# HUMAN RIGHTS IN PURSUIT OF CLIMATE JUSTICE

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## INTRODUCTION

The central argument in this article is that climate justice in the Anthropocene-Capitalocene requires a reconceptualization of human rights commensurate with the scale and urgency of climate breakdown.[1] To this end, the tensions that have afflicted human rights during Holocene modernity must be overcome, principally that between universality and exclusion. The human rights-bearer is a universalized abstraction, and acontextual conceptions such as autonomy and liberty obscure structural disempowerment and inequality. Climate injustice is illustrated by the fact that the wealthiest 1 percent of the world's population were responsible for the emission of more than twice as much carbon dioxide as the poorer half between 1990 and 2015 but are the least vulnerable to climatic harms.[2]

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1 The Anthropocene refers to humanity's destructive impacts on the Earth System. It was initially proposed to designate a new geological epoch after the 11,700-year Holocene but is now widely used in the humanities and social science. See JASON W. MOORE, ANTHROPOCENE OR CAPITALOCENE? NATURE, HISTORY, AND THE CRISIS OF CAPITALISM 7 (2016) for a discussion on the Capitalocene, which suggests that capitalism rather than an undifferentiated humanity is the main driver of environmental and climate breakdown.

2 TIM GORE, CONFRONTING CARBON INEQUALITY: PUTTING CLIMATE JUSTICE AT THE HEART OF THE COVID-19 RECOVERY 2 (2020), (*accessible at*

Despite the emergence of social, economic, cultural, and environmental rights, there remains a tension between the historical focus upon individual rights and the collective nature of climatic harms. In 2009, the UN Office of the High Commissioner for Human Rights concluded that climate change threatens the enjoyment of numerous rights but does not necessarily violate them.[3] Today, it is widely acknowledged that global heating violates a wide range of human rights.[4] The central argument in this article is that reconceptualizing human rights in ways that make them less hierarchical, more inclusive, and genuinely universal can facilitate climate justice for the poor and vulnerable. I argue that this can be achieved through vulnerability theory, new materialism, and the rights of nature.

In Part I, I briefly examine the historical closures, exclusions, and contradictions of human rights that limit their efficacy. Part II examines the limits and potential of domestic and international environmental law in achieving climate justice. This is followed in Part III by a discussion of the advantages and limitations of rights-based climate litigation. In Part IV, I discuss how human rights can be reimagined in pursuit of climate justice through the insights of vulnerability theory, new materialist legal theory, and by giving rights to nature. Part V contains a brief conclusion.

## I. UNIVERSALITY, EXCLUSION AND CONTRADICTION

The Anthropocene-Capitalocene destabilizes the Eurocentric onto-epistemologies and liberal premises from which human rights emerged.[5] The central trope of the Anthropocene is the idea of an

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https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621052/mb-confronting-carbon-inequality-210920-en.pdf?sequence=1&isAllowed=y [https://perma.cc/4TF8-KNKN]).

[3] U.N. Secretary-General, *Rep. of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, ¶¶ 92, 96, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

[4] Climate science is clear that our planet is not merely warming but heating, and that "natural" disasters are increasingly the result of climate breakdown rather than cyclical weather events. Climate change is too passive and gentle a term for the unfolding catastrophe. *See* Damian Carrington, *Why the Guardian is Changing the Language it Uses About the Environment*, THE GUARDIAN (May 17, 2019), https://www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment [https://perma.cc/3DZA-FLVY].

[5] Anna Grear, *Resisting Anthropocene Neoliberalism: Towards New Materialist Commoning?*, *in* THE GREAT AWAKENING: NEW MODES OF LIFE AMIDST CAPITALIST RUINS 317, 338–39 (2021). The Anthropocene has gained widespread purchase in both the academy and public discourse, but it is premised upon the abstraction of Anthropos relatively detached from capitalism–the main

undifferentiated humanity with equal agential capacities and responsibility for the rupture to the Earth System.[6] Anthropos is the super-agent with telluric power capable of provoking the convergence of human and geological history as the unintended consequence of the actions of an undifferentiated species. Dipesh Chakrabarty contends that Anthropos is the universal representation of humanity and "[s]pecies may indeed be the name of a placeholder for an emergent, new universal history of humans that flashes up in the moment of the danger that is climate change."[7] The Promethean technological power acquired by a minority of human beings raises ethical and deontological questions about the duties, responsibilities, and obligations that flow from a super-agency that paradoxically renders humanity increasingly powerless against nature. The paradox and contradictions of law and human rights are leitmotifs in this article.

Anthropos is the geological equivalent of the universal subject of human rights who emerged from the bourgeois revolutions—universalized abstractions that break down when confronted by the lived experiences of corporeal, embedded, situated human beings. "'[H]umanity' has no fixed meaning [and therefore] cannot act as a source of norms. Its meaning and scope keep changing according to political and ideological priorities."[8] Anthropos is the descendant of law's reasonable man and neoliberalism's

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driver of climate breakdown. I use the awkward concatenation Anthropocene-Capitalocene for this reason, and reluctantly. The Capitalocene is more apposite because it focuses attention upon capital accumulation and endless economic growth as the main drivers of environmental destruction, the sixth great extinction, and climate breakdown.

6 Clive Hamilton, *The Anthropocene as Rupture*, 3 ANTHROPOCENE REV. 93, 94, 96 (2016). *See* SIMON L. LEWIS & MARK A. MASLIN, THE HUMAN PLANET: HOW WE CREATED THE ANTHROPOCENE 13 (2018) (arguing that the temporal marker of the Anthropocene is 1610, which marks the lowest point level of carbon dioxide emissions in the Earth's recent geological history brought about by the reduction in economic activity due to the genocide of millions in the Americas in the Columbian Exchange). The periodization of the Anthropocene is contentious and significant but beyond the scope of this paper. *See* Sam Adelman, *Beyond Development: Towards Sustainability and Climate Justice in the Anthropocene, in* THE LIMITS OF LAW & DEVELOPMENT: NEOLIBERALISM, GOVERNANCE AND SOCIAL JUSTICE 54 (Sam Adelman & Abdul Paliwala eds., 2020).

7 Dipesh Chakrabarty, *The Climate of History: Four Theses,* 35 CRITICAL INQUIRY 197, 221 (2009). For critiques of Chakrabarty's argument, see Grear, *supra* note 5, and Malm & Hornborg *infra* note 19. *Cf.*, Conor Gearty, *Is Human Rights Speciesist?, in* THE LINK BETWEEN ANIMAL ABUSE AND HUMAN VIOLENCE (2009), for a discussion on human rights as a form of philosophical speciesism.

8 Costas Douzinas, *The Paradox of Human Rights*, 20 CONSTELLATIONS 51, 55 (2013).

*homo economicus*.[9] In Peter Fitzpatrick's words, the Enlightenment creates the

> very monsters against which it so assiduously sets itself. These monsters of race and nature mark the outer limits, the intractable "other" against which Enlightenment pits the vacuity of the universal and in this opposition gives its own project a palpable content. Enlightened being is what the other is not. Modern law is created in this disjunction.[10]

The privileged autonomous Enlightenment subject at the apex of the rights hierarchy mutates into Anthropos, who Anna Grear describes as a narrow, self-interested figure—exemplified by the abstract, possessive individual of liberal legality—that excludes most of humanity and all of nature. The Anthropocene is a crisis of hierarchies that amplifies systemic exclusions based upon race, gender, indigeneity, and anthropocentrism. Grear argues that

> any ethically responsible future engagement with 'anthropocentrism' and/or with the "Anthropocene" must explicitly engage with the oppressive hierarchical structure of the anthropos itself—and should directly address its apotheosis in the corporate juridical subject that dominates the entire globalized order of the Anthropocene age.[11]

Human rights and the Anthropocene-Capitalocene are rooted in similar contradictory logic of universality, equality, hierarchy, and inclusion-exclusion. Whereas human rights emerged as the universalization of the particular interests of white, bourgeois men, the Anthropocene particularizes responsibility by universalizing culpability.

The historical emergence of human rights as individual entitlements linked them to capitalism from the outset, something that their putative universality has been designed to conceal from the bourgeois revolutions to the Anthropocene. Douzinas writes:

> [t]he universal humanity of liberal constitutions was the normative ground of division and exclusion. A gap was opened between universal "man," the ontological principle of modernity, and national citizen, its political instantiation and the real beneficiary of rights. The nation-state came into existence through the exclusion of other people and

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[9] Jason Read, *A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity*, 6 FOUCAULT STUD. 25, 27–28 (2009).

[10] PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 45 (2002).

[11] Anna Grear, *Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity,"* 26 LAW & CRITIQUE 225, 226 (2015).

> nations . . . The alien as a non-citizen is the modern barbarian. He does not have rights because he is not part of the state and he is a lesser human being because he is not a citizen . . . The alien is the gap between man and citizen.[12]

The closures and exclusions of modern human rights based upon colonial concepts of civilization, property, and reason were followed by the ideological battle between the civil and political rights and economic, social, and cultural rights during the Cold War.[13] Upendra Baxi charts the transformation of modern human rights contained in the Universal Declaration of Human Rights into contemporary trade-related, market-friendly human rights under neoliberal globalization through corporate appropriation.[14] Corporate human rights achieved their apotheosis in the *Citizens United* decision by the US Supreme Court,[15] presumably on the basis of Mitt Romney's inane reasoning that "corporations are people too."[16] The tale of human rights is thus a double history of the gradual expansion of rights-bearers to include slaves, women, LGBTQ+, and other communities on the one hand, and a continuing narrative of exclusion on the other: formal equality disguising and facilitating enduring substantive inequality.

The Anthropocene-Capitalocene reconstructs the othering dualisms of modernity—gender, race, class, and the nature-society divide—in a novel way. The universal rights-bearer of Holocene modernity has metamorphosed into Anthropos, the new universal figure of culpability for climate breakdown and ecological collapse. In modernity, most human beings were denied dignity, protection, and rights on the pretext that they were not fully human; today the biopolitics of exclusion flows directly from humanness itself. If the central contradiction of human rights was the construction of a conception of humanity from which Others could be *excluded*, today all humans are *included* through the attribution of a spurious universal hyper-agency regardless of actual responsibility for ecological and climate breakdown. Whereas in the

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[12] Douzinas, *supra* note 8, at 56.

[13] Nico Schrijver, *Fifty Years International Human Rights Covenants. Improving the Global Protection of Human Rights by Bridging the Gap Between the Two Covenants*, 41 NEDERLANDS TIJDSCHRIFT VOOR DE MENSENRECHTEN [DUTCH MAG. FOR HUM. RTS.] 457, 458 (2016).

[14] UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS at xv (2007).

[15] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 928–29 (2010).

[16] Philip Rucker, *Mitt Romney Says "Corporations are People,"* WASH. POST (Aug. 11, 2011), https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html [https://perma.cc/BT56-VXVQ].

Holocene, the poor and vulnerable were systematically disempowered, in the Anthropocene-Capitalocene, they are held responsible for powers they do not possess as universal rights of the Age of Enlightenment mutate into the universal culpability of the Age of Humans.

The universalization of agency and responsibility in the Anthropocene narrative is contradicted by the history of greenhouse gas emissions. Bonneuil and Fressoz note that "Great Britain and the United States made up 60 per cent of cumulative total emissions to date in 1900, 57 per cent in 1950 and almost 50 per cent in 1980.[17] From the standpoint of climate, the Anthropocene should rather be called the 'Anglocene.'"[18] Malm and Hornborg observe that "[i]n the early 21st century, the poorest 45% of the human population accounted for 7% of emissions, while the richest 7% produced 50%."[19] From the start of the Industrial Revolution to the last quarter of the twentieth century, climate breakdown was driven primarily by a relatively small number of white, bourgeois, Northern men.[20] Assigning responsibility for emissions is complicated by the rising emissions of rapidly industrializing Southern countries. Achieving climate justice is hindered by the fact that more greenhouse gases have been emitted since the adoption of the UN Framework Convention on Climate Change (UNFCCC) in 1992 than prior to it.[21] This does not alter the reality that impoverished billions in the Global South are least responsible for the climate emergency but most vulnerable to its harmful impacts. Human rights cannot be universal unless and until their rights are protected.

During the Holocene, the primary divide was between those with universal rights they did not need and those with rights they could not use; in Jacques Rancière's formulation, "the Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not."[22] In the Anthropocene-Capitalocene, we are witnessing the metamorphosis of this divide into one between those with access to climate justice and those without. Global heating certainly affects everybody, but the inability to avoid climatic harms is not the same as having resources

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[17] CHRISTOPHE BONNEUIL & JEAN-BAPTISTE FRESSOZ, THE SHOCK OF THE ANTHROPOCENE: THE EARTH, HISTORY AND US 132, 82 (2016).

[18] *Id.*

[19] Andreas Malm & Alf Hornborg, *The Geology of Mankind? A Critique of the Anthropocene Narrative*, 1 ANTHROPOCENE REV. 62, 64 (2014).

[20] *Id*. Climate justice is complicated by the rising emissions of rapidly industrializing Southern countries whose *historical* responsibility is still lower than states that industrialized earliest.

[21] DAVID WALLACE-WELLS, THE UNINHABITABLE EARTH: LIFE AFTER WARMING 4 (2019).

[22] Jacques Rancière, *Who is the Subject of the Rights of Man?,* 103 S. ATL. Q. 297, 302 (2004).

for adaptation—a core aspect of climate justice. The latter are least responsible for climate breakdown (a responsibility they cannot evade) but most exposed to climatic harms; the former are those with relatively greater resilience and adaptive capacities perversely derived from their larger historical emissions and the benefits and wealth they accrued from the exploitation of fossil fuels. Dipesh Chakrabarty's erroneous assertion that "[u]nlike in the crises of capitalism, there are no lifeboats here for the rich and the privileged" is an example of the tendency to disconnect the Anthropocene from the socio-economic structures that produced it.[23]

Human rights advances in the Holocene were neither illusory nor negligible. The concept of the human who possessed rights was widened and its scope extended beyond civil and political rights to include socio-economic rights.[24] These gains may be measured by decolonization, poverty reduction, and women's rights, amongst others, but human rights remained universal in theory rather than practice. Since climate justice is not possible without the meaningful universalization of human rights (not least circumscribing the rights of capital through globalization),[25] is it possible to reimagine human rights in a more expansive, inclusive manner that leads to climate justice?

### A. HUMAN RIGHTS, SOVEREIGNTY, AND COSMOPOLITANISM

Despite the many contradictions of human rights, their proponents defend their role in personalizing vulnerability to climatic harms and the ways in which they link law, ethics, and justice.[26] Human rights may be flawed, but they nonetheless constitute an elevated ethical language with greater legitimacy than the soiled discourses of law and politics because they offer visions of futures with less suffering. Few struggles are not framed in rights terms, but cosmopolitan conceptions of international order based upon the organizing principle of human rights have consistently foundered on the rock of sovereignty. In the Westphalian system, the primary duty to protect human rights is imposed on the

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[23] Chakrabarty, *supra* note 7, at 221.

[24] For a discussion on the history of the Covenant, see BEN SAUL, DAVID KINLEY & JAQUELINE MOWBRAY, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES AND MATERIALS (2014).

[25] For a discussion on contemporary, trade-related, market-friendly human rights in contrast to the modern rights envisaged in the Universal Declaration of Human Rights, see BAXI, *supra* note 14.

[26] *See generally* TRACEY SKILLINGTON, CLIMATE JUSTICE AND HUMAN RIGHTS at xvii–xix (2016).

sovereign states which have most egregiously violated them. To be enforceable, rights must be justiciable in state-sanctioned courts.[27] Hannah Arendt wrote that the supposedly inalienable Rights of Man "proved to be unenforceable—even in countries whose constitutions were based upon them—whenever people appeared who were no longer citizens of any sovereign state" and

> broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.[28]

Paradoxically, it is precisely because the "human" in human rights has no fixed meaning that makes it possible to reimagine human rights in more inclusionary ways. If human rights can be expanded to include excluded "Others" such as women and slaves, surely it is possible to enlarge their scope to incorporate new categories, such as those displaced by global heating, or extend the ambit of rights beyond human beings? If the bourgeois revolutions constituted the first appropriations of these objects of desire, can human rights be re-appropriated in pursuit of climate justice? Endlessly paradoxical, human rights are both utopian, in that they postulate the possibility of their redundancy, and Sisyphean, in that the work of creating and defending them never ceases. In Nelson Mandela's words, "I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb."[29] The struggle against apartheid highlighted yet another paradox: universality is the animating force behind the creation of rights that are authored and defended by the rightless in struggle.[30] Human rights survive because their promise of inclusion offers the possibility of rewriting their history of exclusion. Like law, human rights must, in Peter Fitzpatrick's words, "secure stability and predictability but also has to do the opposite: it has to ensure that law is ever responsive to change."[31]

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[27] Regional tribunals derive their legitimacy from the willingness of nation-states to limit their sovereignty.

[28] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 293, 299 (1962).

[29] NELSON MANDELA, LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA 617 (1995).

[30] For a discussion on the authorship and ownership of human rights by non-Western peoples, see BAXI, *supra* note 14.

[31] Peter Fitzpatrick, *Law in the Domains of Death*, *in* LAW, JUSTICE, AND POWER: BETWEEN REASON AND WILL 210 (Sinkwan Cheng ed., 2004).

Ulrich Beck described how the national outlook—the default position in the academy during modernity—undermined cosmopolitan governance by treating the sovereign territory of the nation-state as the natural container of law and politics.[32] The tension between sovereignty and human rights was entrenched in the competing visions of the UN Charter and the Universal Declaration of Human Rights. Sovereign prerogative, immunity, and impunity personified by Jair Bolsonaro and Donald Trump inhibit coherent collective responses to the transboundary problem of global heating and the trans-species implications of mass extinction.[33] Cosmopolitanism theories of global justice became widespread with the advent of neoliberal globalization.[34] Geo-history is a tale of the clash between the territorially bounded, exclusionary rationality of sovereignty, biophysical limits and planetary boundaries and the expansionary, inclusionary, de-territorialized, and self-destructive logic of capitalism.[35] Purportedly universal, human rights could not become global so long as sovereignty retained a monopoly of legitimate force at all levels from the *nation*al to the inter*nation*al. We continue to grasp for a lexicon that adequately reflects the spatialities of the Anthropocene-Capitalocene and the imperative that ecological thought should proceed on the premise that "everything is interconnected" and that the wellbeing of one species depends upon that of all species and the planet.[36] How should we

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[32] ULRICH BECK, THE COSMOPOLITAN VISION 2 (2006).

[33] Telmo Pievani, *The Sixth Mass Extinction: Anthropocene and the Human Impact on Biodiversity*, 25 RENDICONTI LINCEI [LYNIC REPS.] 85 (2014).

[34] For a discussion on cosmopolitanism and global justice, see Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48 (1992); Jürgen Habermas, *A Political Constitution for the Pluralist World Society?*, *in* THE COSMOPOLITANISM READER 267, 286 (2010). For a discussion on neoliberalism, see DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2007). For a discussion on sovereignty and environmental rights, see Sam Adelman, *Sovereignty and Environmental Human Rights*, *in* VII HUMAN RIGHTS AND THE ENVIRONMENT: LEGALITY, INDIVISIBILITY, DIGNITY AND GEOGRAPHY (James R. May & Erin Daly eds., 2019).

[35] The planetary boundaries framework identifies nine boundaries related to critical Earth System processes that delineate a "safe operating space" for humanity. Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet,* 347 SCI. 736, 739–43 (2015). Four boundaries have been transgressed (biosphere integrity, climate change, biogeochemical flows, and land-system change) and the others are under threat. *Id.* at 736. Like Earth System Science, the framework stresses the need for holistic, systemic thinking that is antithetical to modern Western law. Tim Stephens, *What is the Point of International Environmental Law Scholarship in the Anthropocene?*, *in* PERSPECTIVES ON ENVIRONMENTAL LAW SCHOLARSHIP: ESSAYS ON PURPOSE, SHAPE AND DIRECTION 121 (Ole W. Pedersen ed., 2018).

[36] TIMOTHY MORTON, THE ECOLOGICAL THOUGHT 1 (2010).

understand the continuities and differences between the international, the global, the planetary, and what Bruno Latour calls the "Terrestrial"?[37]

Latour views the "Global" as the discredited endpoint of modernity and the "Local" as the refuge for authoritarian, nationalist, xenophobic critics of globalism.[38] Those "who continue to flee toward the Global and those who continue to take refuge in the Local" do not comprehend the scale of the upheaval provoked by geo-human history, which irreversibly alters Holocene geographical and mental cartographies.[39] For Latour, the "Terrestrial" is a new condition, a new political actor, and the new site of law, governance, and politics in the New Climatic Regime.[40] As its name suggests, it is tied to the Earth but transcends borders and territorial identities, and is therefore incompatible with bounded logics that paradoxically refuse to accept biophysical limits and planetary boundaries.

The Anthropocene-Capitalocene calls for posthuman, neo-materialist onto-epistemologies linked to the wellbeing of the biosphere, biodiversity, and widened conceptions of rights.[41]

## II. THE LIMITS AND POTENTIAL OF THE LAW

The flaws of international environmental law (IEL) are widely acknowledged, not least for its lack of normative ambition and its preponderance of soft hortatory rules and principles.[42] The no-harm rule, the polluter pays principle, and the precautionary principle are honored more in the breach than the observance. It comes as no surprise that the world has failed to meet a single Aichi Biodiversity Target to curb the

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[37] Sam Adelman, *Planetary Boundaries, Planetary Ethics and Climate Justice in the Anthropocene, in* RESEARCH HANDBOOK ON LAW, GOVERNANCE AND PLANETARY BOUNDARIES 65 (Duncan French & Louis J. Kotzé eds., 2021).

[38] *See* BRUNO LATOUR, DOWN TO EARTH: POLITICS IN THE NEW CLIMATIC REGIME 26, 30, 71 (Catherine Porter trans., 2018).

[39] *Id.* at 51.

[40] *See id.* at 40, 42, 58.

[41] *See id.* at 67, 72.

[42] *See* Duncan French & Louis J. Kotzé, *'Towards a Global Pact for the Environment': International environmental law's factual, technical and (unmentionable) normative gaps*, 28 R. EUR., COMPAR. & INT'L ENV'T L. 1, 6, 8 (2019). *See also* Louis J. Kotzé, *Earth System Law for the Anthropocene*, 11 SUSTAINABILITY 1, 4 (2019), https://www.mdpi.com/2071-1050/11/23/6796/htm [https://perma.cc/5RLZ-ZDK9].

destruction of wildlife and life-supporting ecosystems in the last decade, rendering sustainable development more oxymoronic than ever.[43]

It was only in 2015 that the Paris Agreement became the first multilateral environmental agreement to include a reference to human rights—in the preamble rather than the operative part of the instrument.[44] There are growing calls for a global meta-right to a clean, safe, healthy, and sustainable environment spurred by the work of successive UN special rapporteurs on human rights and the environment, but little sign that such a right will be adopted by the UN.[45] The legal systems of approximately three-quarters of UN member states contain an environmental right in various forms.[46] There has been a 38-fold increase in environmental laws since the 1972 UN Conference on the Human Environment in Stockholm, but not in effective protection of human rights and the environment.[47] This is partially due to the fact that both IEL and human rights are usually deployed after rights violations and environmental destruction have occurred, often too late to prevent the increasing number of attacks and killings of environmental defenders.[48] Atapattu and Schapper note that some scholars believe that "human rights can be interpreted expansively

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[43] *See* SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, GLOBAL BIODIVERSITY OUTLOOK 5, at 12–17 (2020). For an overview of sustainable development, see Arturo Escobar, *Sustainability: Design for the pluriverse*, 54 DEV. 137 (2011) and Sam Adelman, *The Sustainable Development Goals, Anthropocentrism and Neoliberalism, in* SUSTAINABLE DEVELOPMENT GOALS: LAW, THEORY & IMPLEMENTATION 15 (Duncan French & Louis J. Kotzé eds., 2018).

[44] Sam Adelman, *Human Rights in the Paris Agreement: Too Little, Too Late?*, 7 TRANSNAT'L ENV'T L. 17, 17 (2018).

[45] *See* Sam Adelman, *Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse, in* HUMAN RIGHTS & CLIMATE CHANGE 159, 159, 172 (Stephen Humphreys ed., 2010); David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENV'T SCI. & POL'Y FOR SUSTAINABLE DEV., July–Aug. 2012, at 3, 4, 6, 13. *See generally* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT (John H. Knox & Ramin Pejan eds., 2018).

[46] JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 55–56 (2015). *See also* David Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*, *in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 17 (John H. Knox & Ramin Pejan eds., 2018). The relative inefficacy of the right is partially due to obstacles such as causation, jurisdiction, standing, and separation of powers, as well as lack of clarity about the scope and content of the right.

[47] *See* SWATANTER KUMAR ET AL., UNITED NATIONS ENVIRONMENT PROGRAMME, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT 1–2, 4–5 (2019).

[48] The environmental rule of law is threatened everywhere, particularly in Latin America. *See, e.g., Environmental Defenders Under Threat Around the World*, GLOB. WITNESS (Nov. 5, 2019), https://www.globalwitness.org/en/blog/environmental-defenders-under-threat-around-world/ **[**https://perma.cc/3GQZ-5VL7**].**

to include environmental rights [while] . . . Others insist that international law must adopt a substantive right to a healthy environment."[49]

A globally accepted right to a healthy environment is necessary but insufficient unless law embraces the lessons of Earth System Science and the planetary boundaries framework.[50] Liberal legal systems are prone to adversarialism, exclusion, hierarchy, and possessive individualism rather than connectedness, holism, and harmony. This results in jurisprudence rooted in Baconian mechanistic thinking, Cartesian dualisms, and instrumentalism, formalism, positivism, and anthropocentrism, which promote the commodification and monetization of nature rather than ecological sustainability; in other words, in law as usual.[51]

Christina Voigt argues that there is a moral vacuum at the heart of IEL: "*philosophical* ideas about sustainability have failed to inform *legal* approaches to the concept, and vice versa."[52] Multilateral environmental agreements reflect agreement around lowest common denominators rather than climatic and ecological exigencies. As Bharat Desai argues, at the normative level

> soft rules or principles generally lack the requisite characteristics of international legal norms proper. Hence, they are legally regarded as non-binding. It would be more appropriate to state that negotiating states design them in such a fashion that they remain uncertain in application, with 'calculated ambiguity,' and generate conflicting signals.[53]

Liberal legality's tendency towards abstraction facilitates the detachment of the material effects of social relations from environmental

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[49] SUMUDU ATAPATTU & ANDREA SCHAPPER, HUMAN RIGHTS AND THE ENVIRONMENT: KEY ISSUES 64 (2019).

[50] Earth System Science focuses on interactions and feedbacks in the atmosphere, hydrosphere, biosphere, and geosphere. *See* Eva Lövbrand et al., *Earth System Governmentality: Reflections on Science in the Anthropocene*, 19 GLOB. ENV'T CHANGE 7, 7 (2009).

[51] *See* Sam Adelman, *Epistemologies of Mastery*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 9, 10–11, 13 (Anna Grear & Louis J. Kotzé eds., 2015).

[52] Christina Voigt, *From Climate Change to Sustainability: An Essay on Sustainable Development, Legal and Ethical Choices,* 9 WORLDVIEWS: GLOB. RELIGIONS, CULTURE & ECOLOGY 112, 113 (2005).

[53] Bharat H. Desai, *Making Sense of the International Environmental Law-Making Process at a Time of Perplexity,* 29 Y.B. INT'L ENV'T L. 3, 11 (2018).

consequences similar to the gap between formal and substantive equality under the rule of law.[54]

Borrowing from Giorgio Agamben, the Anthropocene-Capitalocene appears to be unfolding as a global state of exception in which the law applies in its inapplicability.[55] For Agamben, declarations of rights from 1789 to the present day have been the means by which human beings have been incorporated into the nation-state and subjected to sovereign power.[56] Walter Benjamin wrote: "There is no document of civilization which is not at the same time a document of barbarism." Rights are double-edged because in confronting state power they have "simultaneously prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves."[57] This is why human rights are primarily used to achieve goals other than justice.

Extending the leitmotif of paradox and contradiction in this article is what one might call the problem of absences: lacunae in IEL and human rights law that deprive victims of climatic harms of protection. Inhabitants of small island developing states (SIDS) threatened by inundation from rising sea levels ideally need a right to the ground beneath their feet or, more realistically, a right to relocation and resettlement. New rights are not much help in the absence of the meaningful protection of those in the International Bill of Rights such as the rights to life, property, and self-determination. SIDS citizens urgently need protection under the climate regime for managed migration as a form of adaptation, adequate climate finance, and compensation for climatic harms under the Warsaw International Mechanism for Loss and Damage.[58] Growing numbers of people displaced by global heating will be forced to migrate without

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[54] *See, e.g.,* E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 197, 266 (1975) (discussing the British "Black Act," which created certain environment-related offenses).

[55] *See* GIORGIO AGAMBEN, STATE OF EXCEPTION 1, 4 (Kevin Attell trans., 2005). *See also* Adelman, *supra* note 44, at 166.

[56] GIORGIO AGAMBEN, MEANS WITHOUT END: NOTES ON POLITICS 21–22 (Vincenzo Binetti & Cesare Casarino trans., 2000).

[57] GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 72 (Daniel Heller-Roazen trans., 1998).

[58] *See Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM),* UNITED NATIONS, https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage-ld/warsaw-international-mechanism-for-loss-and-damage-associated-with-climate-change-impacts-wim#eq-3 [https://perma.cc/7GDH-LHAX] (last visited Jan. 31, 2021).

protection under the 1951 Refugee Convention (because they are likely to be treated as economic migrants), international human rights law, or IEL because they fail the test of political persecution. A sliver of light is offered by the ruling of the UN Human Rights Committee in January 2020 on a complaint by an individual seeking asylum due to global heating. The committee decided that countries may not deport individuals who face climate change-induced conditions that violate the right to life, that the extreme risk of inundation may create conditions incompatible with the right to life with dignity, and that climatic harms may trigger non-refoulement obligations in the future.[59] Law rarely moves at the speed dictated by a global emergency.

## III. RIGHTS-BASED CLIMATE LITIGATION

Human rights arguments are increasingly used in climate litigation with mixed results.[60] Courts in many jurisdictions appear more willing to accept rights-based arguments, but litigants are confronted by a range of substantial and sometimes insuperable hurdles relating to jurisdiction, standing, sovereign immunity and the right to sue the state, redressability, and costs.[61]

There is a long and winding road from the 2005 Inuit petition to the Inter-American Commission on Human Rights that marked the first attempt to establish a link between anthropogenic climatic harms and human rights violations. The petition alleged that acts and omissions of the US government violated a wide range of rights protected by the American Declaration of the Rights and Duties of Man and other international instruments.[62] Progress can be measured by the absence of

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[59] *See* Int'l Covenant on Civ. & Pol. Rts., Hum. Rts. Comm., Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, at ¶¶ 9.3, 9.11 U.N. Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020).

[60] *See* Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?,* 7 TRANSNAT'L ENV'T L. 37, 39, 48 (2018).

[61] *See* INT'L BAR ASS'N, MODEL STATUTE FOR PROCEEDINGS CHALLENGING GOVERNMENT FAILURE TO ACT ON CLIMATE CHANGE: AN INTERNATIONAL BAR ASSOCIATION CLIMATE CHANGE JUSTICE AND HUMAN RIGHTS TASK FORCE REPORT 6–12 (2020) [hereinafter IBA] (*accessible at* https://perma.cc/YA3B-8ZAR).

[62] *Id.* at 5. *See also* Inter-American Commission on Human Rights [Inter-Am. Comm'n H.R.], *American Declaration of the Rights and Duties of Man* (1948). The Commission had previously recognized the link between the right to life and environmental degradation in a case brought by the Yanomami community in the Amazon against the Brazilian government. *See* Coulter v. Brazil,

surprise at the finding of the Philippines Human Rights Commission in December 2019 that forty-seven carbon majors are legally and morally liable for violating the human rights of Filipinos.[63] The Commission found that in circumstances involving obstruction, deception, or fraud, companies may be accountable under civil and criminal law, and that victims of human rights violations are entitled to adequate remedies.[64] Accountability and reparative justice for the twenty fossil fuel companies responsible for more than one-third of greenhouse gas emissions in the modern era is a central aim of climate justice and the Holy Grail of climate litigation.[65] Rights-based arguments are an increasingly prominent feature of landmark decisions such as *Urgenda* and *Ashgar Leghari*—despite meager preambular reference to human rights in the Paris Agreement—primarily due to the resistance of developed countries seeking to avoid liability, and the lack of environmental rights in the major UN human rights instruments.[66] At a regional level, judges in the Inter-American Court of Human Rights expanded the application and scope of human rights in a 2017 Advisory Opinion on the Environment and Human Rights, and widened the extraterritorial application of human rights.[67]

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Case 7615, Inter-Am. Comm'n H.R., Resolution No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 (1985).

[63] *Groundbreaking Inquiry in Philippines Links Carbon Majors to Human Rights Impacts of Climate Change, Calls for Greater Accountability,* CTR. FOR INT'L ENV'T L. (Dec. 9, 2019), https://www.ciel.org/news/groundbreaking-inquiry-in-philippines-links-carbon-majors-to-human-rights-impacts-of-climate-change-calls-for-greater-accountability [https://perma.cc/2PLP-NTVQ].

[64] *Id.*

[65] *See* Richard Heede, *Carbon Majors: Update of Top Twenty companies 1965-2017*, CLIMATE ACCOUNTABILITY INST., (Oct. 9, 2019), https://climateaccountability.org/pdf/CAI%20PressRelease%20Top20%20Oct19.pdf [https://perma.cc/R6DC-GG7F].

[66] *See* RBDHA 24 juni 2015, HA ZA 2015, 13-1396 m.nt. ¶ 3.1 (Neth.). In October 2018, the Court of Appeal for The Hague affirmed the District Court. *See* Hof's-Gravenhage 9 oktober 2018, NJ 2018, 200.178.245/01 m.nt. ¶¶ 76–77 (Neth.). The Netherlands Supreme Court dismissed a further Government appeal and affirmed the Court of Appeal's decision. *See* HR 20 december 2019, NJ 2020, 19/00135, m.nt. ¶ 9 (Neth.). *See also* Leghari v. Federation of Pakistan, (2015) W.P. No. 22501-15 (Lahore High Court, Green Bench) ¶¶ 6–7 (Pak.). *Urgenda* sparked similar litigation elsewhere, such as *VZW Klimaatzaak v. Kingdom of Belgium,* which is currently ongoing. *See VZM Klimaatzaak v. Kingdom of Belgium et al. (Court of First Instance, Brussels, 2015),* GRANTHAM RSCH. INST. ON CLIMATE CHANGE & ENV'T, https://climate-laws.org/geographies/belgium/litigation_cases/vzw-klimaatzaak-v-kingdom-of-belgium-et-al-court-of-first-instance-brussels-2015 [https://perma.cc/W5X3-5LSA] (last visited Nov. 13, 2019).

[67] *See* The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the

In contrast, the difficulties encountered by climate litigants are reflected in two US cases early in 2020: Exxon Mobil's successful evasion of accountability and the failure of the *Juliana* case.[68] Victories in cases such as *Urgenda* and *Leghari* are outnumbered by setbacks in *Juliana*, *KlimaSeniorinnen,* and a raft of other cases.[69] The motto for climate litigants might be Samuel Beckett's words in *Westward Ho!*: *"Ever tried. Ever failed. No matter. Try again. Fail again. Fail better."* Mixed progress characteristic of much climate litigation is reflected in the case filed by Friends of the Irish Environment (FIE) in the High Court in 2017, arguing that the government's approval of the National Mitigation Plan in 2017 violated Irish climate legislation, the Constitution, and the right to life and the right to private and family life under the European Convention on Human Rights (ECHR).[70] In July 2020, the Supreme Court overturned the High Court decision in favor of the government and concluded that although the FIE had not made a sufficiently compelling case for an unenumerated right to a healthy environment separate from the rights in the Irish Constitution, "constitutional rights and obligations may well be engaged in the environmental field in an appropriate case."[71]

The turning point in rights-based litigation came in the passage of the *Urgenda* case from The Hague District Court to the Netherlands Supreme Court over seven years. *Urgenda* demonstrated the possibilities of innovative strategic litigation and a judiciary willing to adapt the law to reflect the climate crisis. The District Court finding that Urgenda, a non-governmental organization, could not raise a constitutional argument nor arguments based on the right to life contained in the ECHR on its own behalf, but the right to life could nevertheless "serve as a source of interpretation" in determining the standard of care owed by the Dutch

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American Convention of Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 244(5)–(8) (Nov. 15, 2017).

[68] This makes the decision against the state of New York on 10 January 2020 in its attempt to hold Exxon Mobil liable for its failure to disclose research it commissioned into global heating all the more regrettable. *See* People v. Exxon Mobil Corp., 2019 N.Y. Misc. LEXIS 6544 (N.Y. Sup. Ct. Dec. 10, 2019). *See also* Juliana v. United States*,* 943 F.3d 1159, 1164–65 (9th Cir. 2020), *petition for reh'g filed*, No. 18-36082 (9th Cir. Mar. 2, 2020).

[69] *Juliana v. United States*, 943 F.3d at 1164–65. Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Nov. 27, 2018, A-2992/2017 ¶¶ 9–10 (Switz.).

[70] *See* Friends of Irish Env't CLG v. Gov't of Ireland [2019] IEHC 747, ¶¶ 1, 12, 71 (Ir.). The lack of an environmental right in the European Convention on Human Rights has forced litigants to rely on violations of these two rights. In contrast, the African and Inter-American regional instruments contain rights to a healthy environment.

[71] Friends of Irish Env't CLG v. Gov't of Ireland [2020] IR 205/19, ¶ 9.5 (Ir.).

government to its citizens under the Dutch Civil Code.[72] In December 2019, the Supreme Court upheld the Court of Appeal's decision that the threats to human rights from greenhouse gas emissions impose a duty of protection on the state and an obligation to take suitable measures to avert imminent hazards to people's lives and welfare.[73] Articles 2 and 8 of the ECHR also apply to long-term environmental threats to large groups or whole populations.[74] Article 13 of the ECHR requires effective legal national remedies against current or imminent violations of Convention rights and, therefore, effective legal protection in national courts.[75]

The judgment of the Netherlands Supreme Court is significant for IEL in other ways. It is the first time an apex court in a Western state has held that the UNFCCC and the "no harm" rule impose an independent duty on states to prevent climatic harms and that the Netherlands must therefore adhere to obligations it voluntarily assumed under the climate regime.[76] The Supreme Court relied upon the Common but Differentiated Responsibilities and Respective Capabilities principle in rejecting the government's contention that the Netherlands' emissions are relatively small, and held that "partial causation justifies partial responsibility" so that each state can be held responsible for its failure to reduce greenhouse gas emissions. The Netherlands cannot evade its obligations even if other states fail to meet their responsibilities, "otherwise, a State can simply avoid its responsibility by pointing to other nations."[77] Even the smallest reductions are not negligible if they diminish dangerous climate change.[78]

In *Leghari*, the plaintiff, a farmer, used public interest litigation provisions to argue that the policies of the federal and state governments

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[72] RBDHA 24 juni 2015, HA ZA 2015 at ¶ 4.46; Art. 6:162 para. 2 BW (Neth.).

[73] HR 20 december 2019, NJ 2020, 19/00135 at ¶¶ 2.2.2, 5.2.2.

[74] *Id.* ¶¶ 5.2.2–.3. *See generally* European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 2, 8, Nov. 4, 1950, E.T.S. 5.

[75] European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 74, art. 13.

[76] An important aspect of the judgment is the significance the Court gave to human rights and the European Convention on Human Rights, though a discussion that is beyond the scope of this paper. For an example of a case signifying the importance of human rights, see HR 20 december 2019, NJ 2020, 19/00135, m.nt. ¶¶ 5.7.1–5.8.

[77] *Id.*

[78] It is possible that this decision may form the basis for proportional liability and compensation by the Netherlands for climatic harms such as loss and damage, even though the case concerned injunctive relief rather than damages. André Nollkaemper & Laura Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, EJIL:TALK! (Jan. 6, 2020), https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/ [https://perma.cc/2KYG-FPP7].

threaten his rights to food, water, energy, and security, and breached his fundamental rights to life and the inviolability of human dignity in Articles 9 and 14 of the Constitution of Pakistan.[79] In a wide-ranging decision, the Lahore High Court Green Bench found in his favor and, *inter alia*, ordered the creation of a Climate Change Commission to oversee the implementation of the state's national climate change framework.[80]

The courts in both *Urgenda* and *Leghari* were willing to identify a legal duty under an existing cause of action or instrument that required the Netherlands and Pakistan governments to reduce emissions or take other measures to limit the impacts of global heating on human and civil rights and, crucially, to order the governments to undertake specific actions. Courts appear increasingly willing to accept the existence of a new legal duty under an existing cause of action in climate litigation, although it is unclear whether holding governments and corporations liable for their acts and omissions in this manner will be common in the long-term. The absence of specific climate-related legislation or regulations has required judicial openness to innovative multi-pronged litigation strategies, but prospects for climate justice may be enhanced by the worldwide increase in climate change legislation following the UK's pathbreaking 2008 Climate Change Act.[81]

Climate change litigation is necessary because of a malfunctioning climate regime incapable of providing a coherent and enforceable framework for adaptation, mitigation, compensation for loss and damage, and the inadequacies of much climate-related legislation. The growing number of climate cases does not disguise the broader political failure of the UNFCCC highlighted by school climate strikers, Extinction Rebellion, and a host of environmental non-governmental organizations. The intergenerational implications of an uninhabitable planet are motivating the increasing use of children's rights in climate litigation; examples include *Pandey* in India, *Juliana* in the United States, the so-called People's Climate Case against the EU, and the petition filed by

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[79] *Leghari v. Federation of Pakistan*, (2015) W.P. No. 22501-15, at ¶ 7.

[80] *See* Emily Barritt & Boitumelo Sediti, *The Symbolic Value of Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South*, 30 KING'S L.J. 203 (2019).

[81] *Climate Change Laws of the World: Laws and Policies*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE & ENV'T, https://climate-laws.org/cclow/legislation_and_policies [https://perma.cc/RV67-2QY2] (last visited Jan 31, 2021).

Greta Thunberg and others under the Rights of the Child Convention in September 2019.[82]

## IV. REIMAGINING HUMAN RIGHTS FOR CLIMATE JUSTICE

A full reconceptualization of human rights on a scale commensurate with the climate emergency is beyond the scope of this article. In this Part, I sketch some ways in which more expansive rights thinking might facilitate climate justice.

The history of human rights since the Second World War is largely that of an anthropocentric discourse consistently antithetical to the biosphere and other species that must be reimagined to facilitate ecological sustainability and climate justice. Put another way, protecting the needs and interests of human beings is impossible so long as human rights and other legal discourses remain riven by the Cartesian separation of nature and society. The ruptures represented by the foundational dualisms of Enlightenment rationality—body/mind, society/nature—lead inexorably to the rupture of the Earth System. At the risk of restating what has long been obvious, human wellbeing is contingent upon a healthy environment. This points to the need for an onto-epistemological reconceptualization of the relationships between humans, of rights, and of nature/environment. First, the conception of the Kantian (legal) subject as outside and against nature or, paradoxically, at the center of an environment from which they are detached, characterizes the thinking that has brought us to this point. Second, the tight link between human rights, property, and exclusion must be severed. The tendency of liberalism to treat rights as claims must give way to a set of specific entitlements to resources for adaptation and mitigation, compensation for loss and damage, and new rights to relocation and resettlement and to a clean, safe, and healthy environment. Third, obligations to protect human rights and the environment must supersede legal provisions such as limited liability and fiduciary duties that enable corporate immunity and impunity. Fourth, the scope of human

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[82] *Pandey v. Union of India*, Unreported Judgments, No. 187 of 2017, dismissed on Jan. 15, 2019, (National Green Tribunal) (India); *Juliana v. United States,* 943 F.3d at 1159. Case T-330/18, Carvalho v. Parliament, ECLI:EU:T:2019:324, ¶ 30 (May. 8, 2019). On 23 September 2019, sixteen child petitioners including Greta Thunberg from twelve countries filed a complaint to the United Nations Committee on the Rights of the Child to protest lack of government action on the climate crisis. *16 Children, Including Greta Thunberg, File Landmark Complaint to the United Nations Committee on the Rights of the Child*, UNICEF (Sept. 23, 2019), https://www.unicef.org/press-releases/16-children-including-greta-thunberg-file-landmark-complaint-united-nations [https://perma.cc/MJ3A-4TDQ].

rights must be expanded to new categories of collective rights for those displaced by global heating. Liberal conceptions of human rights that treat individuals as the primary or only rights-bearers are inadequate for a problem that affects populations. Fifth, the subjects of rights should be expanded to include nature itself.

### A. RIGHTS OF NATURE

Law systems are comfortable with rights to non-human entities such as corporations and nation-states, but rights of nature are less common. It has been nearly fifty years since Christopher Stone asked why trees should not have rights.[83] Ecological sustainability and climate justice are contingent upon a healthy environment. As Knox and Pejan argue, "[a] healthy environment is necessary for the full enjoyment of human rights and, conversely, the exercise of rights (including rights to information, participation and remedy) is critical to environmental protection."[84] One of the characteristic closures of modern Western law is its denial of subjectivity to nature on the basis that it is inert, inanimate, or lacks consciousness and agency.[85] Nature is objectified and othered. Giving rights to nature reflects growing awareness of the need to transcend the sterile anthropocentric-ecocentric dualism that scars liberal law and illustrates the legally disruptive nature of global heating.[86]

Rights of nature are provided in the constitutions of Ecuador (2008) and Bolivia (2009).[87] Recent cases on the rights of nature in Colombia suggest that judicial willingness to develop a new jurisprudence

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[83] Christopher D. Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects*, CAL. L. REV. 450 (1972).

[84] John H. Knox & Ramin Pejan, *Introduction*, *in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 1 (John H. Knox & Ramin Pejan eds., 2018). *See also* IBA, *supra* note 61.

[85] Lawrence Haworth, *Rights, Wrongs and Animals*, 88 ETHICS 95–105 (1978); Gary L. Francione, *Animals—Property or Persons?*, *in* ANIMAL RIGHTS: CURRENT CONTROVERSIES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). It is widely accepted that animals are sentient, conscious beings capable of having rights and that plants are living entities.

[86] Elizabeth Fisher et al., *The Legally Disruptive Nature of Climate Change*, 80 MOD. L. REV. 173, 174, 177 (2017).

[87] The Ecuadorian Constitution guarantees the rights of *buen vivir* (articles 12–34) and grants rights to nature (articles 71–74). CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION OF THE REPUBLIC OF ECUADOR] Oct. 20, 2008, arts. 12–34, 71–74. In Bolivia, the concept of *buen vivir* informs the 2009 Constitution, which does not grant rights to nature. However, *Pachamama* is protected under the Law of the Rights of Mother Earth passed by the Plurinational Legislative Assembly on 21 December 2010. Law of the Rights of Mother Earth, Law 071 of the Plurinational State (2012) (Bol.).

seldom leads to unambiguous protection of the environment.[88] Giving rights to nature may not offer a ready-made alternative to Western forms of development,[89] but nevertheless suggests alternative ways of being, seeing, and knowing than business and law as usual.

The Whanganui River in New Zealand and the Atrato River in Colombia have been recognized as legal entities possessing rights, but attempts to give rights to the Ganga (Ganges) and Yamuna Rivers in India have been less successful.[90] In the United States, some three dozen cities and towns have passed laws recognizing nature's rights and the related human right to a healthy environment.[91]

Rights of nature are closely linked to the concepts of Mother Earth (*Pachamama*) and *buen vivir* (living well), which are derived from Andean cosmovisions in Latin America.[92] Epistemologies derived from *buen vivir* postulate alternatives *to* development rather than alternative forms *of* development such as sustainable development that greenwash the depredations of growth-driven, extractive economic models. *Buen vivir* eschews Cartesian dualisms, Western hierarchies, and anthropocentrism in pursuit of modes of living that are not defined by growth, consumption, and Eurocentric notions of progress.[93] These pluralistic onto-epistemologies reject the instrumentalization and commodification of social life and nature and prioritize ecological sustainability as a precondition for community wellbeing, which in turn promotes harmony with nature and respect for *Pachamama* as the source of life.[94] Climate

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[88] Paola V. Calzadilla, *A Paradigm Shift in Courts' View on Nature: The Atrato River and Amazon Basin Cases in Colombia*, 15 L. ENV'T & DEV. J. 49, 58 (2019).

[89] Juan M. Ramírez-Cendrero, *Limits and Contradictions of Post–Developmentalism as a Heterodox Approach to Capitalist Development*, 29 CAPITALISM NATURE SOCIALISM 68, 71 (2017).

[90] Grant Wilson & Darlene M. Lee, *Rights of Rivers Enter the Mainstream*, 2 ECOLOGICAL CITIZEN 183, 184 (2019). *See generally* Ludwig Krämer, *Rights of Nature and Their Implementation*, 17 J. FOR EUR. ENV'T & PLAN. L. 47 (2020).

[91] Emily Levang, *Can We Protect Nature by Giving it Legal Rights*, ENSIA (Feb. 4, 2020), https://ensia.com/articles/legal-rights-of-nature [https://perma.cc/C4N4-8Q6K].

[92] Alberto Acosta, *Buen Vivir: A proposal with global potential in Rosa Hartmut and Christoph Henning*, *in* THE GOOD LIFE BEYOND GROWTH: NEW PERSPECTIVES 29 (Routledge, 2017).

[93] Adelman, *supra* note 6.

[94] *See generally* Eduardo Gudynas, *Buen Vivir: Today's Tomorrow*, 54 DEV. 441 (2011). *See also* Eduardo Gudynas, *Beyond Varieties of Development: Disputes And Alternatives*, 37 THIRD WORLD Q. 721, 727–28 (2016); Alberto Acosta, *El Buen (con) Vivir, una utopıa por (re)construir: Alcances de la Constitucion de Montecristi* [*The Good (with) Living, a utopia to (re)build: Scope of the Constitution of Montecristi*], 6 OBETS REVISTA DE CIENCIAS SOCIALES [OBETS JOURNAL OF SOCIAL SCIENCES], 35–67 (2010) (Ecuador); Alberto Acosta & Eduardo Gudynas, *La renovacion de la crıtica al desarrollo y el buen vivircomo alternative* [*The renewal of the critique*

justice is promoted by "a 'biocentric' understanding of life in which Nature has rights of its own and an intrinsic significance regardless of its value for human life."[95] This is reflected in the alternative vision of rights and ethics in the ecocentric approach in the 2010 People's Agreement adopted at Cochabamba:

> We propose to the peoples of the world the recovery, revalorization, and strengthening of the knowledge, wisdom, and ancestral practices of Indigenous Peoples, which are affirmed in the thought and practices of "Living Well," recognizing Mother Earth as a living being with which we have an indivisible, interdependent, complementary and spiritual relationship.[96]

## B. VULNERABILITY THEORY AND NEW MATERIALIST LEGAL THEORY

Another way of reimagining human rights is through vulnerability theory, an epistemic framework that offers a way of linking exposure to climatic harms to the violation of rights. Martha Fineman argues that justice should be grounded in an understanding of the universal vulnerability of individuals embedded in nature rather than the fiction of an autonomous, invulnerable, Kantian legal subject at the center of liberal thought[97]—the universal figure separated from time, space, and nature during modernity but reinserted into geo-history as Anthropos. Vulnerability arises from

> embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise. Individuals can attempt to lessen the risk or mitigate the impact of such events, but they cannot eliminate their possibility. Understanding vulnerability begins with the realization that many such events are ultimately beyond human control.[98]

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*of development and good living as an alternative*], 16 UTOPIA Y PRAXIS LATINOAMERICANA [UTOPIA & LATIN AMERICAN PRAXIS] 71–83 (2011) (Ecuador).

[95] René Ramírez, *La transición ecuatoriana hacía el buen vivir* [*The Ecuadorian transition towards the good living*] *in* SUMAK KAWSAY/BUEN VIVIR Y CAMBIOS CIVILIZATORIOS [SUMAK KAWSAY/GOOD LIVING CIVILIZATIONAL CHANGES] 125 (Irene León ed., 2010).

[96] *People's Agreement of Cochabamba*, WORLD PEOPLE'S CONF. ON CLIMATE CHANGE & RTS., MOTHER EARTH (Apr. 24, 2010), https://pwccc.wordpress.com/2010/04/24/peoples-agreement [https://perma.cc/VP7D-9G5P].

[97] Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 20 YALE J.L. & FEMINISM, 1, 9 (2008). Vulnerability calls for Aidosean responses.

[98] *Id.*

Vulnerability provides "an independent universal approach to justice, one that focuses on exploring the nature of the human rather than the rights, parts of the human rights trope."[99] Fineman argues that vulnerability theory addresses the limitations of formal equality, which reproduces and legitimizes institutional and systemic privileges and disadvantages, and seldom makes it possible to challenge existing allocations of resources and power.[100] Fineman seeks to reclaim "the term 'vulnerable' for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility."[101]

Vulnerability theory coheres with new materialist approaches to law that are also grounded in embeddedness and situatedness rather than separation and abstraction. The increased vulnerability of all living entities in the Anthropocene-Capitalocene is prompting an expansion of the post-anthropocentric tendency intrinsic in environmental studies to mutate "into a number of neomaterialist variations" in Braidotti's words.[102] Margaret Davies argues that new materialist approaches

> focus on situating the human, including human meaning and human subjectivity, in a material world where all matter, living and non-living, is related, where objects have their own vitality and resistance, and where agency emerges in relation rather than as an existing quality.[103]

Ecological sustainability is contingent upon relationality and respect for the inextricable connections between humans and other actors. Anna Grear maintains that the materiality and agency of living and non-living entities have significant, but often unacknowledged, ethical and legal implications: "There is a need for law to face up to and embrace a certain non-negotiability of *ethical* demand emerging from the implications of living materiality itself, notwithstanding the fact that the precise implications of such ethical demand remain, in large part,

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[99] Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13 (Martha Albertson Fineman & Anna Grear eds., 2013).

[100] Fineman, *supra* note 97, at 3.

[101] *Id*. at 8.

[102] Rosi Braidotti, *Critical Human Knowledges*, 116 S. ATL. Q. 83, 84 (2017).

[103] MARGARET DAVIES, LAW UNLIMITED: MATERIALISM, PLURALISM AND LEGAL THEORY 66 (2017).

undecided."[104] Elsewhere, Grear calls for reconceptualized eco-human subjectivities and rights to overcome Cartesian dualisms and deep anthropocentrism in liberal law's contribution to the "death of nature."[105]

Grear argues that the contingency of human rights facilitates exclusion but also provides the basis for reimagining them in more inclusive ways.[106] In the climate emergency, onto-epistemologies must reflect the scale and urgency of the existential threat to life on Earth. One of the distinctive contributions of neo-materialist thinking is its insistence that it is not possible to grasp the full implications of what it means to be human in a state of emergency without comprehending human co-constitution and the interrelatedness of all species with nature. Human rights and nature's rights are not different species. Put another way, finding a path out of the climate crisis calls for the re-embodiment of humans as beings embedded in their surroundings but not at their center, neither dominant nor invulnerable. The significance of embeddedness and re-embodiment of the self is widely recognized by ecofeminist scholars.[107] Grear observes that "the entire history of the modern subject is precisely that of a knowing, separative agent who *acts upon* 'nature' (now reduced to 'the environment') as a passive backdrop to *the only real action that counts*–the exercise of 'human' (rational) agency."[108] Since vulnerability to climatic harms flows from our corporeality and embeddedness in

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[104] Anna Grear, *Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 41 (Martha Albertson Fineman & Anna Grear eds., 2013).

[105] Anna Grear, *Human Rights and New Horizons? Thoughts toward a New Juridical Ontology,* 43 SCI. TECH. & HUM. VALUES 129 (2018). *See also* Carolyn Merchant, *The Death of Nature*, *in* ENVIRONMENTAL PHILOSOPHY: FROM ANIMAL RIGHTS TO ECOLOGY 268 (Michael E Zimmerman et al. eds., 1998) (discussing the development of an "ecological ethic emphasizing the interconnectedness between people and nature.").

[106] Anna Grear, *Human Rights, Property and the Search For 'Worlds Other,'* 3 J. HUM. RTS. & ENV'T 173, 174 (2012).

[107] *See generally* VAL PLUMWOOD, FEMINISM AND THE MASTERY OF NATURE (1993); LORRAINE CODE, ECOLOGICAL THINKING: THE POLITICS OF EPISTEMIC LOCATION (2006); DONNA J. HARAWAY, STAYING WITH THE TROUBLE: MAKING KIN IN THE CHTHULUCENE 4 (2016). Diana Coole and Samantha Frost argue that we cannot be anything other than materialists in light of the "massive materiality" that comprises us. Our embodied condition is as human animals embedded in assemblages of dependencies and relations with other species and forms of matter. Diana Coole & Samantha Frost, *Introducing the New Materialisms*, *in* NEW MATERIALISMS: ONTOLOGY, AGENCY, AND POLITICS 1 (Diana Coole & Samantha Frost eds., 2010).

[108] Anna Grear, *Foregrounding Vulnerability: Materiality's Porous Affectability as a Methodological Platform, in* RESEARCH METHODS IN ENVIRONMENTAL LAW: A HANDBOOK 3, 7 (Andreas Philippopoulos-Mihalopoulos & Victoria Brooks eds., 2017).

natureculture,[109] for Margaret Davies it follows that legal theory should focus upon

> situating the human, including human meaning and human subjectivity, in a material world where all matter, living and non-living, is related, where objects have their own vitality and resistance, and where agency emerges in relation rather than as an existing quality.[110]

Because human in human rights has changed over time since there is no essential human nature, we are free to re-imagine who we are:

> If we were to replace the bifurcated, disembodied Cartesian construct of "humanity" with a philosophical account expressing the nature of being itself as a form of inter-being . . . and to adopt this as the *most real*, (as ontologically and epistemologically prior), then perhaps there is a genuine chance that human subjectivity, and the legal subjectivity of "humans" and "non-humans" alike, can be reimagined as a form of *inter*subjectivity.[111]

## VI. CONCLUSION

Human rights can promote climate justice when they are connected to the experiences of embodied victims of climatic harms. Reconceptualizing them means repoliticizing them against the technocratic, managerialist climate regime.[112]

Human rights are supposed to be universal, inherent, inalienable, and indivisible. The intensification of climatic harms in the Anthropocene-Capitalocene indicates that justice is also indivisible: climate justice is not possible without distributive, environmental, gender, global, procedural, and reparative justice. Human rights are a flawed but valuable means for achieving climate justice, which is not possible without protecting the rights of all living entities. History will reveal whether we responded to the vulnerability of current and future generations by making human rights

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[109] The concept of natureculture is borrowed from Donna J. Haraway. DONNA J. HARAWAY, MODEST_WITNESS@SECOND_MILLENNIUM. FEMALEMAN©_MEETS_ONCOMOUSE™: FEMINISM AND TECHNOSCIENCE, 149 (1997).

[110] DAVIES, *supra* note 103.

[111] Anna Grear, *The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective*, 2 J. HUM. RTS. & ENV'T 23, 42 (2011).

[112] For a discussion on depoliticization, see Erik Swyngedouw, *Depoliticized Environments and the Promises of the Anthropocene, in* THE INTERNATIONAL HANDBOOK OF POLITICAL ECOLOGY 131 (Raymond L. Bryant ed., 2015).

genuinely universal and inclusive, or found that we were asking them to bear a burden for which they were not designed.