired precisely by the acknowledgement of vulnerability. Unlike theology, here there has been no one who pushed us, no one who gave us the choice – even that of no choice. Here, there is no distance between our substance and that of the divine. We are all one, according to Spinoza (2000). There has never been an apple moment with its soothing quality of origin. Here, the body woke up in the middle of its fall: apples and other fruit, animals, tools, cities, plants, machines, cyborgs, ecosystems, the earth – all form part of the same gravitational movement, itself absorbed by its own force and eventually collapsing. A body (whether it is human, animal, technological, linguistic, inanimate) finds itself in the middle of this, moving and becoming-other-than itself, trying to grapple with its condition shared by everything around. On the plane of immanence, vulnerability occupies the space of exposure that goes beyond epistemology and beyond the Heideggerian (1962) distinction between the ontic and the ontological. We can no longer accept levels of being – or this kind of thought, a staggered ontology that reinforces categories and hierarchies. I want to begin on a clean slate where the surface is *all that there is*. In that sense, vulnerability is a moment of pure ontology, a moment of doubling-up, where the vulnerable (that is, everything) is present in its own vulnerability as its defining condition of presence. As soon as one is present, one is vulnerable.

The space of vulnerability has grave repercussions for the way we understand ecological processes (in the broadest possible sense that includes as much the ecosystemic as the cultural) and the position of environmental law with regards to them. First, it reveals an incontestable exposure to the world. No matter how well protected humanity feels behind its technological armour, it remains exposed to the flow that surrounds it, be this in the form of natural disasters, autopoietically-produced technological risks, human-caused accidents or hybrid forms of life between the natural and the artificial. Second, the space of vulnerability exposes the futility of looking for a centre in the way life, society or anything else is structured. Indeed, the middle is not the centre – if anything, the middle makes the centre collapse. In that sense, the debate between anthropocentric and ecocentric is an exercise in old semantics. And third, it exposes the illusion of hierarchical control believed to be yielded by the law in relation to nature. To begin in the middle is to find oneself in a horizontal plane where no transcendent summit is to be seen and no *über*perspective can be assumed by anything, least of all the law.

On this shifting plane of immanence, I would like to locate an attempt to reconceptualise environmental law in its new becoming, what I would call *critical environmental law*. Briefly, critical environmental law's main theoretical task is to reconcile the observer with the actant, namely the epistemology of observation and the ontology of being in the middle. There is no simple dialectic between observation and participation, observer and actant or even spectator and actor: there is no good guy-bad guy here – neither of them corresponds directly to issues of centre and middle, and certainly no synthesis can rescue us from the distinction. At work here is an attempt at weaving the two in strands that retain their individuality yet work together in order for the middle to take up the expansive immanence of the distance that is traditionally reserved for observation. This is particularly important in the face of the absence of boundaries between traditional categories such as human/animal, artificial/natural and so on. If this difference is no longer, then how can critique be conceptualised? Can one move away from representations and embrace the materiality of the environment? In order to answer these questions, I follow a broadly Deleuzian understanding of the connection between the human and the environmental, on which I build a theoretical sketch of critical environmental law that is inspired by a productive conflict between Luhmann and Deleuze. Thus, in the following section, I begin, brutally in the middle – offering a broken text dealing with its own vulnerability.

After situating the concept of vulnerability in the middle, I look further afield, to the open plane of immanence where there is no differentiation between human/natural/artificial. This is what, in section three, I call 'open ecology'. In section four, environmental law is formulated in its paradoxical nature of both *nomos* and *logos*, namely, both as an invitation to disciplinary and ontological openness and as a call to remain within existing legal structures. This is theorised in section five as the crisis of environmental law, namely the confluence of critique as demarcation/boundary/crossing over and critique as problematisation of concept. In the final section, the findings are distilled in four critical environmental positions that set the stage for the construction of a critical environmental law.

2. To begin in the middle

To begin in the middle is to denounce the possibility of a centre. The middle does not allow for a perspective that calls itself an origin and from which all is centrally, panoptically surveyed. The middle is not the centre. In fact, it is not even a beginning, properly speaking. It is a movement along movement, something equivalent to stepping out of a door and being carried away by a crowd irresistibly pulling in this and that direction. One finds oneself right in the middle of things, surrounded by a movement that cannot be controlled: "The middle is by no means an average; on the contrary, it is where things pick up speed" (Deleuze and Guattari 2004, p. 28). To begin in the middle (just as to relinquish control) is at the same time debilitating and liberating.

When Deleuze and Guattari emphasise precisely this space of the middle as the point from which to begin, they revolt against the habitual conceptualisation of beginning with its panoply of origin, centre and boundary. Deleuze and Guattari (2004) use the example of the grass in order to describe the process. Just as the grass has no one root, central part, or limits to its expansion, in the same way to begin in the middle is to find oneself folded between the multiplicity of the world without a discernible origin, a specific centre or determined territorial limits. To be thrown into the mobile multiplicity of the grass is to follow the blades waving in the wind: one loses one's origin, one's preconceived ideas of location and destination, one's belief in the importance of the centre. One is lost in a horizontal plane of movement, and on this plane one begins by ebbing and flowing between strength and vulnerability.

Grass is opposed to the tree with its defined root, trunk and volume. As Deleuze and Guattari (2004, p. 16) write, "arborescent systems are hierarchical systems with centers of significance and subjectification". For this reason they urge, "make rhizomes, not roots, never plant! Don't sow, grow offshoots!" (at p. 24). Offshoots and rhizomes are characteristics of the planar mobility with which Deleuze and Guattari describe the world. Rhizomes specifically encapsulate the ideas of horizontal, trans-species, heterogeneous growth that trammels Deleuzian/Guattarian thought, in that they do not constitute a linear, vertical construction, but a surface where any modulation is absorbed, closed in and eventually spread in lake-like smoothness. However, even radical rhizomes have been routinely fetishised in the literature as being the way to guarantee openness, flexibility and contingency. This marginalises the fact that rhizomes can also be co-opted, overcoded and used in ways that go against the very idea of rhizome, although Deleuze and Guattari specifically write that the rhizome cannot be overcoded (Michulak 2008).

The above is an example of the complexity of the middle: neither necessarily 'good' or 'bad', positive or problematic, the space in the middle is a space of struggle – in this case, against origins, boundaries, centres. Even better, the space in the middle is a space of encounters with other bodies, a space in which one's body affects and is affected by other bodies, and within this movement of affect, the body is deemed 'good' or 'bad'. It is not a space of prejudgement, of secure values, of fixed

constructions. Rather, the space in the middle is precisely *in the middle*: neither this nor that side; but then again, the middle is not a boundary and therefore is not flanked by sides. It simply is – a movement amidst movement. Likewise, it offers no direction: just as the leaves of grass move with the wind, the space in the middle consists of the *encounter* between the grass and the wind. An encounter for Deleuze (2004, p. 141) pushes the encountered parties off their comfort zone of categories and identities, and throws them in a "mad becoming". The grass becomes wind and moves along the wind's breath, the wind becomes grass and spreads itself on the ground: becoming itself is pushed deeper in the middle, as it were. The space in the middle offers no chronology and no external causality: all is interfolded in simultaneity and immanence. The wind becomes the grass, the grass becomes tomorrow's grass – its beginning is in the middle, in the space of here, flailing around its movement.[1] Finally, here there is no difference between spectator and actant. Any ontic counting, categorising or calculating becomes absorbed by an all-embracing, self-absorbing ontological singularity. The spectacle of the environment engulfs the spectators and the boundary between the two is reduced to a feeble epistemological construction, which, even then, is resisted.

How does this happen? What is it that pushes one from the safety of the spectator to the exposure of the actant? More specifically in relation to humans, what is it in this space that brings them closer to their own responsibility? The answer must be sought in the way that vulnerability becomes apparent. To be in the middle is to become *aware* of one's vulnerability that comes with exposure, abandonment and ultimate release from the habitual illusions that, crutch-like, enable the construction of 'man' to carry on. In his move away from phenomenological consciousness, Deleuze sides with (and interprets) Spinoza's triple illusion of consciousness: the illusion of final causes, of free decrees and the theological illusion (Deleuze 1988, p. 20). In other words, the illusion of taking effects as causes, the illusion of imagining oneself as the origin, and the illusion of a transcendental point of volition and judgement. Denuded from these foundational illusions, one is also deprived of consciousness itself, for "consciousness is inseparable from the triple illusion that *constitutes* it … Consciousness is only a dream with one's eyes open" (Deleuze 1988, p. 20). So, vulnerability is the moment where the spectator takes herself in, in her full actant dimension, and when the actant swallows up the spectacle of herself in the world. It is the moment of awareness of loss of individual consciousness that consequently requires no distance between the position of observation and the world. Vulnerability is a glimpse at the annihilation of the self through the immense spreading of the self on the open surface of the plane of immanence.

But then, can one be in the middle *and* carry on dreaming with one's eyes open? Can one remain a spectator while observing oneself acting out in the middle? Can consciousness be reconciled with the plane of immanence? Is agency a possibility when one is 'thrown-in'? I attempt an answer to these questions in the following sections, since they lie in the foundation of the tension between, on the one hand the plane of immanence – namely the univocity of substance (be this human, animal, plant, inorganic) – and on the other, the need for assuming a *special* responsibility for the ecological predicament as human beings. It is, in other words, the question of distinguishing without divorcing the human from the rest of the world. The tension focuses on this: can we retain consciousness yet abandon its privileged position? Can we assume responsibility without assuming a central position? Divorcing is much easier than mere distinguishing: it is reassuring to divorce the here from the there, that is, to carve a boundary on the surface of the

1 Deleuze and Guattari (2004, p. 10) use the example of the wasp and the orchid: "The orchid deterritorializes by forming an image, a tracing of a wasp; but the wasp reterritorializes on that image. The wasp is nevertheless deterritorialized, becoming a piece in the orchid's reproductive apparatus. But it reterritorializes the orchid by transporting its pollen. Wasp and orchid, as heterogeneous elements, form a rhizome."

earth and then position oneself in such a way as to observe a chunk of it while leaving another chunk as blind spot behind. This might well be arbitrary. Every distinction between the observed and the non-observed is to some extent arbitrary. But isn't this what epistemology commands us to do? Thus, say that one chooses to observe how environmental law operates on an EU level with regards to specific atmospheric pollution. This distinction is performed in full awareness of the fact that it entails an exclusion of all other environmental legal issues. But one carries on with it, in a dreamy consciousness of the exclusion and in solid determination to pursue the chosen focus. One learns to live with one's illusions. It might make life bearable, research less chaotic, multitasking less pernicious. It also makes one feel less exposed, vulnerable and abandoned to the movement of the grass. One might even reserve a space for illusions, a bit like a circus corner designated for tricks and hallucinations. This is not to be harshly judged as inadequate or weak. Faced with complexity, one needs patience. Illusions are necessary, and indeed serve a useful purpose, provided that the grander schema in which illusions are contextualised becomes clear. In this case, the schema refers to the tension between spectatorship and participation, observer and actant, epistemology and ontology. And on another level, it refers to that fundamental distinction between divorce and distinction. The difference is that the latter works across both continuum and rupture – that is, across both identity and difference – and can therefore accommodate a plane of immanence that consists of singular differences, as I show below. But how to achieve this space of distinction within the power struggle of human supremacy versus everything else?

The tension is, once again, solved by the entry of vulnerability. Its impact is not direct, in the sense of solution, but indirect, in the sense that no solution is offered. Vulnerability is too forceful to be easily accommodated. The brutality of the exposure is a singularity unto itself, an all-consuming space of relentless, autopoietically-generated horizontality. The awareness of being thrown-in, the exposure that comes along the realisation of being singular produces the angst of, to recall Maurice Blanchot (1988), an acephalous community, namely a society that is no longer sovereign of itself, nor can nominate a sovereign head with any plausible certainty and permanence. Thinking is no longer directional but open, brutally lost, vulnerably liberated. Especially on an institutional level, where law operates, the space of differentiated thinking is well upon us in every single field, and above all in the fields of interest here, namely environmental law and ecological processes. Environmental legal thought has been exposed to the coruscating atmosphere of horizontality, and while the interest of society might be to maintain the illusion of centre, hierarchy, direction ("arborescent systems"), the evolution of environmental legal thought is radically and irreversibly exposed to the space in the middle.

Still, this is not a straightforward case of urging things to change. Institutional thought remains conditioned by the resilience of its illusions. Institutional self-descriptions keep on legitimising themselves on the basis of such convenient constructions as consensus, communication, dissent (see Philippopoulos-Mihalopoulos 2009 for an analysis of the connection between institutional self-descriptions and illusions of identity). Environmental law hides behind its legal categorisation and justifies its operations on the basis of its legal nature. This means that, however *sui generis*, environmental law desires to remain law, takes refuge in the grand authority that law still (thinks that it) yields. This places law both away from nature, hierarchically 'superior' to it, and apart from the crisis of the acephalous society. Thus – however much criticised in law – authority, categories, hierarchy remain relevant. So, environmental law exemplifies the paradox of, on the one hand, ontological vulnerability, and on the other, epistemological defence. This is the difference between description and prescription: the latter observes things as they are/appear and tries to speak on

the level of the 'system', while the former urges things to change towards a 'better' reality. In the following sections, a combination of the two is attempted.

3. The open ecology of Environmental Law

For the past few decades, environmental law and ecology have been going through a co-evolution of sorts (Brooks *et al.* 2003, Turgut, 2008). This connection is now being redefined, not least because both environmental law and ecology themselves are in the process of redefinition. While ecology has been traditionally associated with ecosystemic principles and management methods, its remit has recently been significantly modified. It is now understood that ecology cannot be taken to mean simply ecosystemic management (Indeed, Herzogenrath (2009) following Deleuze and Guattari, replaces ecology with geophilosophy; see also Papuzinski 2009); nor however, can ecology be seen merely as being the scientific branch of the theoretical approach that has come to be known as 'deep ecology' (Welchman 2008). The definition of ecology employed here is both broader and more pragmatic than the above. At the same time, it is ethically and politically positioned, and also removed from traditional semantic structures of ecocentricity, homeostasis, natural equilibrium and so on. Indeed, when in the 80s Guattari (2000, p. 20) presented us with his three ecologies, namely a "mental, a natural and a cultural ecology", he envisaged nothing less than an ethicopolitical articulation of the connections between subjectivity, biosphere and society (Genosko 2009). Amongst these connections, and specifically in the movement between them, I attempt to locate what I call *critical environmental law*, namely an environmental law that exerts a radical critique of traditional legal and ecological foundations, while proposing in their stead a new, mobile, material and acentric environmental legal approach.

This wider new ecology, which I would call *open ecology*, combines the natural, the human, the artificial, the legal, the scientific, the political, the economic and so on, on a plane of contingency and fluid boundaries.[2] This 'and so on' is precisely the space of openness and simultaneous closure of the concept. 'And so on' arrests the future in way that excludes waiting. The future is always already here, included in an open ecology of no boundaries. Outer space, hybrid technohumans, technologically manipulated meteorological phenomena, 'and so on' are all grounded on the materiality of here, itself open to any definition of materiality may come from over there. In that sense, open ecology is entirely closed. Any transcending movement is inscribed within, in the recesses of the unknowable here. There is nothing that is not, actually or potentially, included in open ecology. And nothing that is not, actually or potentially, connected to everything else. Barry Commoner's (1971, p. 33) first law of ecology, namely that "everything is connected to everything else", takes up a new meaning, where everything now *becomes* everything else. This is a processual rather than a value-based ecology and, to quote Deleuze and Guattari, "we make no distinction between man and nature: the human essence of nature and the natural essence of man become one within nature in the form of production of industry" (1986, p. 4). This makes the understanding of ecology legal, just as it makes law ecological. The 'production of industry', that is the various elements that repeat themselves in nature and humanity in the form of processes and products is the focus of the connection between law and ecology. Values that have led nowhere successful so far are now replaced by a study of the processes that transcend the usual dichotomy between human/natural.

By merely focusing on ecosystemic processes and their management, the construction of 'man' retains its centrality, however included it is supposed to be in

[2] Although such inclusive ideas have been successfully rehearsed in the wider ecological debate (e.g., Baarschers, 1996, p. 14, who equates ecology with "an attitude, a world-view"), there is a difference between a vaguely or even contextualised ethical/ecological view, and the kind of ecology that combines the material and the conceptual without distinction and traversed by continuous movement. For two excellent contributions to the connection between Deleuze and ecology, see Herzogenrath 2008, 2009.

the ecosystem itself. To differentiate between the human and the natural/ecosystemic on the basis of category is part of the old semantics of the centre, where various approaches vied on who will get there first. But to begin in the middle is tantamount to abandoning the requisite vocabulary for such categorical distinctions. Every thing is different in absolute, an individual singularity repeating itself in difference.[3] Each singularity is folded in the universal without, however, losing its absoluteness. Every human is different, just as every animal, plant, pollution particle or artificial limb is different. Their singularity is folded in the plane of an immanence that brings things together while differentiating. It is a difference that makes a difference and can never lead to clusterings of categories. This plane can be called life, matter, Nature or indeed, Earth. Thus Deleuze and Guattari argued that "[the Earth] is not one element among others but rather brings together all the elements within a single embrace, using one or another of them to deterritorialize territory" (1994, p. 85). But this is the coup of the present approach: not only unity but radical difference on a plane of immanence where everything is infinitely folded. Difference, but not divorce. Open ecology is a closed aggregation of infinite openness, a unity that cannot be seen as a unity because it includes the space from which any observer is to be gazing at it. Open ecology is a unity of radical difference and a difference that breaks unity into luminous, self-absorbing singularities. Further, the present approach not only accepts difference, but also conflict: "to deterritorialize territory" means to destroy, to flatten out, to smoothen up space, to abandon cities to the jungle, bodies to the ground, fishstock to vessels, vessels to tsunamis: in short, continuously to become-other. There is conflict in movement, for moving always displaces others and constantly renders the organised, structured land a thing of the order of the earth, a smooth, absorbing surface.

So, difference exists. Indeed, only difference exists. Even the Earth which is seen as 'the single embrace' is an open whole, its immanence an infinite plane that is nothing but a snapshot of connections: "as the production of the diverse [it] can only be an infinite sum, that is, a sum which does not totalize its own elements" (Deleuze 1990, p. 266). Thus, to say that humans are different from animals/plants/artifice on the basis of essence, consciousness or language constitutes a return to a categorising unity, and as such it goes against everything that this new ecology attempts to do. Essences are means of categorisation, clustering, control. Consciousness is an aggregation of illusions. Language has been abused as the basis for the denial of materiality, the platform on which the material has been delegated to a container or a backdrop. But this new ecology posits an intricate connection between singularity and materiality. Singularity is carved out of individual materiality, of each body. For Deleuze, "a body can be anything: it can be an animal, a body of sounds, a mind or idea; it can be a linguistic corpus, a social body, a collectivity" (1988, p. 127). What connects all these bodies is matter. But matter is not a dead weight. On the contrary, "matter is molecular material, not dead, brute, homogeneous matter, but a matter-movement" (Deleuze and Guattari 2004, p. 512). In its movement, matter is generative of both order and chaos. It is supple ("molecular"), folding, heterogeneous. It bears singularities and their encounters with other singularities. Matter is pure ontology, unrepresentable, uncontainable, infinite. Matter is the stuff of vulnerability, simultaneously a hiding place and a theatre of exposure, bearing bodies that in their movement affect and are affected by other bodies. Yet, precisely because of matter, there is a difference between humans and other bodies. The difference is one of material thickness, control of affective states and ultimately power. When Spinoza (2000) talks about bodies affecting other bodies, he refers to a wider striving (*conatus*) that pertains

[3] Deleuze (2004) has written specifically on the connection between the two, where repetition can only be 'true' repetition if it is difference. In the case of the law, this can only happen when we move from the 'particular' (which subsumes repetition to the same) to the 'singular' ("not add a second or third time to the first, but carry the first to the 'nth' power": 2004, p. 2).

to all bodies. Striving happens for self-preservation and self-preservation constantly requires more power in order to be able to affect other bodies rather than merely be affected by them. The ultimate goal for Spinoza is a joyful existence, where joy must be understood not as happiness but as a passage to a greater power of acting (Spinoza, 2000). It is clear from the way humans have organised their affects that their misapprehended joy (and rather obviously not happiness) has reached vertiginous heights. But this is all happening because of the unacknowledged context. Spinozian affects do not take place in a vacuum. They are always related to the greater, infinite oneness of which they form part. Spinoza calls this 'god', yet the main criticism against him has always been that of atheism (Della Rocca 2008). This is because Spinoza's god is nothing more than the infinite substance within which everything floats about, trying to achieve its potential. Spinoza's god is the Deleuzian/Guattarian plane of immanence – that ecological openness that remains infinitely immanent, defined only by and through itself. To put it bluntly, this *here* is all we've got. The way we employ our power is our responsibility. For this reason, the initially peculiar reversal of vulnerability does not discount the importance of power. It is that old paradox, that only through our awareness of our limits and limitations do we become stronger.

4. Locating environmental law

Environmental law is thrown in the middle of open ecology. This new predicament renders obsolete several of the constituent elements of environmental law. Yet, the law remains law. Its umbilical credentials are not entirely broken, its illusions not utterly shattered, its vulnerability not totally exposed. Its thrown-ness is cushioned by a resilient layer of procedures, concepts, expectations. We are faced with a paradox, or what Beressem (2009, p. 70) calls "radical paradoxical logic": on the one hand, a law that is moving along the new ecology, situating itself on a plane of difference and dealing with such grand and unheard-of (for the law) concepts such as futurity, genetic materiality, nature or catastrophe – thus flirting with movement and spaces in the middle as no law has done before.[4] And on the other hand, a law that still employs habitual legal mechanisms and processes in order to decide, reverting always to the foundational moment of crisis, of judgement, of partitioning, thus reviving the boundary that cuts across the earth, separating it into us and them.

It would seem, therefore, that environmental law echoes precisely the two forms of law described by Deleuze and Guattari: law and *nomos*. They are both spatially defined, in a way indistinguishable from the material geography in which they operate. Law is the space of the "legal model", of *logos* and sovereign morality: this is what the authors call 'striated space', namely the space of boundaries, enclosures and exclusions. *Nomos*, on the other hand, is associated with 'smooth space', namely a space that is unlike "Euclid's striated space" (Deleuze and Guattari 2004, p. 409); rather, it is a haptic space "wedded to a very particular type of multiplicity: nonmetric, acentered, rhizomatic multiplicities that occupy space without 'counting' it". While striated space is the space of the law of the *polis* characterised by points, boundaries and zones, smooth space is that of uncountable, uncalculable *nomos*: "the *nomos* came to designate the law, but that was originally because it was distribution … one without division into shares, in a space without borders or enclosure" (Deleuze and Guattari 2004, p. 420). The difference is not unlike that between a game of chess and a game of Go: "in chess it is a question of arranging a closed space for oneself, thus of going from one point to another … In Go, it is a question of arraying oneself in an open space, of holding space, of maintaining the possibility of springing up at any point … The 'smooth' space of Go as opposed to the 'striated' space of chess. The *nomos* of Go against

[4] These concepts appear within the law as legal constructions, always filtered by legal functionality. The fact that they are now part of the legal discourse means that the law has neutralised them sufficiently so that they no longer embody any unpredictable risk for the law.

the State of chess" (Deleuze and Guattari 2004, p. 389). Deleuze in particular has always been fixed on a kind of binarism (although he would not call it so) that contains, on the one side, the idea of law, which came to include the discourse of Human Rights in his later work, and involved state in its oppressive role as coloniser/land controller/; and on the other, *nomos*, which is the distribution of territory along the movement of the nomads, without permanent zoning.

It is, however, problematic to circumvent law (even in the striating sense) altogether. The nomic alternative is a reconstruction of a nomadic connection to the territory, where space had not (yet) been appropriated by the state and converted into colonisable, profit-generating land. While this still happens in enclaves of indigenous population, it is not difficult to see that even these enclaves are folded in an overwhelming striating presence of capitalist law (but see Brighenti 2010 for the need to resist nomadically). And, even if the presence of the state has in several cases been replaced by a collective and spread-out presence of instruments of control that operate beyond, and indifferently of, state boundaries, the law, in the Deleuzian sense, is literally everywhere, permeating every fissure and fold, and populating the air that one breathes. Law's presence, even if disconnected from the state, is resilient, ever-changing, indeed moving. Environmental law specifically moves along the open ecology, at times co-opting this new thought for its own purposes, and at other times genuinely giving itself up to a constant becoming-other (becoming-science, becoming-politics, becoming-resistance, becoming-tree …) that reasserts its singularity. This paradoxical nature of environmental law, simultaneously law and 'becoming-other-than-law', joining its own fragmentation with that of science, economy, geography, politics, philosophy, demands a radical yet grounded reconceptualisation.

This might come along the lines of Deleuzian *jurisprudence*. Deleuze uses the term creatively, as a contextualised, positive and problem-specific thought located in the middle (in French, *milieu*) of concrete situations. Jurisprudence is a philosophical thought that amounts to praxis, and that facilitates the production of radical encounters between bodies and, consequently, the "prolonging of singularities" (Lefebvre 2008, p. 112). The positive features of jurisprudence, at least the way I want to contextualise them here, include its spatial specificity, its materiality and its acentricity, in that it does not have a given conceptual centre around which its protective role is exercised, but moves along the spatial and material context. In that sense, one can conceive of an environmental jurisprudence as being a form of legal concreteness that dives headlong into the case at hand without preconceived structures as to how the law should act. Every case reconstructs the jurisprudential approach in line with an open ecology of material emplacement. In that sense, Deleuzian jurisprudence puts the material into the Derridean ghost of the undecidable (Derrida 1992). Indeed, for Derrida, the judge is expected to destroy the law and reconstruct it at the moment of decision, thus refusing to submit to the conservatism of the legal regime while, however, still relying on its force-legitimising structures. The ghost of the undecidable comes before the moment of decision as the doubt that opens up law to justice. Deleuzian jurisprudence demolishes structures in the same way as deconstructive justice, but adds to it the pivotal element of material specificity.

An environmental jurisprudence could bring a material ethical orientation capable of resisting political co-optation and disciplinary collapse. Such an ethical orientation, however, cannot come from a habitual employment of environmental ethics.[5] While

[5] Although innovative applications of environmental ethics do promise a certain – if not way out – at least a way of seeing things differently. This is perhaps the greatest contribution of environmental ethics. On its own, however, it is unable to deal with the kind of increasing uncertainty present in environmental law, not least because of its continuing reliance on a human nature that can be changed from within and according to ecological urgencies. It is characteristic, for example, that Stone's (2007) observations on ethics and international environmental law conclude with the following, rather disheartening to the present reader, sentence: "Ultimately, international environmental ethics may be

Oñati Socio-Legal Series, v.3, n. 5 (2013), 854-876
ISSN: 2079-5971

this remains important, it is also culpable of misguiding expectations that society may have of environmental law. To put it bluntly, environmental law cannot save the planet. What is more, society cannot expect environmental law to *want* to save the planet. As Keith Hirokawa writes, although from a perspective that I would be very reluctant to share, "deeply held beliefs alone are ill-equipped to achieve progress in environmental law" (2007, p. 227). And this is perhaps the crux of the problem and indeed, the main challenge. For, although environmental law is required to position itself amidst the ecology of unbounded disciplines, non-linguistic materiality, human/natural/artificial hybrids and looming ecological disasters; at the same time and after all its disciplinary excursus, environmental law must always return to the employment of a legal language and house itself in courts. This means that, however 'better' jurisprudence may appear in relation to the traditional abstraction of the law, it itself is steeped into the reality-check of the law itself. The paradox of law looms above all attempts to change things, to prescribe a better law, to take up transformative action: law, and environmental law in particular, remains *simultaneously* open to the infinity of ecology *and* restricted by its legal edifice, itself an ivory tower of closure.

Thus, the task of environmental law is to work both along its connection with this open ecology of disciplinary and ontological fluidity *and* its legal structures, in order to construct a new language (*-logy*) to communicate about this new home (*eco* from the Greek *oikos*, 'home'). Indeed, as existing *logos* (language and rationality), more traditionally structured law is spectacularly discredited when faced with the challenges of environmental law: traditional legal dogmatics collapse before the idiosyncracies of environmental law, bastions of reason are replaced by floats of contingency, and trusted linguistic forms manage to attract vehement critique from feminists, ecologists, spatial theorists, autopoets, corporeal materialists and so on.[6] In the same vein, nature as *oikos* has been demolished long ago, not so much in its death (Merchant 1980), but significantly in its moving from a fixed background that 'houses' humanity to a machine that can no longer be differentiated from the human: "Nature is like an immense Abstract Machine … its pieces are the various assemblages and individuals, each of which groups together an infinity of particles entering into an infinity of more or less interconnected relations" (Deleuze and Guattari 2004, p. 512).

Amidst this machine, the challenge for environmental law is multiple. In order to simplify it, I would say that it can all be seen as a striving to avoid the binary distinction between observer and actant, namely critical observation on the one hand and participation on the other. To start with, environmental law has to accommodate its paradox of open ecology (which demands participation) and legal structure (which demands a certain critical distance). This has grave repercussions for the way environmental law conceptualises open ecology: namely, both as the successor of the 'death' of nature, and as the orgiastic breeding of this very corpse in such a way that life simply jumps out of it. This is further complicated by the need for language, which can no longer be 'just' a language (the legal language of the spectator) but rather a performance of wholehearted embracing of materiality (an acting out). For the above reasons, it is not coincidental that environmental law is the most readily available means to drag law as a discipline outside its linguistic ivory tower. Environmental law constitutes the clearest example of law in postmodernity, faced with insurmountable dilemmas that range through cultural relativism to decisions about life and death in a biopolitical context and projected

less about human welfare or even the environment, than about the unavoidable moulding of ideal human character." If even at the arena of international law, arguably the least human-centred legal discipline, the focus of ethics remains the ideal human character, it seems obvious that the connection between ethics and contemporary concepts of agency is still far away.

[6] See indicatively Verchick, 2007; Delaney, 2003; Holder and McGillivray, 1999; Tarlock, 2004. This is more than a "Galileo problem" as Cassuto (2004) puts it, namely that the environment or indeed environmental law could ever affect a pretence of objectivity. For even when environmental law is forced to affect precisely such a pretence, its affect becomes all too apparent.

temporalities and the future risk of nanotechnology. As Brooks (1991, p. 1) writes, "a complete re-examination of current environmental law might … [operate] not only as a preface to environmental law, but as a preface to the understanding of all law". Environmental law has a responsibility to pull law out of its linguistic closure and to land it on the material, the social, the corporeal, the gendered, the spatial, the animal, the molecular. These are the inhabitants of environmental law's new home: no longer based on the distinction conceptual/material, environmental law becomes one with its ecology, one gesture amongst many others, trying both to define itself and to carry on with its job of protecting its home.

It is clear from the above that there is a need to push further the theorisation of environmental law along the lines of open ecology. No doubt the relevance of theorisation may not always be immediately apparent, especially since it does not contribute to an assumed 'planet-saving' mission and does not amount to a blueprint for action. Still, the various constructed emergencies have reduced environmental law to being mere reaction rather than thoughtful action, to patching up rather than taking a step back and then throwing itself in, and indeed to a not-so-qualified failure in terms of environmental protection. To a large extent, this is attributed to a lack of critique of the processes and goals of environmental law, which is the focus of the following section. We rarely stop to assess, we have accepted as given a certain traditional legal thinking that remains too positivist for the complexity of environmental issues; we have unquestionably reproduced the human/natural division and even the anthropo/ecocentric distinction; we have looked into environmental law merely as law and not as the idiosyncratic transdisciplinary singularity that it is.

5. The crisis of environmental law

There is no doubt that environmental law is currently going an identity crisis, at least in terms of its theoretical underpinning, with all the positive and negative consequences such a crisis might have (Tarlock 2004). The 'crisis' of the section heading, however, refers to something slightly different. It is a crisis of critique, namely a crisis of location of the critical perspective within a plane of immanence where all is connected. It is, once again, the problem of spectatorship versus acting, but this time confronted head-on. Indeed, the whole endeavour of critical environmental law is premised on the concept of critique (of existing legal and social structures) which, at least according to some definitions, requires a distancing from the object of critique, a movement away and indeed higher than, the object – an overview, in short: a transcendence. On a plane of immanence, however, where the connecting event is that of exposed, vulnerable matter shaped in elongated singularities of affect, the critical distance would be a betrayal, a departure from the suffering of the matter for a 'higher', 'safer' sphere of almost theological overview. In this sense, critique would imply that whatever the open ecology might be, the law needs to construct for itself a simplified, legalistic representation. A representation does not involve the viewers, who remain distant and able to exert critique from the safety of their distance. An ontological event, however, sweeps up the spectators and situates any critique on the immediacy of the connection between the spectator and the object of critique.

Traditionally, the possibility of a critical environmental law presupposes, first, a boundary between the law and its ecology (a distance), and second, the crossing of the boundary (a transcendence). This is because to be critical entails a departure (from the current situation and indeed the object of critique). It also entails an (illusion of) arrival (to a better situation explicitly or implicitly assumed behind the act of critique). In this movement from one side of the boundary to the other, critique performs its actualising, its *krinein*, its distinguishing, indicating and judging: as Douzinas and Gearey write, "*krinein* means also to cut; critique is a diacritical or cutting force, a critical separation and demarcation" (2005, p. 38). Thus, a legal critique begins from the current state of the law and crosses the

boundary that distinguishes the latter from a 'better' state of the law. In its urge to cross, critique announces a crisis (a judgement, a distinction), a crisis of crossing (critique cannot leave itself out) as well as a crisis than can only be observed through this crossing.

One however must wonder: is it really the case that for environmental law to be reconfigured as *critical* environmental law, a higher, transcendent perspective must be adopted? This goes into the heart of the legal discipline and its ecology. Niklas Luhmann's theory of autopoiesis may be of succour here as the antilogos to Deleuzian normative claims. This is not because autopoiesis is critical *per se* (Philippopoulos-Mihalopoulos 2009) but because autopoiesis professes always to talk on the level of description of what actually happens rather than on the level of normative prescription on what should be happening. It is indeed the theory of spectatorship, in the sense of distant observation, par excellence. The main concept of autopoietic theory is that law (or politics, religion, economy and so on) is an autopoietic system, namely a moving and amoeba-like sum of (legal, political and so on) processes and operations that evolves by learning from its ecological position amidst the greater openness of society. In this way, the system constructs its own self-description, its location and its boundaries, not unlike the Deleuzian understanding of Earth, as commented earlier. The system, however, is contained by a boundary that determines interiority and exteriority. Although the system learns from its ecology (it is cognitively open to it), nothing ever crosses the boundary between the system and its ecology: in that sense, an autopoietic system is a closed system that observes, from a safe distance, its 'other'. This other, however, is nowhere to be found but inside the system. Everything is internalised and self-constructed within the system, as an infinite plane of immanence folded within the system – except that this one is placed on an epistemological, systemic level, rather than the ontological level of Deleuze's immanence. Everything in autopoiesis constitutes its own singularity, and indeed believes in it: as far as the system is concerned, there is nothing outside its boundary. Yet, other systems, each one believing in its own absolute singularity, carry on constructing their own world, containing everything that they (actually or latently) understand, meteoric formations swirling in a claustrophobic embrace with themselves. And despite all this, everything is somewhat connected, coupled up and operating in unison. For Luhmann, society is equivalent to the Deleuzian/Guattarian abstract machine which is nothing more and nothing less than the infinite sum of its parts.

There are several points of contact between a Deleuzian and a Luhmannian theory of ecology, including the absence of centre, the turning against the linguistic turn, the dilution of the human in the wider ontological (for Deleuze and Guattari) or epistemological (for Luhmann) plane of couplings, and indeed, the infinity of openness (Beressem 2009). The question of the boundary, however, seems to be the defining difference between the two approaches. Thus, while for Deleuze there are no boundaries, just folds, for Luhmann, the system is defined by (while it itself defines) its boundary. The question of the boundary is not of just theoretical interest. Crucially, it has profound implications for the kind of theoretical advancements that one can pursue in terms of environmental law. If environmental law operates within a boundary that distinguishes it from politics, science, other law, and even the materiality of ecology, its critical transformation will entail a crossing of this boundary, a transgression to a perceived transcendent amelioration: critical environmental law can happen if current environmental law is suspended. Only in its suspension can environmental law generate the kind of critical distance needed for a truly radical new identity. If, however, environmental law does not operate within a boundary but is simply another plane within the plane, an infinite fold of the Deleuzian plane of immanence, its critical manifestation will not involve either crossing or suspension. Critique for Deleuze and Guattari is a process of problematisation of the concept under critique. By positing the problem (a new problem or an existing problem in a new way), the critique exerted becomes

concentrated in the concept itself, indeed internalised by the concept. As they write, "to criticize is only to establish that a concept vanishes when it is thrust into a new milieu, losing some of its components, or acquiring others that transform it" (1994, p. 28). There is no crossing as such, just a throwing of the concept into a new middle (milieu), replacing its elements with others and constructing its connections with its new milieu in a positive and creative way. The consequences of this approach for critical environmental law do not amount to suspension of existing structures and concepts, as they would be with critical autopoiesis, but are an infinite unfolding (in the sense of folding out, continuously folding: "Unfolding is not the contrary of folding, but follows the fold up to the following fold" Deleuze 2006, p. 6) of its concepts, a continuous throwing-in-the-middle in order to replace their obsolete components.

The positions of Delueze and Luhmann, however, have more in common than it would actually appear at first impression. Let me attempt to weave them together, in an effort indeed to show that spectator and actant are not necessarily so different. For Luhmann, as far as the system is concerned, the boundary does not exist. The system considers itself infinite, spreading itself on thick layers of universal matter and containing all that is to be contained. Does the universe have a boundary? A system does not know any more than we do. The system's self-construction of its outside is (almost) so fault-proof that there is no difference between construction and 'reality'. To put it provocatively, there is no difference between (Luhmannian) epistemology and (Deleuzian) ontology, between the distance of spectatorship and the immersion of the actant. The boundary dis/appears in the form of the materiality of transgression, of critique itself. For support, surprisingly, I return to Deleuze and Guattari's understanding of critique: "when philosophers criticize each other it is on the basis of problems and on a plane that is different from theirs and that melt[s] down the old concepts in the way a cannon can be melted down to make new weapons. *It never takes place on the same plane*" (1994, p. 28, added emphasis). The difference between planes is comparable to a systemic boundary: an invitation to jump over, to transgress, and eventually to construct internally in the system or the concept.[7] Of course, just as with a boundary, the crossing never really takes place. It is always the object of critique that deals with the various critiques around it by internalising them in the form of new components, autopoietically reproducing itself like an infinite fold: as Deleuze (2006, p. 39) writes, "the problem is not how to finish the fold, but how to continue it, to have it go through the ceiling, how to bring it to infinity". As such, critique is continuous. There never is a beginning of critique in the sense of a boundary cutting through and separating. Critique can only build on critique in a continuous unfolding. At the same time, however, critique always suspends the concept that it criticises, or to put it more precisely, it reveals that the context in which the concept used to operate successfully so far, is no longer relevant, indeed that it has suspended itself. This paradox, which applies specifically to the concept under critique, is mirrored in the more familiar paradox of critique necessitating both distance from and simultaneous immersion in the folds of its object. In that sense, one can revisit the Deleuzian concept of jurisprudence, as applied, materially specific problem handling, and bring it together with the legal need for maintaining a certain closure in terms of the structures it uses, the language it employs, the houses in which it is housed. Jurisprudence operates as the critique of the crisis of environmental law, an applied, hands-on critique that is both enmeshed with the crisis of environmental law and contextualised in an open ecology of connections.

One thing becomes clear. There is no transcendence, no *über*perspective from which environmental law can perform its critique. Either protending its own plane or crossing its boundary, critical environmental law turns 'against' itself, internalising

[7] This is how I interpret Lefebvre's 2008, p. 279, n.8, statement that for Deleuze critique is always and only external. Absolute externality can only become internalised by the object of critique, if the critique is to be at all meaningful.

Oñati Socio-Legal Series, v.3, n. 5 (2013), 854-876
ISSN: 2079-5971

its fall in scathing but positive critique, because "those who criticize without creating, those who are content to defend the vanished concept without being able to give it the forces it needs to return to life, are the plague of philosophy" (Deleuze and Guattari 1994, p. 28). And if I may add, this is precisely the plague from which environmental law suffers. To realise that there is no opposition between maintaining a distance and immersing oneself is the way critical environmental law needs to conceptualise itself. In practical terms, this is nothing more but a realisation of the need to renegotiate given balances in a such a way that they can accommodate the paradox. In what follows, and as a conclusion to the discussion as well as an opening of further research, I articulate four positions on critical environmental law that integrate the above observations.

6. Four critical environmental positions[8]

6.1. Position one: critical environmental law begins in the middle

In its critical turning, the law must adopt the same level of vulnerability as its object of protection, namely open ecology in its expansive sense of human/natural/artificial. In being thrown in the middle, environmental law, first, relinquishes the illusions of control of nature; secondly, abandons the search for a centre; and thirdly, takes on the exposure needed in order to create the appropriate conditions for its own materiality. For it is one thing to *talk* about how the law needs to engage with materiality, and another to seek and promote the materiality of the law itself. While the former begins by carving a boundary between itself and the material world, equipping itself to confront it; the latter does not differentiate between the materiality of ecology and that of the law itself, bringing thus forth the mobile matter of the law. As Austin Sarat (1990, p. 343) writes, "the law is all over": this is a call to claim law's spatial, corporeal, emotional, sensory presence that has been subsumed to the critique of discourse. Critical environmental law can no longer hide behind the usual legal logocentric panoply that insulates it from the influx of materiality. More than other legal disciplines, environmental law is exposed to its own materiality: dealings with scientific thresholds, ecological catastrophes, urban poverty, sick bodies and polluted atmospheres – most recently, the challenge of material inscription of the law within the body of genetically modified crops (Pottage 2010). These are relatively recent encounters for the law and from such encounters law can muster the power to change itself. As Halsey (2010, p. 283) writes, law's encounter with the majestic in nature has the potential of impacting "in ways not immediately amenable to preassigned or preconceived categories". And, one has to add, while maintaining the structures of legal decisions as the calculations towards justice. This is precisely the meaning of being thrown in the middle – ontologically vulnerable, exposed in the middle, and at the same time taking refuge in existing legal structures.

6.2. Position two: critical environmental law is moving along its open ecology

The dry dualism between anthropocentric and ecocentric legal protection must be relinquished and the blurring between the 'natural', the 'human' and the 'artificial' must be extended in line with biopolitical readings that point to precisely this kind of fragmentation and reinstitute a posthumanist form of continuum/rupture, referring variously to human/non-human nature, and to the way in which these differences are conceptualised (see Foucault 2003, Ruddick 2004, Braidotti 2006, Sharpe 2007). This has been transposed into ecological thinking, with a pioneering ecofeminism, especially through the writings of Val Plumwood (1993) and Catherine Merchant (1980), whose ecocriticism of pre-existing binarisms has had a

[8] I have already offered these four positions from an autopoietic perspective in Philippopoulos-Mihalopoulos (2010). The present is an exercise in bridging the two streams of thought as well as fleshing out the constructive conflict between them.

measurable effect on feminist theory as a whole. Donna Haraway (2004, p. 32) has famously declared that "the boundary between human and animal is thoroughly breached" and cyborgs, oncomice and coyotes are posthumanist dimensions of more traditional feminist bodies that transcend the natural/cultural, organic/mechanical, physical/non-physical divides. Bruno Latour (1993, 2004) talks about 'hybrid networks' between social, informational and ecological systems, and the 'pluriverse' consisting of collectivities of humans and non-humans that redefine democracy as something that can be found either side of the boundary. Katherine Hayles's (2005) digital subjectivity is built on a discontinued and inherently unpredictable conception of the human. Anna Grear's (2010) new corporate identity departs from the technocratic and augurs new conceptual spaces of understanding responsibility and vulnerability, as well as this new, perennially perplexing lack of distinction between the human and the non-human. In a critical environmental legal perspective, there is no question on whether trees should have standing (Stone 1974). The question, rather, becomes one of *nomic* law, that is, a legal regime beyond the property regime, where the singularity of the tree is equivalent to the singularity of the cyborg. The way the law treats these is through a rearticulation, every time, of the jurisprudential problem rather than through the reliance on immobile rules about standing and legal harm and interest. To mention an example: it is not an exaggeration to say that environmental law's uncontested reliance on the concept of harm is one of its foundational problems. A critical environmental legal task is to continue with disengaging legal action from harm, thereby acknowledging the interconnectedness of the open ecology. In more general terms, critical environmental law is expected to move away from the traditional articulation of the legal problem in terms of existing structure/new problems, and turn against itself, in a jurisprudential critique, indeed an immanent critique, of its very own adherence to structure. The result is not the absence of structure, but a structure that does not stand apart from the wider open ecology.

6.3. Position three: critical environmental law is singular

Singularity is difference. The seemingly closed unity of differences is an open sum of connections, ridden with conflicts, displacements, movement. Although this goes against the usual starting point of the ecological discourse in the sense of ecosystemic or narrowly ecological unity, along with a unifying centre and a homeostatic goal (Odum 1971, Blühdorn 2000), it is important to reconceptualise environmental law in its singularity as a body (of discourse) that affects and is affected by other bodies (in every sense). Singularity, however, is not uniformity. Environmental law must be thought critically, as a multilayered, global, fragmented discipline, characterised by links that follow the transboundary nature of pollution. Differentiated velocities of connections, however, make this a complex affair: the connection, for example, between law and science is one of progressive convergence of very different temporalities (science is faster, law takes longer to deliberate) and as such there can be no facile impression of direct influence and control. To be a singularity amidst a plane of other singularities entails a radical *acentricity* and an understanding that various perspectives operate on the same concept at the same time, with different and not necessarily predictable effects on it. This is more than a call for the inclusion of uncertainty in environmental law. Rather, it is, once again, an invitation to a jurisprudential (in the Deleuzian sense) approach to environmental issues, namely a praxis-oriented, spatially specific, material approach that considers every problem in its singularity. While this sounds commonplace, it is actually radical. Its radicality lies in the constant destruction of existing structures in order to reconstruct them, every time once, every time as first time, in the face of the demands of ontological vulnerability.

6.4. Position four: critical environmental law is immanent

The overly prescriptive nature of environmental discourse, even in its legal theoretical aspect, urges towards a rushed search for short-term solutions that misunderstands the complexity of ecological protection. An immanent environmental law acknowledges the necessity to link to existing law (*logos*), while opening up to the possibility of nomad law (*nomos*). This is a combination of acknowledgment of limitations and of potential for a differential evolution. Immanence also precludes transcendence: law cannot assume the higher ground in order to judge (for there is no such thing as higher ground), and critical environmental law cannot rely on distance in order to perform its critique. On the contrary, the critical distance is devoured by the folds of immersion, at the same time as immersion is carried further away on a different critical plane. In this relentless ebb and flow, critical environmental law constantly becomes-other, is thrown into new middles and loses old components. Just as environmental law cannot refrain from being law, it can also not refrain from *not* being law. Its identity crisis offers the perfect platform for its continuous becoming-other, becoming-science, becoming-animal, becoming-economy, becoming-Earth. Its vulnerability, beyond representation, is embodied in environmental law's continuous 'throwing-in'. Environmental law has the potential of leaving representation behind, of throwing itself in the ontological event of exposure: no longer a law that only deals with discourses, but a law that violently unearths the materiality of the discourse; further, that unearths the matter beyond discourse; even further, that exposes its own materiality on the same plane as the materiality of its object. Critical environmental law is a law frank about its material presence: through its own folds of embodiment, critical environmental law spreads the body of its judgement across the plane of immanence.

Bibliography

Baarschers, W. H. B., 1996. *Eco-facts and Eco-fiction: Understanding the Environmental Debate*. London: Routledge.

Beressem, H., 2009. Structural Couplings: Radical Constructivism and a Deleuzian Ecologics. *In*: B. Herzogenrath, ed. *Deleuze|Guattari and Ecology*. Basingstoke: Palgrave Macmillan.

Blanchot, M., 1988. *The Unavowable Community*. Translator P. Joris. New York: Station Hill Press.

Blühdorn, I., 2000. *Post-ecologist Politics*. London: Routledge.

Braidotti, R., 2006. *Transpositions: on Nomadic Ethics.* Cambridge: Polity Press.

Brighenti, A., 2010. Lines, Barred Lines: Movement, Territory and the Law. *International Journal of Law in Context*, 6 (3), 17–27.

Brooks, M., 1991. A New Agenda for Environmental Law*. Journal of Environmental Law and Litigation,* 6 (2), 1-17.

Brooks, R., Ross J. and Ross V., 2003. *Law and Ecology: The Rise of the Ecosystem Regime*. Aldershot: Ashgate.

Cassuto, D., 2004. The Law of Words: Standing, Environment, and Other Contested Terms. *Harvard Environmental Law Review* [online], 28, 79-128. Available from: http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1038&context=lawfaculty [Accessed 15 July 2013].

Commoner, B., 1971. *The Closing Circle: Nature, Man, and Technology*. New York: Knopf.

Debord, G., 2009. *Society of the Spectacle*. London: Soul Bay Press.

Delaney, D., 2003. *Law and Nature*. Cambridge University Press.

Deleuze, G., 1988. *Spinoza: Practical Philosophy*. Translation, R. Hurley. San Francisco: City Light Books.

Deleuze, G., 1990. *The Logic of Sense*. Translation, M. Joughin. New York: Zone Books.

Deleuze, G., 2004. *Difference and Repetition*. Translation, P. Patton. London: Continuum.

Deleuze, G., 2006. *The Fold*. Translation, T. Conley. London: Continuum.

Deleuze, G., 1994. *What is Philosophy?*. Translation, H. Tomlinson, and G. Burchell. New York: Columbia University Press.

Deleuze, G., 2004. *A Thousand Plateaus: Capitalism and Schizophrenia*. Translation, B. Massumi. London: Continuum.

Deleuze, G., and Guattari, F., 1986. *Anti-Oedipus: Capitalism and Schizophrenia*. Translation, R. Hurley *et al*. University of Minnesota Press.

Della Rocca, M., 2008. *Spinoza*. London: Routledge.

Derrida, J., 1992. Force of Law: The 'Mystical Foundation of Authority'. *In*: D. Cornell, M. Rosenfeld and D.G. Carlson, eds. *Deconstruction and the Possibility of Justice*. New York: Routledge, 1-56

Douzinas C., and Gearey, A., 2005. *Critical Jurisprudence: The Political Philosophy of Justice*. Oxford: Hart.

Foucault, M., 2003. *Abnormal: Lectures at the College De France 1974-1975*. London: Verso.

Genosko, G., 2009. Subjectivity and Art in Guattari's The Three Ecologies. *In*: B. Herzogenrath, ed. *Deleuze|Guattari and Ecology*. Basingstoke: Palgrave Macmillan.

Grear, A., 2010. *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity*. Basingstoke: Palgrave Macmillan.

Grear, A., 2011. The Vulnerable living order: Human rights and the environment in a critical and philosophical perspective. *Journal of Human Rights and the Environment*, 2 (1), 23-44.

Guattari, F., 2000. *Three Ecologies*. Translation, I. Pindar, and P. Sutto. New Brunswick, NJ: Athlone.

Halsey, M., 2010. Majesty and Monstrosity: Deleuze and the Defence of Nature. *In*: A. Philippopoulos-Mihalopoulos, ed. *Law and Ecology: New Environmental Foundations*. London: Routledge.

Haraway, D., 2004. *The Haraway Reader*. London: Routledge.

Hayles, K., 2005. *My Mother Was a Computer: Digital Subjects and Literary Texts*. Chicago University Press.

Heidegger, M., 1962. *Being and Time*. New York: Harper and Row.

Herzogenrath, B., ed., 2008. *An [Un]Likely Alliance: Thinking Environment[s] with Deleuze|Guattari*. Newcastle upon Thyne: Cambridge Scholars.

Herzogenrath, B., ed., 2009. *Deleuze|Guattari and Ecology*. Basingstoke: Palgrave Macmillan.

Hirokawa, K., 2002. Some Pragmatic Observations about Radical Critique in Environmental Law. *Stanford Environmental Journal,* 21 (2), 224-281.

Available from: http://ssrn.com/abstract=1477459 [Accessed 14 September 2013].

Holder, J., and McGillivray, D., eds., 1999. *Locality and Identity: Environmental Issues in Law and Society*. Aldershot: Ashgate.

Igoe, J., 2010. The spectacle of nature in the global economy of appearances: Anthropological engagements with the spectacular mediations of transnational conservation. *Critique of Anthropology,* 30 (4), 375-397.

Latour, B., 1993. *We Have Never Been Modern*. Translation, C. Porter. Cambridge, MA: Harvard University Press.

Latour, B., 1996. On Actor-Network: A Few Clarifications. *Soziale Welt*, 47 (4), 369-381.

Latour, B., 2004. *Politics of Nature*. Cambridge, MA: Harvard University Press.

Lefebvre, A., 2008. *The Image of Law: Deleuze, Bergson, Spinoza*. Stanford University Press.

Merchant, C., 1980. *The Death of Nature: Women, Ecology and the Scientific Revolution*. London: Wildwood House.

Michulak, M., 2008. The Rhizomatics of Domination. *In*: B. Herzogenrath, ed. *An [Un]Likely Alliance: Thinking Environment[s] with Deleuze|Guattari*. Newcastle upon Tyne: Cambridge Scholars.

Odum, H., 1971. *Environment, Power, and Society*. New York: John Wiley and Sons.

Papuzinski, A., 2009. The Idea of Philosophy Versus Eco-Philosophy. *Problems of Sustainable Development*, 4 (1), 51-59.

Philippopoulos-Mihalopoulos, A., 2009. *Niklas Luhmann: Law, Justice, Society*. London: Routledge.

Philippopoulos-Mihalopoulos, A., 2010. Towards a Critical Environmental Law. *In*: A. Philippopoulos-Mihalopoulos, ed. *Law and Ecology: New Environmental Foundations*. London: Routledge.

Philippopoulos-Mihalopoulos, A., 2011. '…the sound of a breaking string': critical environmental law and ontological vulnerability. *Journal of Human Rights and the Environment*, 2 (1), 5-22.

Plumwood, V., 1993. *Feminism and the Mastery of Nature*. London: Routledge.

Pottage, A., 2010. Biotechnology as environmental regulation. *In*: A. Philippopoulos-Mihalopoulos, ed. *Law and Ecology: New Environmental Foundations*. London: Routledge.

Ruddick, S., 2004. Domesticating Monsters: Cartographies of Difference and the Emancipatory City. *In*: L. Lees, ed. *The Emancipatory City.* London: Sage.

Sarat, A., 1990. "…The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*. Yale Journal of Law and Humanities,* 2 (2), 343-380.

Sharpe, A., 2007. Structured Like a Monster: Understanding Human Difference Through a Legal Category. *Law and Critique,* 18 (2), 207-228.

Sloterdijk, P., 1998. *Sphären I: Blasen: Mikrosphärologie*. Frankfurt am Main: Suhrkamp.

Spinoza, B., 2000. *Ethics*. Translation, G.H.R. Parkinson. Oxford University Press.

Stone, C., 1974. *Should Trees Have Standing? Toward Legal Rights for Natural Objects*. Los Altos: William Kaufmann.

Stone, C., 2007. Ethics in International Environmental Law. *In*: D. Bodansky, *et al*., eds. *The Oxford Handbook of International Environmental Law*. Oxford University Press.

Tarlock, D., 2004. Is There a There in Environmental Law? *Journal of Land Use*, 19 (2), 213-254.

Turgut, N. Y., 2008. The Influence of Ecology on Environmental Law: Challenges to the Concept of Traditional Law*. Environmental Law Review*, 10 (2), 112-130.

Verchick, R., 2007. Katrina, Feminism, and Environmental Justice. *Cardozo Journal Of Law And Gender*, 13 (2), 791-832.

Welchman, A., 2008. Deleuze and Deep Ecology. *In*: B. Herzogenrath, ed. *An [Un]Likely Alliance: Thinking Environment[s] with Deleuze|Guattari*. Newcastle upon Tyne: Cambridge Scholars.