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SYMPOSIUM ON UN RECOGNITION OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT

THE RIGHT TO A HEALTHY ENVIRONMENT AND LAW'S HIDDEN SUBJECTS

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In this essay I reflect upon whether and how the recent international recognition of the right to a healthy environment might—or might not—provide greater support for efforts to define and protect the rights of what one could term "law's hidden subjects," namely future generations and nature. Although there are several examples of rights-based regimes that aim to protect future generations and nature, few would disagree that these hidden subjects require better legal protection, and that thoroughgoing reform of existing human rights law is overdue. I argue that the international recognition of a human right to a healthy environment might contribute less to such reforms than what one would have intuitively expected. One reason for this is because the formulation of the right does not provide anything new in terms of more comprehensive recognition and protection of rights of nature and future generations. Although it is an important symbolic event that signifies broad consensus on the importance of rights-based environmental protection, many domestic and regional legal regimes already protect future generations, while some even offer innovative rights of nature provisions. At best, UN General Assembly Resolution 76/300[1] merely reinforces the status quo ante.

Law's Hidden Subjects

Future generations are often hidden from law's eye, and therefore its protective scope, simply because they do not yet exist. Scholars and advocates have long argued for greater consideration of future generations in political and legal processes, but with little success.[2] On paper at least, key international environmental law declarations, multilateral environmental agreements, domestic laws, the Sustainable Development Goals (SDGs), and even some domestic environmental human rights emphasize the importance of protecting future generations. Often they do so explicitly in human rights terms. One famous example is Principle 1 of the Stockholm Declaration (widely considered the forerunner to current manifestations of the human right to a healthy environment), which states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations." Even though only in a preambular provision, the Paris Climate Agreement notes the importance for states, "when taking action to address climate change, [to] respect, promote and consider their respective obligations on human rights, [including] intergenerational equity."

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[1] GA Res. 76/300 (July 28, 2022).

[2] Most famously: Edith Brown Weiss, In Fairness to Future Generations (1989).

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The Constitution of the Republic of South Africa, 1996 is a domestic example that recognizes: "Everyone has the right to an environment that is not harmful to their health or wellbeing; and to have the environment protected, for the benefit of present and future generations."[3]

Yet very little of this high rhetoric has managed to effectively translate into concrete institutions, processes, and mechanisms that protect unborn generations. One example of what is possible when rhetoric translates into action is the office of the Future Generations Commissioner for Wales that was created under the Well-being of Future Generations (Wales) Act 2015.[4] Another is the Israeli Commission for Future Generations that operated for only one term between 2001–2006.[5] Elsewhere, most of the action seems to be happening in court rooms and (youth) activist spaces, especially in the climate litigation context, where incremental success is being achieved.[6] Often relying on environmental and other human rights provisions, courts are gradually impacting and shaping power dynamics in politics by empowering the youth (sometimes also representing the unborn) to have a say in the making of climate laws and policies, influence regressive global climate governance, and increase liability for climate damaging activities.[7] A recent example is *Neubauer et al. v. Germany*, where the German Constitutional Court declared the country's Federal Climate Protection Act partly unconstitutional because it does not sufficiently protect young people against future infringements and limitations of their existing fundamental rights as a result of climate change.[8]

Like future generations, nature's rights are also invisible to law's eye and largely remain hidden behind the human-centered Cartesian veil that separates humans and nature. The rational human subject has over many years, notably through its disembodying gendered legal and political processes, constructed nature as an objectified, subservient, weak, feminine "Mother Earth." "*Man*kind" continuously seeks to dominate, mold, control, and protect Mother Earth through anthropocentric social institutions to ensure optimal ecosystem "services" and other benefits that must sustain (mostly present human) life on Earth.[9] Anthropocentric law, including its human rights provisions, has been deformed by rational thinking that places *Anthropos* at the center of all concern, where nature merely acts as a backdrop for the many hierarchies and predatory practices that law creates and perpetuates between living beings.[10] Nature is only protected for the short term utilitarian benefit of humans, and not because of a sense of obligation, ethical or otherwise, that is commensurate with an acknowledgement that non-human beings should be legally protected in their own right.

It is only recently that more "radical" alternative framings of rights have been emerging in the form of rights of nature, mostly in Latin American countries, but also elsewhere in the world.[11] In many instances driven by

[3] Section 24. Other domestic examples are summarized in Joerg Tret Tremmel, *Establishing Intergenerational Justice in National Constitutions*, *in* HANDBOOK OF INTERGENERATIONAL JUSTICE (Joerg Tret Tremmel ed., 2006).

[4] Haydn Davies, *The Well-Being of Future Generations (Wales) Act 2015: Duties or Aspirations?*, 18 ENVTL. L. REV. 41 (2016).

[5] Shlomo Shoham & Friederike Kurre, *Institutions for a Sustainable Future: The Former Israeli Commission for Future Generations*, *in* INTERGENERATIONAL JUSTICE IN SUSTAINABLE DEVELOPMENT TREATY IMPLEMENTATION: ADVANCING FUTURE GENERATIONS RIGHTS THROUGH NATIONAL INSTITUTIONS (Marie-Claire Cordonier Segger, Marcel Szabó & Alexandra R. Harrington eds., 2021).

[6] Louis Kotzé & Henrike Knappe, *Youth Movements, Intergenerational Justice, and Climate Litigation in the Deep Time Context of the Anthropocene*, 5 ENVTL. RES. COMM. 025001 (2023).

[7] Annalisa Savaresi & Juan Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, 9 CLIMATE L. 244 (2019).

[8] Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021) (Ger.).

[9] Anna Grear *The Vulnerable Living Order: Human Rights and the Environment in a Critical Philosophical Perspective*, 2 J. HUM. RTS. & ENV'T 23 (2011).

[10] Anna Grear, *Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity,"* 26 L. & CRITIQUE 225 (2015).

[11] *E.g.*, RIGHTS OF NATURE: A RE-EXAMINATION (Daniel Corrigan & Markku Oksanen eds., 2021).

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movements of Indigenous peoples and communities, the nascent rights of nature initiative is seen to have some potential to dissolve modernist dualisms and to promote more expansive ways of seeing, being, caring, and knowing that can redefine sociality and relationality in a decentered, all-inclusive and non-hierarchical "ecological" legal space.[12] As is the case with climate litigation and future generations, the judiciary in particular is playing a key role in illuminating the evolving possibilities and limitations of rights of nature provisions, and the myriad tensions that arise when these radical provisions collide with the systemic obstacles and realities of capitalist-driven growth-without-limits development. One example is the 2011 *Vilcabamba River case* in Ecuador, where the court upheld the country's constitutional rights of nature provisions.[13] In 2017, Colombia's Constitutional Court ruled that the Atrato River possessed rights to "protection, conservation, maintenance, and restoration" and established joint guardianship arrangements shared between Indigenous communities and the government.[14] But these victories are few and far between and difficult to implement; they are still only confined to a few (mostly Global South) jurisdictions, and are often too weak to withstand the realities of exploitative economic development.[15]

The Effect of the Right to a Healthy Environment on Law's Hidden Subjects

Clearly, there have been some significant, but still insufficient, advances in efforts to afford future generations and nature the care and protection they deserve under rights-based regimes. In this section, I explain why I believe the international recognition of the human right to a healthy environment will likely not play a significant role in advancing the legal protection of law's hidden subjects.

One consideration is conceptual-ontological and requires reflection on whether the *human* rights language in which the resolution is explicitly framed is the most appropriate basis for environmental rights-based approaches. This is not a trivial wordplay exercise. One criticism often leveled against human rights is that they tend to center the human subject as their main concern while "othering" everything else that does not fit within the rationalist liberal construct of "the human" and its central position in law. In liberal law's anthropocentric view, and the view of human rights specifically, nature is a disembodied object at the service of a small, selectively privileged subset of some present-day humans.[16] As far as I am aware, there is no empirical evidence that suggests non-anthropocentric laws, such as those expressed in rights of nature provisions, offer better protection in comparison to their anthropocentric counterparts, although they could in theory. But rights of nature do at the very least provide radical alternative and expansive ways of knowing, seeing, being, and caring that could open up human-centered rights to alternative understandings and much broader categories of law's vulnerable subjects. There is no explicit recognition in the resolution of the intrinsic significance of nature, let alone the possibility of affording rights to nature, or even for the resolution to act as catalyst to do so over time. It is rather the case, as the resolution says, that nature stands in the service of humans instead of recognizing that anthropogenic pressures actually impact ecosystems: "the decline in services provided by ecosystems interfere[s] with the enjoyment of a clean,

[12] Posthuman Legalities: New Materialism and Law Beyond the Human (Anna Grear, Iván Darío Vargas-Roncancio & Joshua Sterlin eds., 2021).

[13] Wheeler v. Director de la Procuraduria General del Estado en Loja, Case No. 11121-2011-0010, Judgment (Provincial Court of Loja) (Ecuador) (in Spanish).

[14] Corte Constitucional [C.C.] [Constitucional Court], Sala Sexta de Revision, 10 November 2016, M.P.: J. Palacio, Expediente T-5.016.242 (Colom.).

[15] Sara Caria & Rafael Domínguez, *Ecuador's* Buen Vivir*: A New Ideology for Development*, 43 Lat. Am. Perspec. 18 (2016).

[16] Louis Kotzé, *The Anthropocene, Earth System Vulnerability and Socio-ecological Injustice in an Age of Human Rights*, 10 J. Hum. Rts. & Env't 62 (2019).

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healthy and sustainable environment."[17] The more critical issue that the resolution does not recognize is that these ecosystems are in decline precisely because of increasing human pressures that are promoted by capitalist-oriented pro-growth laws, including *human* rights.

At a more general level, there are convincing arguments that increasingly expose environmental law's cornerstone principle of sustainable development for the predatory, neoliberal growth-oriented world order that it actively and consciously creates and maintains.[18] The resolution is explicitly embedded in this growth-without-limits sustainable development paradigm, and more specifically, what it describes as the "far-reaching and *people-centred* set of universal and transformative Sustainable Development Goals and targets."[19] Neoliberal sustainable development operates as the pivotal core of the SDG framework, and as a result, the SDGs have had negligible positive steering effects on efforts that aim to achieve planetary integrity, protection of the non-human world, and future generations.[20] The fact that the resolution endorses and orientates itself alongside the SDGs suggests that it will likely not be able to counter the dominant pro-growth, people-centered framing of a world order that favors short term economic development at the cost of long-term ecological sustainability. This is arguably a lost opportunity for environmental human rights to prompt the sort of radical social transformations that must recognize both the limits of the planet and the fact that humans are not the only living beings that matter.

On the one hand, one might argue that recognizing nature's rights was probably not the intention of states parties, or their primary concern in this instance. Rather, other interstate processes such as the United Nations' much "softer" Harmony with Nature program, which through the adoption of thirteen General Assembly resolutions to date aims to propose alternative understandings of nature-human relationships, are more suitably geared toward pursuing such an effort (although even this program is unlikely to move states to formally recognize nature's rights in the foreseeable future).[21] But on the other hand, the resolution presented an ideal—but now lost—opportunity for states to recognize the rights of nature. Nothing, in principle, prevented states from doing so, especially in the light of well-established precedent already embedded in the many domestic legal systems that provide for such rights, and in the light of parallel UN processes supporting the rights of nature movement. Was recognizing rights of nature just asking a tad too much from states?

In the end, the menace of realpolitik probably prevailed and it is likely that officially recognizing the rights of nature was seen to be too radical and controversial, and therefore unacceptable for the unambitious, path-dependent, development-oriented, human-centered global (environmental) governance regime.[22] Global governance processes and politics being what they are, and chasing the lowest common denominator as they do, delicately curating this opportunity to recognize the human right to a healthy environment was a tedious and protracted task that required a mammoth multi-actor effort. Requiring states to also recognize the rights of nature in that same resolution was probably going too far, although it should not have been the case.

I am therefore not optimistic that the international recognition of the human right to a healthy environment will have any significant destabilizing effect on business-as-usual global environmental governance by shifting its orientation from one rooted in human-centered development to that which is more ecologically caring. More specifically, the resolution is a missed chance for bolstering the rights of nature movement and I suspect that, as with the

[17] GA Res. 76/300, *supra* note 1, pmbl., para 9.

[18] Summarized in: Louis Kotzé & Sam Adelman, *Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope*, 34 L. & Critique 227 (2022).

[19] GA Res. 76/300, *supra* note 1 (emphasis added).

[20] Frank Biermann et al., *Scientific Evidence on the Political Impact of the Sustainable Development Goals*, 5 Nature Sustainability 795 (2022).

[21] Helen Dancer, *Harmony with Nature: Towards a New Deep Legal Pluralism*, 53 J. Legal Pluralism & Unofficial L. 21 (2021).

[22] Louis Kotzé, *International Environmental Law's Lack of Normative Ambition: An Opportunity for the Global Pact for the Environment?*, 16 J. Eur. Envtl. & Planning L. 213 (2019).

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transnational environmental human rights regime that has been built over several decades from the bottom up, the future growth of rights of nature will largely depend on domestic, and perhaps to a more limited extent also regional, innovations.

The resolution is clearer about recognizing the rights and interests of future human generations, although it does not offer anything new in terms of formulation or concrete measures and institutions that are more fully geared toward protecting future generations. The resolution merely reaffirms, as do so many other international texts, that "sustainable development . . . and the protection of the environment, including ecosystems, contribute to and promote human well-being and the full enjoyment of all human rights, for present and future generations"; and that "environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights." The extent to which the gravity of the problem is recognized by the resolution is not commensurate with the extent of the measures that are being proposed to address the problem. Moreover, while states acknowledge the need that "additional measures should be taken for those who are particularly vulnerable to environmental degradation," the resolution is unclear whether this category also includes future generations. On the basis of a contextual-textual analysis of the resolution, one can therefore only conclude that the international recognition of the human right to a healthy environment is as insignificant for the protection of future generations as it is for bolstering the rights of nature.

Conclusion

International recognition of any "new" human right is usually a signifier of universal state support; a critically important event that precedes the creation of regional and domestic legal provisions and procedures, and associated governance institutions. One of the outliers in traditional global governance practice (others are the international recognition of women's rights and disability rights), this was not the sequence of events in the present case. Approximately 156 out of 193 UN member states already provide for a human right to a healthy environment in their constitutions and/or other laws;[23] it features prominently in most regional human rights instruments; courts around the world are actively involved in innovatively interpreting, enforcing, and further developing this right;[24] the right undergirds grassroots activities of many civil society movements worldwide;[25] and it has been the focus of an impressive—and growing—body of scholarly work now for decades.[26] Even the resolution itself explicitly recognizes that "a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies."

I am therefore of the view that, while symbolically important, the international recognition of the human right to a healthy environment by the UN General Assembly might rightly be considered a bit of a damp squib. This is not to reflect negatively in any way on the tireless and crucial efforts over many years by states, courts, civil society movements, international organizations, both UN special rapporteurs on human rights and the environment, and others, to reach this point of near universal recognition of the right. It is rather to postulate that this international recognition, while important, could very well have less of a reinforcing and even transformative trickle-down effect than what one would expect, especially when it does not offer anything radically innovative and new compared to what already exists.

[23] UN Doc. A/HRC/43/53, Annex II (2019).

[24] *E.g.* James May & Erin Daly, Global Environmental Constitutionalism (2015).

[25] *E.g.*, Joshua Gellers & Chris Jeffords, *Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice*, 18 Glob. Envtl. Pol. 99 (2018).

[26] *E.g.*, The Human Right to a Healthy Environment (John Knox & Ramin Pejan eds., 2018); David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (2011).

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