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Water Justice and the Law in Latin America

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Book Review Essay

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In 2012, Mexico enshrined the human right to water in its national constitution. The reform was simultaneously progressive in nature—a formal pledge to safe, sufficient, affordable, and reliable domestic water supply—and also strikingly superficial, a cosmetic gloss that obscures widening inequalities of access and the enhanced traction of neoliberal reforms in Mexico's water sector. To date, the translation of constitutional mandates into enforceable regulations and real-life action has failed to manifest in Mexico, despite expert recommendations and urgent need.¹

¹ Alejandra Rabasa, Anaid Velasco, and Xavier Martínez, *La Instrumentación del Derecho Constitucional al Agua en México: Recomendaciones para su Regulación* (Mexico City: Centro Mexicano de Derecho Ambiental A.C. and the Environmental Law Institute, 2014).

Mexico is not alone in its paradoxical position of law as the arbiter of water justice. Across the hemisphere, a series of experimental policy reforms and creative counter-practices have established Latin America as a continental force in global water politics. Countries like Mexico and Brazil have institutionalized nirvana concepts like ‘decentralization’ and participatory ‘watershed councils’ even as they facilitate private sector participation and market creep in water. Chile continues to serve as the world’s poster child for water rights as tradable commodities, despite the persistence of local *costumbres* that collectivize water management and rip the market right out of the Chilean model.² Programs like Ecuador’s *Pachamama* or Bolivia’s *Buen Vivir* inject radical new ontologies into water policy, refusing distinctions between ‘people’ and ‘nature’ and prioritizing water for life and ‘good living’.³ Yet in Bolivia, constitutional reforms are still wedded to “a state that does not appear detached from neoliberal interests” and powerful interests that foster the very conditions of water insecurity.⁴ Indeed, realizing the human right to water and sanitation in Latin America has not been antithetical to increased private sector involvement.⁵ A recurring theme in critical water scholarship is that while environmental and social conditions are considered malleable and dynamic, the ‘Law’ is often falsely perceived as static, immutable, or universal, hence its use as an insurance mechanism for

² Carl J. Bauer, *Siren Song: Chilean Water Law as a Model for International Reform* (Washington, DC: Resources for the Future, 2004); Manuel Prieto, “Practicing *costumbres* and the decommodification of nature: the Chilean water markets and the Atacameño people,” *Geoforum* 77, no. 1 (2016), 28-39.

³ María Cecilia Roa-García, Patricia Urteaga-Crovetto, Rocío Bustamante-Zenteno, “Water law in the Andes: a promising precedent for challenging neoliberalism,” *Geoforum* 64, no. 1 (2017), 270-280.

⁴ *Ibid.*, p. 277.

⁵ Madeline Baer, *Stemming the Tide: Human Rights and Water Policy in a Neoliberal World* (New York: Oxford University Press, 2017).

‘justice’. Key questions have emerged: what counts as water justice, under what conditions is it produced, and for whom does it benefit?

Four recent monographs call for a fresh take on water and its policy landscape in Latin America. Each book is distinct in terms of its focus, methodology, and theoretical orientation. In Brazil, Rebecca Neaera Abers and Margaret Keck (*Practical Authority: Agency and Institutional Change in Brazilian Water Politics*) reveal how experts struggle to navigate the entanglement of new water institutions and democratizing policy mandates. In central Mexico, Veronica Herrera (*Water and Politics: Clientelism and Reform in Urban Mexico*) compares the divergent pathways of eight municipalities that adopted water policy reforms in the wake of national-level ‘democratization’ efforts. Tacking between two Andean countries, Miriam Seemann (*Water Security, Justice and the Politics of Water Rights in Peru and Bolivia*) analyzes ‘top-down’ and ‘bottom-up’ formalization strategies used by national governments trying to convert customary water use institutions into law. Shaylih Muehlmann (*Where the River Ends: Contested Indigeneity in the Mexican Colorado Delta*) plumbs the ethnographic depths of water conflict in northwest Mexico, where government practices and water scarcity have squeezed the Cucapá people living at the dry end of the Colorado River. Policy contexts and state-society relations figure differently in each story, yet the connective tissue of these books is their critical stance and rigorous deployment of evidence to bring the Law back to earth. Collectively, the authors interrogate ‘holy grail’ assumptions about law and policy reform in water governance: such as the procedural belief that simply assigning legal rights to indigenous groups will result in greater justice and equality (Muehlmann, Seemann); or that the work of policy reform is done in the

hallways of national legislative power, rather than in the shockingly ordinary worlds of home patios and municipal offices (Abers and Keck, Herrera). Policy formalization is a process, the authors argue, not a panacea. This essay traces the connective tissue among their respective case studies, and reflects on the lingering challenges for conceptualizing water justice in Latin America.

Security is the New Watershed

Water policy is characterized by paradigmatic ideas (or ‘nirvana concepts’) that circulate through expert networks and shape how water (and society) is managed and understood.⁶ Over the past two decades, the concept of ‘water security’ has ascended to global prominence in academic and policy circles, spawning various United Nations proclamations, national policy mandates, intellectual debates, and a namesake academic journal. Like many emerging paradigms, water security suffers from little agreement regarding its precise definition, scope, or analytic approach.⁷ Yet the approach commands attention, at least in the Americas, precisely because so much of the hemisphere remains shockingly water insecure. Recent disasters in Puerto Rico and Mexico City, for example, expose the precarious nature of public water provision, particularly as systemic ‘shocks’ (earthquakes, hurricanes, debt) exacerbate already existing inequalities in household water access, quality, and reliability. Nor are so-called ‘developed’ nations immune to water insecurity. In the United States, with its own particular

⁶ François Molle, “Nirvana concepts, narratives and policy models: insights from the water sector,” *Water Alternatives* 1, no. 1 (2008), 131-156.

⁷ Christina Cook and Karen Bakker, “Water security: debating an emerging paradigm,” *Global Environmental Change* 22, no. 1 (2012), 94-102.

geography of settler colonialism and racial capitalism, the struggle for secure water access is at the heart of problems in Flint, Michigan and the unplumbed *colonias* of the Texas borderlands.⁸

Seemann starts the book in a familiar place, at least to political ecologists. Water scarcity and insecurity are not ‘natural’ products of hydrologic lack or absence, she argues, but are the products of unequal water distribution, access, quality, and water-related benefits, mediated by power asymmetries that produce inequality in the first place. This claim—that water scarcity is made, not born—builds on a longstanding argument brought to prominence by geographer Erik Swyngedouw.⁹ While political ecologists tend focus on how political-economic systems produce inequality, Seemann turns to the law. She interrogates a key assumption in debates over property rights: the idea that “formal recognition of local customary water rights is essential to provide water security” (6). Drawing on theories of legal pluralism, Seemann tracks the different pathways followed by the national governments of Peru and Bolivia as they transformed *usos y costumbres*—customary water use rules and norms, held by indigenous groups or small-scale irrigators—into legal rights, regulations, and institutional structures.¹⁰

The comparison is important. Peru is considered a neoliberal shining light of South America, a legacy of several decades of Spanish-influenced water law (1902-69) that concentrated land and water rights in the hands of a small number of landlords. Despite efforts to

⁸ Malini Ranganathan, “Thinking with Flint: racial liberalism and the roots of an American water tragedy,” *Capitalism Nature Socialism* 27, no. 3 (2016), 17-33; Wendy Jepson and Emily Vandewalle, “Household water insecurity in the global North: a study of rural and periurban settlements on the Texas-Mexico border,” *The Professional Geographer* 68, no. 1 (2016), 66-81.

⁹ Erik Swyngedouw, *Social Power and the Urbanization of Water: Flows of Power* (Oxford: Oxford University Press, 2004).

¹⁰ See also Tom Perreault, “Custom and contradiction: rural water governance and the politics of *usos y costumbres* in Bolivia’s irrigators’ movement,” *Annals of the Association of American Geographers* 98, no. 4 (2008), 834-854; Rutgers Boelens, David Getches, and Armando Guervera-Gil (eds), *Out of the Mainstream: Water Rights, Politics and Identity* (London and Washington DC: Earthscan, 2010).

recognize and ‘integrate’ indigenous rights in the 1970s, the Fujimori government (1990-99) also introduced neoliberal water policies, much in the style of neighboring Chile, which threatened collectivized management and indigenous water practices. In contrast, Bolivia has inspired more widespread ‘hope’ for equitable governance structures through its recognition of collective rights, especially with the 2005 election of its first indigenous president, Evo Morales, and his subsequent designation of principles such as ‘living well’ (*Buen Vivir*) and ‘water for all’ as guiding coordinates for government policy. Justice through formalization must work here, right? Bolivia, after all, is home of the Cochabamba ‘Water Wars’ of 2000, a series of anti-privatization protests that ricocheted through media headlines and altered water policy conversations worldwide.¹¹

Seemann delivers the disappointing news with quiet, empirical grace. Peru and Bolivia share similar challenges in formal rights recognition because of their liberal and positivist—and, I would add, stubbornly colonial—frameworks of law. Many indigenous users failed to meet state-defined criteria to formalize their rights, a finding shared with Muehlmann’s study of the Cucapá in northwest Mexico. Legal technologies, such as the local water rights registry, became the prime battleground where customary rights and intra-communal agreements were either recognized or made invisible. Seemann concludes that, through formalization, water policies and discourses of ‘participation’ and inclusion may in fact become capillary “tools for accumulation” (187) and social exclusion, despite their ideological construction as bulwarks against insecurity. Water security is the new paradigm on the block, she concludes, but its promise as a policy

¹¹ Baer, *Stemming the Tide*.

principle cannot be “misguided by the assumption that everyone can benefit equally from incorporating the concept into national laws and policies” (181).

Participation is a Double-Edged Sword

If the law is less static than we may naïvely assume, then how do policy ideas actually take shape? In *Practical Authority*, Abers and Keck draw on a decade of research in Brazil to conceptualize policy formalization as a social experiment in building capacity and authority. Their account weaves together extensive national surveys and intensive case studies (23 in total!) that chronicle the birth of participatory decision-making in water management at the ‘scale’ of the river basin—yet another popular paradigm with the promise of ‘holistic’ water management (4). Drawing on a practice-based approach, their study is informed by Deweyian theories of institutional action: water institutions are conceptualized as experiments, forged by “conducting policy experiments, building networks, discussing ideas, and pooling resources” toward the accrual of broader capacities, engagement, and authority (19). This process is not tidy and linear, they warn, and perhaps best characterized by the metaphor of ‘entanglement’ (21). Brazilian water reforms in the late 1990s provided a unique opportunity to track the rise of the watershed—“a territorial unit that had no precedent in constitutional norms or historical practices” (5)—and the realization of Brazilian democracy-building efforts. “Brazil was gaining fame for experimentation with new participatory arenas,” they write (xvii), “which has spread like wildfire through its political system.”

Conventions in political science methodology, it turns out, interfered with their initial research objectives. “It took us some time before we understood that our original objects of

study—functioning river basin committees—were not necessarily there,” they confess (xix). Nor did existing river basin committees fit well with theories in comparative politics. Such complexity forced them to pose a “question that we rarely ask in political science: how do new organizations of this kind become institutions at all?” (27) Their response is *practical authority*: “the kind of power-in-practice generated when particular actors (individuals or organizations) develop capabilities and win recognition within a particular policy area, enabling them to influence the behavior of other actors” (2). Practical authority necessarily involves “a gradual accrual of capabilities and recognition over time, expressed in a politics of perseverance” (143). Similar to Seemann, Abers and Keck situate law and institution building as a relational process of human action, which draws attention to how power operates at many different scales and is simultaneously ubiquitous and hard to assemble.

My favorite example of practical authority takes place over drinks in a backyard patio garden. Every Friday afternoon, a group of São Paulo public employees meets in a home garden to strategize about improving the water management process. “Most were career civil servants,” explain Abers and Keck (1), “who had risen to positions of influence in their agencies by honing their technical and managerial skills, in the hope of using their positions to bring about change.” Later in the book, we discover that this ‘informal’ assemblage of water experts yielded one of the more successful examples of policy formalization. Moreover, actors may build authority and influence government actions from positions ‘outside’ the state. In the southern state of Santa Catarina, the river basin committee grew out of efforts by local university professors and business leaders who were “critical of the dominant approach to water management espoused by

the state government” (172). Farther north, in Minas Gerais, a charismatic doctor-activist spearheaded an initiative to clean up the polluted Velhas River, including a well-publicized kayak trip wearing gas masks.

A focus on practical authority reveals the everyday practices and informal spaces that constitute what we call policy action and state power. “The relationship between civil society and the state is not reducible to making demands and providing services,” Abers and Keck (169) argue, “nor is the relationship between social movements and the state always adversarial.” Perhaps these distinctions are up for debate in political science. In other disciplines, feminist political geographers have long advanced the idea that state power and rule is crafted through everyday practices, informal diplomacy, and mundane spaces; here, Abers and Keck miss an opportunity to put their argument in wider circulation with insights from anthropology, geography, and critical geopolitics.

Nonetheless, their investigation yields important clues about the nature of democracy building in the Americas. Brazil’s water reforms—the turn toward river basin councils—have created a series of new institutions and mandates that were layered on, but did not eliminate, previous institutions (195). Political systems in Brazil are notoriously multiple and complicated to navigate. Yet the authors document a “surprising mix of rigidity and flexibility in the Brazilian legal system, in which minute decisions that might in the United States be made in administrative rulings must be voted on by the legislature, often giving rise to a continuous loop of legislation, problem, and revision” (84). Brazil’s National Water Agency (the ANA), created in 2000, was a new insulated bureaucracy positioned alongside (but independent from) a drastically reduced

Water Resources Secretariat, both housed in the Ministry of Environment (88). The layer-cake approach resulted in tensions between federal and state governments, interagency competition, and a process of “mutual adjustment” in which new and old gradually institutions reconfigure themselves into a coherent field.

Herrera’s Mexico, where CONAGUA (the National Water Commission) retains outsized federal control and authority over water compared to Brazil’s ANA, presents a very different experience of democracy building and water policy formalization. In *Water and Politics*, Herrera examines the dark side of public participation in municipal utility reform. More participation, in Herrera’s hands, is not an automatic ‘good’ for water policy, but a black box to be opened, an assumption to be interrogated in practice. Through a rigorous comparative study of eight Mexican cities, Herrera sets out to answer to a deceptively simple question: “why is public service provision faring so poorly in Global South cities after democratization?” (3) The result is a far more dystopian account of ‘practical authority’ as she chronicles the manipulation of networked public water services for electoral favor, influential allies, symbolic capital, or political gain. She discovers that limiting or controlling open participation may, in fact, generate *more* social welfare improvements and accountability in water provision.

Why? Herrera explains that clientelist exchange, defined as “a mode of distribution that does not fit easily into conventional distinctions between public and private goods” (6), is especially susceptible in networked public services (like water), where resources are difficult to fence off and any deleterious effects impact resource integrity as a whole, beyond the individual user. In one notable example, elected local officials and members of the PRI (Mexico’s long-

dominant Institutional Revolutionary Party) “extended special pricing arrangement for water services to low-income neighborhoods—as they did in many cities throughout the country—to help build electoral networks for the party. Recalled one utility worker, ‘Water was a currency [used] to obtain political benefits—votes.’” (108). While Herrera does not offer systematic evidence of electoral manipulation, her study is a systematic assessment of clientelism—a key aspect of water development at the local level.

Herrera develops a multi-criteria model to assess the performance of eight public water utilities. She identifies four distinct pathways of reform outcomes, summarized in a table (55) and elaborated by two in-depth case studies per pathway. Similar to Abers and Keck, Herrera identifies the role of nonstate actors in influencing government outcomes. In contrast to *Practical Authority*, Herrera’s nonstate actors are big businesses and middle-class elites motivated by self-interest—specifically, the improved management, quality, and reliability of networked water supply. More elites in the city, she finds, results in better water provision, an outcome that happens to benefit consumers (poor and rich) at large. Reform failure is characterized by a lack of water-intensive industries and a sizeable middle-class base. Two successful cases suggest that “broad participation may not be a necessary ingredient for policy reform; rather, to benefit politically from crafting programmatic provision, reformers may seek to limit widespread stakeholder participation” (124). The implication, regretfully, is that democratic policy implementation is perhaps best achieved with a healthy dose of elite guidance and participation.

Herrera provides an important corrective to water scholarship that is hyper-focused on privatization and World Bank initiatives as the first and last word on policy reform. Federal-level

initiatives in the Mexican water sector are clearly influenced by international financial institutions, but Herrera's findings suggest huge variation in local-level adoption and implementation. Moreover, she brings a much-needed analytical focus to insecurity among piped water recipients. In the city of Xalapa, for example, "the focus has been on service coverage expansion through new public works construction rather than on improving existing networks" (167), a dynamic that creates hidden water insecurities among the plumbed. During the dry season in Xalapa, "40 percent of the population is put on a service rationing schedule, receiving water only a handful of days a week" (168). Ironically, these residents are counted as 'plumbed' in the Mexican national census. Herrera ultimately concludes that democratic transitions can produce better governance, but they also generate new political dynamics that impede the task of improving government services. She effectively shifts focus back to one of the most overlooked aspects of public water provision: the state.

Swearing Like a State

Unlike the three previous books, *Where the River Ends* is not an account of water policy formalization, but an invitation to blast open the black box of state power and conflict from the perspective of some of its most marginalized citizens, the indigenous Cucapá people of northwest Mexico and southern Arizona. Living at the dry confluence where the Colorado River meets the sea, the Cucapá have long struggled to secure traditional fishing rights, water use rights, and full recognition by the Mexican state. Based on an ethnographic study, Muehlmann examines how the Cucapá negotiate the pathways of environmental and structural change, equipped with unexpected but surprisingly resilient tools—maps and surveys, yes, but also

traditional legends and colorful *groserías*. Unlike Herrera or Seemann, who provide a list of helpful suggestions and best practices for water policy reform, *Where the River Ends* refuses to prescribe pills for more hegemonic state practices. Instead, Muehlmann challenges us to read between and beyond the lines of Law—to understand who is left out and why—and to consider how environmental knowledges and subjects are made illegitimate and invalid through statecraft. Who gets to know water, how, and with what implications?

Muehlmann wanders far and wide from the wonkish politics of the Colorado River, a ‘sustainability’ debate mired in the arid technicalities of acre-feet and the familiar geopolitical tropes of nation-states. She opens the book with a photograph of a bisected animal corpse—a dog, a victim of a highway paving project, laying prone with a painted stripe across its neck. No punches are pulled here: the dead dog is a metaphor for the Colorado River and the Cucapá peoples of Mexico and the United States. For Muehlmann, “the water conflict at the end of the Colorado River has been as much about struggles over class hierarchy, language politics, and what constitutes indigenous identity as it has been about who gets access to water and fishing rights” (5). The Mexican government does not consider the Cucapá to be ‘indigenous enough’ for official status, as the Cucapá speak Spanish more than their native language—a product of assimilation and cultural violence. Other borderland tribes share this paradoxical position. In the nearby state of Sonora, the official vehicle license plate is emblazoned with the figure of a native Yaqui deer dancer (*La Danza del Venado*)—an indigenous group, like the Cucapá, bisected by the international border and forced to ‘perform’ their indigeneity even as the Mexican state

makes it difficult, if not impossible, for the Yaquis to make legal claims on Sonoran rivers and groundwater in their traditional territory.¹²

Yet the Cucapá refuse easy erasure; cultural technologies serve as points of resistance. When a pair of Jehovah's Witnesses, looking to convert village souls, ask Cucapá youth for their native word for "water", the teenagers giggle and instead teach them the Cucapá phrase for "tits and ass". The unsuspecting Witnesses thank them and proudly test their newfound language skills next door: they ask for a glass of "water" from a Cucapá elder, who responds with unsurprising rage. This simple act, argues Muelhmann (157), is not so much an innocent display of swearwords as it is an anecdote of epistemic resistance by "indigenous people [who] are continuously called on to prove their authenticity." *Do you speak your language?* asks the state. Words are technologies of indigenous survival and dignity amid state-sponsored insecurity and violence, including water insecurity. "When they [the Cucapá] offer 'go fuck yourself' as evidence of their authenticity, they draw attention to the authenticators' lack of access to the knowledge they would need to determine the fulfillment of their own criteria" (167). Muelhmann's host father puts it best, sitting in the back of a pickup truck after a backbreaking day of work. "That's the great contradiction," he says, sharing a drag off a cigarette, "Now the government *wants* us to act like Indians" (149).

Beyond the Panacea

¹² Jeffrey M. Banister, "Deluges of grandeur: water, territory, and power on northwest Mexico's Río Mayo, 1888-1910," *Water Alternatives* 4, no. 1 (2011), 33-53.

In diverse ways, the books profiled here provide offer traction on a central dilemma and unavoidable tension in the water world. For nearly two decades, and largely in response to the privatization of public water services and utilities, critical social scientists have argued for (or passively relied on) the centrality of the state—and by extension, water law and policy—as the primordial mechanism to guarantee the equitable, universal, and just distribution of water.¹³ Certainly, in situations where multinational corporations like Vivendi or Suez, two of the more prominent European concessionaires, encroach in the public provision of water supply, propping up the state and public sector are salubrious options.

Yet, as the authors here collectively demonstrate, the law is no panacea for water justice. The state, as Muelhmann suggests, may be the arbiter of *in*justice. So much depends on a water policy experiment. The books reviewed here advance the frontiers of water policy formalization and its outcomes, including careful empirical and ethnographic explanation of factors that produce public institutions and their (in)justices. “Greater numbers of participants do not necessarily make a policy more democratic,” contend Abers and Keck (196), “either in the sense of who decides or who benefits.” Policy reforms in Brazil, Bolivia, Mexico, and Peru have coincided with and in some cases exacerbated inequalities in water access and rights, particularly for groups—such as the Cucapá—that are rendered invisible by the state.

Mexico provides an apt concluding example. As I write this essay, thousands of Mexico City residents are without public water service in the wake of the September 2017 earthquake.

¹³ Karen Bakker, *Privatizing Water: Governance Failure and the World’s Urban Water Crisis* (Ithaca, NY: Cornell University Press, 2010).

Collaborators in a civil society organization have banded together to install emergency rainwater harvesting systems in homes located in the boroughs of Xochimilco and Iztapalapa, where public services are fragmented or few—a condition that predates the earthquake. What the earthquake reveals, in accelerated form, is a paradox at the heart of modern plumbing. Now more than ever, *chilangos* must confront the dual realities of the Mexican state—the constitutional right to water, on the one hand, and the slow violence of water insecurity, on the other. Water, perhaps more than any other element, reveals the precarious nature of the democratic experiment in Latin America, a situation that requires surgical assessments of social power rather than a single overarching theory of how the world works—or ought to be. The authors reviewed here provide important tools to move beyond uncritical assumptions touted by policy elites. Hope springs eternal, even if water justice does not.

Author Information

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Books Reviewed:

Practical Authority: Agency and Institutional Change in Brazilian Water Politics. By

Rebecca Neaera Abers and Margaret E. Keck. New York: Oxford University Press, 2013. Pp. ix + 253. \$34.95 paper. ISBN: 9780199985272.

Water and Politics: Clientelism and Reform in Urban Mexico. By Veronica Herrera. Ann

Arbor: University of Michigan Press, 2017. Pp. ix + 245. \$75.00 cloth. ISBN: 9780472130320.

Where the River Ends: Contested Indigeneity in the Mexican Colorado Delta. By Shaylih

Muehlmann. Durham and London: Duke University Press, 2013. Pp. ix + 215. \$23.95 paper. ISBN: 9780822354451.

Water Security, Justice and the Politics of Water Rights in Peru and Bolivia. By Miriam

Seemann. New York: Palgrave Macmillan Press, 2016. Pp. vi + 223. \$105.00 cloth. ISBN: 9781137545220.