The Transnational Mining Justice Movement: Reflecting on Two Decades of Law Reform Activism in the Americas

- **Charis Kamphuis**

Abstract

In this article, I consolidate research that tracks the activism of the mining justice social movement from the late 1990s to present. As a starting point, I conceptualize this movement as a transnational political project that seeks to transform the terms of corporate resource extraction pursuant to the political and legal arrangements of neo-liberal economic globalization. In this context, I reflect on the movement's most significant human rights-oriented law reform projects in the Americas: Indigenous right to consultation legislation in several Latin American countries, and a series of non-judicial grievance mechanisms in Canada, in response to the right to remedy norm in international law. Drawing on existing research, I conclude that in both cases the state has responded with law and policy reforms that fall far short of achieving advocates' objectives. I argue that these shortcomings are due in part to the persistence of three liberal/neo-liberal ideologies in the reforms in question: formalism, voluntarism and privatism. To better understand and explain these findings, I turn to three critical theories of human rights legal activism: pragmatism, left critique/critical legal liberalism and counter-hegemony. I examine the work of a range of scholars writing under the banner of each theory in order to identify key debates and insights that may be instructive as the mining justice movement, and related social and environmental justice movements, continue to aspire toward a law reform agenda capable of addressing pressing global environmental and social justice issues.

Table of Contents

The Transnational Mining Justice Social Movement:
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- **Charis Kamphuis****

Introduction

The legal instruments associated with economic globalization, including foreign investment agreements, global markets and trade agreements, have significantly facilitated foreign resource extraction and imbued it with particular geographic patterns. The majority of mining companies operating globally are headquartered in Canada, making it an important "home country" for companies.[1] At the same time, almost half of these Canadian companies' activities take place in resource rich countries in Latin America, sometimes referred to as "host countries".[2] The social conflicts that extraction often generates between local communities and foreign companies are increasingly trans-border in that they may implicate home and host states, investors, NGOs, lawyers, journalists and researchers in multiple jurisdictions.

I use the term "transnational mining justice social movement" to refer to the alliances and coordinated practices that result when mine-affected communities search for legal remedies or law reform in collaboration with trans-border networks. This article reflects on two of this movement's key law reform projects in the last twenty years: Indigenous right to consultation/consent

* Citation: Charis Kamphuis, "The Transnational Mining Justice Movement: Reflecting on Two Decades of Law Reform Activism in the Americas" (2020) 57 Canadian Yearbook of International Law *forthcoming*.
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[1] See for example: UN OHCHR, *Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights* (1 June 2017), online: *OHCHR* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E>.
[2] The Mining Association of Canada, "Facts and Figures of the Canadian Mining Industry: F&F 2016" (2016) at 81, online (pdf): *MAC* <http://mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf>.

legislation in Latin America and right to remedy legislation in Canada.[3] In undertaking this reflection, I draw on my experiences and observations accumulated over more than ten years participating in the movement, as a Canadian advocate, lawyer and an academic, who has also lived and worked in Latin America.[4] My participation in the movement has included academic publications alongside close work with civil society organizations in Canada and Latin America, as well as advocacy for the law reforms and/or the underlying rights claims that I study here.[5]

In this article's *first part*, I refer to literature on social movements in order to identify the political and institutional aspects of the mining justice movement's engagement in law reform activism as a means for changing the terms, conditions and relations of neo-liberal globalization that characterize the dominant model of resource extraction.[6] Advocates and affected communities

[3] In identifying the prominence of these projects in terms of the attention and resources they have received from advocates within the movement, I do not assume that there was or is a consensus within the movement about these proposed reforms. I do my best to capture this nuance throughout this article.

[4] The community-based lawyering tradition calls for critical reflection on one's social location and epistemological assumptions in relation to the communities one seeks to support: Shin Imai, "A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering" (2002) 9:1 Clinical L Rev 195. In 2011 I co-founded the Justice & Corporate Accountability Project (JCAP), a Canadian organization that provides legal support to resource-affected communities and their allies in a framework of community self-determination, community-based lawyering and corporate and state accountability.

[5] For some examples of my public and collaborative statements on these issues, see: Charis Kamphuis, Shin Imai & Juan Carlos Ruiz Molleda, "Comunidad de San Andrés de Negritos vs. Minera Yanacocha: ¿Como despojar a comunidad campesina de su territorio para favorecer a la megaminería? *Instituto de Defensa Legal* (May 31, 2019) online: https://idl.org.pe/comunidad-de-san-andres-de-negritos-vs-minera-yanacocha-como-despojar-a-comunidad-campesina-de-su-territorio-para-favorecer-a-la-megamineria/; Charis Kamphuis, "Why does Justice Trudeau succumb to corporate pressure?" *The Conversation* (May 5, 2019) online: https://theconversation.com/why-does-justin-trudeau-succumb-to-corporate-pressure-116134; Shin Imai & Charis Kamphuis, "Canadian government promises stronger monitoring of Canadian companies operating abroad" *Due Process of Law Foundation* (Washington, January 2018), online: https://dplfblog.com/2018/01/30/canadian-government-promises-stronger-monitoring-of-canadian-companies-operating-abroad/; Penelope Simons, Shin Imai & Charis Kamphuis, "Independent accountability needed for Canadian mining companies abroad" *The Hill Times* (Ottawa, March 15, 2017), online: https://www.hilltimes.com/2017/03/15/independent-accountability-needed-canadian-mining-companies-abroad/98982.

[6] Fábio De Castro, Pitou Van Dijck & Barbara Hogenboom, "The Extraction and Conservation of Natural Resources in South America: Recent Trends and Challenges" (2014) at 6-7, online (pdf): *Centre for Latin American Research and Documentation (CEDLA)* <http://www.cedla.uva.nl/50_publications/pdf/cuadernos/cuad27.pdf>; UN Economic Commission for Latin America and the Caribbean (ECLAC), *Foreign Direct Investment in Latin America and the Caribbean, 2016*, UN Doc LC/G.2680-P, (Santiago, 2016) at 107, online (pdf): <https://repositorio.cepal.org/bitstream/handle/11362/40214/6/S1600662_en.pdf>.

have argued that the state's regulation of transnational mining is inadequate and that mining companies are not properly held to account for harm that may flow from their actions and operations.[7] They argue that companies are able to violate human rights and degrade the environment with impunity, while unjustly accumulating enormous wealth. They believe that states and companies have repressed legitimate critiques of, and opposition to, these practices.[8] This compels them to employ a range of political and legal tactics, including a turn to law reform advocacy in an effort to address their concerns. While my social movement approach highlights the significance of the movement's fundamental normative positions, it does not presume consensus on the goals or the appropriate strategies or tactics.[9]

In this article's *second part*, I examine the mining justice movement's efforts to advance two related justice-oriented law reform agendas in both home and host countries. The first achievement builds on advances in the inter-American human rights system with a body of jurisprudence, first initiated in 2001, that recognizes Indigenous collective property rights, including in relation to resource extraction. As countless resource-related protests, blockades, and domestic lawsuits unfolded across the Americas, beginning in 2011 several Latin American countries passed national legislation that purported to codify Indigenous communities' rights to

[7] Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014).
[8] OAS, Inter-American Commission on Human Rights, *Criminalization of the Work of Human Rights Defenders* OROEA/Ser.L/II.Doc.49/15 (2015) at paras 48-50; Global Witness, "On Dangerous Ground: The Killing and Criminalization of Land and Environmental Defenders Worldwide" (20 June 2016) at 5, online (pdf): *Global Witness* <https://www.globalwitness.org/en/campaigns/environmental-activists/dangerous-ground/>.
[9] Social movement scholars and participants alike are well aware that movements often encompass a diversity of positions with respect to the normative goals of the movement and the appropriate, necessary or effective tactics. As such, the general statements offered in this article provide a contextual description of the movement based on my research and observations, without purporting to definitively define its ideals and without assuming a consensus.

free, prior and informed consultation in relation to government decision-making about resource extraction.[10]

The second achievement profiled here is related, and follows a similar temporal trajectory, albeit in the northern half of the Americas. In the late 1990s, the question of effective remedies for harms caused by Canadian resource companies overseas became a topic of discussion in Canada among federal public officials, and beginning in 2005 it became the subject of a series of law reform proposals and federal policy statements. These efforts culminated in 2019 when the Canadian government created the Canadian Ombudsperson for Responsible Enterprise (CORE), a mechanism that purports to improve access to remedies for individuals and communities harmed by the overseas operations of Canadian companies.

While acknowledging these important achievements, my concern in this article is also with their limitations (at least to date) from the point of view of the objectives of the mining justice movement and the advocates and communities who have pushed for these changes. After nearly twenty years of sustained and focused transnational activism on these issues, research and critical analysis indicate that the resulting law reforms fall short of generating material and meaningful improvements in the circumstances of the communities they seek to benefit. Given the powerful social and political mobilizations behind these reforms, this observation compels deeper inquiry and reflection in an effort to more fully conceptualize and explain these achievements and limitations.

[10] In Peru this legislation is general and in theory captures all areas of state decision-making, but other Latin American countries with right to consultation legislation have made it sector-specific, applying only to particular forms of resource extraction or infrastructure development: see Roger Merino and Carlos Quispe "Consulta previa y participación ciudadana en proyectos extractivos. Los límites de la gobernanza ambiental" (2018) Escuela de Gestión Pública de la Universidad del Pacífico, *Policy Brief* N° 5, online: https://www.up.edu.pe/egp/Documentos/Policy-Brief-05.pdf

With an analysis that brings my chosen case studies into conversation, I identify three key themes in the movement's law reform outcomes that signal the persistence of problematic classical liberal and neo-liberal ideologies and legal forms.[11] These are: (1) a formal equality view of relations between companies, communities and civil society actors (*formalism*); (2) a view of state and company obligations as voluntary/unenforceable (*voluntarism*); and (3) a view of the state as a private actor, solely or primarily concerned with promoting private economic interests, instead of as a public regulator acting in the public interest (*privatism*). To the extent that the movement has sought to address these three issues at the outset in its law reform proposals, it has been unsuccessful in influencing the final result, fashioned and approved by lawmakers.

In *part three*, I review the work of theorists across the disciplines of political science, law & society, history and international relations who are similarly interested in examining how progressive political projects engage in legal activism in their efforts to create a more just society. I identify three frameworks that grapple with this issue: (1) pragmatism, (2) left critique / critical legal liberalism, and (3) counter-hegemony. Under the banner of each approach, the theorists reviewed in this section share a common interest in activists' use of liberal legal constructs to pursue political projects built upon principles and values that are critical of some of liberalism's foundational frameworks. This review of each approach is by no means comprehensive, but rather represents a sampling of key concepts, priorities and critiques.

My approach to each theoretical framework follows a similar method. I begin by summarizing the contribution of each author in order to identify key points of consensus and debate. With this foundation, I put each theoretical approach into dialogue with my empirical observations about the mining justice movement's law reform efforts (described in part 2). The

[11] See section 3.B.1 for a definition of liberalism and see section 3.C.1 for a definition of neo-liberalism.

objective of this exercise is to draw insights from each approach in order to better understand the achievements and limitations that emerge from the mining justice movement's 20-year experiment with law reform-oriented activism.

This article's transnational lens on the movement's sustained engagement with domestic law reform in Canada and Latin America offers an important opportunity to examine law's potential as a tool in the pursuit of a more just global economic system. The successes of the activists studied here deserve recognition and celebration, while their setbacks warrant careful reflection. In conclusion I reflect on the common themes and debates that cut across all three theoretical traditions and I explore potential pathways forward in light of my reflection on the experiences, knowledge and strategies accumulated by the mining justice movement to date.

1. Transnational Lawyering & the Social Movement Context

Social movement lawyers agree that one's approach to lawyering must be informed by the nature of the actors and issues at play.[12] This position stands against an approach that articulates the legal professional's tasks and obligations in accordance with a generic set of standards and procedures, regardless of context. In their work on "cause lawyering", Austin Sarat and Stuart Scheingold argue that conventional ideas of legal professionalism are challenged where a lawyer has a personal commitment to the cause underlying the legal work being performed.[13] They further

[12] Imai, *supra* note 4; Deena R Hurwitz, "Lawyering for Justice and the Inevitability of International Human Rights Clinics" (2003) 28:2 Yale J Intl L 505; Caroline Bettinger-Lopez et al, "Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice" (2011) 18:3 Geo J on Poverty L & Pol'y 337; Gerald Lopez, "Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice" (2005) 73:5 Fordam L Rev 2041.
[13] Austin Sarat & Stuart Scheingold, eds, *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998).

assert that when "cause lawyers" begin to work for social movements, the departure from conventional approaches to lawyering becomes even more profound and complex.[14]

Sarat and Scheingold rely primarily on the work of Charles Tilly to define a social movement in terms of its ability to generate a "sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation".[15] In Tilly's conception, these interactions are notable for their capacity to make "publicly visible demands for changes in the distribution or exercise of power".[16] Further, in his view a social movement is also marked by its ability to mobilize public demonstrations of support for its demands. To this definition, Sarat and Scheingold add that social movements are "concrete and embodied" in the people, organizations and actions that constitute them.[17]

Social movements are also defined by their transcendence of any particular place, event, institution or individual. Although interest groups (understood primarily as advocacy organizations) participate in, and act as conduits of, social movements, a movement cannot be reduced to these organizations.[18] Reading Tilly together with the work of political scientist Michael McCann, Sarat and Scheingold take the view that a social movement is an expression (a "collective voice") of political protest and *moral vision*[19] that leads its participants to seek the social and political transformation of their society in the hope of creating a better society.[20]

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[14] Austin Sarat & Stuart Scheingold, "What Cause Lawyers Do *For*, and *To*, Social Movements: An Introduction" in Austin Sarat & Stuart Scheingold, eds, *Cause Lawyers and Social Movements* (Stanford: Stanford University Press, 2006) 1 at 2 [Sarat & Scheingold].

[15] Charles Tilly, "Social Movements and National Politics" in Charles Bright & Susan Harding, eds, *Statemaking and Social Movements* (Ann Arbor: University of Michigan Press, 1992) 297 at 306 cited in Sarat & Scheingold, *ibid* at 2.

[16] Tilly, *ibid.*

[17] Sarat & Scheingold, *supra* note 14 at 2.

[18] *Ibid* at 8.

[19] *Ibid* at 8 citing Tilly, *supra* note 15.

[20] Sarat & Scheingold draw on Michael McCann's chapter "Law and Social Movements" in Austin Sarat, ed, *The Blackwell Companion to Law and Society* (London, UK: Blackwell Publishing, 2004) 506. Other works of interest by McCann on this topic are: Michael McCann, "Law and Social Movements: Contemporary Perspectives" (2006) 2

Drawing on the work of Sarat and Scheingold, it is clear that the actors, concerns and legal strategies analyzed in this article constitute elements of a broader, and considerably consolidated, social movement, defined in part by its dissent to, criticism of and/or protest against what are viewed as the unjust consequences of foreign mining activities in developing countries. This mining justice movement is made up of affected communities, faith groups, not-for-profit organizations, labour unions, lawyers, academics and journalists, located in numerous countries in both the global North and South. No single group or community represents this movement and groups work together through a series of overlapping and fluid networks. The advocacy and dissent tactics adopted by this movement include civil disobedience, media strategies, letter writing campaigns, research and report writing, law reform efforts, litigation, complaints to domestic and international bodies, and various kinds of appeals directly to company executives or investors.[21] The interface between some of these tactics and the law is the precise focus of this study.

This diversity of tactics indicates that the members of the movement have specialized roles and a range of proximities to the issues. Mine-affected communities in the global South, including Indigenous communities, are on the front lines of the impacts of industrial mining. They often receive direct support from local civil society organizations, including not-for-profits, faith groups and unions. These local groups bear witness to the concerns of mine affected communities, provide information and resources, and assist in articulating communities' objectives. Moreover, they often liaise with their civil society counterparts in a developing country's capital city and/or

Ann Rev L & Soc Sci 17; and Michael McCann, *Law and Social Movements: International Library of Law and Society*, vol 15 (New York: Routledge, 2016).

[21] For one description of some of these tactics, see: Charis Kamphuis, "Home-State Grievance Mechanisms: Law Reform Strategies in the Canadian Resource Justice Movement" in Isabel Feichtner & Markus Krajewski, eds, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Cham, Switzerland: Springer, 2019) 455-509 [Kamphuis, "Home-State Grievance Mechanisms"].

in the global North, sharing information and developing research, communication and advocacy strategies. Academics and journalists in both the North and the South are embedded in these civil society relations, with a specialized role due to their training in credible and independent research methods, and their capacity to disseminate research and information to the public and policy makers. Finally, lawyers in the global North and South may work with all of these groups, providing legal advice and translating communities' concerns into legal claims that have traction with adjudicators, public authorities and company executives.

In this way, this movement's actors have been able to sustain interactions with both international and domestic law and policy makers in multiple jurisdictions, as well as in some cases with corporate executives. These interactions have led to a growing list of law reform initiatives in a number of domestic contexts, together with institutional policy and normative responses in diverse international and domestic arenas.[22] Moreover, these interactions, initiatives and responses often overlap with the activities of other interrelated movements, including most notably those concerned with the intersection between transnational corporate activity and human rights more generally, and with other specific industries or sectors, such as for example the garment industry. There is also considerable overlap between the mining justice movement and Indigenous peoples' movements as well as with the environmental and labour movement, especially those elements concerned with other forms of resource extraction, such as petroleum and forestry.[23]

[22] For some European examples see law reform work of the European Network for Corporate Accountability. For some examples of responses from international bodies, see Charis Kamphuis & Leah Gardner, "Effectiveness Framework for Home-State Non-Judicial Grievance Mechanisms" in Amissi M Manirabona & Yenny Vega Cardenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflicts* (Toronto: LexisNexis Canada, 2019) 75-100.

[23] For a study of the legal activism of the labour movement with a focus on trade agreements, see Ruth Buchanan & Rusby Chaparro, "International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labour Cooperation" (2008) 13:1 UCLA J Intl L & Foreign Aff 129-160 [Buchanan & Chaparro, "Transnational Advocacy"].

In spite of the overlapping nature of these movements, it is possible to identify a discrete trans-border movement specifically concerned with the impacts of industrial mining on communities in the global South and the capacity of these communities and their allies to dissent to these mining practices. This movement appears to coalesce more or less around a critique of neo-liberal globalization, along with a loosely shared moral vision, often articulated with one or more of the following concepts or principles: corporate accountability/responsibility, environmental sustainability, business respect for human rights, and Indigenous rights to consultation, consent, and self-determination. The movement's central objective is to articulate and implement new ways of formulating the relationship between the corporation, the state (both host and home states), and affected communities, in an effort to approximate socio-economic relations and environmental practices that are more just and sustainable.

This article focuses on ways in which movement actors have pursued this vision and translated it into concrete legal and advocacy strategies that aim to support two specific rights claims: (1) the Indigenous right to consultation/consent in relation to resource extraction, and (2) the right to remedy for corporate-caused harm in the resource extraction process and related activities such as security operations. As such, my approach here resonates with Sarat and Scheingold's concept of law as a "useful site for articulating and advancing alternative visions of the good."[24]

Having characterized in general terms the actors, issues and normative vision of the mining justice movement, the next step is to evaluate how this comes to bear on the movement's engagement with liberal legal forms. For Sarat and Scheingold, lawyering with a social movement raises a fundamentally political question: "what do cause lawyers do *for*, and *to* a social

[24] Sarat & Scheingold, *supra* note 14 at 9.

movement".[25] In this way, they conceive of lawyering as a political and social practice that will come to bear in some way on a political force (the movement) that is already in motion. In their view, law's utility as a tool for social movements depends on the ability of the movement (and lawyers) to "politicize the law" by strategically exploiting the cultural resonance of rights and legality.[26]

One contribution of this approach is its focus on the movement's political processes outside of law. Sarat and Scheingold understand social movement lawyering as an essentially political practice, where law is a political resource used by social movements as part of a series of strategic choices in a broader political struggle. This undoubtedly resonates with experiences in the mining justice movement, where communities frequently resort to protest and/or civil disobedience when other channels fail and where specific legal arguments and lawsuits are only one part of a larger set of demands and justice concerns with respect to global resource extraction.

Yet this emphasis on politics outside of law highlights the need for its counterpart. In other words, a full exploration of the mining justice movement's achievements and limitations requires a theoretical frame that captures not only *the politics of how social movements use law in a broader political process*, but that also recognizes that *the identification and articulation of law by a social movement is itself a political act*. In other words, the theoretical perspectives explored in part 3 all share a sensitivity to the ways in which lawyering with social movements involves making political and strategic choices both inside and outside of law. In the course of emphasizing the politicization of the law, Sarat and Scheingold seem to take for granted the fundamentally political question of the very content and form of the law. Although they insightfully point out that the lawyer's effective exploitation of the cultural resonance of legality is crucial for the movement,

[25] *Ibid* at 3 [emphasis in original].
[26] *Ibid* at 10.

this point nonetheless circles around equally crucial questions of what law, in what form, and with what consequences for the movement's vision.[27]

While it is undoubtedly true, as Sarat and Scheingold state, that social movement lawyering significantly involves responding to decisions made by the movement, this study of the mining justice movement reveals that it is not often obvious, especially in the transnational context, what "right" should be claimed[28] and what form of law should be deployed. As a movement turns to the law, complex decisions must be made regarding how to translate its moral vision into legal argumentation and legal processes. The mining justice movement does not simply seek to access established rights, but rather is attempting to re-imagine the way that relationships are constituted and regulated in the global economy. Thus, while Sarat and Scheingold's pragmatic concept of "politicization" is useful in that it calls attention to some of the choices made in a movement's use of law as a political resource, it does only part of the conceptual work necessary to understand the translation of the movement's moral vision into legal formulas and strategies.

At this juncture, it is important to once again recognize that opinions have certainly varied among mining justice movement participants about the strategic value of the specific law reform proposals analyzed here.[29] This highlights the comments above with respect to the political, internally contested and complex nature of a social movement's engagement with law. However, this disagreement does not detract from the fact that the proposals studied here are undoubtedly the most prominent developed by the movement over the last twenty years. They reflect a vision

[27] For an interesting study of a movement's strategic choices with respect to adopting a particular legal frame in the domestic context to advance a cause (protecting a river), see: Laura Spitz & Eduardo Moises Penalver, "Nature's Personhood and Property's Virtues" (March 13, 2020), University of New Mexico School of Law Research Paper No. 2020-1.

[28] *Ibid* at 10 (Sarat and Scheingold adopt a typology that suggests social movements are fundamentally involved in "rights claiming" at 10).

[29] In one study of transnational human rights activism that included interviews with advocates, the authors observed that the human rights lawyers involved were ambivalent but also pragmatic about the legal strategies they adopted: Buchanan & Chaparro, "Transnational Advocacy", *supra* note 23.

that has garnered broad civil society support in key moments, although the eventual state-controlled legal outcomes are criticized by many movement actors.

In sum then, two useful insights can be drawn from the work of Sarat and Scheingold. The first is the importance of characterizing the political context and the moral vision of a particular social movement. In response, I have made some general assertions about the mining justice movement. The second insight comes as a reminder to be attentive to the political decisions made by social movements outside of law, which includes the instrumentalization of law. In response, I have added that these decisions are often inextricable from political decision made inside of law, in relation to the form and content of the law to be deployed. This theme will be explored more fully in part three of this article.

2. The Transnational Mining Justice Movement: 20 Years of Law Reform Activism

As indicated, this article analyzes the mining justice movement's use of litigation and law reform in two key areas. The first area captures an inter-related set of collective legal claims, namely to communal property rights and Indigenous rights to consultation and consent, that aim to modify the terms and conditions of the state's prerogative to privatize, and the companies' legal rights to exploit, natural resources. Several Latin American countries are currently leaders among developing countries in the area of constitutional Indigenous rights recognition and related law reform in the area of consultation.[30] The second area of legal activism refers to efforts to address the potential harm caused by a company's overseas operations, by advocating for the right to effective remedy and accessible mechanisms for redress in a company's home country. In this

[30] See Merino & Quispe, *supra* note 10; Charis Kamphuis, "Contesting Indigenous-Industry Agreements in Latin America" in Dwight Newman & Ibironke Odumosu-Ayanu, eds, *Indigenous-Industry Agreements*, *Natural Resources, and the Law* (Routledge, 2020) [Kamphuis, "Contesting Indigenous-Industry Agreements"].

area, Canada, as the most important home state for mining companies globally, has been the site of significant law reform debate and innovation on the topic of access to remedies.[31] Interestingly, law reform debates and new developments in these two areas have unfolded almost contemporaneously in Latin American and Canada.

The interconnections between these two areas of mining justice advocacy makes this study all the more pertinent. These efforts have required the transnational mining justice movement to engage in legislative drafting of proposed new administrative and regulatory regimes in Canada and Latin America. In terms of related litigation efforts, lawyers in Canada have focused on bringing civil law claims, while efforts in Latin America have focused on constitutional Indigenous rights claims.[32] Taken together, these two areas of legal activism have typically involved framing the issues in relation to public international law and in terms of at least four fundamental rights claims: the right to property/land/resources, the right to consultation/consent, the right to free expression and association, and the right to remedy.

More specifically, mining related conflicts are often framed as struggles over the terms and conditions of property relations between companies and affected communities. The issue of control and distribution of land, resources and wealth is often at the core of contestations over consultation/consent, and the very meaning of these concepts. When expressions of critique or opposition to mining are met with repression or coercive practices, activists often frame the issues in terms of the right to free expression and protest. Finally, when social and environmental conflicts escalate and companies become perpetrators of harm or are complicit, the movement has

[31] See Coumans, *infra* note 53; Kamphuis, "Home-State Grievance Mechanisms", *supra* note 20.
[32] For one early study of transnational private law litigation as a mechanism for addressing human rights violations, see Craig M. Scott & Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation." in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004) 287.

documented the problem of impunity and has invoked the right to remedy as the basis for fashioning novel transnational law regimes.

These interrelated rights claims, and the law reform efforts they underpin, are an important site of analysis because together they have constituted a dominant mode of political engagement by activists and local communities with the social justice issues raised by transnational resource extraction. In the remainder of this section, I draw on previous studies to synthesize and integrate my findings of the strategies, challenges and contradictions generated by activists' invocation of the aforementioned rights in an effort to advocate for the law reforms referred to above. Not only does this involve distilling the content of these rights claims, it also requires assessing the efficacy of these law reform strategies from the perspective of mining-affected communities, their justice concerns and the aforementioned moral vision of the movement. Drawing on my findings in a larger body of work, I analyze the ongoing presence of problematic liberal and neo-liberal ideologies and legal forms in the state-controlled laws that have resulted from the movement's efforts.

A. Indigenous Rights Recognition and Law Reform in Latin American "Host" Countries

The intensification and expansion of resource extraction in Latin America since the early 2000s has provoked opposition from many Indigenous peoples and affected communities. States and companies have not managed this opposition constructively and Indigenous leaders, human rights and land defenders have often faced threats, violence and repression.[33] Communities and whole regions have often concluded that they have no choice but to resort to protest and civil

[33] Jayalaxshmi Mistry, "Defending the environment now more lethal than soldiering in some war zones – and indigenous peoples are suffering most" *The Conversation* (5 August 2019), online: <https://theconversation.com/defending-the-environment-now-more-lethal-than-soldiering-in-some-war-zones-and-indigenous-peoples-are-suffering-most-118098>.

disobedience in order to defend their interests, environment and livelihoods. Alongside this phenomenon, and in response to litigation, inter-American human rights bodies and Latin American constitutional courts began to recognize a range of Indigenous rights in relation to resource extraction.[34] Then, beginning in 2011, and typically in response to protest, a handful of countries in the region enacted Indigenous right to consultation legislation, often specifically focused on resource-related decision-making. These major achievements in the areas of judicial recognition and law reform represent a relatively rapid transformation of the normative landscape in the Americas in relation to Indigenous peoples, territory and resources.

However, close and applied study reveals that these normative advances in Latin America in the areas of free, prior and informed consultation/consent, collective property and equitable compensation, are precarious in practice, especially in relation to foreign resource extraction. One fundamental issue is that the recognition of these rights in constitutional and/or international law has for the most part ignored the question of how they might be claimed and enforced in practice.[35] Critically, rights recognition has not included related reforms to the procedural rules that establish the specific processes whereby Indigenous rights might be claimed and potentially enforced. This observation applies to both the Inter-American legal system as well as Latin American constitutional law.

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[34] See *Mayagna (Sumo) Awas Tingni Cmty v Nicaragua* (2001) Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (Ser C) No 79 at para 148 [*Awas Tingni*]. *Awas Tingni* was the first indigenous rights claim brought to the Inter-American Commission. The petition was filed in 1995 and the Court issued a final judgment in 2001. See Charis Kamphuis, "Litigating Indigenous Dispossession in the Global Economy: Law's Promises and Pitfalls" (2017) 14:1 Brazilian J Intl L 165 [Kamphuis, "Litigating Indigenous Dispossession"] for a reference to many of the Indigenous rights cases in the Inter-American system since *Awas Tingni*. For a summary of Latin American jurisprudence on the Indigenous right to consultation, see María Galvis & Ángela Ramirez, *Digesto de jurisprudencia latinoamericana sobre los derechos de los pueblos indígenas a la participación, la consulta previa y la propiedad comunitaria* (Washington, DC: Fundación del Debido Proceso, 2013).

[35] Kamphuis, "Litigating Indigenous Dispossession", *ibid*; Kamphuis, "Contesting Indigenous-Industry Agreements", *supra* note 30.

Inter-American human rights law requires Indigenous communities to exhaust internal remedies before bringing a petition to the Inter-American Commission or Court on Human Rights against a member state. However, in practice communities often find it extremely difficult to identify and/or access appropriate domestic remedies or pathways to remedies. If communities seek an exception to the exhaustion of remedies rule for the purposes of pursing their claim in the inter-American system, they then incur the additional evidentiary burden of proving the lack, or inadequacy, of appropriate domestic remedies. If communities pursue their rights claims before domestic courts, among other obstacles, they will undoubtedly encounter generic constitutional procedures that are not designed to account for the historical, social, cultural and economic contexts that inform Indigenous peoples' rights violations. This in turn affords the courts discretion to impose onerous and inequitable procedural requirements on Indigenous claimants. For example, there are often few if any legal safeguards to prevent courts from resorting to formal/strict interpretations of procedural rules like limitation period requirements, with the effect of blocking substantive analysis of Indigenous rights claims.[36]

These deficiencies and oversights create serious obstacles for Indigenous peoples in Latin America who seek to assert their constitutional and internationally recognized rights in legal venues that are binding on their state governments: domestic courts and the Inter-American Court of Human Rights. In contrast to the intensity of the social conflict between Indigenous communities and resource companies, communities have brought relatively few cases to the courts and even fewer have been successful. For example, the Constitutional Court in Peru first recognized Indigenous consultation rights in 2008 and then decided several related cases between 2008 and 2012. However, the Court has not decided a single Indigenous right to consultation case

[36] *Ibid.*

since 2012, and only one of the decided cases has involved an Indigenous claimant asserting a specific right, the others were brought by NGOs or associations on behalf of Indigenous peoples generally. A similar pattern is observed in the inter-American system. Between 2001 and 2015 approximately eleven Indigenous or Afro-descendant property and/or consultation/consent rights related petitions against seven South and Central American member states were admitted, although not all have yet been the subject of decisions on the merits.[37] Not only is this less than one case a year for the entire region, missing from this timeframe are many countries with large Indigenous populations, including Colombia, Peru, Brazil and Mexico.

As such, a situation has emerged whereby there is relatively widespread legal or constitutional recognition of Indigenous legal rights to communal property, but comparatively few examples of these rights being invoked by specific communities in domestic legal proceedings. While a full examination of the reasons for this situation is beyond the scope of this study[38], it is clear that the progressive international recognition and domestic constitutionalization of Indigenous rights in Latin America has *not* been accompanied by the development of accessible and equitable procedures for enabling claims brought by specific communities in relation to specific foreign-owned resource extraction projects.

Adding to the inequities and obstacles that Indigenous peoples encounter in accessing domestic and international courts for the purposes of making property and consultation/consent rights claims, a second fundamental issue arises from the experience across South America with the codification of the right to consultation in national legislation. This refers to the emergence between 2011 and 2015 of statutes in four Andean countries (Bolivia, Ecuador, Colombia and

[37] Kamphuis, "Litigating Indigenous Dispossession", *ibid* at 178.
[38] For one attempt at a more fulsome explanation, see *ibid*.

Peru) that establish mechanisms and rules to govern state consultations with Indigenous peoples in relation to, *inter alia*, proposed resource extraction projects.[39] There is now an abundance of empirical research (field work) and positive law analysis that evidences the grave deficiencies in these statutes.[40] Indeed the negotiations between Indigenous communities, their allies, and the state that led up to the creation of these statutes were fraught with political conflict and in some cases communities and allies withdrew from the process in protest.[41]

There is also broad consensus that consultation processes in the region, implemented pursuant to these laws and regulations, have failed to ameliorate profound power disparities and information gaps. This includes poorly designed processes, lack of accessible and adequate information, together with inadequate or non-existent safeguards and oversight of agreements reached between communities and private or state actors. As such, there are few if any examples of consultation processes and resulting agreements that meet the standards required by international human rights law.[42]

One sign that business as usual appears to continue in spite of Indigenous rights recognition and Indigenous consultation legislation in Latin America is the reality of ongoing social conflict

[39] Patricia Urteaga-Crovetto, "Implementation of the Right to Prior Consultation in the Andean Countries: A Comparative Perspective" (2018) 50:1 J Leg Pluralism & Unofficial L 7 at 8.
[40] See for example: *ibid*; Merino & Quispe, *supra* note 10; César Rodriguez-Garavito, "Etnicidad.gov: Globla Governance, Indigneous Peoples and the Right to Prior Consultation in Social Minefields" (2011) 18:1 Indiana Journal of Global Legal Studies 263. For a summary of some of this research, see Kamphuis, "Contesting Indigenous-Industry Agreements", *supra* note 30.
[41] Deborah Delgado-Pugley, "Contesting the Limits of Consultation in the Amazon Region: On Indigenous Peoples' Demands for Free Prior and Informed Consent in Bolivia and Peru" (2013) 43 RGD 151; Claire Wright, "Indigenous Mobilisation and the Law of Consultation in Peru: A Boomerang Pattern?" (2014) 5:4 Intl Indigenous Pol'y J 1 at 8; Almut Schilling-Vacaflor & Riccarda Flemmer, "Conflict Transformation through Prior Consultation? Lessons from Peru" (2015) 47:4 J Latin Am Stud 811.
[42] For a framework setting out the required standard, see James Anaya, "Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples", UNGAOR, 24th Sess, UN Doc A/HRC/24/41 (2013).

and violence that surrounds resource extraction in the region.[43] Moreover, there is an unfortunate compounding impact between the problems with consultation and consent/agreement legislation, and the problem of inequitable and inappropriate procedural rules that function as gatekeepers to substantive judicial scrutiny of Indigenous rights claims. As described above, the research indicates that legal and political conditions in many Latin American countries generate a serious risk that Indigenous communities may enter into agreements with state entities and/or resource companies in the absence of full information and knowledge of the meaning and significance of the agreement, without a variety of safeguards and sometimes as a result of inappropriate or illegal tactics on the part of company and/or state officials. When this occurs, communities may find it difficult or even impossible to resort to the courts to challenge inequitable consultation processes and/or illegitimate "agreements" due at least in part to the lack of appropriate procedural pathways to accessing the courts for Indigenous rights claimants.

This analysis signals that Indigenous rights recognition and consultation legislation have not necessarily resulted in the achievement of concrete and substantively positive results for affected communities. This article does not presume to explore all of the complex, multifaceted and contextual reasons for this. As indicated above, the analysis developed here is primarily conceptual in that it is narrowly focused on the content and form of the law reforms that have resulted from the movement's activism.

In this regard, one relevant observation is the fact that these reforms have ultimately required Indigenous communities and their advocates to translate their concerns into the classical liberal legal frameworks of property rights and contract/free choice. When land is taken and

[43] Shin Imai, Leah Gardner & Sarah Weinberger, "The 'Canada Brand': Violence and Canadian Mining Companies in Latin America" (2017) Osgoode Legal Studies Research Paper No 17/2017, online: *SSRN* <https://ssrn.com/abstract=2886584>.

agreements are broken or misunderstood, human rights law has required Indigenous peoples to package their justice concerns as alleged violations of procedural obligations to consult, communal property rights and/or of contractual obligations in relation to benefit agreements. Researchers have observed that in both the implementation of right to consultation legislation, as well as in the judicial interpretation of procedural rules that govern the admissibility of rights claims, existing laws have allowed state and company authorities to adopt a formal equality stance to circumscribe the scope of consultations or to preclude Indigenous rights claims alleging violations from being heard on the merits.[44]

Added to this, right to consultation legislation to date has not included mechanisms that enable Indigenous peoples to effectively enforce resulting agreements with government or to challenge deficient consultation processes in the courts. In other words, the codification of the state's obligations to recognize consultation rights and seek agreements has paradoxically left the effective enforcement of this obligation unaddressed. Importantly, this reality of weak or inexistent enforcement mechanisms for state actors is consistent with the standard treatment of company obligations to consult and respect Indigenous rights as a matter of voluntary or discretionary corporate social responsibility. Legislative advances in Latin America to date have not directly addressed the legal obligations of companies in relation to Indigenous peoples and their consultation rights. For example, the formation of industry-Indigenous agreements remains entirely unregulated.[45]

These weaknesses in the regulation/enforcement of Indigenous peoples' legislated rights to consultation vis-à-vis private and public actors exist in combination with the absence of

[44] For examples of this observation as it relates to the implementation of consultation legislation, see literature cited *supra* notes 40-41. For examples of this observation as it relates to Indigenous rights litigation, see Kamphuis, "Litigating Indigenous Dispossession", supr*a* note 30.
[45] Kamphuis, "Contesting Indigenous-Industry Agreements", *supra* note 30.

appropriate procedural pathways for judicial enforcement of Indigenous constitutional rights, described above. When these gaps and deficiencies are viewed in combination, state and company obligations to consult Indigenous peoples and respect their land and natural resource related rights, are potentially rendered inaccessible and unenforceable in practice, even in the face of positive law recognizing these rights.

There is another common thread between the shortcomings of Indigenous rights principles and jurisprudence, as recognized by international human rights bodies and Latin American constitutional courts, and the creation of statutes that codify Indigenous consultation processes in the context of proposed resource extraction. The research cited in this section reveals that reform in both of these areas have insufficiently accounted for the significance of social context, power and epistemology in determining how positive law becomes meaningful and emancipatory in practice. Judicial recognition and statutory reforms to date have not adequately contended with the problem of power and the reality of longstanding and radical economic deprivation/exploitation, and social and cultural domination, of Indigenous communities at the hands of public authorities and private actors. This context has serious implications for how knowledge and agency are conceptualized within the legal constructs of property, contract, and consultation, which are fundamentally predicated on the presumption/possibility of free and informed choice (consent).

B. Right to Remedy Law Reform in Canada "Home" Country

A second major area of law reform activism taken up by the transnational mining justice movement focuses on the responsibilities of capital exporting "home states" to ensure that adequate remedies are available to those in developing countries who are harmed by their

companies' oversees operations. Discussion of law reform in Canada in this area first began in the late 1990s, intensifying after 2005, and is ongoing. The bulk of these discussions to date, and various concrete proposals, have focused on the creation of a non-judicial state-based grievance mechanism in Canada.[46] This refers to an administrative body, created by the Canadian (federal) government, and empowered to receive and investigate human rights complaints with respect to the overseas operations of Canadian resource companies. Within the frameworks of international law, calls for this kind of mechanism have invoked the human rights concepts of the victim's right to a remedy and the state's duty to protect human rights.[47]

Advocates have employed a range of strategies to support their argument that Canada should create this kind of grievance mechanism. This includes extensive empirical and documentary research to establish that Canadian mining companies are credibly linked to a range of human rights violations in connection with their overseas operations.[48] Advocates have further sought to uncover certain forms of Canadian government economic and political supports for companies who are the subject of serious allegations. Added to this, they have undertaken a variety of strategies to establish that existing remedies and mechanisms in Canada are inadequate.[49]

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[46] As stated earlier, there has been disagreement among movement participants regarding the strategic value of home-state grievance mechanisms as a priority area for law reform. More recently, some Canadian organizations have begun to focus on proposals for corporate due diligence legislation. So far relatively less attention has been given to the development of concrete law reform proposals to improve access to civil law remedies in Canadian courts. At present, only a few civil cases have overcome the formidable procedural obstacles to admissibility, no claim has been decided on the merits and one claim has settled.

[47] Sara L Seck, "Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights" (2011) 49 Can YB Intl L 51; Kamphuis & Gardner, *supra* note 22.

[48] See for example: House of Commons Standing Committee on Foreign Affairs and International Trade (2005) Mining in Developing Countries: Corporate Social Responsibility. 38th Parl, 1st Sess, 14th Rep, http://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14; Working Group on Mining and Human Rights in Latin America (2013) The impact of Canadian Mining in Latin America and Canada's Responsibility: Executive Summary of the Report submitted to the Inter-American Commission on Human Rights, http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf; Imai et al, *supra* note 43.

[49] See for example: Above Ground, MiningWatch Canada and OECD Watch (2016) "Canada is Back" but Still Far Behind – An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational

Finally, advocates have brought these concerns to international human rights tribunals, who have in turn issued numerous statements that together establish an emerging consensus that Canada has a duty to ensure access to effective remedies in Canada for harms caused by its corporate nationals abroad.[50]

Initially, the Canadian government responded by creating two different mechanisms, the Canadian National Contact Point (2000) and the Corporate Social Responsibility (CSR) Counsellor (2009 and 2014), each with a similar mandate to receive complaints and mediate if all parties consent. The standards that govern these mechanisms are non-binding and both lack any power to investigate, make findings of fact or require action or remedy from any party. Numerous studies and international bodies have concluded that they are not effective in providing remedies for alleged harm, resolving conflicts, or improving the situation of mine-affected communities.[51]

With this background, the mining justice movement in Canada proposed an Ombudsperson, an agency with the power to fully investigate alleged human rights violations perpetrated by Canadian industries overseas. In the civil society proposal, this included the power to compel the participation of the company respondent, including the production of documents, to make findings of fact, and to make these available to the public. This also included the power to make recommendations: to the company with respect to reparations or other actions linked to

Enterprises, https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf; Canadian Network for Corporate Accountability & Justice & Corporate Accountability Project (2014) Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations. Inter-American Commission on Human Rights, Thematic Hearing for 153rd Period of Sessions, http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada_mining_cidh_oct_28_2014_final.pdf. For a comprehensive survey of these strategies, see Kamphuis, "Home-State Grievance Mechanisms", *supra* note 21.

[50] See for example UNESC, Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Canada, UN Doc E/C.12/CAN/CO/6 (2016), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCAN%2fCO%2f6&Lang=en, at para 15. For a comprehensive summary of these statements see: Kamphuis & Gardner, *supra* note 22 at 89-91.

[51] See literature cited at *supra* note 49.

remedies, as well as to government with respect to appropriate responses or policies, including potentially withdrawing financial and political support for a company found responsible for a violation. In this proposal, financial support referred to loans from Export Development Canada (a crown corporation) and political support referred to diplomatic support through embassies and trade officials.

Significantly, in their proposal, Canadian civil society decided *not* to demand that the proposed Ombudsperson would have the power to *enforce* remedies or sanctions.[52] Thus advocates made a strategic choice to orient their proposal toward strong investigatory powers and transparency provisions, with weak or no enforcement power. As such, the worst direct outcome for a company under the proposed regime was a negative final report and the loss of certain federal government supports. The company could have continued to operate in Canada under provincial law and could have therefore avoided compliance with recommended remedies.

There was much celebration in early 2018 when the Canadian government publicly announced its intention to create a Canadian Ombudsperson for Responsible Enterprise (CORE) with a number of key features that aligned with the civil society proposal. This was an extraordinary step forward after many years of government resistance and inaction. However, the status of this achievement quickly fell into question. Following this announcement, the government faced intense opposition from industry representatives who lobbied vigorously against the government's planned approach.[53] After 15 months of delay, in April 2019 the Prime

[52] In the civil society proposal, the Ombudsperson could resort to the courts and seek judicial review of the Canadian government's refusal to respond to a recommendation.

[53] Justice and Corporate Accountability Project, "Lobbying by mining industry on the proposed Canadian Ombudsperson for Responsible Enterprise (CORE)" (24 July 2019), online: *JCAP* <https://justice-project.org/wp-content/uploads/2019/07/2.-Report-on-Lobbying-by-Mining-Industry-july-24fin.pdf>. This was not the first time that industry marshalled an intensive lobby campaign to counter a law reform proposal supported by Canadian civil society, see Catherine Coumans, "Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms" (2012) 45:3 UBC L Rev 651.

Minister's Office finally created the CORE with an Order-in-Council (OIC).[54] However, the details revealed that the government had stripped the Ombudsperson of all of the features that would make it effective. The CORE as created is not independent from government, has no power to compel the production of documents, and has no power to enforce remedies or sanctions.

Perhaps most shocking, the new CORE included provisions that would have allowed companies to file complaints, and seek remedies, against civil society groups for "unfounded human rights allegations". Unfortunately, this kind of provision is not new to Canadian policy in this area, as a version of it first appeared in the 2009 CSR policy, referred to above.[55] While the government ultimately decided to remove this provision from the CORE terms of reference about six months later,[56] its decision to adopt such a provision in both the 2009 and 2019 versions of its framework is deeply troubling for at least two reasons. First, there is strong evidence that companies are more than capable of availing themselves of existing civil laws available to seek remedies for unfounded allegations (defamation).[57] Moreover, it is well documented that companies are willing to abuse defamation laws to silence their critics.[58] Indeed, in recent years, several Canadian provinces have enacted legislation to address this problem.[59] As such, there is

[54] *Order Setting out the Mandate of the Special Adviser to the Minister for International Trade, to be known as the Canadian Ombudsperson for Responsible Enterpriser*, PC 2019-0299 (2019), online: *Government of Canada* <https://orders-in-council.canada.ca/attachment.php?attach=37587&lang=en> (an OIC is a unilateral decision of the federal executive, or Cabinet, that is made known when it is published online and in the Canada Gazette, but is not discussed or voted on in Parliament).
[55] For analysis of this provision, see Charis Kamphuis, "Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account" (2012) 13:9 German L J 1456 [Kamphuis, "Canadian Mining Companies and Domestic Law Reform"].
[56] The OIC was updated on September 2019: *Canadian Ombudsperson for Responsible Enterprise*, Schedule, PC 2019-1323 (2019), online: Government of Canada <https://orders-in-council.canada.ca/attachment.php?attach=38652&lang=en>.
[57] Susan Lott, "Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada" (September 2004), online: *Public Interest Advocacy Centre* <https://www.piac.ca/wp-content/uploads/2014/11/slapps.pdf>.
[58] Byron Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (Waterloo: Wilfrid Laurier University Press, 2014).
[59] *Protection of Public Participation Act*, SO 2015, c 23; *Protection of Public Participation Act*, SBC 2019, c 3.

no basis for the government's apparent conclusion that companies are suffering from inadequate remedies or access to justice problems vis-à-vis their critics.

Second, the government's decision to allow companies to use the Ombudsperson to complain about human rights activists cynically contorts a mechanism whose ostensible purpose was to address the problem of inadequate remedies for human rights abuses perpetrated by transnational companies in developing countries. This contortion reflects a logic of false equivalence (or formal equality) between companies on one hand, and affected communities and human rights activists on the other. This formalist approach negates the well-documented problem of corporate impunity and the economic, legal and political power imbalance between corporations and those affected by their operations.

The extensive work of the mining justice movement in advocating for access to remedies in Canada has made a significant contribution to raising the profile of these issues, in conceptualizing law and policy responses, and in shaping the international law conversation. Notwithstanding these major achievements, at present, the outcome of these efforts is rather dismal. After nearly two decades of extensive research, numerous reports, strong statements from international human rights bodies, and significant debate and discussion at the federal level, including in Parliament and at parliamentary committee hearings, advocates have been unable to convince the Canadian government to create an effective home-state non-judicial grievance mechanism. In spite of election promises, and even public commitments once in power, federal political leaders have reneged and remained unwilling to create an investigatory body that is independent and has adequate power to acquire the relevant evidence, ensure that harms are remedied, and require government to halt support for problem companies. Civil society

organizations were so appalled by the end result, that in 2019 they collectively resigned in protest from the government created Multi-Stakeholder Advisory Board.[60]

Like the Latin American case study referred to above, this Canadian case study forces the question of why the sustained advocacy and mobilization of this social movement over nearly two decades has thus far been unable to achieve law reform results that approximate its goals and vision. As before, this article's analysis of this complex question is conceptual, and by no means comprehensive. It does not even begin to flesh out and analyze the larger political, legal and economic contexts that have impacted this outcome, such as for example the role of corporate lobbying.[61] At this stage the discussion is limited to some narrow, albeit important, observations about the strategic and conceptual choices that advocates have made to date in their law reform efforts in Canada.

As mentioned, for the past decade, some proponents for corporate accountability have devoted significant effort to pursuing the idea of a Canadian federal agency empowered to receive complaints from alleged victims of human rights abuses in connection with Canadian resource extraction projects abroad. These advocates have argued that this agency, or Ombudsperson, must be independent from government, and with the power to undertake mandatory and thorough investigations followed by public reporting requirements. They calculated that they would be more likely to obtain an agency with these features alone, than an agency with additional enforcement powers. Likewise, this included a focus on advocating for an Ombudsperson with

[60] Canadian Network on Corporate Accountability, News Release, "Government of Canada turns back on communities harmed by Canadian mining overseas, loses trust of Canadian civil society" (11 July 2019), online: *CNCA* <http://cnca-rcrce.ca/recent-works/news-release-government-of-canada-turns-back-on-communities-harmed-by-canadian-mining-overseas-loses-trust-of-canadian-civil-society/>.

[61] See for example research cited above: *supra* note 53. For a very insightful study of the impact of corporate capture on domestic Canadian environmental policy, see Jason MacLean, "Regulatory Capture and the Role of Academics in Public Policymaking: Lessons from Canada's Environmental Regulatory Review Process" (2019) 52:2 UBC L Rev 479 [MacLean, "Regulatory Capture"].

the power to make policy recommendations to government, including for the withdrawal of financial and political support for problem companies. In this civil society proposal, the agency could pursue judicial review of government inaction in response to the Ombudsperson's recommendations.[62]

These strategic trade-offs have meant that the civil society proposed mechanism would have been much weaker than Canada's existing federal and provincial human rights bodies with a territorial focus.[63] The proposal also fell significantly short of the emerging international consensus on what is required for home-state non-judicial mechanisms to be effective in relation to the objective of remedying the harms that flow from transnational human rights violations.[64] Yet even this compromise proposal has not gained traction with the Canadian government and industry.

This summary helps isolate two defining characteristics of the pragmatic approach to law reform taken by proponents of the Ombudsperson proposal. The first is a pragmatic approach to regulation. As mentioned, advocates intentionally avoided proposals that include an agency with the power to *enforce* remedies and sanctions.[65] As such, these proposals adopted a self-regulation or voluntary approach when it comes to *remedy* for harm. I refer to this as a pragmatic decision because many members of the movement are proponents of improving access to remedy and are highly critical of voluntary approaches, which are part-and-parcel of the neoliberal economic arrangements that they oppose.

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[62] For a full summary of the Ombudsperson as proposed by civil society, see Kamphuis, "Home-State Grievance Mechanism", *supra* note 21.
[63] This refers to the Canadian Human Rights Commission, and provincial commissions, which are connected to quasi-judicial human rights tribunals.
[64] Kamphuis & Gardner, *supra* note 22.
[65] In the civil society proposal, the Ombudsperson's enforcement power was limited to the power to compel disclosure of documents.

Strategically, advocates hoped that strong provisions for getting to the truth and making it public (investigation, the power to order disclosure and mandatory transparency) would generate sufficient public pressure on companies to follow a recommended course of action (ie remedy). Thus, even though the civil society proposal includes some mandatory features, it nonetheless also has some resonance with neo-liberal regulatory approaches, where attention is dedicated to transparency with the assumption that companies will voluntarily adjust their behavior in response to public pressure.[66] For example, this is the same logic behind many industry-backed initiatives, like Publish What you Pay, the Extractive Industries Transparency Initiatives, or the Canadian *Extractive Sector Transparency Measures Act*, which all focus solely on transparency.

The second key feature of the civil society approach to the Ombudsperson is its concept of the relationship between the state and the private sector. Recall that the sole sanction component of the civil society proposal was the potential withdrawal of state financial and political support for a specific company. While this certainly reflects one dimension of the current relationship between the Canadian state and Canadian companies, a wider view reveals that this relationship also manifests in the Canadian state's role in constituting foreign investment markets and in enabling and facilitating the industry itself.[67] For example, the Canadian state (federal and/or provincial) has a role in: enabling the formation of companies in Canada through corporate law; establishing the terms according to which companies raise capital through securities law; determining the rules that govern the taxes they owe the public through corporate tax law and tax treaties; providing companies with privileged access to foreign government decision-makers

[66] See Ronen Shamir, "Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony" in Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, eds, *Law and Globalization from Below* (New York: Cambridge University Press, 2005) 92, cited below in section 3.C.1 for a discussion of voluntary regulation as a response to social movement demands for corporate accountability.

[67] For a more extensive discussion of this point in relation to earlier law reform proposals, see Kamphuis, "Canadian Mining Companies and Domestic Law Reform", *supra* note 55.

through services provided by Canadian embassies and the larger foreign service; and establishing the rules that govern companies' foreign investments through investment law and treaties. This list highlights some of the areas where the Canadian state takes a range of positive steps to shape and enable the market and the industry.

This also helps put civil society's focus in its law reform proposal on political support, through special services provided to companies by the Canadian foreign service, and financial support, through preferential loans and insurance provided by Canada's export credit agency (Export Development Canada or EDC) into context.[68] The focus on withdrawing political and economic services as the sole form of regulatory sanction tacitly accepts the state-company relationship as a direct bilateral relationship, similar to the logic of private contract, where the state appears to operate as a private contracting party, instead of as a public regulator. This is not to say that these contractual relationships don't formally exist or are not relevant, indeed EDC support is issued pursuant to a contract and more recently Canadian diplomatic support also requires companies to sign an agreement called an Integrity Declaration in exchange for various support services (wherein the company is referred to as the government's client).[69] The point here is to highlight that civil society's approach to public regulation has attempted to infuse this contractual relationship with certain human rights conditions. However, this attempt to add new terms to the

[68] For some examples of case studies depicting these forms of support, see Jen Moore & Gillian Colgrove, "Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy" (2013), online (pdf): *MiningWatch Canada, United Steelworkers & Common Frontiers* <https://miningwatch.ca/sites/default/files/blackfire_embassy_reportweb.pdf>; Jen Moore, "Unearthing Canadian Complicity: Excellon Resources, the Canadian Embassy, and the Violation of Land and Labour Rights in Durango, Mexico" (2015), online (pdf): *MiningWatch Canada & United Steelworkers* <https://miningwatch.ca/sites/default/files/excellon_report_2015-02-23.pdf>; Above Ground, "Anti-Corruption and Export Development Canada: Recommendations for an Effective Policy and Improved Regulatory Oversight" (2018), *Above Ground* <https://aboveground.ngo/wp-content/uploads/2018/04/Anti-corruption-and-EDC-Above-Ground-report.pdf>.

[69] Government of Canada, "About Canada Trade Missions", online: https://www.international.gc.ca/trade-commerce/trade_events-evenements_commerciaux/trade_missions-missions_commerciales/about-a_propos.aspx?lang=eng&_ga=2.223401883.1471054383.1581707825-1103413297.1566577377

contract has not challenged or changed the fundamental logic of casting the state-company relationship as one of private contract. On its own, this approach omits from view the multifaceted, proactive structural and systemic role of the Canadian state in constituting the market and the sector.

This analysis reveals that Canadian mining justice advocates' home-state grievance mechanism law reform proposals significantly, albeit inadvertently, resonate with neo-liberal approaches to regulation, the state and the company. In this approach, transparency/reporting is the goal of the investigation, remedies for human rights violations remain voluntary, and the Canadian state's relationship with the company is narrowly defined in terms of contract. It is important to acknowledge that this approach was the product of a pragmatic trade off in that advocates hoped that it would be relatively more politically palatable to government and industry. This article does not aim to second guess or criticize these difficult strategic choices, which are shaped by numerous constraints and factors. Rather, it seeks greater insight into these trade-offs by examining this pragmatic approach to law and regulation conceptually. Here this examination highlights apparent contradictions between these civil society-based law reform proposals (and their state-controlled outcomes) and the movement's political and philosophical opposition to neo-liberalism as a political and economic system, that is not only unjust and antithetical to meaningful respect for human rights, but is also fundamentally predicated on formalism, voluntarism and privatism.

In other words, the analysis here suggests that activists concerned with inadequate state regulation and remedies have made pragmatic choices that (perhaps paradoxically) find them promoting a law reform proposal that reflects a voluntary model of regulation (re remedy), and tacitly accepts the role of the state as a provider of political and economic services to companies.

Ultimately, the Canadian government's 2019 Ombudsperson regime maintained this voluntary approach, added in (at least initially) the formal equality dimensions discussed above, and even discarded the features necessary for adequate reporting/transparency. Unfortunately, civil society's strategic trade-offs in formulating its proposal appear to have had little success in securing law reforms that align with the substantive change that the movement desires.

C. Themes & Common Problems

The introduction to this section described how the regulation of Indigenous peoples' right to consultation in Latin America, and access to remedy law reform proposals and outcomes in Canada, are both a product of the activism of the transnational mining justice social movement, often working in conjunction or overlapping with other social movements.

These two case studies share a common focus on activists seeking to create new state-based regulation of the harms potentially generated by private sector activities (resource extraction). The recognition of the right to consultation and its legal regulation in the Latin American context emanated from the domestic judiciary and the state (respectively) in response to Indigenous peoples' resource-related protests, advocacy and litigation on one hand, and norm development in international courts, on the other. In the Canadian context, the movement focused on developing proposals for a home-state non-judicial grievance mechanism, most recently called the Canadian Ombudsperson for Responsible Enterprise. Thus, these two case studies share a common focus on those instances where the movement has demanded that the state develop new legislation and create new processes (consultation and investigation/remedies) to respond to the movement's specific justice demands. Notably, in both case studies these regulation-oriented law reform efforts

emerged on the heels of private law litigation against companies (Canada) and public law litigation claiming constitutional rights (Latin America).

There are also commonalities in the limitations that emerge from the reforms ultimately adopted in each context. In the Latin American context, the judicial recognition of Indigenous rights to property and consultation/consent have not addressed the issue of whether or not the existing rules of civil procedure that ultimately mediate rights claims are appropriate, given Indigenous peoples' social, cultural and economic context. This contributes to a situation where, even decades after the judicial recognition of rights, massive social protests are common and very few communities have brought their rights claims to the courts. Likewise, the regulation of the right to consultation has lacked effective enforcement and oversight mechanisms and has failed to create the conditions necessary to ensure that communities can obtain just and equitable agreements. Thus, there is a yawning gap between positive law and the conditions and mechanisms required to make it meaningful.

In Canada, civil society law reform proposals to advance the right to remedy for mine-affected communities abroad have also had mixed results. As described above, the movement made strategic choices in the framing of its most recent proposal, first, by adopting a relatively narrow (contractual) view of the Canadian state's support for companies, and second, by trading enforcement of remedy provisions in the hope of strong independent and transparent investigations. While the campaign around the proposal certainly generated greater public awareness, including in the Canadian financial press,[70] unfortunately, the trade-off did not materialize as hoped. The resulting mechanism is weak, not only from a remedy perspective, but it retains inadequate reporting/investigation powers. Moreover, at first the result appeared to be

[70] For one example, see Gabe Friedman, "'Lobbied to death': Liberals face backlash over corporate responsibility ombudsman" *Financial Post*, April 8, 2019.

even worse than the status quo when the government was initially willing to adopt a bizarre formal equality logic that would have allowed companies to use this purported human rights mechanism to request an investigation of human rights activists.

Thus, notwithstanding the remarkable strengths, commitments and tactics of the mining justice movement, another common thread that unites these two case studies is the prevalence of three liberal and neo-liberal approaches to law, imbedded in both law reform outcomes: (1) formal equality treatment of actors that ignores power (formalism); (2) inadequate or inexistent enforcement mechanisms that effectively amount to voluntary treatment of state and company legal obligations (voluntarism); and (3) a view of the state as a private/economic actor rather than a public regulator (privatism). This analysis reveals that the social movement's legal strategies, developed in a human rights law framework, have been unable to overcome imbedded liberal and neo-liberal concepts of the state, the individual/community and the private sector. These concepts have ultimately shaped the law reforms that resulted from the movement's activism, to the dismay of many movement participants.

3. Theorizing the Mining Justice Movement's Law Reform Activism

The observations presented in the previous section provide an entry point into a rich tradition of debate on the question of how to theorize the relationship between progressive movements and the law in liberal and neo-liberal legal orders. The next section turns to examine four approaches that directly grapple with this question: pragmatism, left critique, critical legal liberalism, and counter-hegemony. This review identifies the assumptions, propositions and conceptual tools in each approach in an effort to isolate analyses, critique and prescriptions that offer insight into the successes and limitations of the mining justice social movement's law reform

outcomes, described above. As such, the discussion represents a survey of some important thinkers in each area, rather than a comprehensive assessment of any given theoretical tradition.

A. Pragmatism

For the purposes of this discussion, pragmatism is understood both as a philosophy of social movement activism and action, and as an approach to studying social movement's use of the law. Among the texts discussed in this section, two take a pragmatic approach to the study of social movements (Kennedy 2001; Sarat & Scheingold), another studies social movement pragmatism (Kennedy 2013), while the fourth blends these distinct lines of inquiry (White & Perelman). The significance of these distinctions is taken up in more detail at the end of this section. This section begins with a summary of the treatment of pragmatism by these authors in the context of social movement lawyering, and then goes on to analyze the value of their insights in relation to the mining justice social movement.

1. Pragmatism and Human Rights Lawyering

The analytical frame (described in section 1 above) that Sarat and Scheingold use to study social movement lawyering is implicitly built upon a particular definition of pragmatism. They evaluate the efficacy of lawyering in terms of its ability to maximize the movement's capacity to approximate its moral vision of a better society. As stated previously, Sarat and Scheingold's central thesis is that lawyering tactics will be most effective if they are able to exploit the cultural resonance of legality and rights in favor of the movement's objectives.

In an essay first published in 2001, David Kennedy also takes a pragmatic approach in his critical analysis of the international human rights movement.[71] Kennedy poses this question: "assuming the goals and intentions of humanitarian action are clear, how can we improve our ability to assess whether humanitarian work in fact contributes more to 'the solution' than to 'the problem'?"[72] To answer this question, Kennedy argues that one must weigh the "benefits" against the "costs" generated by the movement. While the bulk of his essay is dedicated to developing hypotheses about possible costs, Kennedy also briefly defines what he views to be indicators of movement success. He argues that the "benefits" of the movement materialize in the form of "distributions of power, status, and means" in favor of those who share its objectives.[73]

In a follow up essay published in 2013, Kennedy takes the position that it is now more accurate to speak of international human rights as a regime rather than a movement.[74] He uses the term "regime" to refer to human rights both as a professional practice and as a practice of governance. Kennedy argues that human rights in this sense currently suffer from two "dangers": idolatry and pragmatism.[75] In this framework, idolatry refers to the veneration of classical human rights tools and norms, such that advocates become blind to other approaches to human emancipation, other issues of injustice not easily captured by human rights frames, or the unintended costs of human rights victories. On the other hand, Kennedy defines pragmatism as participation in governance, which includes the use of instrumental reasoning and the weighing of costs and benefits.[76] Pragmatism provokes significant concerns for Kennedy, indeed, he states that

[71] David Kennedy, "The International Human Rights Movement: Part of the Problem?" (2001) 3 Eur HRL Rev 245.
[72] *Ibid* at 4.
[73] *Ibid*.
[74] David Kennedy, "The International Human Rights Regime: Still Part of the Problem?" in Rob Dickinson et al, eds, *Examining Critical Perspectives on Human Rights* (New York: Cambridge University Press, 2013) 19 at 19.
[75] *Ibid* at 22 (Kennedy understands idolatry and pragmatism in a dialectic relationship, in that each one is the antidote for the other).
[76] *Ibid* at 22-3.

the "most significant challenges for the human rights movement in the years ahead will be to understand what it means to be a participant in governance".[77]

To resolve the idolatry/pragmatism conundrum, Kennedy argues that human rights proponents must acknowledge humanism as a political project, together with the concomitant fact that the practice of human rights involves making political decisions, increasingly as "rulers".[78] In this context, Kennedy calls for humanitarian professionals to engage in "responsible rulership", defined as a willingness to exercise power, participate in political conflict, and responsibly exercise human freedom, which he contrasts with "the ethical self-confidence of idolatry or the evasions of instrumental reason".[79] Yet in spite of his forward looking prescription for human rights practice, Kennedy ultimately forecasts the decline of human rights as a politically relevant project with the potential to productively address pressing global concerns of climate and social inequality.

Lucie White and Jeremy Perelman also reflect on pragmatism in their case study of human rights campaigns that have unfolded on the African continent in relation to social and economic issues.[80] Drawing on these experiences, they endeavor to theorize the "on the ground" human rights practices of African lawyers, all of whom view their legal activism as a political practice.[81] In doing so, White and Perelman observe two common "strategic patterns of engagement" among activists: pragmatism and performance.[82] In their analysis, pragmatism is defined by activists' conscious decision to engage in human rights activism in spite of their awareness of the limits of

[77] *Ibid* at 27.
[78] *Ibid* at 23.
[79] *Ibid* at 32-3.
[80] Lucie E White & Jeremy Perelman, eds, *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford: Stanford University Press, 2011) [White & Perelman, *Stones of Hope*].
[81] Lucie E White & Jeremy Perelman, "Introduction" in White & Perelman, *Stones of Hope*, *ibid*, 1 at 2-3 [White & Perelman, "Introduction"].
[82] Lucie E White & Jeremy Perelman, "Stones of Hope: Experience and Theory in African Economic and Social Rights Activism" in White & Perelman, *Stones of Hope, ibid*, 149 at 149 [White & Perelman, "Experience and Theory"].

human rights as a liberal legal form.[83] White and Perelman argue that in doing so, activists attempt to "devise a new kind of [rights] practice" that goes beyond formalistic legal practice and is capable of framing public debate, influencing political will and spurring a social movement.[84]

Building on this definition of activist pragmatism, White and Perelman identify three features of the pragmatic practices observed in their study. More than just characteristics, these features are essentially theories of effective movement tactics. The first is the belief that litigation is not the best method for achieving economic and social rights objectives, but that under certain conditions, and together with a toolbox of other political tactics, it can be used to help build the strategic power of a movement's campaign.[85] The second is a concerted focus on the state as a target of advocacy, which includes multiple public actors and domains.[86] However, White and Perelman report that there is no consensus among activists on the degree to which the state should be prioritized among other possible targets of advocacy. In fact, they argue that the third feature of activist pragmatism is its explicit willingness to engage both private and public actors.[87] White and Perelman observe that the advocates in their study "reject the moral logic of the public/private divide."[88]

Turning to the movement's goals (ends), White and Perelman identify two main objectives, first, the disruption of inequitable social and economic patterns, and second, sustainable institutional change.[89] However, they also identify a common set of normative commitments

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[83] For a similar conclusion in another context, see Buchanan & Chaparro, "Transnational Advocacy", *supra* note 23.
[84] White & Perelman, "Experience and Theory", *supra* note 82 at 149-50.
[85] *Ibid* at 150.
[86] *Ibid* at 151.
[87] *Ibid* at 152.
[88] *Ibid*.
[89] *Ibid* at 167-171. The second of these two objectives is described at length in another chapter of the same book, see Peter Houtzager & Lucie E White, "The Long Arc of Pragmatic Economic and Social Rights Advocacy" in White & Perelman, *Stones of Hope, supra* note 80, 172 at 172-94.

among the activists they study. Specifically, these activists are committed to engaging with liberal legalism from a critical perspective, to incorporating an ethos of critical epistemological pluralism into their human rights work, and to prioritizing the possible redistributive outcomes of their political practices.[90]

2. Pragmatism and the Mining Justice Movement

This section distils three key themes at play in the literature reviewed above, and considers their significance for the law reform experiences of the mining justice movement as described in the previous section.

Pragmatic Study vs. Movement Pragmatism

The concepts and frameworks discussed above reflect two different approaches, the first is the study of social movement pragmatism on one hand, and the second is the pragmatic study of social movements, on the other. The latter of these is concerned with the extent to which a social movement achieves particular results, however defined. In this vein, Kennedy (2001) enquires into the "costs" of the human rights movement, and Sarat and Scheingold are concerned with the degree to which social movement lawyers are able to exploit the cultural resonance of rights and legality.

In contrast, a study of social movement pragmatism examines how social movements employ pragmatism as a philosophical approach to engaging with law to achieve the changes they seek. This is the approach taken by Kennedy in his 2013 essay where he conveys caution about pragmatism among human rights practitioners. Interestingly, White & Perelman's study melds

[90] *Ibid* at 155.

these two approaches together. While they specifically theorize social movement pragmatism, they also dedicate considerable energy to measuring the social movement's capacity to achieve a specific result, namely that of structural institutional change.

The distinction between pragmatism as an object of study and pragmatism as an approach to study assists in analyzing the mining justice movement's engagement in law reform. It also reveals that this study combines both elements. On one hand it studies social movement pragmatism, such as the mining justice movement's pragmatic decision to use liberal legal human rights forms (consultation, remedy) to argue in favor of law reform. Another example is the movement's pragmatic trade off in Canada between transparent investigations and enforceable remedies. In this specific sense, this study resembles White and Perleman's and Kennedy's (2013) examination of social movement pragmatism. At the same time, this study is also pragmatic in the sense described by Sarat & Scheingold, in that it examines the movement's law reform efforts in terms of their success in achieving a desired result, normative goal or ideal, and in the sense proposed by Kennedy (2001) in that it endeavors to identify unintended costs.

Definitions of Pragmatism

A second group of observations relate to the definitions of social movement pragmatism that the authors reviewed here employ. Recall that Sarat & Scheingold define pragmatism as the use of political tactics, primarily outside of the law, to exploit law's cultural renaissance in an effort to garner broad support of the movement's normative vision. Kennedy (2013) defines pragmatism as the conversion of the movement's practices into professional practices and practices of governance. Finally, White and Perelman define pragmatism as the conscious use of a legal

form (human rights) that is perceived to be problematic but that is employed strategically in the pursuit of some normative end that aligns with deeper values (pluralism and redistribution).

These conceptions of movement pragmatism are not necessarily incompatible; rather they highlight that there is a possible range of pragmatic practices that a movement may take up at any given time, or even simultaneously. This reveals that the mining justice movement has been pragmatic in the ways described here. It has employed many tactics outside of positive law to exploit the cultural renaissance of international human rights norms in order to advocate for domestic law reform. In both case studies discussed here (right to remedy in Canada and right to consultation in Latin America), movement actors formed coalitions and focused on the state as a target of advocacy in an effort to engage in the "practice of governance", referring to concerted discussions of the contours of proposed new legislation. Finally, movement actors have attempted to use liberal legal forms strategically by infusing them with community/Indigenous perspectives (pluralism), and to achieve greater accountability for the distribution of the costs and benefits of resource extraction. However, in this final area, that of shifting economic, political and cultural power, the largest gap appears to emerge between the law reforms that have ultimately resulted from the movement's efforts, and its ideals of pluralism and redistribution.

Pragmatism and Normative Commitments

Another item of interest is the way that the authors reviewed here locate ethics, principles and normative commitments in their analysis. Norms emerge in Sarat and Scheingold's analysis in their identification of the social movement's ends. The movement is defined by its pursuit of a social arrangement that is more acceptable in moral terms ("a different better society"), an ideal

that they suggest is never fully realizable.[91] They write that for cause lawyers, "the Good is known in the causes for which they work even as its realization may be deferred."[92] Part One of this article described in general terms some of the features of "the Good" or the "better society" sought by the mining justice movement.

The relationship between pragmatic social movement practices and ethics or normative commitments is also a theme in White and Perleman's article. While they describe the activists in their study as fundamentally pragmatic, at the same time they observe these activists to be operating within the bounds of a consistent and identifiable ethical framework that guides and orients their pragmatism in some respect. Notably, in the law reform case studies described in Part Two of this article, governments created mechanisms to facilitate civil society participation in law reform discussions relating to consultation laws in Latin American and the Ombudsperson in Canada (2018 and 2019). However, when the government's course veered too far away from core movement principles (for example, with respect to the effectiveness of the Ombudsperson as a tool for corporate accountability, or with respect to meaningful consultation processes for Indigenous communities), civil society partners and/or Indigenous organizations withdrew in protest. Thus, pragmatic decisions to participate in governance were limited by certain principled commitments, which were ultimately put to the test.

As stated previously, in his 2001 article Kennedy takes the position that there is never a consensus regarding a movement's normative goals. Rather, he opts for a materialist definition of movement goals, proposing that the success (benefits) of the movement can be evaluated in terms of the redistribution of power, resources and status toward those who share the movement's goals.

[91] For this idea they cite Judith Butler, "Deconstruction and the Possibility of Justice: Comments on Bernasconi, Cornell, Miller, Weber" (1990) 11:5-6 Cardozo L Rev 1716 cited in Sarat & Scheingold, *supra* note 14 at 9.
[92] Sarat & Scheingold, *supra* note 14 at 10.

For him, participation in the social movement raises the ethical obligation to reflect on the possible negative outcomes (costs) of the movement and weighing these against its positive achievements (benefits). While Kennedy acknowledges that different individuals will see and value costs and benefits in different ways, he asserts that this does not deter from the ethical duty to weigh costs and benefits. This theme is extended in his 2013 follow up article where he argues that to the extent that movement participants pragmatically become powerholders, they must engage in "responsible rulership". In sum, Kennedy shifts the focus away from the movement's normative vision and toward a series of ethical concerns about the movement itself. His goal is to develop and defend a concept of movement ethics or a normative framework that might guide movement pragmatism.

The discussion in Part Two, examining the limitations associated with the mining justice movement's law reform outcomes, reflects Kennedy's proposal to identify potential costs of the decision of some movement actors to participate in governance through law reform advocacy. In this regard, studies have concluded that in Latin America, rights recognition without appropriate and equitable procedural pathways, and consultation legislation that fails to account for colonial histories, power and epistemology, have carried unintended costs. This includes for example legitimizing unfair agreements between communities and companies/the state while at the same time insulating these agreements from judicial scrutiny. In other words, where the legal recognition of human rights claims leaves the status quo of business as usual unaddressed in practice, there is a risk that powerful actors will appeal to human rights norms to legitimate the status quo. This is most crudely depicted in the Canadian case study where advocacy for a non-judicial human rights remedy in Canada has twice resulted in a mechanism that also allows companies to bring complaints against human rights activists.

This summary highlights that the "weighing" process that Kennedy proposes is difficult to undertake in practice. State recognition of the right to consultation and the right to remedy has certainly strengthened the movement's capacity to appeal to the "cultural resonance" of these rights, thereby potentially influencing state and company conduct for the better. However, the countervailing cost of inadequate or partial reforms that legitimate unfair outcomes is a serious concern. While Kennedy's assertion, that there is an ethical duty to weigh costs and benefits, is well received, he offers little guidance on how exactly this might be undertaken.

These different accounts of the location of normative and ethical concerns in relation to social movement pragmatism suggest that there are at least three different ways of emphasizing principle in relation to pragmatism: (1) in the movement's ends; (2) in the movement's values; and (3) in the movement's ethical responsibilities. In the first, the movement's normative commitment is to its ultimate goal or ideal form of social change. In the second, the movement undertakes its work within the constraints of certain movement values. And in the third, the movement is charged with an ethical commitment to weigh the costs and benefits of its achievements.

Summary: insights from pragmatism for the study

The discussion above reveals that pragmatism is an approach that offers helpful tools for this article's analysis of the mining justice movement and the limitations of its law reform outcomes to date. Taken together, the authors cited here make three contributions to this article's research question. First, they help to characterize this study as a pragmatic study of the mining justice movement, as well as a study of the movement's pragmatism. Second, they provide a spectrum of definitions of pragmatism that help conceptualize different aspects of the movement's pragmatism. Finally, they establish the importance of identifying the relationship between

normative commitments, and the movement's pragmatic practices. For example, both case studies in Part 2 included examples where movement actors decided to withdraw from participation in governance in the name of their values.

However, Kennedy's assertion that movements undertake a balancing exercise between the costs and benefits of their achievements is particularly pertinent. This highlights not only that movements may fall short of their goals, but that engagement with law may generate costs. In the study undertaken here, both issues emerge. While the movement has achieved definite gains in raising the public profile if its concerns, in other respects its law reform outcomes fell short of its goals when the state responded by adopting legal instruments that perpetuate problematic liberal or neoliberal forms. The next section will shed greater light on this issue and in particular the challenge that inheres in evaluating the net outcome of countervailing wins and losses.

B. Left Critique and Critical Legal Liberalism

The discussion above hints that social movement pragmatism and the pragmatic study of social movements are both inevitably laden with a particular relationship with liberalism. Recall that Sarat and Scheingold define progressive social movements, in part, by their interaction with power holders, protest, and the pursuit of societal change. Where liberalism is the dominant organizing philosophy of a particular society, social movements must necessarily contend with liberal institutions, legal frameworks and subjectivities in the formulation of their ends and means. In Part Two, this article described how the mining justice movement developed specific law reform proposals in its attempt to transform the relations that characterize resource extraction. It also analyzed how the reforms ultimately adopted by the state have incorporated and perpetuated certain liberal and neo-liberal frameworks and assumptions.

Critical legal scholars have focused on theorizing the relationship between progressive activists, the law and liberalism. This section will review two contributions to the topic: that of Wendy Brown and Janet Halley, followed by that of Lucie White and Jeremy Perelman. These two pairs of authors each make their contributions as the editors of a collection of book chapters. Thus, their reflections are particularly helpful as they center on developing a theoretical framework for understanding the range of empirical contexts studied in each book's case study-based chapters.

1. Critique & Liberal Law

Wendy Brown and Janet Halley introduce their edited collection *Left Legalism / Left Critique* with a chapter dedicated to theorizing "left critique" and advancing a case for its importance as a component of left politics.[93] Brown and Halley conceive of left critique as an intellectual and political commitment to relentlessly and critically assess ostensibly progressive political or legal projects. In their framework, liberalism and liberal legalism constitute the central targets of, but also threat to, progressive political projects. They define liberalism as a political order characterized by modern democratic constitutionalism and abstract individualism.[94] In this political order, the state's legitimacy is tied to its role as the guarantor of equality before the law and individual freedom, both of which are secured through the legal protection of individual rights.[95] Liberalism thus casts the state and the law as neutral vessels for the pursuit of these ideals.

Brown and Halley's define "the left" in terms of its relationship to liberalism: it is a project committed to revealing the limitations of liberal justice as well as to advancing alternative visions

[93] Wendy Brown & Janet Halley, "Introduction" in Wendy Brown & Janet Halley, eds, *Left Legalism / Left Critique* (Durham, NC: Duke University Press, 2002) 1.
[94] *Ibid* at 5.
[95] *Ibid* at 6.

of justice.[96] In their view, critique is the left's necessary starting point because it illuminates the ways in which the liberal state and the law function as sites and instruments of domination. Brown and Halley fashion their concept of critique by drawing on a long intellectual history of theorizing critique. They find strands of this history in the German philosophical tradition, from Kant to Hegel, Marx, Nietzsche and the Frankfurt School, as well in the work of Derrida and Foucault.

Notwithstanding the differences and strains of critique in these and other traditions, Brown and Halley assert that critique is fundamentally a method of inquiry into a formulation that aims to examine and test its premises.[97] Critique seeks, not to determine truth or acquire objective knowledge, but rather to obtain greater perspective and insight. As such, it often works at the level of epistemology, uncovering how ideology and power produce what is understood to be the problem, as well as the range of available political and legal possibilities. Importantly, since critique requires the critic to interrogate their most revered maxims, the political commitments that compel the critic toward critique will almost inevitably change in its wake.[98]

This frames Brown and Halley's concern with the fact that progressive projects increasingly and significantly articulate their understanding of the political or social problem they seek to address, and the model of justice they seek to advance, in terms of a need for law reform or change within the legal system.[99] Brown and Halley refer to this orientation and its attendant practices as "left legalism", which comprises two different modes: rights legalism and governance legalism. The latter arises when the left attempt to capture or influence some part of the state's administrative apparatus.[100] In Brown and Halley's analysis, left legalism demands scrutiny

[96] *Ibid.*
[97] *Ibid* at 26.
[98] *Ibid* at 28.
[99] *Ibid* at 1.
[100] *Ibid* at 10.

(critique) for the reason that, at least at some level, it takes up the liberal promise that law can provide an effective vehicle for the pursuit of justice.[101]

This informs the question that underlies Brown and Halley's edited collection: what are the limits, paradoxes, and perils of contemporary practices of left legalism?[102] In pursuing this line of inquiry, they are interested in identifying lessons that point to ways in which the left might productively reformulate its politics. The nature of this question and its related objective reveal that a normative definition of the good may underlie Brown and Halley's project of left critique. Arguably, lessons learned from the pitfalls of left legalism can only be understood in reference to some ultimate objective. As stated above, Brown and Halley refer to left critique's objective of greater insight and perspective into practices of domination. However, they also appear to subscribe to a definable normative vision, namely greater substantive freedom and equality.[103]

As Brown and Halley apply the method of critique to practices of left legalism, they demonstrate one of critique's key qualities: it is not oriented toward providing clear answers, political prescriptions, outcomes or resolutions.[104] The first example of this is depicted in their treatment of the theme of the relationship between the left and liberalism. On one hand, they argue that when left projects are translated into the frames of liberal legalism, the progressive project necessarily enters into tension with, or perhaps will even be forced to abandon, its original values and aims.[105] In their view, this occurs because the values and objectives of the left are inherently in tension with those of liberalism. They point out that the very fact of making a claim to justice in the language of liberalism shapes the subjects and the relationships that are spoken of. At this

[101] *Ibid* at 7.
[102] *Ibid* at 4.
[103] *Ibid* at 2, 5.
[104] *Ibid* at 27.
[105] *Ibid* at 16.

juncture Brown and Halley warn that to the extent that left legalism reproduces a liberal normative order, it is responsible for the consequences, however unintended.[106]

Yet on the other hand, they make a point of *not* categorically rejecting either legalism or liberalism as inherently flawed.[107] Rather, they argue that it is the left's *current* engagement with the law that has robbed the left of its power and potential. For example, they argue that rights, while classically central to liberal orders, maintain a "certain formality and emptiness which allows them to be deployed and redeployed by different political contestations."[108]

A second example of the slippery nature of critique in Brown and Halley's analysis is depicted by their articulation of the relationship between the left and law. On one hand they argue that left projects in liberal democratic orders cannot avoid rights and governance legalisms and their problematic baggage.[109] They specifically discount the (possibly utopian) idea that there could be a "pure left political space independent of legalism".[110] According to Brown and Halley, this is the case because, given that culture and law are not distinct, the left cannot escape the law just as it cannot escape culture. [111] Yet even while they reject this ideal, Brown and Halley are fascinated by the possibility of discovering politics outside of legalism,[112] or politics that is relatively "less saturated" by legalism.[113] They describe these politics as "radically democratic" and focused on deep deliberations about society's governing values and practices.[114]

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[106] *Ibid* at 17-18 (Brown and Halley name some of these unintended consequences in the following passage: "The preemptive conversion of political questions into legal questions can displace open-ended discursive contestation: adversarial and yes/no structures can quash exploration; expert and specialized languages can preclude democratic participation; a pretense that deontological grounds can and must always be found masks the historical embeddedness of many political questions; the covertness of norms and political power within legal spaces repeatedly divests political questions of their most crucial concerns" at 19).
[107] *Ibid* at 6.
[108] *Ibid* at 9. Also see Stanley Fish, *The Trouble with Principle* (Cambridge, Mass: Harvard University Press: 2001).
[109] *Ibid* at 11, 20.
[110] *Ibid* at 20.
[111] *Ibid* at 13 (Brown and Halley describe law as operating the "background rules" for culture at 11-13).
[112] *Ibid* at 19.
[113] *Ibid* at 20.
[114] *Ibid.*

In light of critique's function to provide perspective rather than truth, it is perhaps not surprising that Brown and Halley's response to the question of the limitations and effects of left legalism is open-ended. They suggest that critique reveals that the effects of law (and law reform) are complex, multiple and contingent, in a way that is analogous to the effects of the exercise of other forms of cultural power and norms. Accordingly, they describe the effects of left legalism as "mutable and contestable interventions into complex discursive and distributive systems", rather than as "monolithic installations of 'justice'".[115]

Lucie White and Jeremy Perelman's theory of critique offers further insight into the relationship between social movements and liberalism. As stated previously, White and Perelman's intervention is informed by their empirical study of economic and social rights activism on the African continent, presented in their book *Stones of Hope*. In interpreting and bringing together multiple case studies, they identify "critical/transformative legal liberalism" as a theoretical vantage point[116] that helps explain the approach taken by the activists they study. (Note that their description of critical legal liberalism as a theory, resonates and somewhat overlaps with their account of pragmatism).

White and Perelman describe activism carried out in this framework as "an engaged but critical stance toward liberal values" that employs a "set of recognizably legal, but also explicitly political, advocacy strategies."[117] A "critical stance" means that activists attempt to develop politically progressive interpretations of liberal legal norms and further, they are reflexive about

[115] *Ibid* at 13.
[116] White and Perelman draw on a range of contemporary theorists to articulate their critical liberal legalism lens: Jeremy Waldron, Nancy Fraser, Thomas Pogge, Amartya K Sen, Alan Hunt and Michael W McCann. They also identify four other theoretical approaches to analyzing the activists in their study: distributive legal analysis, legal experimentalism, subaltern cosmopolitanism, and historical institutionalism. See White & Perelman, "Introduction", *supra* note 81 at 5.
[117] *Ibid.*

the interpretations that they put forward.[118] Moreover, White and Perelman assert that this stance is politically committed to a fair distribution of resources and power.[119] Finally, critical legal liberalism is grounded in democratic deliberation. Not only do activists fashion their progressive interpretations of the law as a result of participation and debate, but they also pursue the redistribution of resources in part in order to better equip the poor with the material conditions necessarily to participate in liberal democracy.[120]

Activists operating in a critical legal liberalism framework are also realistic about what can be accomplished with liberal legal claims because they believe that the rules of the game are not substantively fair, even though they might be objectively neutral.[121] However, in spite of, or perhaps because of this, these activists are committed to using the law pragmatically in an effort to realize their redistributive aims. In practice, this often involves using the language of rights strategically and stretching it to support claims that entail economic and social redistribution.[122]

According to White and Perelman, because of its political commitment to redistribution, critical legal liberalism is able to *fully answer* progressive critiques of rights-centered activism, which they attribute to "the skeptics".[123] The activists in White and Perelman's study do not depart from the assumption that successful rights claims in and of themselves will result in greater social equality. Rather, they invoke these claims as part of a broader political struggle by harnessing their normative and moral force. The rights claim affords activists greater symbolic power to

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[118] White & Perelman, "Experience and Theory", *supra* note 82 at 155.
[119] *Ibid* at 156.
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid* at 156-7. Also see *ibid* at 164-7.
[123] *Ibid* at 165. For a representative summary of the skeptics' critique, White and Perelman cite David Kennedy, *The Dark Side of Virtue* (Princeton: Princeton University Press, 2004). Chapter one of Kennedy's book reprints his 2001 essay "The International Human Rights Movement: Part of the Problem?", *supra* note 71, discussed at length in the previous section on pragmatism.

inspire social mobilization, strengthen political organizing, and pressure power-holders. In this framework, White and Perelman argue that activists are able to use human rights claims to open up broader democratic debates about deeper policy questions regarding the nature of the relationship between the market, the state and its population.[124] In their study, activists were able to avoid the pitfalls of formalism and formal equality because they interpreted human rights claims in light of underlying commitments to the deeper values of dignity, security and political democracy.[125]

Skeptical Critique vs Engaged Critique

White and Perelman's conversation with "the skeptics" raises the possibility of tensions between "critical legal liberalism" and "left critique". In general terms, these concepts are evidently focused on the same set of legal practices, namely those of activists and social movements loosely understood as progressive, or as part of the left. However, there are important distinctions between the two approaches. Left critique evaluates the engagement of progressive political projects in left legalism in order to gain greater perspective and insight. Critical legal liberalism is a theory of human rights activism that attempts to answer critiques of this activism that originate on the left.

Thus, these two concepts are in a direct conversation: left critique marshals a critique that critical legal liberalism attempts to answer. Some contours of this conversation can be distilled from the critique of "pragmatism" launched by Brown and Halley and from White and Perelman's vigorous response to "the skeptics". Thus a question emerges: how does Brown and Halley's

[124] *Ibid* at 166 (they summarize these policy questions as: "where to allocate, when to expand, and how best to renew limited resources in ways that enable all people to live decent lives" at 166).
[125] *Ibid.*

critique of pragmatism apply, if at all, to the pragmatism that forms part of White and Perelman's framework? Or stated somewhat differently, how does White and Perelman's concept of critical legal liberalism answer the concerns expressed by Brown and Halley's left critique?

As a starting point, both sets of authors define pragmatism similarly. Brown and Halley define it as those instances where a progressive political project consciously adopts a legal category that is problematic from the perspective of the values of that project. As stated earlier, White and Perelman define pragmatism as activists' conscious and reflexive decision to engage in human rights activism in spite of their awareness of the limits of human rights as a liberal legal form.

Brown and Halley observe that pragmatists often rationalize that the strategic use of liberal legal tools will provide justice for disadvantaged groups who stand to benefit from the advancement of specific changes to the law.[126] Brown and Halley's central problem with this is that, in their view, it inadvertently relies on a liberal concept of law as merely instrumental (a means to an end), rather than as a form of politics with substantive content and consequences.[127] They assert that rights and governance legalisms are always dependant on normative categories that draw their meaning and power from the broader social context and that contain substantive elements that contradict progressive projects. For their part, and in response to those who question the potential of human rights activism to approximate its aspirations, White and Perelman argue that the political commitment of activists to redistribution helps to avoid the possible pitfalls and limitations of packaging social and economic claims into human rights legal frames.

[126] Brown & Halley, *supra* note 93 at 24. The example they provide is of gay rights litigation where, for the sake of obtaining equality rights protection, litigants argued that "homosexuality" was an immutable characteristic.
[127] *Ibid.*

The apparent divergences in these authors' respective treatment of pragmatism can be explained in part by scrutinizing in closer detail the role in their analysis of two fundamental concepts: law and politics. The above review reveals that these authors appear to be emphasizing different theories of the nature of law, and its relationship with politics. For Brown and Halley, law is inherently political and its political nature is inescapable because of its status as a cultural form. They are unflinching in their assertion that law cannot be a neutral, empty vessel for the pursuit of politics. This leads them to the potentially contradictory conclusions that the left must engage *differently* with the law, while at the same time developing politics that are somehow "less saturated" by the law. Brown and Halley respond to this conundrum with the concept of critique. They believe that critique holds the potential to open pathways toward transcending, transforming or subverting liberalism's legal categories.

White and Perelman agree with the assertion that law is political and carries problematic liberal baggage. However, they argue that a radical political commitment to redistribution is capable of surmounting this baggage and pushing the boundaries of liberal interpretations. Recall their contention that activism carried out in the critical legal liberalism framework provides a *full answer* to the concerns of the skeptic. They assert that a progressive political agenda has the power to harness the symbolic power of the law in a larger process of social transformation. In this view, the problem of the political nature of law can be resolved by an equally political project, namely that of redistribution. Thus, unlike Brown and Halley, White and Perelman do not long for politics outside of law. Rather they aim to politicize law by bringing it into the politics of anti-poverty activism, and by bringing politics to bear on law.

Thus, while both sets of authors agree that law is political, they emphasize different aspects of this point. White and Perelman see law as political primarily because of its role in the

constitution and maintenance of a power structure, defined most importantly by social inequality. On the other hand, Brown and Halley's emphasize law's political role in a series of cultural processes and productions of norms and subjectivities, all of which are implicated in power relations. This analysis of the nature of law and politics in the work of these authors returns this discussion full circle to the questions above, which interrogated critical legal liberalism's attempt to answer the concerns of left critique. At this juncture, two avenues of response emerge.

In one sense, it may be that White and Perelman commit the error that Brown and Halley attribute to pragmatism, namely they believe that the human rights movement can use liberal law instrumentally in the service of the objectives of redistribution. In this view, the weakness in White and Perelman's theory is the fact that it significantly relies on activists' political commitment to redistribution in order to address the skeptics' concerns with left legalism. As a result, they do not seem to account for the cultural force of law and the possibility that the very process of engaging liberal legal forms will in turn shape the nature of the political struggle for economic and social justice. When White and Perelman make the assertion that pragmatism involves a commitment to epistemological pluralism, and that a legal claim's utility to a political struggle is derived from its symbolic normative power, they implicitly acknowledge that law carries cultural/ideological content that prefigures activists' engagement with it. However, perhaps due to a problem of emphasis, their theory falls short of accounting for the possibility that the transformative process is a two-way street. Just as activists seek to transform liberal law, their political projects are similarly shaped by their very engagement with this cultural form.

On the other hand, a second avenue of interpretation is available, leading to a more charitable response to the question above. It might be argued that by reflexively politicizing the law, White and Perelman are on a path toward resolving the conundrum encountered by Brown

and Halley in their desire for politics outside of law. In this view, the politicization of the law serves as an opportunity to apply the lessons of critique in renewed contexts and struggles and to explore different and more satisfactory modes of left legalism. As such, the value of critical legal liberalism may be in its potential to move beyond critique's apparent propensity toward political paralysis. However, the lessons of critique suggest that such aspirations may well depend on the capacity of critical legal liberalism to be robustly reflexive. In White and Perelman's framework, reflexivity is a component of critical legal liberalism but its role and importance is arguably under-discussed. In the spirit of left critique, reflexivity must extend to include not only awareness of the possible pitfalls of human rights activism and the cultivation of strategic lessons, but also intensive scrutiny of the assumptions and categories that frame one's activist engagement with law, and with what consequences.

The discussion so far highlights two interrelated areas where further theoretical development would enhance the capacity of critical legal liberalism to respond to the challenge of left critique. The first relates to the need to fully acknowledge and theorize the ways it in which redistributive politics are themselves shaped by the use of the human rights legal form, and the second refers to the need to develop a robust theory of reflexivity that includes critique of activists' practices, assumptions, and categories. These two concerns allude to a fundamental tension that arguably underlies the conversation between left critique and critical legal liberalism, namely, the extent to which the human rights practices in White and Perelman's study take epistemological concerns into account.

To be fair, certain features of White and Perelman's concept of critical legal liberalism directly respond to some concerns of the so-called skeptics, in addition to the fact that it includes

a commitment to epistemological pluralism.[128] However, it is not clear how critical legal liberalism effectively addresses the epistemological issues raised by activists' engagement with human rights legal forms. Not only are these concerns paramount in Brown and Halley's intervention, they are also prominent in David Kennedy's article, which White and Perelman cite as a representative placeholder for "the skeptics". Kennedy opens his article with the concern that human rights activism occupies the field of emancipatory possibilities, ways of thinking, vocabularies, projects and institutions.[129]

Substantive Equality & Radical Democracy

In spite of these potential tensions and differences in emphasis, left critique and critical legal liberalism share deep normative commitments to substantive equality and radical democracy. They evaluate activist interventions in terms of the degree to which they contribute to creating greater conditions of equality, freedom and human dignity in the individual and collective lived experience of daily life. They hope that progressive activism might help enable the necessary conditions for radical democracy, defined in part as widespread participation in inclusive conversations regarding society's most fundamental governing arrangements. For Brown and Halley this refers to the values and practices that regulate subject formation, while White and Perelman single out policies that determine the arrangement and distribution of resources and

[128] For example, White and Perelman's focus on redistribution, substantive equality, and engagement with private actors responds to several of the critiques advanced by Kennedy, including that human rights views the problem and the solution too narrowly by delegitimizing remedies in the domain of private law, by insulating the economy from critique, by privileging form over substance and by ignoring context. See Kennedy, *supra* note 71 at 10-13.
[129] *Ibid* at 8.

power.[130] For both sets of authors, these normative aspirations spring from their yearning for a society capable of overcoming the failures of liberalism.

The second important similarity between these authors is the recognition that the results of a movement's engagement with liberal legalism are inevitably complex and uncertain. Neither approach takes the perspective that progressive advocacy efforts are certain to produce their desired effects. Rather, these authors are explicitly anti-essentialist in their view of these practices. This is most clearly demonstrated in Brown and Halley's argument that the effects of law are complex, multiple and contingent, and in White and Perelman's use of the theoretical lens of legal pluralism and historical institutionalism in order to illuminate and anticipate possible unintended effects.

2. Critique and the Mining Justice Movement

The concepts, tensions and themes that emerge in the conversation between left critique and critical legal liberalism are at the heart of this article's analysis of the mining justice movement. The concept of left legalism accurately describes the movement's turn to litigation and law reform as a means for realizing its goals. Similarly resonating with left critique, many of the movement's participants are critical of liberalism's most fundamental legal frameworks, such as property and contract, and most central institutions, in particular the market, voluntary or soft law, and the corporation. Concepts from critical legal liberalism are also relevant. Its focus on economic and social rights activism and its political commitment to redistribution resonates with

[130] White and Perelman also refer to this as a commitment to "voice" that they argue resonates with the work of Roberto Unger on democratic experimentalism, Charles Sabel and Mouffe and Laclau's work on radical democratic renewal. See White and Perelman, "Experience and Theory", *supra* note 82 at 166, nn 35, 36, 37 (respectively: Roberto Unger, *Democracy Realized: The Progressive Alternative* (New York: Verso, 1998); Charles Sabel & Joshua Cohen, "Directly Deliberative Polyarchy" (1997) 3:4 Eur L J 313; Anna Marie Smith, *Laclau & Mouffe: The Radical Democratic Imaginary* (New York: Routledge, 1998)).

the concerns and commitments of the mining justice movement. Moreover, the activist orientation within critical legal liberalism toward *engaged critique* connects with the mining justice movement's decision to use law reform to fashion concrete proposals for positive change.

The theoretical questions posed by left critique and critical legal liberalism closely parallel those that drive this study of the mining justice movement. Like Brown and Halley, this study is concerned with the question of how movement actors, by taking up liberal legal forms, inadvertently became party to the reproduction of certain liberal ideologies and their legal counterparts. This is reflected in the results of two areas of law reform activism, where formal equality (formalism), voluntary approaches to legal obligations (volunteerism) and a privatized view of the state (privatism) have prevailed in the resulting reforms, notwithstanding movement actors' best efforts. The findings summarized in Part Two suggest that in taking up "the liberal promise that law can be an effective vehicle for the pursuit of justice", mining justice movement participants advocated for law reforms that ultimately reproduced or further entrenched certain elements of the liberal and neo-liberal normative order. This observation appears to validate the position of the skeptics and the concerns expressed by Brown and Halley.

Left critique and critical legal liberalism offer insights that help further explain these observations. Taken together, these theories help capture the operation of two forms of power that underlie the relationship between law and politics, namely power as knowledge and power as material resources. Both are at play in the shortcomings of the mining justice movement's law reform outcomes. Focusing on power as knowledge, Brown and Halley insist on the meanings, symbols, relationships, norms and subjectivities that flow from the concepts and forms of law employed by the left. In this regard, the law reform outcomes studied here have maintained the abstract decontextualized subjectivities and relationships embedded in formalism, along with the

corporate norms and relationships that underlie privatism and volunteerism. In terms of power as material resources, White and Perelman emphasize the hierarchies, inequalities, asymmetries and erasures implicated in the construction and maintenance of legal concepts and regimes. This highlights that the mining justice movement's law reform outcomes in the two areas studied appear to have done little to disrupt the entrenched systemic and unequal distribution of economic and political power in favor of the private sector.

Both critical theories also add greater depth and complexity to this study's effort to put the mining justice movement's law reform outcomes into a larger context or perspective. To be clear, this reflection on unintended outcomes should not serve to minimize or ignore the accomplishments and positive results of the movement's important work. Indeed, Part Two of this article reveals that the movement's activism has raised the public profile of its concerns, and transformed the way in which all actors, corporate, state and community, see and frame the issues. Recall that Brown and Halley argue that the effects of left legalism are always multifaceted, paradoxical, contradictory and contingent. In other words, no result is all "good" or all "bad". Moreover, Brown and Halley agree with White and Perelman that at any point in time, it is not possible to be deterministic or predictive about the future impacts of legal activism. Notably, this approach seems to diverge from the more simplistic costs/benefits analysis that Kennedy prescribed, which led to the unanswered question about how a movement might undertake a balancing exercise of this kind.

Brown and Halley's approach in particular suggests that the significance and impact of left legalism may be very difficult to anticipate prospectively and may shift over time and in relation to other factors. For example, how might we understand and capture the multifaceted impacts, especially for grassroots political mobilization and consciousness raising, of the historically

ground-breaking recognition by states and companies alike that Indigenous communities have special communal property rights/claims and must be freely consulted and potentially compensated? How might we balance this positive, albeit symbolic change, with the negatives of formalism embedded in the resulting consultation laws that perpetuate colonial assumptions, power inequities and risk legitimating unfair results? Would we have been better off without this symbolic recognition? Or does it constitute another (albeit imperfect) legal and political tool in a much longer process of struggle?

Similar questions might be asked of right to remedy law reforms in Canada. How can we understand the impact of the Canadian state's (albeit symbolic and indirect) recognition that it has an obligation to create a mechanism to investigate and remedy human rights abuses alleged against Canadian companies abroad? Does this impact outweigh the problems with the resulting mechanism, which is (on its own) incapable of providing meaningful remedies and perpetuates neoliberal approaches to public regulation and corporate accountability?

While these questions are critically important, they also can feel impossible to answer, and as a result disheartening, when structured as a kind of balancing exercise. Brown and Halley's proposal is helpful in this sense because it encourages us to explore the limitations, contradictions and paradoxes of left legalism without slipping into a simplified one-off costs/benefits framework. Moreover, a simple cost/benefit frame may also be unhelpful because it can foment polarization within the movement of different view about tactics. While the identification of unintended consequences is important, it does not mean that positive results are irrelevant or were not worth the effort. The fact of an unintended consequence does not necessarily mean that the chosen tactic was unwise. Indeed, activists and social movements work within a whole raft of constraints that shape their choices, including with respect to tactics.

In the spirit of Brown and Haley's concept of critique, the purpose of questions like those formulated above, is to gain insight and perspective, not truth and categorical conclusions. In this regard, one insight derived from the questions themselves is the revelation that the main accomplishment of the mining justice movement's law reform efforts to date is the affirmation/recognition (explicit or implied) of state obligations in positive law (right to consultation legislation) and/or policy (right to remedy mechanisms). It is a major milestone for the Canadian state to accept that it has a duty to strengthen access to remedies, and for Latin American states to codify in legislation that Indigenous peoples have procedural and substantive collective rights in relation to resource extraction. However, in both the Canadian and the Latin American case studies, the movement has encountered serious obstacles and resistance among state and corporate actors, who have worked to ensure that law reform outcomes maintain liberal subjectivities, ideologies (formalism, volunteerism, privatism) and entrenched inequities.

In recognizing and analysing the pitfalls encountered by specific mining justice movement law reform efforts (left critique), this study nonetheless shares critical legal liberalism's interest in the possibility of an engaged response to left critique. In other words, it seeks insight and lessons from past efforts in order to formulate a more productive re-engagement with law. Critical legal liberalism's efforts to respond to the skepticism of left critique contains two key elements that may assist in forging a way forward: commitment to redistribution and contribution to democratic politics.

First, White and Perelman asserts that human rights activism can overcome the perils of left legalism, formalism and formal equality if it stretches the language of rights to support social and economic rights and redistribution. Part One described how economic and environmental justice (redistribution) is arguably central to the mining justice movement's moral vision, while

Part Two described how the movement adopted demands for law reform in the areas of Indigenous rights to property and consultation (Latin America) and the right to remedy/accountability for corporate caused human rights abuse (Canada). However, the movement's experience, at least to date, indicates that it has been difficult to infuse these liberal rights claims with redistributive content/outcomes, either in terms of knowledge (epistemological pluralism) or in material distributions of wealth and power. Movement actors have found it difficult to subvert the ideologies of formalism, volunteerism and privatism, embedded in neo-liberal constructs of consultation (contract) and the right to remedy. In other words, contrary to White and Perelman's assertion, movement actors' political commitment to redistribution was not sufficient to overcome the pitfalls of left legalism. It has not been easy for activists to meaningfully translate this commitment into tangible results. Ultimately, when designing new laws, the state has fallen back into its old liberal habits.

Second, White and Perelman argue that the movement must use human rights claims to foster wider democratic debate about deeper policy questions regarding the relationship between the market, the state and its population. Brown and Halley similarly share the conviction that legal activism must be supportive of "radical democracy" and deep deliberations about society's governing values and practices. This fits with their concept of operating inside the law while simultaneously attempting to transform it, transcend it, and seek politics that are "less saturated" by law.

In this area, it is not easy to identify the extent to which the mining justice movement's right to remedy and right to consultation law reform proposals have been able to foment mainstream debate on underlying global economic arrangements. While the movement has certainly used the media and a variety of knowledge dissemination strategies to encourage public

debate on specific issues, it has found it challenging to attract sufficient mass popular support for its causes. In Canada, the government's responses to date (and failed promises) signal that it has consistently calculated that it can ultimately ignore the movement's demands with little political cost, at least domestically.[131] Similarly, in Latin America, the movement has faced criminalizing and at times violent and racist rhetoric in the media and directly from elected officials in response to Indigenous and Campesino protest and justice claims, pitting these "backward minority" groups against the interests of the broader population in so-called "progress" and "development". In this light, right to consultation laws have done little to trouble the entrenched economic arrangements and the political ideologies that underpin industrial resource extraction in Latin America. Indeed, it is possible that the mere fact of right to consultation laws may more readily enable powerholders to construe opposition and dissent as irrational and backward when mine affected groups reject proposed processes and outcomes.[132]

In the end, the insights of left critique appear to have held true. The mining justice movement's experience with the law reforms studied here indicates that its commitment to redistribution, on its own, has not necessarily safeguarded its proposals from the pitfalls of left legalism. At least for the moment, the liberal claims to consultation and remedy do not appear to have resulted in a more expansive approach to economic, social and environmental justice. Similarly, the presence of voluntarism, privatism and formalism in resulting law reforms suggest that movement actors have not been able to subvert or shift a liberal and neo-liberal worldview of the legal (rights-bearing) subject, the market and the state. Moreover, the movement's capacity to

[131] There is speculation that Canada is beginning to pay some political costs internationally. Some have connected Canada's foreign policy on mining to its failed bid for a seat at the UN Security Council in 2020: Bianca Mugyenyi, "Why Black and brown countries may have rejected Canada's security council bid" *Ottawa Citizen*, June 18, 2020.

[132] For a poignant depiction of this dynamic, see the short documentary film: Quisca Productions, *Parana – el río* (Peru, 2016) online: https://vimeo.com/195532048.

connect its goals to broader societal normative debates about society's governing principles appears, at least for the movement, to be limited. There is evidence that the larger population has not responded in a sustained and meaningful way to the call for democratic debate on these issues, notwithstanding the movement's laudable public education and knowledge dissemination efforts, especially through the media.[133] What is significant here is that while many members of the mining justice movement hold deep commitments to redistribution and democratic politics, they have been unable to obtain law reform results (governance legalism) that connect meaningfully with these goals.

C. Counter-Hegemony

This section turns to the concept of counter-hegemony as the final step in its exploration of critical approaches to law and their potential application to the experience of the mining justice movement. The writing of Antonio Gramsci makes interesting, but limited comments on the role of law in hegemony theory: in the formation of the state, the hegemonic bloc, civil society, and the strategies of counter-hegemony.[134] As such, the authors considered here adapt Gramsci's framework to the specific context of their analysis. This section begins by distilling each author's treatment of the concept of counter-hegemony before making some comparative observations that help assess the contributions of the concept to this article's examination of the mining justice

[133] While the mining justice movement's law reform proposals have triggered relatively narrow debate among law-makers at certain intervals, the reference here to democratic debate refers to Brown and Halley's concept described above of radical democratic debate over society's governing norms.

[134] See Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17:3 JL & Soc'y 309 at 310; Claire A Cutler, "Gramsci, Law and the Culture of Global Capitalism" (2005) 8 Crit Rev Intl Soc & Pol Phil 527 at 530. The authors here refer to Antonio Gramsci, *Selections from the Prison Notebooks*, ed and translated by Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers Company Inc, 1971).

movement. This analysis picks up on and extends the insights developed in the discussion above of pragmatism, left critique and critical legal liberalism.

1. Counter-Hegemony, Human Rights and Economic Globalization

In her 2005 article, Claire Cutler applies Gramsci's concept of law to the international plane in order to theorize the role of international law in the constitution of the global political economy.[135] In doing so, she comments on the relationship between resistance and international legal hegemony.[136] To this end, she presents the praxis conception of international law.[137] This refers to law's potential to give rise to "forces of both domination and potential emancipation."[138] In this view, law's emancipatory potential is contingent on its capacity to transform global asymmetries of power and influence.

The concept of the commodity legal form is central to Cutler's analysis of resistance. Drawing on the work of a number of theorists, Cutler suggests that law takes on a specific form and significance in different historical moments, and that this form derives from its relationship with economic production and political power. Under conditions of capitalism, law takes on a form that mirrors the commodity form of production, which reduces diverse objects to their exchange-value.[139] Cutler attributes the following characteristics to the commodity form of law:

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[135] Cutler, *ibid* at 527. Certain elements of Cutler's discussion are outside of the scope of this review. Specifically, Cutler argues extensively that Gramsci's conceptions of historical bloc and hegemony can be adapted to the international arena and are useful for understanding the role of international law in the global political economy, *ibid* at 533-38.

[136] *Ibid* at 538.

[137] *Ibid* at 529. Cutler builds on Gramsci's praxis conception of law, where law operates both coercively and consensually within the state to secure the economic interests of the dominant class. In its consensual iteration, law educates the subaltern in the ideology of conformity, turning coercion into freedom. This is also described as the double face or dialectic of law.

[138] *Ibid* at 538.

[139] See *ibid* at 531-32. Here Cutler relies on interpretations of Karl Marx developed in Perry Anderson, *Lineages of the Absolutist State* (Brooklyn, NY: New Left Books, 1974); Evgeny Pashukanis, *Law and Marxism: A General*

it conceals inequalities by creating the "appearance of equality between people as legal subjects"; it presents "the communal protection of private property rights…as natural"; and it "formalizes the private/public distinction, emptying the private sphere of political content".[140] These qualities signal the fetishization of the commodity form of law, meaning that it presents the coercive, oppressive and inherently inequitable economic and political system as rational and equitable.[141]

Cutler then describes the commodity form of law under contemporary conditions of globalization. She argues that the global political economy is undergoing a process of juridification whereby Anglo-American legal concepts have expanded their scope and influence on local orders.[142] The result of juridification in this historical moment is that the commodity form of law has become hegemonic and now defines the international historical bloc,[143] which Cutler characterizes as postmodern and late capitalist.[144] She finds evidence of postmodern forms of law in the phenomenon of legal pluralism,[145] while late capitalist forms are those that "facilitate the displacement of welfare states…through deregulation and privatized legal codes", including "soft-law re-regulation".[146] Cutler further argues that the commodity form of international law under late capitalism is also dialectical. This is represented by the tension between hard legal regimes, which purport to enforce private property rights on an equal playing field, and soft laws, which are

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Theory (New Jersey: Transaction Publishers, 1978); and Isaac D Balbus, "Commodity Form and Legal form: An Essay on the 'Relative Autonomy' of the Law" (Winter 1977) 11:3 Law & Soc'y Rev 571.

[140] *Ibid* at 532.

[141] *Ibid.*

[142] *Ibid.*

[143] *Ibid* (Cutler cites Gramsci's definition of historical bloc: "the complex, contradictory and discordant *ensemble* of…the social relations of production" at 534; Cutler also cites Robert Cox's definition: "the overall configuration of productive, institutional and ideological forces of a given historical period" at 534).

[144] *Ibid* at 535 (Cutler describes the legal elements of post-modernity and late-capitalism on three levels: materially, institutionally and ideologically. In this review I limit my references to her material description).

[145] *Ibid* at 535 (Cutler describes legal pluralism as multiple legal orders that operate sub-nationally, nationally, regionally and transnationally, linking local and domestic economies and societies through the creation and expansion of legal regimes governing myriad areas of social life).

[146] *Ibid.*

rationalized as the most efficient means of regulating the social dimensions of global capitalism.[147] For Cutler, this dialectic fundamentally functions to protect capital: hard laws "constitutionalize private regimes of accumulation" while soft law regimes incorporate and eliminate critique.[148]

Having characterized in detail the commodity form of international law, Cutler sketches some ideas for resistance. Crucially, she argues that resistance must be accomplished "through the revelation of the fetishism and mystification of the legal and commodity forms".[149] This involves, at least in part, critiquing dominant representations of private interests as communal, rational and common sense.[150] Cutler also argues that resistance is linked to the dialectical operation of international law. This means that the distinction between hard and soft law must be challenged to reveal that its fundamental function is to protect capital.[151] Cutler further argues that the praxis of international law requires that resistance be grounded in practical, local experiences, where "common sense understandings of power and authority might be challenged".[152] Finally, Cutler suggests that the objective of resistance is to pursue "emancipatory politics both through law and against law" or, stated somewhat differently, to "negate law through law".[153] This articulation refers back to Cutler's praxis conception of international law, which encapsulates law's double face of coercion and consent, its dialectic of hard and soft law, as well as its transformative potential.

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[147] *Ibid* at 537, 539.
[148] *Ibid* at 539 (in reference to soft laws, Cutler adopts Gramsci's term "*transformismo*" defined as the "process by which opposition and resistance to hegemony is absorbed into the dominant ideology" resulting in the elimination of opposition at 536).
[149] *Ibid* at 538.
[150] *Ibid* at 537-38.
[151] *Ibid* at 539.
[152] *Ibid* at 529-30, 539.
[153] *Ibid* at 528-29, 540 (Cutler takes the idea of the negation of law through law from Gramsci's conception of the ethical, integral, or perfect state: at 529).

Like Cutler, in their 2005 edited collection *Law and Globalization from Below*, Boaventura de Sousa Santos and César Rodríguez-Garavito focus on corporate globalization.[154] While they build on the work of hegemony theorists who track the reproduction of the hegemony of transnational capital,[155] they also distinguish themselves. Rather than focusing on the reproduction of hegemony, they concentrate on identifying the legal strategies and tactics that effectively subvert it.[156] To this end, they focus on the question of how and why hegemonic structures change.[157] To answer this question, they elaborate on their project of cosmopolitan subaltern legality, which they refer to as "a mode of socio-legal theory and practice" and "an approach rather than a theory".[158] They position this approach as the legal counterpart of counter-hegemonic globalization.

For Sousa Santos and Rodriguez-Garavito, the term "cosmopolitanism" incorporates two key features: first, the moral claim that justice and equality concerns transcend state boundaries; and second, the ethical commitment to collaboration, pluralism and diversity.[159] Importantly, the authors "revise" cosmopolitanism's "Western" or "Northern" origins and orientations by introducing the concept of the subaltern. They use this term to refer to all who are the victims of

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[154] Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, "Law, politics, and the subaltern in counter-hegemonic globalization" in Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, eds, *Law and Globalization from Below* (Cambridge, UK: Cambridge University Press, 2005) 1.

[155] *Ibid at* 5 (Sousa Santos and Rodriguez-Garavito associate hegemony theorists with the work of Marx, Bourdieu and Foucault, and in particular those works that reveal the contribution of law to arrangements of domination at 6).

[156] See *ibid* at 9-12 (Sousa Santos and Rodriguez-Garavito offer an extended critique of the contributions and limitations of hegemony theorists).

[157] *Ibid* at 12.

[158] *Ibid* at 5, 13 (Sousa Santos and Rodriguez-Garavito present this approach as a critique of two dominant areas of research in law and globalization studies: the global governance literature and the post-law and development literature).

[159] See *ibid* at 13. For their description of cosmopolitanism, Sousa Santos and Rodriguez-Garavito rely on Debra Staz, "Equality of What Among Whom? Thoughts on Cosmopolitanism, Statism, and Nationalism" in Ian Shapiro & Lea Brilmayer, eds, *Global Justice: Nomos XLI* (New York: New York University Press, 1999) 67; Walter Mignolo, "The Many Faces of Cosmo-Polis: Border Thinking and Critical Cosmopolitanism" in Carol Breckeridge, et al, eds, *Cosmopolitanism* (Durham: Duke University Press, 2002) 157; and Anthony K Appiah, "Citizens of the World" in Matthew Gibney, ed, *Globalizing Rights* (Oxford: Oxford University Press, 2003) 189.

discrimination, exclusion or deprivation of any form, anywhere in the world.[160] In this view, counter-hegemonic strategies and tactics fundamentally privilege the role and perspectives of the subaltern in order to conceive of new forms of global politics and legality.[161]

Framed with the moral lens of cosmopolitanism and the political lens of the subaltern, Sousa Santos and Rodriguez-Garavito turn to the concept of "legality" in relation to the study of counter-hegemonic responses to globalization. They describe this mode of study as "bottom-up" in that it favors "the detailed empirical study of legal orders as they operate on the ground."[162] This includes tracking the legal, illegal and non-legal strategies of transnational and local movements, in relation to state and non-state legal orders at every scale.[163]

The cosmopolitan subaltern legality approach is at once pragmatic and pluralist. First, it is willing to go beyond law, in that it examines "the potential and limitations of law-centered strategies for the advancement of counter-hegemonic political struggles", as well as the importance of political mobilization for the success of subaltern legal strategies.[164] Second, it is willing to affirm the full range of rights related strategies. Sousa Santos and Rodriguez-Garavito's observe that individual rights strategies may be important for the subaltern who face, among other things, the coercive imposition of neoliberal political and legal arrangements. At the same time, subaltern legality cultivates and explores conceptions of rights that go beyond liberalism and that might be characterized by "solidaristic understandings of entitlements grounded on alternative forms of legal knowledge."[165] Finally, cosmopolitan subaltern legality is focused on legal projects

[160] *Ibid* at 14.
[161] *Ibid* at 9.
[162] *Ibid* at 4.
[163] *Ibid* at 15-16.
[164] *Ibid* at 4, 15.
[165] *Ibid* at 16.

emerging from local, non-English speaking, grassroots organizations and community leaders.[166] It aims to shed light on the alternative forms of knowledge, law and politics that subaltern counter-hegemonic legal practices advance in their effort to introduce a "new common sense". [167] However, it does not idealize these coalitions and strategies; rather it is attentive to their tensions, contradictions or shortfalls.

Among the contributions to Sousa Santos and Rodriguez-Garavito's edited collection, Ronen Shamir's chapter on the politics of corporate social responsibility (CSR) fits squarely with this article's focus on the mining justice movement.[168] Shamir sets up his analysis as a dialectic between the hegemonic economic, political and cultural power of multinational corporations (MNCs) on one hand, and on the other, counter-hegemonic efforts to subject this form of private power to legal oversight and control in favor of the public good.[169] These counter-hegemonic practices take place at the international level, where activists advocate for the international regulation of MNCs according to universal standards. They also occur at the domestic level, in MNCs' home states, where activists pressure the courts and governments of developed countries to regulate the human rights consequences of corporate activity abroad.[170] Shamir's first fundamental assertion is that the study of these counter-hegemonic practices must take hegemonic responses into account.[171]

Shamir casts voluntary CSR as a fundamentally important "hegemonic counter-response" to counter-hegemonic efforts to critique and politicize corporate practices. In his detailed

[166] *Ibid* at 11.
[167] *Ibid* at 17-18.
[168] Shamir, *supra* note 66.
[169] *Ibid* at 92-3 (Shamir also refers to counter-hegemony in this context as "the use of law as means for bringing about social emancipation from corporate tyranny" at 95).
[170] *Ibid* at 96-99. In describing these practices Shamir omits to acknowledge that they also take place in the "host states" where MNCs conduct their operations.
[171] *Ibid* at 94.

description of the numerous practices, discourses and tools of voluntary CSR, two key features emerge that are central to its status a hegemonic counter-response. The first is the principle of self-regulation, which Shamir characterizes as "the corporation's most crucial frontline in the struggle over meaning and an essential ideological locus".[172] The second key feature is the integration of CSR into the corporation's profit model through "the language of instrumental-rationality", or more simply put, under the slogan "CSR is good for business".[173] He concludes that *by design*, CSR constitutes an attempt to pre-empt, de-radicalize and de-politicize counter-hegemonic efforts to develop enforceable laws capable of controlling corporate power.[174]

Building on this, Shamir makes his second fundamental assertion, namely that neoliberal tendencies *within* civil society organizations and transnational social movements must be taken into account when theorizing counter-hegemonic globalization.[175] He believes that these tendencies have consequences for the movement's ability to successfully advance alternative agendas.[176] This is especially pertinent because, writing in 2005, Shamir concludes that these movements have largely failed to control corporate power.[177] Two features of the "neoliberal blueprint of civil society" emerge from his arguments. The first is the rise and expansion of a

[172] *Ibid* at 101.
[173] *Ibid* at 101, 107.
[174] *Ibid* at 95.
[175] *Ibid* at 109. In addition to corporate funded NGOs, Shamir includes in this category those organizations who are heavily funded by corporate philanthropic foundations, as well as those that are established or indirectly governed by governments. He distinguishes these from those groups with "institutional and ideological independence" and autonomy, *ibid* at 109-10.
[176] *Ibid* at 95.
[177] For this proposition Shamir cites Prakash S Sethi, "Corporate Codes of Conduct and the Success of Gloablization" (2002) 16:1 Ethics & Intl Aff 89; Morton Winston, "NGO Strategies for Promoting Corporate Social Responsibility" (2002) 16:1 Ethics & Intl Aff 71. While Shamir's chapter dates to 2005, since its publication many of the trends he describes have only intensified. His subsequent work tracks some of these trends. See for example: Ronen Shamir, "Socially Responsible Private Regulation: World Culture or World-Capitalism?" (2011) 45:2 Law and Soc'y Rev 313; Ronen Shamir, "The Age of Responsibilization: On Market-Embedded Morality" (2008) 37:1 Econ & Soc 1; Ronen Shamir & Dana Weiss, "Corporations, Indicators, and Human Rights: A Material Semiotics View" in Kevin Davis et al, eds, *Governance by Indicators: Global Power through Data* (Oxford: Oxford University Press, 2012).

segment of the not-for-profit sector that functions to enhance corporate and/or government power, such as through the promotion of voluntary CSR. Shamir has gathered a wealth of information on the influence of "corporate-sponsored and corporate-oriented NGOs" on the CSR movement.[178] Dubbing them market-oriented NGOs (MaNGOs), he places them as part of a broader and somewhat older trend toward the corporatization of civil society.[179]

The second civil society feature of concern for Shamir is perhaps more complex and subtle in its design and consequences. He argues that many of the organizations that participate in counter-hegemonic social movements have come to share some fundamental social characteristics with the MNCs that they oppose.[180] Specifically, he is concerned with the NGO's institutional paradigm and what he sees as its bias "toward the corporate hegemonic model of organization and implementation."[181] He is also concerned with what has become the typical configuration of counter-hegemonic coalitions, where the poor and oppressed advance their claims principally through the formation of ties with large institutional players and Northern experts.[182]

Shamir argues that these counter-hegemonic elites share a particular culture of professional expertise and of scientific managerial language, that in some important respects resembles that of the corporate classes, and that in some cases amounts to a managerial approach to social action and social change.[183] In what is perhaps his most important example of this, Shamir points out that, while disagreeing on a number of substantive matters, corporate and the counter-hegemonic elites both tend to rationalize, legalize, codify and regulate moral claims, particularly through the

[178] *Ibid* at 95.
[179] *Ibid* at 105, 109.
[180] *Ibid* at 110. Shamir draws on Gouldner's concept of the "new class" as a heuristic device to describe some of his concerns in this regard. See Alvin V Gouldner, *The Future of the Intellectuals and the Rise of the New Class* (Oxford: Oxford University Press, 1979).
[181] *Ibid* at 113.
[182] *Ibid* at 110-13.
[183] *Ibid* at 110-15.

language of human rights.[184] Interestingly though, for Shamir this second concern and its features do not automatically preclude the counter-hegemonic status of particular movements. He seems to accept that these features might exist *within* counter-hegemonic coalitions.[185] However, in his view, they compel us to identify and come to terms with their potential adverse consequences for imagining and realizing emancipatory alternatives to contemporary globalization.[186] In this sense, his contribution calls for greater critical awareness and reflection on the institutional forms, knowledge forms and languages adopted by counter-hegemonic movements.

2. Counter-Hegemony and the Mining Justice Movement

The counter-hegemony theorists discussed above develop and adapt their interpretation of Gramsci's writing to a context. Claire Cutler focuses on international law and the global political economy. Boaventura de Sousa Santos and César Rodríguez-Garavito share Cutler's scale of analysis, although they are concerned more broadly with all contemporary forms of globalization, as well as local articulations of law. Finally, Ronen Shamir concentrates specifically on the international politics of corporate social responsibility. Although each author's conclusions are grounded in their respective context, there are common themes and debates that run through these contributions. In the remainder of this section, I extract common points of interest and consider their relevance to the mining justice movement's experience with the law reform activism studied here.

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[184] *Ibid* at 115.

[185] Shamir cites the Treatment Action Campaign (TAC) in South Africa, a movement to demand access to affordable HIV/AIDS treatment, as an example of the potential counter-hegemonic impact that a transnational coalition might have. Interestingly, the TAC is also the focus of a chapter in White & Pearlman's edited book: William Forbath, "Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa's Treatment Action Campaign" in White & Perelman, *Stones of Hope* 54, *supra* note 80. Further research could examine similarities and differences in the ways in which these two different theoretical frameworks (counter-hegemony and critical legal liberalism) approached and interpreted this case study.

[186] *Ibid* at 113.

Two of the authors reviewed here theorize hegemonic responses to counter-hegemonic resistance. While Cutler and Shamir use different terminology, they seem to agree on a basic premise: hegemony responds to counter-hegemony by partially addressing and incorporating its concerns, such that critique loses its cogency and capacity to generate substantive changes to hegemonic arrangements. Cutler uses Gramsci's term "*transformismo*", defined as the "process by which opposition and resistance to hegemony is absorbed into the dominant ideology" resulting in the elimination of opposition.[187] Shamir adopts the phrase "hegemonic counter-responses" to describe voluntary CSR's effect of pre-empting, de-radicalizing and de-politicizing efforts to develop enforceable laws capable of controlling corporate power.[188]

These descriptions of counter-hegemonic responses help to characterize state responses to the mining justice movement's calls for law reform. As described previously, state-driven reforms have recognized certain human rights obligations, while retaining liberal and neo-liberal frameworks (formalism, privatism and voluntarism) that arguably preclude these reforms from serving as effective instruments of justice. The concept of "*transformismo*" helps to highlight the power relations at play in this dialectic. The state's response, and in particular formal equality, risk (superficially) legitimating the very relations of injustice that the movement has sought to transform. The case study of right to consultation legislation in Latin America is one clear example of this. Moreover, the state's response to resistance may exhaust the movement by generating a new burden to once again demonstrate empirically and normatively the shortcomings of new laws. The Canadian case study of a litany of deficient right to remedy mechanisms is a good example of how *transformismo* can become an endless cycle that risks exhausting the movement. In sum, the

[187] Cutler, *supra* note 132 at 536. Note that Cutler also sees soft laws and CSR as part of the dialectic of the international commodity legal form under conditions of late capitalism. As such, she sees these legal innovations both as part of the hegemonic development of international law, *and also* as a specific response to resistance.
[188] Shamir, *supra* note 66 at 95.

experience of the mining justice movement resonates with these authors' assertion that resistance will be met with a hegemonic counter-response that incorporates demands in an effort to weaken them and maintain the power status quo.

This discussion raises the important question of how these theorists define movement practices as counter-hegemonic (or not). Shamir in particular cautions against the assumption that the efforts of NGOs and inter-governmental organizations are necessarily counter-hegemonic. He demands a critical interrogation of civil society practices in order to determine their implications for corporate hegemony. As a group, the authors display some variance in their willingness to classify human rights claims as counter-hegemonic. Shamir is suspicious of the dominance of these claims in counter-hegemonic movements, especially because corporations and the institutions that support them have incorporated human rights language. In contrast, Sousa Santos and Rodriguez-Garavito more readily accept that rights claims have the potential to produce strategically valuable results for counter-hegemonic movements, although they would prefer to foster claims that advance alternative forms of knowledge. In sum, there is consensus among these authors that rights claiming *could* be transformative of power relations, but that this tactic is also (significantly) vulnerable to *transformismo*.

The question of how the authors reviewed here define counter-hegemony is linked to the way they define movement success. Sousa Santos and Rodriguez-Garavito's begin with cosmopolitan subaltern legality, the term they use to describe the legal counterpart of counter-hegemonic movements. In this framework, success is articulated in moral and epistemological terms: it is the approximation of the cosmopolitan values of justice, equality and pluralism, defined from the perspective of the subaltern. On the other hand, Cutler and Shamir's concept of success focuses on power: Cutler describes counter-hegemony as a transformation in power asymmetries,

while Shamir suggests that it is evidenced by greater public or popular control over corporate power.

The differences in emphasis among these authors in defining counter-hegemonic success can be woven into a three-part framework. First, a movement is successful when it changes dominant ideas (common sense). Second, these changes must have real consequences for the distribution and exercise of power. And finally, these changes must advance an alternative normative vision of the good (justice and equality) defined from the perspective of a less-powerful group (the subaltern).

Applying this framework to the mining justice movement's law reform results helps to analyze the dynamics of hegemony and counter-hegemony in this case study. These law reform efforts have certainly impacted ideas/common sense about state obligations. As described in Part Two, the state has recognized and created new legal regimes, ostensibly to support the right to consultation (Latin America) and the right to remedy (Canada). These regimes certainly represent some change in state norms and practice. However, research and critical analysis has shown that these changes have done little to transform power asymmetries (Cutler) or ensure greater public control over corporate power (Shamir). While activists and community leaders have worked hard to communicate the lived experience of mine affected communities (the subaltern) and an alternative normative vision of social and economic relations, they have not been able to ensure that the resulting reforms enacted by the state (the executive branch) reflect this vision or substantively assist these communities.

The discussion of movement success raises another interesting theme among the authors, namely the route that they would prescribe for achieving the goals of counter-hegemony. This follows the logic of "what do we want?" and "how do we get there?". For Cutler, the crucial work

of counter-hegemony involves critically deconstructing the law and the economy to demonstrate that they are not morally or politically neutral forces, but rather the result of political choices that benefit capitalist classes. She refers to this process as the demystification of the commodity form of law.

Still on the theme of prescriptions, the authors engaged here rally around the idea that counter-hegemonic politics must be rooted in practice. On this basis, Cutler's demystification of the commodity form must connect with people's everyday experience of the economy and the law. Similarly, Sousa Santos and Rodriguez-Garavito call for the detailed empirical study of how legal orders actually operate on the ground, and an approach to scholarship that is sensitive to alternative forms of legal knowledge, otherwise hidden in local practices and forms of resistance. Given his emphasis on hegemonic counter responses, Shamir takes a slightly different approach to the topic of practice. He is concerned with the extent to which the dominant civil society institutional form, the NGO, imposes technocratic, managerial ways of thinking and being onto claims that emanate from grassroots social movement actors. His concern is that the neoliberal NGO institutional form has the effect of disassociating the politics of counter-hegemony from practical experience. It is worth noting that Shamir's frame resonates with Kennedy's reflection (part 3.1) on the politics and ethics of the human rights movement's participation in governance or "rulership".

Once again, these insights from this group of counter-hegemony theorists are significant for the mining justice movement. Movement actors pursued law reform by packaging their claims in the language of human rights. However, these proposals to date have not addressed fundamental issues with the legal and economic arrangements that enable and protect transnational corporate resource extraction (Cutler and Shamir). Rather, the resulting reforms have added a layer of law, namely procedure (consultation) or weak oversight (complaint/review), to existing arrangements.

This helps explain, at least in part, why power relations appear to have continued largely undisrupted by these reforms.

In terms of the call from these authors to root legal change in everyday/ordinary/subaltern experience, the approach of the mining justice movement has been mixed. On one hand, the movement has been remarkably effective in gathering data and telling the story of affected communities and their experiences of social and economic injustice and violence. Further, advocates have consistently appealed to this evidence of injustice to advocate for the law reforms studied here. However, on the other hand, advocates have faced obstacles in ensuring that law reform outcomes account for, and respond to, the realities of social and economic power and context. Thus, while advocates have done well to document grassroots community experiences and connect these with its advocacy efforts, they have been less successful in achieving law reform outcomes that meaningfully address these documented realities of injustice. The prospect of fashioning rights claims and securing law reforms that are responsive to the perspectives and experiences of the subaltern, represents a formidable and as yet unresolved challenge for the mining justice movement.

Finally, some of the authors reviewed here pick up the theme of the relationship between counter-hegemonic movements and the law as a potentially progressive tool for social change. It is common ground among them that this is always contingent on the strength of accompanying forms of non-legal political mobilization. Further, they all agree that law is a crucial site of struggle. In Cutler's praxis conception, international law has the potential to give rise both to forces of emancipation or domination. As a result, law as domination must then be negated, or overcome, with law as emancipation. This is what she means by the phrase "negate law through law". Rather than a debate over what the law says (how rights are recognized and interpreted), for

Cutler the struggle is over the actual form that law takes – the commodity form. In this view, struggle occurs over what the law is, and in particular its relationship with the state and capital. Cutler's challenge to reconceive of law resonates with Sousa Santos and Rodriguez-Garavito's conception of subaltern cosmopolitan legality. While they see practical value in rights strategies organized around classically liberal rights, their main interest is to identify conceptions of rights that go beyond liberalism and represent alternative forms of knowledge.

Building on these discussions in relation to this final theme, three interconnected ways of thinking about the role of the law in social struggles seem to emerge. In the first, the struggle revolves around what the law says or should say, including debates over interpretation of law. This involves attempts to introduce new ideas and practices, and it conjures up commonly observed struggles over distribution, entitlements and recognition. In the second, the struggle takes place over what the law is (ie the commodity form), and how it reflects, produces and rationalizes the state and the market. This moves toward deeper political transformations of power and legitimacy, market and state. Finally, in the third approach, the struggle is over the knowledge or worldview that the law embodies. This alludes to deeper transformations of the values, ethics, culture and histories that underlie law's vision of the good.

The three-part typology once again serves as a useful guide for analysis of the achievements and limitations of the law reforms pursued and obtained by mining justice advocates. Proposed reforms have focused on obtaining legal recognition of, and regimes to support, new state duties in relation to the right to consultation and the right to remedy. However, the outcomes have done little to disturb key elements of law's "commodity form" under conditions of late capitalism (Cutler), namely formalism, voluntarism, and privatism. While advocates have

appealed to community-based forms of knowledge and worldviews, they have not been able to ensure that the state-controlled results are infused with subaltern ways of knowing.

In sum, these counter-hegemony theorists offer a variety of perspectives that enrich our understanding of mining justice advocates' experiment with law reform. In some areas these theorists echo the debates at play in the previous discussions of pragmatism and left legalism. In particular the debate over the strategic value, or inevitability, of rights is a common theme, as well as the role of alternative forms of knowledge and the complexity of civil society's potential role in governance legalism or decision-making (rulership). Counter-hegemony as an approach adds value to this discussion due to its emphasis on (international) capitalism, structural power relations, and the relationship between the state and capital. This emphasis is certainly important in light of the concerns of the mining justice movement. The next section picks up on this by drawing together common themes and important differences across the theoretical approaches consulted in this article.

Conclusion

This article has examined key law reforms that have emerged from the activism of mining justice movement advocates over the last twenty years. In Latin America, courts began in 2001 to recognize Indigenous rights and a number of states responded to Indigenous peoples' ongoing opposition to neo-liberal natural resource extraction with right to consultation legislation, beginning in 2011. In Canada, over the course of nearly twenty years of corporate accountability "right to remedy" advocacy, the state responded with a series of home-state, non-judicial grievance mechanisms, primarily directed at extractive industries (2009, 2014 and 2019). However, a wealth of critical analysis and empirical research suggests that these reforms have had limited success, at

least to date, in meaningfully furthering the movement's human rights and social justice goals. In this article I have argued that this is due, at least in part, to the persistence of three fundamental liberal and neo-liberal ideologies, formalism, privatism and volunteerism, that are tenaciously embedded in these law reforms. This assessment of twenty years of transnational law reform activism on the part of mining justice movement advocates calls for reflection on the strengths and weaknesses of their experiment with law reform in the age of human rights and neoliberal economic globalization.

This article attempts to respond to this call by consulting the work of critical theorists who, while working from a variety of different contexts, are united by their examination of progressive movements' engagement with law in an effort to transform the unjust economic and social conditions that result from liberal and neo-liberalism political and economic arrangements. These authors adopt specific and varied vocabulary to refer to this engagement: pragmatism, left legalism (rights or governance legalism), critical/transformative legal liberalism, subaltern cosmopolitan legality, and counter-hegemony. Although there are certainly differences in emphasis, these authors and approaches have much in common. They all believe that law is an important, perhaps inevitable, site of struggle. However, they also see social movement engagement with liberal law as fraught with political and epistemological risks, paradoxes and tensions with the movement's goals. They similarly agree that this necessitates a commitment within the movement to ongoing critique of liberalism/capitalism/hegemony, alongside reflexivity and critical assessment of the costs/benefits, limitations, contradictions, etc. of legal activism. At the same time, all authors recognize that political action outside of law is critical to the movement's successful engagement in legal activism, and some authors push for political projects that are less reliant on liberal legal claims.

The theorists here also agree that progressive social movement's productive engagement with liberal law should be informed (and constrained) by a variety of normative commitments to: meaningful/substantive equality and freedom, epistemological pluralism, fomenting deeper and richer democratic debate, redistribution, and public control of corporate power. In terms of legal tactics, these authors are fixated on the dominance of human rights as the contemporary language and tool of progressive movements. Generally, they see rights legalism as problematic in that it inevitably carries political content that risks narrowing the movement's capacity to conceive of human freedom, prevents other ways of knowing, and is easily coopted by hegemonic liberalism and capitalism. However, their strategies and degree of optimism in relation to rights activism varies. Some authors emphasize the strategic value of rights due to their malleability and lack of fixed content, as demonstrated by ongoing struggles and shifts over time in their meanings and interpretations. Some authors see rights as uniquely able to capture and advance the specific concerns of marginalized groups.

Less optimistically, the experience of mining justice movement advocates with law reform rooted in human rights frames, appears to resonate, at least for now, with some of the pitfalls of rights legalism that these theorists identify. As indicated, the state has responded to advocates' demands and fashioned law reforms that are predicated on some of the same problematic liberal and neo-liberal ideologies that many members of the movement oppose (formalism, voluntarism and privatism). The persistence of formalism in particular indicates that these new laws and regimes are not appropriately sensitive to alternative worldviews, power relations and context. Voluntarism and privatism reflect the well-known legal foundation of neo-liberal resource extraction: private ownership of and profit from resources, without effective state protection of the public interest, broadly defined, and without effective accountability

mechanisms. In the result, the laws, practices and systems of unjust mining arguably remain fundamentally intact and undisturbed, albeit with an added layer of largely ineffective (consultation and remedy) reforms. There is a risk that these kinds of reforms may serve to legitimate business as usual, as rhetorical and even legal devices in the hands of powerful states and companies.

At the same time, advocates' success in pressuring the state to recognize and create regimes in relation to Indigenous peoples' right to consultation and a general right to remedy, represents a significant and perhaps even radical change in the normative status quo in the last twenty years. These new laws and regimes, however limited, provide new tools and platforms for advocacy and mobilizing that may propel more meaningful change in the future. Notwithstanding their pitfalls, it is arguably better for marginalized communities to have a recognized law and a process to appeal to, instead of no law at all. On the other hand, do these inadequate laws merely distract and exhaust the movement with few results? It is methodologically difficult, and likely too early, to evaluate the medium and long-term impact of these changes for the strength of the movement and future demands/changes.

At this juncture, the empirical and theoretical analysis marshaled here provides a preliminary map of some potentially key sites of struggle and legal innovation going forward. Given this article's focus on public law regulation, these conclusions likely have greater direct relevance to that domain, although knowledge gained about public law activism may also provide important insights to other domains, such as for example civil litigation activism. An important lesson is that the movement must continue to challenge liberal law's commodity form (to use Cutler's term) as manifest in formalism, privatism and voluntarism. In the law reform experiment of the last twenty years, these features of liberal law have emerged as tenacious obstacles to the

movement's social change agenda. This lesson pushes toward the development of proposals that change the fundamental legal arrangements that enable mining injustice, rather than adding a (potentially symbolic) layer of human rights reforms to existing structures. Moreover, the movement will continue to be challenged to fashion its demands with reflexivity and with particular attention to the significance of social context, power, epistemological pluralism and subaltern worldviews. This will require further innovation in translating subaltern ways of being and knowing into law reform agendas that are responsive to this diversity.

This article's scope, and the insights summarized above, have focused on the substantive content of specific public regulation law reform proposals and outcomes. This of course does not address the political and ideological obstacles to pursing counter-hegemonic reforms in practice, such as for example the corporate capture of most liberal states, which consistently prevents governments from implementing even modestly progressive proposals.[189] Both avenues of research and inquiry are equally important. The theorists surveyed here have argued that critical reflection on the question of how movements translate their vision into specific law reforms is incredibly important. At the same time, the strategic and practical question of how to engage effectively with the state to pursue social change is equally crucial. Movements need both an agenda that will help approximate their vision, as well as a strategy for achieving that agenda.

The reality of serious structural obstacles to the mining justice movement's social justice law reform agenda presents an important area of further research as well as a potential opportunity. Perhaps these structural issues will ultimately push toward a broader re-conception of the movement itself, one that integrates its focus on the specific injustices of global mining with a

[189] See for research documenting the corporate lobby against the Ombudsperson proposal, see *supra* note 53. For an in-depth study of the history of corporate capture of environmental law and policy by oil and gas companies, see MacLean, "Regulatory Capture" *supra* note 61.

clear articulation of how these injustices connect with the larger unfolding injustice faced by all of humanity, that of catastrophic climate change, growing global inequality and radical and rapid environmental degradation. The same legal and economic arrangements, liberal ideologies, and state-corporate relations that produce mining injustice are at the root of the broader planetary environmental and social crisis. In this light, the lessons learned from the mining justice movement's experiment with public regulation law reform activism over the last twenty years may have broader significance and application.

Observing the emerging signs of the times, a greater emphasis on large-scale structural change may indeed be the way of the future for the mining justice movement. In 2018, Swedish activist Greta Thunberg began a simple act of protest that galvanized youth around the world to join her and demand that elected politicians undertake swift and radical societal changes in order to address the climate crisis. In August 2019, Thunberg began a journey to visit Canada, the US and several Latin American countries.[190] She had decided to connect her climate crisis struggle to the situation of environment and land defenders globally who face criminalization, threats and violence due to their opposition to harmful resource extraction, including and often especially industrial mining.[191] Indeed, in 2019 the UN Human Rights Council and Special Rapporteurs also began to emphasize this important connection.[192]

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[190] "Greta Thunberg will sail across the Atlantic on a zero-emissions yacht for the UN climate summit" *CNN* (18 August 2019), online: <https://www.cnn.com/2019/07/29/europe/greta-thunberg-sailboat-scli-intl/index.html>.

[191] Brent Patterson, "Thunberg's visit to Mexico could draw attention to the risks faced by human rights defenders" *PBI* (29 July 2019), online: <https://pbicanada.org/2019/07/29/thunbergs-visit-to-mexico-may-draw-attention-to-the-risks-faced-by-human-rights-defenders/>; Front Line Defenders, "Front Line Defenders_; Front Line Defenders, "Front Line Defenders_Global Analysis 2018" (2018), online (pdf): *Front Line Defenders* <https://www.frontlinedefenders.org/sites/default/files/global_analysis_2018.pdf>; Global Witness, "Enemies of the State?: How governments and business silence land and environmental defenders" (July 2019), online (pdf): *Global Witness* <https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/?utm_source=hootsuite&utm_medium=twitter%3e;%20Front%20Line%20Defenders,%20"Front%20Line%20Defenders>.

[192] UNGA, Human Rights Council, *Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development*, UN Doc A/HRC/40/L.22/Rev.1,

These developments suggest that the mining justice movement may begin to more explicitly conceive of its law reform agenda in concert with other movements calling for structural changes to address the environmental and human costs that flow from corporate globalization. The mining justice movement may intensify its efforts to connect with other movements to formulate and pursue fundamental changes to the interrelated systems of extraction, consumption, pollution, and the economic and environmental injustices, that characterize modern life and liberal societies. In this frame, the mining justice movement would remain rooted in the concerns of Indigenous and other marginalized mine-affected communities, while also actively connecting these to related concerns and debates unfolding in the broader society, which is increasingly concerned with the survival of life on the planet.[193]

As the mining justice movement continues to experiment with substantive law reform, it will require innovative lawyering capable of marrying the political and epistemological insights and commitments of left critique, counter-hegemony and critical legal liberalism, together with the engaged, yet reflexive, stance of pragmatism. The task at hand is the articulation of a more radical law reform agenda that moves beyond adding a layer of process or oversight to existing legal and economic arrangements. The agenda of the future, if it will be able to address these urgent issues, must aim to fundamentally transform the ways in which law structures the relationship between the state, the private sector, people and all living things. The knowledge, experiences, strategies and commitments of the transnational mining justice social movement undoubtedly make an important contribution to these broader, ongoing and collective efforts to

20 March 2019, online (pdf): *UN* <https://undocs.org/A/HRC/40/L.22/Rev.1>; UN Human Rights Office of the High Commissioner, "UN human rights experts applaud children fighting climate change" (22 March 2019), online (pdf): *OHCHR* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24393&LangID=E>.

[193] Louis J Kotze, "Editorial: Coloniality, neoliberalism and the Anthropocene" (2019) 10:1 J HR & Envtl 1, online: *Elgar Online* <https://www.elgaronline.com/view/journals/jhre/10-1/jhre.2019.01.00.xml>.

forge a productive and effective agenda for legal activism and research, in pursuit of global social and environmental justice.