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Methodological challenges of transnational environmental law

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This working paper will discuss the growing need for law students and researchers to develop, and to keep honing, specific skills to understand complex and increasingly frequent transnational phenomena in environmental law. The paper will then focus on three inter-related methodological challenges: comparison, empirics, and interdisciplinarity. These considerations will lead to a reflection on the nature of collaboration and research ethics, as well as on common constraints arising from research funding opportunities. In exploring these challenges, the paper builds upon the methodological insights from a 5-year collaborative and comparative research project on the legal concept of fair and equitable benefit-sharing (BENELEX)[1] at different regulatory and geographical sites.[2] The BENELEX project provided a practical understanding of the need for reflexivity and accountability for researchers interested in transnational environmental law phenomena, as well as an opportunity to collaboratively develop a transnational environmental law research project and carry it out through embedded peer-learning and supportive peer-review.

Section 1: The complexities of transnational environmental law

A key concern facing transnational environmental lawyers is that of unpacking and gaining a deeper understanding of the 'multilevel governance context in which contemporary environmental law unfolds'.[3] Bosselmann has highlighted that environmental law is *conceptually* different from other areas of law in two regards: first, it is not merely a piece of the 'legal cake', but rather an element which 'brings texture and flavour' to an entire legal system (consider for instance the project of mainstreaming environmental protection across other sectors,[4] and the incredibly broad objective of environmental law, spanning the commons, including both human and non-human environments); second, the subjects of environmental law are all of us, as opposed to particular segments of society. Private individuals – be it as citizens, taxpayers, professions, consumers, car drivers or private persons – as well as other legal persons, such as private and public institutions, corporations, and NGOs, are affected. We all have environmental duties, which in turn impacts on the rights and duties covered by other legal fields, and vice versa.[5] When returning to the idea of studying *multilevel* governance from a transnational perspective, it quickly becomes clear that the transnational legal researcher must address, as well as question, what constitutes these 'levels', and in doing so move beyond the monist and statist approach to understanding law that focuses on high-level politics, to also explore the ways that law and normative rules are negotiated, adopted and used by relevant actors across sectors, including across the private and public 'spheres'.

Reflecting upon this complex imagery of what makes up the setting of transnational environmental law illuminates the limitations inherent in adopting a positivist, statist and hierarchical approach to legal research, as seeking the unification of principles and standards, often through abstraction, in diverse spaces (be they geographical, cultural, sectoral). Such approaches fail to adequately capture the intricate and multifaceted nature of transnational legal constellations, and provide poor baselines for future action. This is especially true as non-state actors and institutions are gaining a larger role in influencing the development of environmental policy, be it through participation at international negotiations, or by claiming regulatory authority of their own.[6] What's more, from critical justice perspectives,[7] focusing on the consolidation of

[1] BENELEX - Benefit-sharing for an equitable transition to the green economy – the role of law. Funded by the European Research Council (grant 335592).
https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/benelex/
[2] Louisa Parks and Elisa Morgera, 'The Need for an Interdisciplinary Approach to Norm Diffusion: The case of Fair and Equitable Benefit-sharing' [2015] 24 RECIEL 353.
[3] Veerle Heyvaert and Thijs Etty, 'Introducing Transnational Environmental Law' [2012] 1 TEL 1, 8.
[4] https://sustainabledevelopment.un.org/sdgs
[5] Klaus Bossellmann, 'Losing the Forest for the Trees: Environmental Reductionism in the Law' [2010] 2 Sustainability 8, 2426-8.
[6] Heyvaert and Etty (n 3); Natasha Affolder, 'Non-State Actors' in Elisa Morgera and Jonas Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (EE 2017) 387.

universal principles and standards risks ignoring the diversity of actors, values and knowledges historically left at the margins of negotiations or public/private-driven action, yet whose work and contributions could be crucial for progressive action on the ground.[8]

Furthermore, transnational environmental lawyers face the specific complexity of global law – the 'pattern of heavily overlapping, mutually connected and openly extended institutions, norms and processes' that have, in Neil Walker's words, 'global reach' and 'a global justification.'[9] As a result, Walker emphasized that lawyers find themselves 'somewhere between settled doctrine and an aspirational approach':[10] they engage not only in an epistemic but also in an advocacy endeavour, identifying 'patterns of normative development [that] may be anticipated and pursued,'[11] with the aim of addressing the perceived limits of certain areas of international law through 'a more selective reading of its sources and areas of impact.'[12]

All these complexities characterizing transnational and global environmental law have been experienced in the BENELEX project. Fair and equitable benefit-sharing is quintessentially a multi-level concept at the interface of public and private law: it entails complex and creative links between different areas of international law,[13] a dynamic web of national laws of provider and user countries and contractual arrangements between private parties feeding into a system of internationally recognized certificates,[14] and the respect for the customary laws of indigenous peoples and local communities at all these regulatory levels.[15] The BENELEX project, therefore, was designed to address both high-level politics to analyse transnational environmental law questions in multiple fora where public international law on benefit-sharing was developed, reviewed or refined,[16] and local negotiations around benefit-sharing by different non-State actors (indigenous peoples, NGOs, private companies, local governments). Throughout the design and implementation phases of the project, BENELEX researchers were faced with questions about the environmental justice dimensions of their work,[17] as well as their role as advocates in addition to scholars.

Section 2: Comparative legal methods

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[7] Neil Walker, 'The Gap between Global Law and Global Justice: A Preliminary Analysis' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (CUP 2017).

[8] Emeka Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law' [2006] 38 George Washington International Law Review 33, 37; Linda Tuhiwai Smith, *Decolonizing Methodologies* (Zed Books, 2012); Jennifer Hendry, Melissa L. Tatum, Miriam Jorgensen and Deirdre Howard-Wagner (eds), *Indigenous Justice: New Tools, Approaches and Spaces* (Palgrave Macmillan, 2018). For examples see: Forest Peoples Programme, International Indigenous Forum on Biodiversity and the Secretariat of the Convention on Biological Diversity, *Local Biodiversity Outlooks: Indigenous Peoples' and Local Communities' Contributions to the Implementation of the Strategic Plan for Biodiversity 2011-2020, A complement for the fourth edition of the Global Biodiversity outlook* (2016); Indigenous Circle of Experts (ICE), *We rise together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation* (2018).

[9] Neil Walker, *Intimations of Global Law* (CUP, 2015), 11-12, 14 and 18.

[10] Ibid, 18 and 21.

[11] Ibid, 152.

[12] Ibid, 112-113.

[13] Elisa Morgera, Matthias Buck, and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill 2012).

[14] Nagoya Protocol, Art. 17(2)–(4).

[15] Ibid, Art. 12(1).

[16] Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit-sharing' [2016] 27 European Journal of International Law 2, 353-383.

[17] Elisa Morgera, 'Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity' [2015] Italian Yearbook of International Law, 113-141.

One methodological approach to tackle the complexities of transnational environmental law is the use and further development of comparative legal methods. This section thus discusses whether settled methods and long-standing methodological debates in comparative law that focus on transnational law are apt to addressing current questions emerging from the scholarships in transnational environmental law.[18]

Comparative law has featured a wealth of methodological debates that have not yet been fully drawn upon in the context of environmental legal scholarship.[19] Specifically for present purposes, the comparative legal method has been refined to apply in different ways to different levels of regulation "because it consciously detaches itself from the limits set by the legal system of the nation-State ...it dismisses borders from the viewpoint of knowledge production."[20] Comparative lawyers have also dealt in depth with the risk of over-reliance on 'western' models[21] and the need to engage in empirical research (discussed below).'[22] Comparative legal methods, therefore, already provide a wide-ranging methodological toolkit, and an extensive body of scholarly reflection on methodology, that can support transnational environmental lawyers in better understanding legal diversity both in terms of local influences and emerging global patterns.[23] In fact, comparative lawyers largely see methodology as open-ended: dependent on a specific purpose,[24] experimental,[25] "enduringly risky"[26] and "always limited to some extent."[27] So comparative law offers the transnational environmental lawyer a process that necessarily (and usefully) entails: openly coming to terms with challenges, systematically recognizing risks and limitations, and purposely framing a research project around these challenges, risks and limitations.[28] Other than feeling daunted, the researcher can find inspiration in this frank and accountability-centred approach to dealing with the complexity of transnational environmental law and embrace the flexibility it allows for engaging in a process of understanding and appreciating mutual interdependence.[29]

Against this backdrop, the BENELEX project chose to engage with the comparative law notion of norm diffusion[30] in order to better understand the mutual interactions between different levels of legal ordering (which are not necessarily static or clearly defined) at different geographical levels, including soft law, transnational law and the customary law of indigenous peoples and local communities.[31] It focused on the results of cross-level transfers and reciprocal influences, emerging in formal, informal, semi-formal or mixed configurations over a continuous and often lengthy process as the result of interactions between a variety of State and non-State actors (including the private sector, NGOs, individuals and communities, activists and lobbyists, as well as teachers and

[18] This section draws on Elisa Morgera, 'Global Environmental Law and the Comparative Legal Method(s)' [2015] 24 RECIEL 3, 254-263.
[19] Ibid. See also Jan Darpö and Annika Nilsson, 'On the Comparison of Environmental Law' [2010] 3 Journal of Court Innovation 1, 315.
[20] Jaakko Husa, *A New Introduction to Comparative Law* (Hart, 2015), 20.
[21] William Twining, 'Social Science and Diffusion of Law' [2005] 32 Journal of Law & Society 2, 203-5.
[22] Ibid, 217.
[23] Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (CUP, 2006), 596. Concluding, Menski refers to 'pluralistic glocalisation' as the constant, visible and invisible, dynamic interactions between global and local elements of law. See also Werner Menski, 'Beyond Europe' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007), 210.
[24] Esin Örücü, 'Developing Comparative Law' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007), 43 and 46-48.
[25] Husa (n 20), 96.
[26] Roger Cotterrell, 'Is it Bad to be Different? Comparative Law and the Appreciation of Diversity' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007), 152.
[27] Husa (n 20), 24.
[28] Husa (n 20), 24.
[29] Patrick Glenn, *Legal Traditions of the World*, 5th edn (OUP, 2014) , 48 and 371-378.
[30] William Twining, 'Diffusion of Law: A Global Perspective' [2004] 49 Journal of Legal Pluralism 1, 5 and 14. See also Esin Örücü, 'Law as Transposition' [2002] 51 International Comparative Law Quarterly 2.
[31] Twining (n 30), 11-12.

researchers).[32] The choice also permitted the BENELEX project to rely, as Twining suggested, on the concepts and approaches to the study of norm diffusion in the social sciences, in order to understand the role of the behavior, perceptions and interactions of different actors in particular contexts, as well as the paths through which a legal concept and legal practices may spread outside of the law or spread from the bottom up.[33] For one thing, this allowed BENELEX researchers to become aware of possible bias, such as the assumption that the diffusion of benefit-sharing was due to it being a 'desirable, progressive or innovative' norm.[34] In addition, it allowed the BENELEX team to identify 'a significant (but little explored) areas of convergence in the legal, sociological and international relations literatures on norm diffusion' and on that basis to appreciate the importance of the role of different actors, of active and passive pathways of diffusion, and the role of framing.[35] The project was then able to build on these points of contact to suggest opportunities to integrate the understanding of actors and institutional channels for norm diffusion that may fall at different points between continuums flowing from formal to informal mechanisms, active to passive legal instruments and actors, and paths of diffusion between top-down and bottom-up (or indeed horizontal). The project further underscored the need to bring together the knowledge of legal scholars to account for how the law works as an agent of normative diffusion in and of itself, with sociological and international relations accounts of diffusion that tend to halt at the point of adoption and look to the next site to which a norm will diffuse. Bringing these areas of scholarship in conversation with one another permitted to consider norm diffusion as phenomenon that takes on different shapes and continues to develop in different ways over time, also as a consequence of the adoption of legal instruments and their influence on other law-making processes at different levels or in different contexts.

Section 3: Empirical legal research

Another methodological approach to complexity is empirical research. The introductory article of the very first edition of the *Transnational Environmental Law Journal*, invites researchers to study "law-in-action", making the point that although rules themselves are important, the way that they are adopted and influence daily governance and decision-making processes is crucial for understanding law within its broader setting. This section will assess progress in empirical environmental legal research and the degree to which it has addressed transnational issues. It will then identify methodological questions that emerge with specific regard to transnational environmental law.

Empirical research methods are used widely across the social sciences. There is a growing recognition that these approaches can unearth and aid in dealing with the complex nature of law and the legal as it exists and interacts across scales and sectors. As a result, a significant development in legal scholarship over the past couple of decades has been the rise in empirical legal research, to some largely associated with socio-legal research.[36] A recent study, however,

[32] Ibid, particularly table at page 17.
[33] Twining (n 21).
[34] Ibid, 232.
[35] Parks and Morgera (n 2), 363-365. See generally on framing and international law, André Nollkaemper, 'Framing Elephant Extinction' [2014] 3 ESIL blogpost 6 <https://esil-sedi.eu/framing-elephant-extinction/> accessed 23 March 2019.
[36] That said, as will be made clear below, it is not only 'socio-legal' reasearch which draws on empirical research methods, but also legal anthropology, legal geography, etc.

suggests that on empirical research related to environmental law in particular is lagging behind in this trend, and that the approach is still in its infancy.[37]

Traditional legal scholarship stems from doctrinal research, or 'black-letter law', which largely focuses on the law as a self-contained and self-sustaining set of principles and values, deriving from legal texts and judicial decisions, which the traditional legal scholar draws on in seeking order, rationality and theoretical cohesion.[38] A second, more recent tradition in legal scholarship stemming from the late 1960's explores law as part of society, linking legal research back to concerns in political science and sociology, exploring law as a cause of societal change (be it good or bad).[39] This 'law in context' approach, alongside other critical theories of law – realism, critical legal theories, feminism and postcolonial studies – has sought to 'demystify the positivist mentality of neutrality in the law'.[40] Instead, by treating law as an inherently societal phenomenon, complex in its forms and structures, in the ways that it is created, used and the way that it interacts with other rules and normative structures in society (be it scalar, sectoral, institutional, etc.), critical scholars have illustrated that law cannot be amoral or apolitical simply in the sense that it represents a dominant view.[41] Ultimately, what becomes clear is that any one dominant approach to studying the law would be incomplete in telling us what the law *is*, or what it *does* – law, as any social phenomenon or occurrence, can be perceived from a multitude of perspectives and angles,[42] and studied by drawing upon a multitude of information – through an exploration of its texts, engagement with its actors, studying its implementation through policy and public decision-making, by observing 'legal' processes and the way that normative rules produce and shape space, value and meaning, and how this in turn influences the actions of people, institutions and groups in society.[43]

Empirical legal studies have provided a response to scholars of comparative legal studies and legal pluralism, the latter stemming from legal anthropology, [44] that have criticised the traditional legal school for seeking superior universal status for legal rules, promoting State-focused approaches to legal understanding, and for essentialising law itself in a reductionist manner, failing to address the increasing hybridisation of norms and legal systems through globalisation, and ignoring the pluralities within and between legal systems in favour of uniformity and order.[45] Critical scholars in particular encourage lawyers to reflect deeply and critically on the relationship

[37] Robert L. Fischman and Lydia Barbash-Riley, 'Empirical Environmental Scholarship' [2018] 44 Ecology Law Quarterly 4, 767. Notably, some topics attract more empirical approaches than others, for instance pollution control studies.

[38] Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press, 2007), 1.

[39] Ibid.

[40] Margaret Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (Pluto Press, 1996), 2.

[41] Ibid.

[42] Stemming from the debate on the relevance of subjectivity in interpretation within the social sciences, Allison carried out a study of the Cuban Missile Crisis, examining the same events from different frames, and coming up with different explanations. Graham T. Allison, *Essence of Decisions: Explaining the Cuban Missile Crisis* (Little, Brown & Co., 1971). In a similar vein, Wolf addresses feminist and postmodernist critiques of traditional ethnography by retelling the same set of events from three different textual perspectives and styles (fiction, anthropological field notes, and a social science article), all giving rise to different 'outcomes'. Margery Wolf, *A Thrice-told Tale: Feminism, Postmodernism, and Ethnographic Responsibility* (Stanford University Press, 1992).

[43] See for instance Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law' [2006] 32 Law & Social Enquiry 4, 975-995; Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths (eds) *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World* (Routledge, 2004).

[44] Notably, there is an unsettled debate regarding the approaches and concepts adopted by legal pluralist scholars, which range from traditional explorations of relations between state and non-state law, customary law and colonial legal history to the growing study of legal fragmentation within the global sphere.

[45] Menski (n 23), 25. Crucially from a global perspective, Menski also criticizes the way that globalization, and international law, is still in many regards being conceived within the frame of a 'civilizing mission' approach, linking it back to the colonial project.

between law and gender, social class, ethnicity, geopolitics, international economics, and other relations of power.[46]

Thus, empirical research methods are gaining traction as those most appropriate in helping us tease out and deepen our understanding of law and the legal as it operates in society (whether addressing it within, beyond or between national borders).[47] What makes research empirical is that it is grounded on the observation of the world through data collected by the researcher.[48] Of course, the practice of research is seldom as binary as presented through categorisation, and most studies draw on both doctrinal and empirical research methods, merely treating the different sets of data (black-letter law and empirical research findings) as complementary on the whole.[49]

As new actors, such as indigenous peoples, private companies, NGOs, bilateral donors and international advisors, are coming into play (whether central to processes or kept at the margins), power dynamics are shifting, which influences the ways that laws are negotiated and adopted. An exercise of 'mapping out' legal sources[50] could take place through dialogue with relevant actors, and the mapper should themselves walk through legal spaces in order to ensure that the map adequately reflects the experiences of people and groups involved. Within these mapping projects, a pluralistic understanding of law and the power of normative structures would allow to reflect upon the relation between legal regimes within multilevel governance, and provides a good backdrop against which researchers can begin unpacking the 'life' of transnational law – from its negotiation, to the ways in which it is adopted and given meaning both within the 'formal' legal system, but also the way it comes to play a role in society more broadly.

Empirical research, especially when grounded in qualitative approaches such as ethnography and informed by interpretivist epistemologies' (for instance legal pluralism) understanding of law and power,[51] could provide a good foundation for researchers interested in unpacking the meaning and practice of transnational environmental law. The growing body of institutional ethnography for instance addresses several of these aspects, and illustrates a way for scholars to study "law in action". In drawing on a range of ethnographic methods (grounded upon the principle of immersion into a given space), a number of studies have explored the inner workings and decision-making processes of global institutions,[52] and the ways that international legal rules and policies are adopted and interpreted within a unique legal culture, at times going further to explore the ways that they are used and given meaning by certain actors within specific cases.[53] These studies provide an opportunity to reconsider the 'life of law' and legal processes, providing opportunities to bring empirical research findings into conversation with doctrinal and legal

[46] Richard Collier, 'The Law School, The Legal Academy and the "Global Knowledge Economy" – Reflections on a Growing Debate: Introduction' [2005] 14 Social & Legal Studies 2, 259.
[47] See for instance Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (OUP, 1995), 296; Anthony Bradney, 'Law as a Parasitic Discipline' [2002] 25 Journal of Law and Society 1, 71.
[48] Lee Epstein and Gary King, 'Empirical Research and the Goals of Legal Scholarship: A Response' [2002] 69 University of Chicago Law Review, 1-2.
[49] See generally Donatella della Porta, 'Comparative Analysis: case-oriented versus variable-oriented research' in Donatella della Porta and Michael Keating (eds) *Approaches and Methodologies in the Social Sciences* (CUP, 2008); McConville and Hong Chui (n 38).
[50] Though note that the term 'mapping' also carries some controversy, as its practice can be exclusionary in both process and substance. *How* mapping is done, in terms of who is included, when and how, is important. All mapping exercises *produce* as well as represent experienced realities, making them political as well as performative exercises. See Jeremy W. Crampton, 'Cartography: performative, participatory, political' [2009] 36 Progress in Human Geography 6. .
[51] See next section below.
[52] Ronald Neizen and Maria Sapignoli (eds), *Palaces of Hope: The Anthropology of Global Organizations* (CUP, 2017).
[53] Engle Merry (n 43); Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights: Tracking Law between the Global and the Local* (CUP, 2007); Maria Sapignoli, *Hunting Justice: Displacement, Law and Activism in the Kalahari* (CUP, 2018).

theory research, with the hopes of establishing a sustained dialogue between these two sometimes rather distinct fields of legal research. They help illustrate the benefits of adopting empirical methods, coupled with a pluralistic understanding of law and the power of normative structures in understanding the relation between legal rules and regimes under multilevel governance. Such studies can help lay the foundations upon which researchers can begin unpacking the 'life' of transnational law – from the adoption of a norm under a legal system, to the ways in which it is adopted and given meaning both within the 'formal' legal system, including the ways that it comes to play a role in society more broadly, influencing actors and institutions across sectors.

The BENELEX project sought to investigate legal spaces at local, national and regional levels, placing emphasis on the local dimensions of empirical case studies and their relevance both for the interpretation of international legal developments, and to better understand the influence of local actors on international law-making. One way to make these connections was to rely on researchers' direct observation and networking in multilateral meetings convened under international environmental agreements, particularly the Convention on Biological Diversity.[54] Another way was to understand how community protocols were negotiated, revised and used by communities in their interactions with outside actors.[55] A third, complementary way was to contrast the findings from the first two streams of research with a discourse analysis of the decisions adopted under the Convention on Biological Diversity.[56] These multi-level and multi-method observation of legal interpretation and influences on law-making provided insights that fed into the research process, even if not in the research design, contributing to a pluralistic understanding of law, normative structures, as well as attributions and negotiations of meaning – discussed in Section 4. While the BENELEX project did not engage in legal ethnography due to the decision to move beyond a single-case approach (which is a common trade-off in comparative approaches), the team took a grounded and flexible approach in the case studies, putting empirical findings in conversation with doctrinal legal work, as well as social science research on the role of power in the negotiations of community protocols and among national, regional and local sources of authority as well as between community members. This approach was meant to work towards the accountability-centred approach mentioned at the start of this paper, and to provide a basis for future legal ethnography in this area.

Section 3: Inter-disciplinary research (and inter-disciplinary research design)

The previous sections exploring comparative legal methods and empirical approaches have already hinted at the importance of inter-disciplinarity, pointing to the comparative law debates and 'law in context' tradition that link legal concerns to those of political science and sociology. This section will discuss how informing legal research with other disciplines and their associated methods and theories helps to deepen the understanding of law and legal discourse within its broader societal, historical, political, cultural (etc.) context.[57]

[54] As BENELEX researchers organized or contributed to international side-events, or were part of the independent reporting teams of the Earth Negotiations Bulletin: http://enb.iisd.org.
[55] Louisa Parks, 'Challenging Power from the Bottom Up? Community Protocols, Benefit-sharing and the Challenge of Dominant Discourses' [2018] 88 Geoforum.
[56] Louisa Parks, 'Spaces for local voices? A discourse analysis of the decisions of the Convention on Biological Diversity' [2018] Journal of Human Rights and the Environment 9.
[57] Ibid.

A great deal of literature discusses multi- and inter-disciplinarity, but for the purposes of transnational environmental law, the key motivation for inter- and multi-disciplinarity is that international law as a process implicitly recognizes that legal norms must change behavior.[58] On the one hand, multi-disciplinary work approaches an area of study from different perspectives, placing these in parallel to provide a fuller picture of the phenomenon in question. Multi-disciplinary work may thus be best placed to describe studies of the same phenomenon from a variety of more disparate disciplines, for example law and engineering. On the other hand, an inter-disciplinary approach[59] moves beyond the presentation of a phenomenon from different disciplinary perspectives, and aims instead to infuse research within a home discipline with the insights and approaches of other, complementary disciplines with a view to identifying the blindspots of one discipline through the lens of the other and address such blindspots with the help of the other discipline. Within the BENELEX project, and in much other research on transnational environmental law, inter-disciplinary research is about constructively critical collaboration between linked disciplines. And within the BENELEX project it has been a progressive path from multi-disciplinarity to inter-disciplinarity along a continuum. While researchers from different disciplines published work within their own discipline that had been significantly enriched by the insights, critiques and findings arising from the research under the other discipline, there was not sufficient time to develop joint publications to bring more deeply together the results of the critical collaboration between the different disciplines. In addition, the project did not allow time, resources or methodologies to move towards transdisciplinarity with a view to integrating traditional knowledge and traditional knowledge holders into the shaping and conduct of the research, but that certainly remains a key objective for any transnational environmental law that involves indigenous peoples' issues, customary laws and perspectives.[60]

Nevertheless, the BENELEX project featured discussions on interdisciplinary research design that have gradually shifted from relatively narrow questions on methodology and method to the necessary links with broader questions of ontology and epistemology.[61] These considerations can be of relevance to other transnatioanl environmental law researchers. Paying attention to choices in these areas is crucial, and inter-disciplinary to the extent that reasoning about these points explicitly (at least to ourselves as researchers) is a good research design practice that is common to all social sciences. Beginning research by posing these questions forces proper attention to be paid and – hopefully – opens research up to disconcerting ideas about what constitutes appropriate data, or information, about the phenomenon under study. In other words, following research design steps that are common to all social sciences opens work up to contributions and perspectives – as well as methods – more easily met with in disciplines outside our own. This is crucial for transnational environmental law, as classical doctrinal approaches may not be the most adept tools to identify and understand transnational environmental law phenomena. This is not in any way to claim that traditional legal sources and methods are not needed, but rather that traditional legal sources need to be brought into conversation with and challenged by other sources that emerge as powerful factors in transnational environmental law, and that traditional legal methods (notably legal interpretation) should be accompanied by methods from other disciplines to get the broadest and more nuanced possible picture of (often fast-changing or surprising) transnational environmental law phenomena.

[58] See Jeffrey L. Dunoff and Mark A. Pollack, 'International Law and International Relations: Introducing and Interdisciplinary Dialogue' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP, 2013), 3.
[59] Ibid.
[60] Elisa Morgera, 'The Research Challenges of International Biodiversity Law' in Elisa Morgera and Jona Razzaque (eds) *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (EE, 2017), 6-7.
[61] Elizabeth Fisher, Bettina Lange, Eloise Scotford and Cinnamon Carlane, 'Maturity and Methodology: Starting a debate about Environmental Law Scholarship' [2009] 21 Journal of International Law 2.

The research design process common to the social sciences can thus lead legal scholars to a more nuanced understanding of legal sources and to embrace new or renewed methods: notwithstanding the variety of legal questions to answer and aims to fulfill, the initial steps in the research design are likely to be shared by many transnational environmental law scholars, even where they may not be made explicit in the work eventually published, because they force researchers to be more rigorous in defining our objects of study and what in the world can tell us about that object. Considering at the outset questions of ontology and epistemology opens up the question of methodology to input from other disciplines.

The first step in research design in the social sciences is to pose questions about ontology. Fundamental disagreements between social scientists generally stem from ontological questions – that is about how we see the world, which in turn frames what we understand to be 'scientific' knowledge (epistemology) and what constitutes the right kind of information for us to acquire knowledge (methodology). Hughes, cited in Moses and Knutsen (4) sums up the importance of posing ourselves these basic questions.

> 'Every research tool or procedure is inextricably embedded in commitments to particular versions of the world and to knowing that world. To use a questionnaire, to use an attitude scale, to take the role of a participant observer, to select a random sample, to measure rates of population growth, and so on, is to be involved in conceptions of the world which allow these instruments to be used for the purposes conceived. No technique or method of investigation (and this is as true of the natural sciences as it is of the social) is self-validating: its effectiveness, i.e. its very status as a research instrument making the world tractable to investigation, is, from a philosophical point of view, ultimately dependent on epistemological justifications.'

The main difference identified in ontologies in the social sciences is between objectivism and constructivism. Simply put, an objectivist ontology will see the social world as composed of objective 'things' with their own reality and meaning, that can be observed in the world and studied. Constructivist ontologies, on the other hand, view the social world as meaningful only to the extent that meaning is assigned by social actors, usually in interaction. Social objects mean what we decide they mean, and there is not fixed 'truth' to be discovered. Ontological starting points thus have clear effects on how we study the social world. They tend – though this is not always the case - to be linked with certain epistemologies. Most commonly, objectivist ontologies correspond with positivist epistemologies, while constructivism leads us to interpretivist approaches. While positivist studies may lead to design research geared to the discovery of more or less universal 'rules' and patterns, interpretivist approaches – rooted in a less fixed view of social phenomena – will see meaning as contextually bound and located in social interaction. In our research project, we wanted to investigate the emerging norm of benefit-sharing – a still unsettled legal concept in whose progressive development at both international and local levels we were interested. Given this research interest, the starting point for the BENELEX project was constructivist as benefit-sharing was understood to still be very much 'under construction' in interactions between many different actors, and in many different spheres. Benefit-sharing was under discussion, for example, in a number of international treaty bodies. It was also being discussed by many local communities across the world, sometimes in connection with international legal developments and sometimes in complete isolation from them. The BENELEX project therefore focused on the interpretation of different legal sources on benefit-sharing through a corresponding constructivist view of the law. An interpretivist epistemology became equally relevant – the meaning of benefit-sharing was contained in these discussions. While this approach was by no means the 'right' or only way to study benefit-sharing, it was a helpful way to answer research questions about benefit-sharing at different regulatory levels, in different geographical sites, at a certain point in time. If a norm

stabilizes, its content becomes more fixed and traditionally codified, then an objectivist and positivist approach would be more appropriate.

Choices in terms of ontology and epistemology were a necessary step to couch decisions on methodology and, eventually, methods.[62] Methodology is distinct from methods – Moses and Knutsen provide a simple but effective analogy here: if methods are tools, methodology is the toolbox. The question researchers must pose themselves on methodology, they argue, is more or less the following: given my view of the world surrounding this particular research object (ontology) and my corresponding idea of what knowledge about this object is (epistemology), what is the best way of acquiring that knowledge?[63] BENELEX research questions about benefit-sharing had drawn attention to social interactions in a variety of arenas, so the methodology was thus based on considerations of how best to acquire knowledge of these interactions.

A key part of constructing the methodology, in addition to a return to the basics of ontology and epistemology, was then attention to questions of *operationalization.* This refers to thinking seriously about what sources can inform researchers most accurately about their research objects. Often, this part of research design is not subjected to a great deal of thought, as sources appear clear and unambiguous. However, taking a constructivist approach means acknowledging that meaning is not fixed – it is built in interaction. Relevant information may come from more fixed sites of meaning such as legal texts, but it will also be contained in less fixed sites – such as discussions between people, and non-legal interpretations of the law in less formal texts. Attention to the social realm also led BENELEX researchers to consider interactions at different levels – not only the international arenas where high-level discussions took place, but discussions among indigenous and local communities on the ground, but also in national and international debates –in understanding how a legal norm was framed and implemented.[64] Traditional legal approaches were only partly suited to the study of discussions of benefit-sharing in treaty bodies and in the areas traditionally used by local communities, as the two levels (and many other levels in between) were interdependent. The BENELEX project thus looked to other social scientific disciplines, and political sociology in particular, to combine with a legal methodology. A series of comparative case studies drawing on sociological methods was designed to address the local level, using unstructured and semi-structured interviews as well as participant observation. These studies then informed and directed aspects of legal studies of transnational environmental law. The findings were also used to guide sociological research on the presence of key themes for local communities at the international level, using discourse and frame analysis.[65]

Following these research design steps aided BENELEX researchers first to be explicit to themselves about a constructivist starting point. This in turn led their attention to questions of epistemology, methodology and operationalization, which helped in designing research geared to investigating how law was interpreted and the agency of a range of actors. The methodology and methods were thus explicitly designed to allow us to acquire knowledge of actors' perceptions of the law, including non-legal interpretations and framings made at the local level. This focus on framing

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[62] Louisa Parks and Elisa Morgera, 'Reflections on methods from an interdisciplinary research project in global environmental law' [2019] BENELEX Working Paper No. 20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354394> accessed 23 March 2019.

[63] Jonathon W. Moses and Torbjørn L. Knutsen, *Ways of Knowing: Competing Methodologies in Social and Political Research* (Palgrave Macmillan, 2012).

[64] See also Galit A. Sarfaty, 'International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation' [2007] 48 Harvard International Law Journal 2.

[65] Parks (n 56); Louisa Parks and Mika Schröder, 'What we talk about when we talk about 'local' participation in international biodiversity law - the changing scope of indigenous peoples and local communities' participation under the Convention on Biological Diversity' [2018] 11 Participation and Conflict 3 <http://siba-ese.unisalento.it/index.php/paco/article/view/20227/17195> accessed 23 March 2019.

meant that the BENELEX project produced work not only on the complex legal field surrounding questions of benefit-sharing, but also on views of benefit-sharing at local levels that often had little to do with the international norm itself but were rooted in longer local traditions, including those about the management of commons.[66] Another useful consequence of a constructivist starting point was attention to lay interpretations of legal texts, particularly 'softer' texts such as voluntary guidelines and codes of practices. The significance of language for those that are not legal experts – including members of local communities – was thus considered within the BENELEX project as a valid element of framing and interpretation beyond stricter legal considerations. Overall, following this research design thought process, one common in the social sciences, though less so in law, can be useful for scholars of transnational environmental law more generally. As an emerging and constantly changing field, it will certainly benefit from research designs that are also able to study the field beyond the realm of formal legal artefacts. In particular, attention to framing, beyond a classic formal approach to legal interpretation, can allow transnational environmental lawyers to unpack the different meanings attributed to a legal norm in different locations by different actors. Attention to frames offers two advantages to transnational environmental lawyers. First, it tackles blind spots vis-à-vis the role of politics and agency. Second, it supports a more dynamic and non-hierarchical understanding of norm diffusion as local frames that may clash with understandings codified at the international level but could eventually contribute to an alteration of such international framings.[67] This may ultimately allow to discover that the process of constant renegotiation or redefinition[68] across different international, transnational and local scenarios may be affected by power imbalances and strategic (or potentially empty) uses of international norms.

Section 4. Research ethics and funding

The final, yet arguably most important aspect of any research methodology, including the type of collaborative inter-disciplinary methodology we explored earlier, is the ethical framework adopted by the researcher. The history of research provides ample examples of instances in which the interests of those researched were treated as secondary to those of the researcher. What must be remembered is that research can be an alienating experience for many, and without reflexivity and flexibility exercised by the researcher, research endeavors will struggle to address relevant issues. Within law in particular, perhaps due to its positivist tradition steeped in the belief of objectivity and rationality on behalf of the researcher, we are seldom instructed, let alone trained, to think about the implications of our research from an ethical perspective. Most university ethics procedures, even those relating to the humanities and social sciences, are based upon the biomedical model, which prove ill-equipped to adequately address social science research in both practical and philosophical terms.[69] Research ethics is usually treated as of secondary importance, something of a tick-box exercise that comes at the end of research planning. But incorporating ethical thinking into the early stages of a research project starting from questions of ontology onwards can help set researchers up for conducting more meaningful research.

As mentioned above, research can be an alienating experience, and one that has brought with it severe consequences to several groups in society.[70] The perceived distinction between 'experts' and

[66] Elsa Tsioumani 'Beyond Access and Benefit-Sharing: Lessons from the Emergence and Application of the Principle of Fair and Equitable Benefit-Sharing in Agrobiodiversity Governance' in Fabien Girard and Christine Frison (eds) *The Commons, Plant Breeding and Agricultural Research* (Routledge, 2018).
[67] Parks and Morgera (n 2).
[68] Dunoff and Pollack (n 58).
[69] Saskia Vermeylen and Gordon Clark, 'An Alternative ethics for Research: Levinas and the unheard voices and unseen faces' [2017] 20 International Journal of Social Research 5.
[70] Historically, it played a central part in the colonizing project of indigenous peoples, their territories and cultures, acting as a tool to justify physical and psychological abuse, theft, discrimination and oppression. It has also been used

the general public works to reinforce an artificial divide between those holding certain types of knowledge and training, further entrenching constructed epistemological and ontological hierarchies, positioning researchers as those best equipped to determine knowledge gaps and priorities. This has prompted critical scholars to call for a renewed engagement and reflection upon the role of ethics in research projects. For instance, indigenous scholars and communities are calling for the decolonization of research processes, articulating their own research agenda and methodologies.[71] This includes demanding that research concerning indigenous issues emanates from the needs and concerns of the affected groups, and the dissemination, or 'giving back' of research findings amongst the communities in an appropriate and meaningful way, and requires the non-indigenous researcher to commit to a process of reflecting on their positioning within the broader research agenda.[72] With regards to this latter point, emphasis is placed on the researcher vis-à-vis those with whom they are conducting their research to understand and acknowledge their privileged positioning within historical and contemporary power hierarchies, and to actively "dismantle colonial constructs" by challenging beliefs, biases, prejudices and assumptions within the academy.[73] Whether one is exploring issues affecting indigenous groups or not, these are important aspects that all researchers across the disciplines should take into consideration if they are serious about ensuring that their research agenda remains in line with societal needs (be it local, domestic, or across borders).

Furthermore, as was said above, the traditional ethical framework found in university ethics committee boardrooms has its roots in biomedical models based upon the principle of 'do no harm'. This leads to ethical reviews being grounded in a utilitarian and consequentialist approach (least harm to the greatest number). Despite critical insights from social scientists, a shift is yet to occur. This means that there are limited checks and balances in place which incentivizes researchers to go 'above and beyond' that required by university ethics committees, even though merely passing these institutional checks does not mean that one has fulfilled ethical codes established elsewhere.[74] Depending on one's training, there is a risk that these important matters are neglected. To counter this, Vermeylen and Clark propose a framework founded upon Levinas' research ethics. Most importantly, this requires an open-ended approach to ethics in the field – 'ethical sensibilities cannot be anticipated; they emerge only through encounters in the field'[75] – and an adjustment of research methodologies and practices to reflect calls for this by research participants.[76] This relates very much to the point made above regarding reflexivity on behalf of the researcher. In practice this

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as a tool by state institutions to justify the segregation, oppression, torture and killing of groups based on ethnicity, sexuality, skin color, etc. See Tuhiwai Smith (n 8).

[71] Gabrielle Russell-Mundine draws on a number of diverse Indigenous scholars' work to identify broad key principles that research by, or with, Indigenous peoples should incorporate: seek to empower Indigenous peoples; aim to decolonize and reframe research; be critical and liberationist recognizing social, political and historical contexts; have political integrity; privilege Indigenous voices; recognize and represent the diversity of cultures, voices and experiences; allow Indigenous peoples to set the agenda; focus on matters of importance to Indigenous peoples; use core structures of Aboriginal world-views; integrate cultural protocols, social mores and behaviours into methodology; Integrate Indigenous ways of knowledge creation. See Gabrielle Russell-Mundine, 'Reflexivity in Indigenous Research: Reframing and Decolonising Research' [2012] 19 Journal of Hospitality and Tourism Management 1, 86-87. In particular, she quotes Judy Atkinson, Maggie Brady, John Henry, Karen Martin, Martin Nakata, Lester-Irabinna Rigney and Linda Tuhiwai Smith.

[72] Tuhiwai Smith (n 8) page 132; Åsa Nordin Johnsson, 'Ethical Guidelines for the documentation of *árbediehtu,* Sami traditional knowledge' [2011] 1 *Diedut / Sámi allaskuvla*.

[73] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988); Rauna Kuokkanen, 'The Responsibility of the Academy: A call for Doing Homework' [2010] 26 Journal of Curriculum Theorizing 3, 75-90; Rauna Kuokkanen, 'Ethics of Sámi and Indigenous Research' [2008] *Seminára raporta, Kárásjohka*.

[74] See for instance the American Anthropological Association, whose guidelines stress the contingencies between research sites as opposed to universal principles.

[75] Vermeylen and Clark (n 69), 10.

[76] Ibid.

means opening up early opportunities for dialogue between researchers and people in the field who will have insight into where research may be appropriately targeted and action-oriented. According to this approach, ethics is a matter of process, as opposed to a one-off box-ticking exercise, and requires regular reflection on research aims, questions, with the researcher remaining open to adjusting these as the work progresses. This also requires the researcher to remain sensitive to existing power dynamics and relations, for instance in interview settings, consent forms, remunerations in exchange for contributions, etc. and work actively to counter these through their own practices.

This iterative approach to research and ethics also opens up questions about how far this is possible under the majority of current research fund rules. Many funders of legal and political research provide relatively short-term funding that may not be appropriate for this kind of iterative, risky, multi-level research. The constraints dictated by funding conditions, including the prior development and approval of methodologies, also warrant a fresh look given the arguments outlined here and in more in-depth critiques.[77] The limitations imposed by many funding rules are placed in yet sharper relief where the aim is to develop a research partnership to meet a group's needs and effectively involve them in co-development according to their views and procedures[78].

Section 5: **Concluding remarks on collaborative research**

In this paper, we drew on the experiences of the BENELEX project to discuss various methodological challenges posed by transnational environmental law, namely comparative legal methods, empirical legal research, inter-disciplinarity and research ethics. The complexity of transnational environmental law calls for an innovative and high-risk combination of methodologies that may be quite dauting for the researcher. The BENELEX project sought to manage such complexity and high risks through collaborative research. This concluding section will discuss how collaborative approaches may enrich studies of transnational environmental law by informing the research design process in particular. We discuss collaboration, and peer-learning, further in the conclusions to this paper.

Achieving credible comparative, empirical and inter-disciplinary research often requires scholars to engage in close and long-term collaborations. While the infusions of different disciplines could be achieved by study alone, the BENELEX team found that collaboration was better suited to deal more confidently with the demands on individual researchers, as well as to nourish more creative approaches for individuals and the team as a whole. The collaborative approach developed under the BENELEX project entailed embedded peer-learning and peer-review. Comparative legal methods, collaborative inter-disciplinary work, and the need for reflexivity around questions of ethics and power – all of these can be better informed and achieved by opening individual work and working methods to cross-fertilization, while still acknowledging individual researchers' distinctive voice (through, for instance, individual publications where researchers systematically acknowledge how they drew on the comments and research of other researchers in the team, but also have the opportunity to distinguish their own findings and distance themselves from other researchers' insights that they disagree with, in whole or in part). During research design processes and the acts of research, peer-learning provided a supportive path towards inter-disciplinarity, with researchers from different disciplines explaining to others the tenets of their own disciplines and key findings from their own literature reviews with a view to bringing up to speed with current debates in their

[77] Ibid; Kevin Love (ed) *Ethics in Social Research* (Emerald, 2012).
[78] Ibid; Massey University, 'A Brief Introduction to Te Ara Tika' (undated) https://www.massey.ac.nz/massey/fms/Human%20Ethics/Documents/Te%20Ara%20Tika%20summary.pdf?91A1B6C1CCBE36D7116F20C62124D4EB accessed 23 March 2019.

disciplines the team members from other disciplines. Peer-learning in the early stages may take up some time, but it can be fruitful by ensuring researchers pose themselves fundamental questions about what they want to research, and how to gather the most suitable types of information. Peer-learning is not a one-way process, but two- or multiple-way: all of those in a group of scholars engaged in peer-learning will be richer for it. In the BENELEX project, legal methods and data brought a new dimension to the legal research work by the political sociology researcher, and vice versa. During empirical research, for instance the skills and approaches honed by the legal researchers were invaluable to the political sociology researcher in understanding the workings and rationale for that working under international treaty bodies, as well as the legal framework surrounding (limiting or supporting) local communities on the ground. Conversely, the skills and approaches honed by the political sociology researcher were invaluable to the legal researchers in understanding power dynamics in the negotiations and encapsulated in the texts agreed upon under international treaty body, as well as power dynamics around and within communities, and the importance of politics at different levels for local communities.

Together with peer-learning, supportive peer-review comes into play as an embedded collaborative approach to transnational environmental law research. Peer-review is of course normal practice in academic work. However, the kind of peer-review system developed in the BENELEX project was in line with collaboration both within and between disciplines. For one, it was very early peer-review: peer-review of paper outlines, of blog posts that sketched the need for certain research directions, and of early-stage work-in progress. Second, peer-review can sometimes be rather combative (particularly when anonymous and publication is our immediate goal). Instead, we suggest open and constructive – collaborative – peer review. This approach means taking seriously the idea that others' research can enrich your own and to that end, engage in a dialogue with the peer-reviewer: rather than simply defending your thesis, you are being supported in reflexivity and you can also challenge your peer-reviewer in his/her own standpoints. Again, this may be more time consuming, but it also leads to a scholarly culture of supporting researchers that take on high-risk endeavors (such as comparative, empirical and inter-disciplinary projects). It may mean no longer fitting neatly into a disciplinary box – or at least not always fitting into the same disciplinary box. Significantly, it may also help in making legal scholarship more understandable and relevant to other disciplines. So it can help build a more rounded, accessible and self-reflexive body of knowledge about transnational environmental law, and identify where and how law can do better.