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Water laws in the Andes: A promising precedent for challenging neoliberalism

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ABSTRACT

The purpose of this article is to analyze the advances of, and obstacles to, progressive attempts at modifying the balance of power over water through the use of the law as a tool for social transformation and to characterize the alternatives based on the ways in which they challenge neoliberal principles. The study of such dynamics using a broad perspective on the law which includes not only written laws, but also historical moments in which water laws were created and used, provides a platform to discern alternatives that in many cases might otherwise remain invisible.

We critically analyze the major legal contradictions and tensions in Bolivia, Colombia and Peru that suggest post- and counter-neoliberal alternatives. First, certain alternatives indicate a break from neoliberal principles based on relational ontologies (that avoid divisions between nature and culture as well as between individuals and communities). Such breaks include the statement that water is a common good or a common resource for the benefit of all, the goal to re-establish the human connection with nature, and support for a water provision system based on reciprocity, community and cooperative principles. Second, additional proposals that can be characterized as counter-neoliberal oppose neoliberal means or outcomes, such as proposals for more equitable water allocation or inclusive participation mechanisms for decision making. Both counter- and post-neoliberal alternatives also find much resistance in water laws; however, they do represent progressive alternatives that reach state laws and challenge neoliberal conceptions of nature.

1. Introduction

Our inquiry into legally challenging a neoliberal approach to water in the Andes is based on the observation that multiple fundamental societal concerns converge on the topic of water, and that alternative perspectives to the dominant neoliberal paradigm provide unmistakable but ambivalent signs of a paradigmatic transition in the Andean region. The purpose of this article is to analyze the advances of, and obstacles to, progressive attempts to modify the balance of power over water through the use of the law as a tool for social transformation and to characterize alternatives based on the depth to which they challenge neoliberal principles. We focus on tensions and contradictions in the different water law incarnations in Bolivia, Colombia and Peru and assess the alternatives to neoliberal natures (Bakker, 2010) through the use of the law as a tool, which has been traditionally perceived as hegemonic.[1]

Santos and Rodríguez-Garavito (2005) noted that studies on law and society have not included the growing grassroots opposition to the spread of neoliberal institutions by landless peasants, subsistence farmers and indigenous people, who have mobilized national courts and transnational advocacy networks to assert their rights to land, culture and nature. For Santos, oppressed or minority group achievements in courts and through legislative changes cannot be dismissed as an anomaly of the legal system, which is expected to favor the powerful. Such small victories are fragile because they are reversible and uncertain, but they manifest the potential of the law to serve as a tool for social transformation. The law is a tool that is necessary for maintaining the tension

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[1] Traditionally, laws are considered authoritative, state-produced normative standards of social action, while rights are authoritative, state-guaranteed individual entitlements derived from laws. Other laws, such as traditional, indigenous, community or popular laws are outside of the state and may be used in conjunction with the state to pursue either exclusionary or inclusionary purposes. In the latter case, such laws assume a counter-hegemonic role (Santos, 2005).

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between social regulation (by the state and corporate actors) and social emancipation (by social movements and civil society) which characterizes the paradigm of modernity (Santos, 1995, 2003), and the use of the law by social movements is precisely the effort to maintain this tension. The law is considered a resource for diminishing oppression, exclusion or domination given certain structural opportunities, such as a minimally functional judicial system that people can resort to (the current law) and the opportunities to change it (future changes to the law).

By examining written state water laws, we recognize counter-hegemonic movement achievements in transforming the dominant law into an instrument to reduce oppression and marginalization. We distinguish counter-neoliberal from post-neoliberal proposals by determining whether they directly oppose a concrete neoliberal manifestation, such as inequality, or a neoliberal mechanism, such as privatization, deregulation and re-regulation, or market creation or strengthening. We further distinguish such proposals by whether they refer to values or principles that radically differ from the principles underlying neoliberalism, i.e., individual freedom and separation of the individual from society and nature as well as private property and "free" accumulation based on the dichotomy between society and nature. We believe that this distinction contributes to the debate initiated by Yates and Bakker (2013) on whether recent legal reforms in Latin America compose a few disjointed and context-dependent counter-neoliberalization incidents rather than solid contributions to post-neoliberal alternatives.

Focusing only on state-generated alternatives would narrow the debate, particularly around contributions that originate from those negatively impacted by neoliberalism. Consequently, we also examine social movement struggles to reform water laws and enrich the already complex landscape of counter and post-neoliberal debates. Herein, the law is not only conceived of as written codes but also as a field within which there are opportunities to debate and transform society. Second, we propose to discern relational ontologies in water laws that are points of departure from neoliberalism towards post-neoliberalism. In contrast to the dual ontologies of liberal modernity, relational ontologies are not constructed on the divides between nature and culture and between the individual and community, but refer to interconnections among nature, culture and society (Escobar, 2010).

In the first section, we endorse a broader conception of neoliberalization of nature as a framework through which to analyze resistance. In section two, we introduce Andean water laws and show the tensions and contradictions in Bolivian, Colombian and Peruvian water laws. In section three, we analyze such tensions with respect to their post-neoliberal potential, and in section four we synthesize the ideas previously developed.

1.1. Neoliberalization of nature, ontologies and the law

Bakker (2010) proposes a conceptual expansion of the notions of neoliberalization and nature, which may be used as an analytical tool to examine water law reform. As she suggests, integrating a broader understanding of socio-nature (as opposed to the narrow definition of nature as a resource) with multiple neoliberalization dimensions (cultural, psychological, social as well as the traditional political, ecological and economic dimensions) can contribute to a more comprehensive analysis, which may include the variegated forms which neoliberalism takes (Brenner et al., 2010; Peck et al., 2009) and the resistance through the law that remains largely unaddressed in neoliberal scholarship.

Scholars increasingly recognize that natural or ecological conditions are not distinct from social processes, and that chemical, physical, social, economic, political and cultural processes are inseparable. Swyngedouw (1999) defines such inseparability as socio-nature, and water is a classic example of this because it includes material, symbolic, political and discursive constructions. Neoliberalization promotes explicit detachment of nature from social processes and favors unlimited individual land and property accumulation as the foundation for a just and efficient social order (Corrigan and Sayer, 1985; McCarthy and Prudham, 2004; Brand, 2009; Renfrew, 2011; Sader, 2011). This dual ontology starkly contrasts with alternative perspectives from cultures that do not rely on a nature-society dichotomy (Escobar, 1999, 2010), but compose "societies of nature", where plants, animals and other entities belong to a socioeconomic community subject to the same governing principles as humans (Descola, 1996). Many non-modern Andean cultures conceive of the universe as a living being without a separation between humans and nature, the individual and the community, and the community and the gods (Grillo, 1991; Apffel-Marglin and Valladolid, 1998). Culture plays a critical role in explaining some social movements' alternative conceptions of nature (Escobar, 1998), which are characterized by a two-way relationship between culture and territory, wherein identity and nature merge.

As social constructions, the law and state are complex and ambiguous institutions because they are, in part, based on the principle of justice (Santos, 2001). The law and state have been key to establishing neoliberalism (providing a legal framework that ensures certainty and predictability, reduces transaction costs, protects property rights and enforces contractual obligations); however, as the bastions of justice, they are also claimed by social movements. Consequently, the rule of law has been an area of contention among lawyers, economists, international donors, national policy makers, and a myriad of other elite and subaltern actors striving for the power to define the content, pace, procedures and beneficiaries of the rule of law (Rodríguez-Garavito, 2011b). Thus, the law is a key factor in studies on resistance to neoliberalization (Corrigan and Sayer, 1985).

In his theory of law, Santos (2009) proposed to expand the content and scope of the law, to broaden the horizons of power struggles, but he is cautious about the weakness of the law since the law is not impartial or neutral (as the liberal conceptions of the law suggest). The law has coexisted with authoritarian regimes and the impunity of the powerful; lower classes have historically experienced the repressive dimension of the law; and widespread cynicism about the protective dimension of the law is reflected in the discrepancies between the law of the codes and effective application of the law. On the other hand, Santos also opposes Marxist conceptions that emphasize the contribution of the law to the resilience and pervasiveness of domination within and across borders and that excludes counter-hegemonic movements (Santos and Rodríguez-Garavito, 2005). A Marxist perspective argues that the legal framework changes from calculated decisions by hegemonic political or economic elites that would allow them to gain power or wealth (Hirschl, 2000). In contrast, for Santos, power struggles create contradictions that generate the potential for transformation; we explore such contradictions in our analysis of the law as a tool for social transformation.

1.2. Legal trends in Latin America

During the last 20 years social movements have demonstrated that the rule of law is an arena of dispute in which equity, human dignity and freedom are still fought for. Recent legal transformations in Latin America represent steps towards more inclusive and sustainable societies and may also be conceptual and ontological advances in response to inequality and environmental scarcity (Homer-Dixon, 1999). Two trends generate resistance to neoliberalism from within the law: neoconstitutionalism and incorporation of international human rights law, with a significantly broader understanding of human rights, into national legal systems.

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