Environmental governance and rights-related discourse: A study of human rights- and rights of nature-based discourses in the international climate change regime from 1992-2015

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ABSTRACT

The 21st century is a time of environmental firsts, as the average global temperature continues to reach record highs, and scientists report that the earth is crossing the planetary boundaries within which humanity can live sustainably. We have undeniably reached the Anthropocene – the "Age of the Human" – with devastating implications for the sustainability of life on Earth. Against this backdrop, many actors have also begun to conceptualize the linkages between environmental governance and rights, increasingly framing environmental harms in terms of rights violations, including in the realm of climate change. This thesis adopts a discourse analytic approach to examine the discourses of human rights and the rights of nature in the international climate regime, seeking to unpack and make visible some of the assumptions, values, and interests that underpin them. By tracing the development and deployment of these discourses in relation to other dominant discourses in the arena of environmental governance, it explores the ways in which climate change is articulated as a social product of discursive struggles, the kinds of solutions that may emerge as a result, and the broader implications for the relationship between rights and environmental governance in the face of the shifting challenges of the Anthropocene.

RÉSUMÉ

Le 21ème siècle est un temps de « premières » environnementales. La température moyenne mondiale ne cesse d'atteindre des sommets record et les scientifiques signalent que la terre franche les frontières planétaires dans lesquelles l'humanité puisse vivre durablement. On est indéniablement dans l'anthropocène – l'« âge de l'humain » – ce qui aurait des conséquences désastreuses pour la durabilité de la vie sur terre. Dans ce contexte, de nombreux acteurs ont commencé à concevoir les relations entre la gouvernance environnementale et les droits, encadrant de plus en plus les dommages environnementaux en termes des violations des droits, y compris dans le domaine du changement climatique. Ce mémoire emploie l'analyse du discours afin d'examiner les discours sur les droits de la personne et sur les droits de la nature dans le cadre du régime international sur le climat, en visant à éclaircir et rendre visible les assomptions, valeurs et intérêts qui les sous-tendent. En traçant le développement et déploiement de ces discours en relation avec d'autres discours dominants dans le contexte du changement climatique, il interroge les façons dont le changement climatique s'articule comme produit social des luttes discursives, les types de solutions qui pourraient prendre forme et les implications plus larges en termes de la relation entre les droits et le gouvernance environnemental face aux nouveaux défis de l'anthropocène.

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1. Introduction

The 21st century is a time of environmental firsts. Reports predict that 2016 will be the hottest year on record,[1] and scientists indicate that the earth has crossed four of nine "planetary boundaries" – the limits within which humanity can live sustainably.[2] The earth's atmosphere has now passed the threshold of 400 ppm of carbon dioxide,[3] and the first species of mammal has gone extinct due to human-induced climate change.[4] Meanwhile, the global population continues to soar, projected to reach 9.7 billion by the year 2050.[5] We have undeniably reached the Anthropocene – the "Age of the Human" – with devastating implications for the sustainability of life on Earth.

Against this backdrop, we have also begun to conceptualize the linkages between environmental governance and rights, increasingly framing environmental harms in terms of rights violations. This conceptual linkage is not inevitable. Just as the concept of "the environment" itself had to be crystallized in politics and policy making through a series of social, historical and political developments,[6] so too has the formulation of environmental impacts or effects on human populations in terms of rights violations been a process rather than a foregone conclusion, slowly taking root as part of the more general ascendance of rights beginning in the 1970s. As Nedelsky notes:

> [T]he language of rights has become a worldwide phenomenon. People use "rights" to identify serious harms, to make claims from and against governments, to make claims for international intervention and assistance. The battle over the

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[1] Andrea Thompson, "99 percent chance 2016 will be the hottest year on record", online: *Scientific American* <http://www.scientificamerican.com/article/99-percent-chance-2016-will-be-the-hottest-year-on-record/>.
[2] "Earth closer to 'irreversible changes' as humanity crosses 4 of 9 planetary boundaries", online: <http://rt.com/news/223835-earth-planetary-boundaries-humanity/>.
[3] Brian Kahn, "Antarctic CO2 hits 400ppm for first time in 4m years", online: *The Guardian* <https://www.theguardian.com/environment/2016/jun/16/antarctic-co2-hits-400ppm-for-first-time-in-4m-years>.
[4] Brian Clark Howard, "First mammal species goes extinct due to climate change", online: *National Geographic* <http://news.nationalgeographic.com/2016/06/first-mammal-extinct-climate-change-bramble-cay-melomys/>.
[5] United Nations Department of Economic and Social Affairs, "World population projected to reach 9.7 billion by 2050", online: <http://www.un.org/en/development/desa/news/population/2015-report.html>.
[6] John S Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford; New York: Oxford University Press, 1997) at 4.

use of the term has been decidedly won in its favor.[7]

Thus, if a distinct right to a healthy environment has yet to be accepted unequivocally by the legal and political mainstream, it is by now relatively uncontroversial to assert that a toxic waste spill may have an adverse impact on the right to life or right to health of those living nearby. Rights language has allowed those affected by environmental issues to identify the harms suffered, and to make moral claims for their remedy.

The language of rights has also inevitably seeped into the realm of climate change – believed by many to be the greatest environmental challenge and indeed "defining issue" of our time.[8] Because of its potential to impact nearly every facet of human civilization and the earth's systems upon which we rely, the changing climate will affect an array of rights, variously defined. Yet the complexities of climate change also pose a number of challenges in terms of how we conceptualize rights and how we seek to operationalize them in search of a more sustainable relationship with the earth. Climate change, by its very nature, crosses borders, involves long timeframes, and implicates an enormous array of actors, making more conventional rights claims difficult. It is a "hyperobject" – a thing "massively distributed in time and space relative to humans".[9]

Indeed, the challenge of climate change is so enormous that it has been aptly characterized as a "super wicked problem"[10] – one "that defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution."[11] Rather than a discrete problem, climate change

is better understood as a symptom of a particular development path and its

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[7] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford; New York, NY: Oxford University Press, 2011) at 73.
[8] Joseph Camilleri & Jim Falk, *Worlds in Transition: Evolving Governance Across a Stressed Planet* (Edward Elgar Publishing, 2009) at 273.
[9] Timothy Morton, *Hyperobjects: Philosophy and Ecology after the End of the World* (Minneapolis: University of Minnesota Press, 2013).
[10] Richard J Lazarus, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future" (2008) 94 Cornell Law Rev 1153 at 1160.
[11] *Ibid* at 1159.

> globally interlaced supply-system of fossil energy. Together they form a complex nexus of mutually reinforcing, intertwined patterns of human behavior, physical materials and the resulting technology. It is impossible to change such complex systems in desired ways by focusing on just one thing.[12]

In addition to this complexity, those with the greatest capacity to address the problem largely lack the impetus to do so, instead seeking to preserve a global economic system that has incentivized overconsumption and the overexploitation of natural resources.[13] The most powerful, industrialized countries will not feel the effects of climate change as severely as less powerful, less developed countries. On the other hand, those with the least historic responsibility for greenhouse gas emissions will be most acutely impacted.

The extent and seriousness of climate change, and the difficulty in arriving at effective solutions, also raises fundamental questions about the nature of the relationship between human beings and the environment. The very survival of human civilization is now at stake due to the way in which the environment and our relationship to it has been imagined, defined, and acted upon to date. As Purdy points out:

> What we become conscious of, how we see it, and what we believe it means— and everything we leave out— are keys to navigating the world, whether to manage forests for Teddy Roosevelt's Forest Service, to understand ecological connections as conservation biologists, or to survive in a harsh new place while seeking Christian salvation. Imagination also enables us to do things together politically: a new way of seeing the world can be a way of valuing it— a map of things worth saving, or of a future worth creating. [14]

To this end, this thesis adopts a discursive analytic approach in order to interrogate our ways of seeing and imagining the environment, and the moral and intellectual commitments that underpin them. The analysis takes as a starting point the idea that "[a]ny understanding of the state of the natural […] environment is based on

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[12] Gwyn Prins & Steve Rayner, "Time to Ditch Kyoto" (2007) 449:7165 Nature 973 at 974.

[13] Indeed, research published in 2014 by Richard Heede shows it is possible to attribute the majority of carbon dioxide and methane emissions between 1751 and 2010 to a mere 90 "carbon major" entities (fossil fuel and cement producers). See: Richard Heede, "Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010" (2013) 122:1–2 Clim Change 229.

[14] Jedediah Purdy, *After Nature: A Politics for the Anthropocene* (Cambridge, Mass.: Harvard University Press, 2015) at 7.

representations, and always implies a set of assumptions and (implicit) social choices that are mediated through an ensemble of specific discursive practices."[15]

In analyzing the discourses of human rights and the rights of nature, this thesis will explore how rights structure our underlying understanding of the world and our relationship with nature, as well as "relations of power, trust, responsibility, and care."[16] How do the ways in which we frame rights in the realm of the environment and climate change replicate or seek to disrupt hierarchical relationships that lead to unsustainable development? What do these discourses "see" and what do they obscure in mediating the relationship between humans and nature? And what are the possibilities for redefining this relationship in more sustainable ways?

Chapter 2 will introduce the analytical framework and methods, examining the concept of discourse and social constructionist approaches to discourse analysis. It will outline the discourse analytic method that this thesis will employ, and explore some of the potential and limitations of using discourse analysis in the realms of human rights and the environment. It will also examine the dominant discourses in international environmental governance. Chapter 3 will look at human rights-based and rights of nature-based approaches to environmental governance, examining their intellectual foundations, development and manifestations in domestic and international law. Chapter 4 will then turn specifically to climate change, briefly surveying the dominant discourses in international climate change governance before turning to detailed analyses of human rights-based and rights of nature-based discourses in the climate regime. Finally, Chapter 5 will conclude by interrogating the paradoxes of, and prospects for, rights discourses in the age of the Anthropocene.

2. Analytic Framework and Methods

This chapter will provide an overview of discourse analysis as an analytical framework and research methodology. Discursive analysis has been employed by a

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[15] Maarten A Hajer, *The Politics of Environmental Discourse Ecological Modernization and the Policy Process* (Oxford; New York: Clarendon Press ; Oxford University Press, 1995) at 17.
[16] Nedelsky, *supra* note 7 at 74.

number of disciplines. It is connected to a rich intellectual tradition in philosophy and the humanities, and carries with it important epistemological implications for the ways in which we understand and study the role of law in environmental governance.

I will begin by delineating the concept of discourse (section 2.1), drawing out the broad contours of a social constructionist approach to discourse analysis, outlining the discourse analytic method that this paper will employ, and examining the potential and limitations of discourse analysis in the areas of human rights and the environment. I will then examine the dominant discourses in international environmental governance – green governmentality, ecological modernization, civic environmentalism and sustainable development (section 2.2).

2.1. The concept of discourse

The concept of discourse has a number of meanings, which vary across disciplines and theoretical perspectives.[17] Despite these differences, in defining discourse, Jørgensen and Phillips point to the general idea "that language is structured according to different patterns that people's utterances follow when they take part in different domains of social life".[18] In basic terms, then, discourse can be defined as "a particular way of talking about and understanding the world (or an aspect of the world)."[19] Common examples include discourses relating to specific disciplines, such as medicine.[20] Legal discourse is another strong example – "one of the most explicit, concrete and institutionalised cadres of ethno-sociological discourse."[21]

Within each discourse are internal "rules" for the production of truth, which determine the conditions of legitimacy of particular utterances according to the logic of that

[17] Indeed, "[s]o abundant are definitions of discourse that many linguistics books on the subject now open with a survey of definitions" (Deborah Schiffrin et al, *The Handbook of Discourse Analysis* (Malden, MA: Blackwell Publishers, 2005) at 1).
[18] Marianne W Jørgensen & Louise J Phillips, *Discourse Analysis as Theory and Method* (SAGE, 2002) at 1.
[19] *Ibid.*
[20] See, e.g. *Ibid.*
[21] Sally Humphreys, "Law as Discourse" (1985) 1:2 Hist Anthropol 239 at 242.

discursive field. For example, in the common law tradition, we speak of "legal reasoning", and judicial decisions are based on legal precedent, taking their validity from previous determinations of the court. Particular forms of text and speech are sanctioned, such as the affidavit, the contract, or the cross-examination, while others (hearsay evidence, for example) are excluded.

What falls within the definition of discourse also varies across theoretical approaches. While a basic linguistic understanding of discourse would center on the study of language effects such as syntax, style and semantics,[22] critical approaches to discourse analysis expand the field of discourse to encompass a broader grouping of linguistic and social practices. For example, Hajer and Versteeg define discourse "as an ensemble of ideas, concepts and categories through which meaning is given to social and physical phenomena, and which is produced and reproduced through an identifiable set of practices."[23] This paper adopts a similarly broad definition of discourse, adhering to a social constructionist understanding of the term, including in its analysis of a range of "linguistic and nonlinguistic social practices and ideological assumptions".[24]

The concept of storylines is particularly important to the discursive analytical approach. A storyline "is a generative sort of narrative that allows actors to draw upon various discursive categories to give meaning to specific physical or social phenomena."[25] Storylines create meaning and evoke discursive systems, producing narrative coherence from otherwise disparate and value-neutral phenomena.[26] For example, in the realm of the environment, Hajer points out that "[c]alamities only become a political issue if they are constructed as such in environmental discourse, if story-lines are created around them that indicate the significance of the physical events".[27] Indeed, physical events such as the melting of a glacier or the acidification of the ocean only become "calamities" to the extent that they are inserted into a storyline in

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[22] Alan Bullock & Oliver Stallybrass, *The Fontana Dictionary of Modern Thought* (London: Collins, 1977) at 232.
[23] Maarten Hajer & Wytske Versteeg, "A Decade of Discourse Analysis of Environmental Politics: Achievements, Challenges, Perspectives" (2005) 7:3 J Environ Policy Plan 175 at 175.
[24] Schiffrin et al, *supra* note 17 at 1.
[25] Hajer, *supra* note 15 at 56.
[26] *Ibid*.
[27] *Ibid* at 20–21.

which they may be framed in relation to other actors, or in terms of their effects within the matrix defined by the storyline itself. In other words, if a tree falls in the forest, it will be heard (or not heard) differently, depending on how it is discursively constituted.

2.1.1. Social constructionist approaches to discourse analysis

Just as there are multiple definitions of *discourse*, there are also multiple understandings of what is meant by the term *discourse analysis*. Discourse analysis is not simply one approach, but rather "a series of interdisciplinary approaches that can be used to explore many different social domains in many different types of studies."[28]

This paper adopts a social constructionist approach to discourse analysis.[29] While a great deal of variation exists even within this subset of discourse analytical methods, social constructionist approaches do share several key premises.[30] Firstly, social constructionist discourse analysis takes as a starting point the notion that the language we use does not neutrally reflect or describe the world "out there"; rather, our access to reality is mediated through, and constructed by, discourse.[31] Thus, the meaning of a thing "depends on the orders of discourse that constitute its identity and significance."[32] This insight draws on the work of structuralism and post-structuralism – particularly the notion that through language we create representations of reality that also contribute to the construction of that reality.[33] We access the world through the categories of our language,

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[28] Jørgensen & Phillips, *supra* note 18 at 1.
[29] Social constructionist approaches include, *inter alia*, Foucauldian discourse analysis, which focuses on power relationships in society, expressed through social and linguistic practices (see Carla Willig & Wendy Stainton-Rogers, *The SAGE Handbook of Qualitative Research in Psychology* (SAGE, 2007)); critical discourse analysis, which examines the role of discourse in constructing the social world (see Teun A Van Dijk, *Discourse Studies: A Multidisciplinary Introduction* (SAGE, 2011); Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language* (Routledge, 2013)); and discursive psychology, which examines how people's selves are formed through social interaction, focusing on psychological themes in language and images (see Jonathan Potter, "Discourse analysis and discursive psychology" in H Cooper et al, eds., *APA Handbook of Research Methods in Psychology Volume 2: Research Designs: Quantitative, Qualitative, Neuropsychological and Biological* (Washington, DC, US: American Psychological Association, 2012) 119).
[30] Jørgensen & Phillips, *supra* note 19 at 5.
[31] *Ibid* at 1.
[32] David Howarth & Yannis Stavrakakis, "Introduction" in David R Howarth, Aletta J Norval & Yannis Stavrakakis, eds, *Discourse Theory and Political Analysis: Identities, Hegemonies and Social Change* (Manchester; New York: Manchester University Press, 2000) 1 at 3.
[33] Jørgensen & Phillips, *supra* note 18 at 8–9.

which in turn means that our knowledge of the world is a product of this categorization, rather than an unmediated reflection.[34] In describing the world around us, we are always already creating it discursively through the historical rules determining the conditions of possibility for the truth, meaning and validity of statements within a particular discourse.[35]

This inability to ever get outside discourse leads to the dismissal of claims to objective truth or singular rationality.[36] There is no "universal truth" as such, only "truth effects" created within discourses.[37] One focus of discourse analysis is therefore to examine how such truth effects are created.[38] The role of the discourse analyst is not to "get 'behind' the discourse, to find out what people *really* mean when they say this or that, or to discover the reality behind the discourse", as this is an impossibility.[39] Rather, since reality cannot be apprehended outside of or beyond discourse, discourse itself must be the object of analysis.[40]

Generally speaking, social constructionist approaches to discourse analysis also share a common interest in the power relations that underlie systems of language and knowledge. The theorization of the connection between knowledge, discourse and power comes primarily from the work of Michel Foucault, which expands the field of discourse to include social practices and the diffusion of power across these practices.[41] Power comes into play because the constitution of discourses always "involves the exclusion of certain possibilities and a consequent structuring of the relations between different social agents".[42] In Foucault's view, power is productive, rather than merely oppressive, constituting "discourse, knowledge, bodies and subjectivities".[43]

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[34] *Ibid* at 5.
[35] See, in particular, Michel Foucault, *The Archaeology of Knowledge* (Knopf Doubleday Publishing Group, 2012).
[36] Peter H Feindt & Angela Oels, "Does Discourse Matter? Discourse Analysis in Environmental Policy Making" (2005) 7:3 J Environ Policy Plan 161 at 163.
[37] Jørgensen & Phillips, *supra* note 18 at 14.
[38] *Ibid*.
[39] *Ibid* at 21.
[40] *Ibid*.
[41] *Ibid* at 13.
[42] Howarth & Stavrakakis, *supra* note 32 at 4.
[43] Jørgensen & Phillips, *supra* note 18 at 13.

Foucault also links power and truth, "arguing that 'truth' is embedded in, and produced by, systems of power."[44] These systems of power are not absolute; rather, "[s]truggles at the discursive level take part in changing, as well as in reproducing, the social reality."[45] In this way, discourses create truths and subjectivities that are contingent and contestable. The environmental realm in particular becomes an "interesting site to interrogate the exercise of power" as "nature – claims on the land, the construction of wilderness, ideas of human nature, human/non-human interaction – is one area in which the messy politics of representation, articulation, essentialism and discursive construction come to the fore."[46] The very idea that nature is *natural* – an original or base state from which varying degrees of "civilization" emerge and develop – is inextricably linked with systems of power, including the continuing legacies of colonialism, imperialism and modern forms of market capitalism.

Flowing from these observations on power and the construction of knowledge is the insight that knowledge and social action are intimately connected. As Jørgensen and Phillips point out, "[d]ifferent social understandings of the world lead to different social actions, and therefore the social construction of knowledge and truth has social consequences".[47] If reality is mediated and constructed discursively, leading in turn to concrete social consequences, then the ways in which we talk about and conceive of a subject through discourse are crucially important. In terms of environmental governance, different social understandings of human societies' relationship to the natural world, constituted by and expressed through discourse, produce tangible consequences in the form of policies, laws and regulations determining the protection or exploitation of natural resources and the environment. Even our choice of terminology – for example, choosing between the terms "natural world", "nature", "the environment" or "Mother Earth" – has significant consequences.

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[44] *Ibid* at 14.
[45] *Ibid* at 9.
[46] Stephanie Rutherford, "Green Governmentality: Insights and Opportunities in the Study of Nature's Rule" (2007) 31:3 Prog Hum Geogr 291 at 294–295.
[47] Jørgensen & Phillips, *supra* note 18 at 6.

Discourse analysis is therefore a powerful tool for tracing the ways in which linguistic and social practices translate into social action – policies, laws and other norms – and for elucidating how discourse configures the ways in which we as humans conceive of our place in, and our relationship with, the "world out there." Bringing discursive effects into view can open spaces for critical engagement. As Purdy points out, in the environmental realm, the awareness

> that today's environmental ideas are the products of the human power to reinterpret our relation to the natural world and create, or discern, new reasons to act in new ways […] gives a reminder that our future environmental law and politics might look as different from the present as the present does from the past.[48]

Taken together, the productive and constitutive role of power circulating through discourse, and the connection between discourse and social action, may even open possibilities for social and political change,[49] for example, "through the emergence of new story-lines that re-order understandings". [50] But while this possibility for change exists, the structural power asymmetries embedded in institutions and discursive structures make any true transformation difficult. As Fairclough cautions:

> Discourses and narratives construe social phenomena in particular and diverse ways, but whether these construals have constructive effects on non-discoursal moments of social phenomena is a contingent matter. It depends upon which strategies in a field of strategic struggle are selected and retained, become hegemonic, whether and to what extent they are recontextualized in new social fields and across different social scales, and whether and to what extent and in what forms they are operationalized – enacted in new ways of (inter)acting, inculcated in new ways of being and identities, and materialized in the physical world.[51]

To the extent that it makes the deconstruction of institutional and discursive structures possible, discourse theory may indeed support projects of social change, and the project of finding an appropriate story-line in the articulation of an issue may become

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[48] Jedediah Purdy, "American Natures: The Shape of Conflict in Environmental Law" (2012) 36:1 Harv Environ Law Rev 169 at 176.
[49] Jørgensen & Phillips, *supra* note 18 at 2.
[50] Hajer, *supra* note 15 at 56.
[51] Norman Fairclough, "Introduction" in Norman Fairclough, Guiseppina Cortese & Patrizia Ardizzone, eds, *Discourse and Contemporary Social Change* (Bern; Oxford: Peter Lang, 2007) 9 at 12.

a form of agency.[52] But it is also important to recognize that the possibilities for transformative change are limited and contingent.

2.1.2. Discourse Analytic Method

While there are many ways to approach discourse analysis in methodological terms, this thesis will use the model outlined by Dryzek, which sets out a set of key questions for the analysis of discourses.[53] According to Dryzek, discourses are comprised of four principal elements: (1) the basic entities whose existence is recognized or constructed; (2) assumptions about natural relationships; (3) agents and their motives; and (4) key metaphors and other rhetorical devices. These elements are interrelated. For example, the basic entities recognized by a discourse will be intimately connected to the assumptions about relationships that a discourse espouses. In turn, the types of relationships recognized will be linked to conceptions of agency and motivation.

(1) Basic entities whose existence is recognized or constructed

Basic entities are related to the "ontology" of a discourse – in other words, what a discourse "sees" in the world – and differ from discourse to discourse.[54] For example, in the environmental realm, while "[s]ome discourses recognize the existence of ecosystems, others have no concept of natural systems at all, seeing nature only in terms of brute matter."[55] Similarly, some discourses recognize and "organize their analyses around rational, egotistic human beings", while others "deal with a variety of human motivations", and "others still recognize human beings only in their aggregates such as states and populations."[56]

(2) Assumptions about natural relationships

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[52] Hajer, *supra* note 15 at 56.
[53] Dryzek, *supra* note 7 at 15.
[54] *Ibid* at 16.
[55] *Ibid.*
[56] *Ibid.*

According to Dryzek, "[a]ll discourses embody notions of what is natural in the relationship between different entities".[57] These assumptions can range from relationships of competition and struggle, cooperation and equality, or any number of hierarchies on the basis of various characteristics or criteria.

(3) Agents and their motives

Agents are the actors of the storylines created by discourse. They may be individuals or collectivities, human or non-human, and they have different motivations and characteristics, which may intimately be tied to the particular conception of agency itself.[58] For example, in the realm of environmental discourse, agents might include "enlightened élites, rational consumers, ignorant and short-sighted populations, virtuous ordinary citizens, a Gaia that may be tough and forgiving or fragile and punishing, among others."[59]

(4) Key metaphors and rhetorical devices

Metaphors and rhetorical devices are key to the constitution of discourse. Among some of the key metaphors that have been employed in environmental discourses, Dryzek lists "spaceship earth", "the grazing commons of a medieval village", "machines", and "goddesses."[60] Whether we view nature in mechanistic terms as a machine that we can manipulate to human ends, or as an essentially benign, female deity will have concrete implications for our behavior towards the earth.

Taking these four elements into account, Dryzek contends that the effects of a discourse can be measured by examining the politics associated with that discourse, its effect on the policies of governments and institutions, the arguments of critics, and the

[57] *Ibid.*
[58] *Ibid* at 16–17.
[59] *Ibid* at 17.
[60] *Ibid.*

flaws that such arguments reveal.[61] This may seem to contradict the typically Foucauldian position that an individual stands within a discourse as a subject, and is therefore unable to assess that discourse. But as Dryzek argues, "[d]iscourses are powerful, but they are not impenetrable."[62] And while some discourses may be hegemonic – as the discourse of industrialism was prior to the 1960s – environmentalism is now "composed of a variety of discourses, sometimes complementing one another, but often competing."[63] This variety, in and of itself, indicates possible openings and opportunities for intervention.

2.1.3. The use of discourse analysis in the study of human rights and the environment: potential and limitations

I turn now to the use of discourse analysis in the contexts of human rights and environmental studies, in order to provide an initial exploration of the potential and limitations of the method in these areas of inquiry, and to compare and contrast how discourse analysis has been employed in domains seen as "social" and those seen as "natural" or "scientific". I will revisit this subject in relation to rights-based approaches to environmental governance, and ultimately in relation to rights-based approaches to climate change, later in the thesis.

Numerous authors have identified the relevance of discourse analysis in the realm of human rights.[64] Espinosa points out that "rights are a uniquely human construct", and as such, the discursive analytical approach is perhaps less controversial here than it is in the realm of environmental studies, which has generally been viewed as a discipline grounded in science and physical "reality". In the social constructionist understanding, human rights are "created, re-created, and instantiated by human actors in particular

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[61] *Ibid* at 20.
[62] *Ibid*.
[63] *Ibid*.
[64] See, e.g.: Stephen C Ropp & Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999); V Spike Peterson, "Whose Rights? A Critique of the' Givens' in Human Rights Discourse" (1990) Alternatives 303; Matthew Waites, "Critique of 'Sexual Orientation' and 'Gender Identity' in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles" (2009) 15:1 Contemp Polit 137; Elisabeth Le, "Human Rights Discourse and International Relations: Le Monde's Editorials on Russia" (2002) 13:3 Discourse Soc 373.

socio-historical settings and conditions."[65] Crucially, this understanding of rights "does not require them to have any metaphysical existence (for example, through nature or God), nor does it rely on abstract reasoning or logic to ground them."[66] In other words, rights discourse is a both a product and co-creator of socio-historical circumstances.

This conceptualization of rights is at odds with the naturalized way in which human rights have predominantly been articulated in Western socio-legal thought, as entitlements that are self-evident[67] and inherent in each individual. The United States Declaration of Independence proclaims: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Similarly, the Universal Declaration of Human Rights begins with the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family".[68] This understanding of human rights as self-evident and inherent in each individual has also been firmly established in international law. As Cullet states, "[i]n accordance with international law theory, all human rights represent universal claims necessary to grant every human being a decent life that are part of the core moral codes common to all societies."[69]

Yet these claims tend to overlook the very particular socio-cultural history in which they are grounded. Claims relating to the self-evidence and universality of human rights are themselves inventions, with identifiable historical origins. For example, Hunt has argued convincingly that the faculty of empathy across the traditional social divides of gender and class developed – at least in the Western world – concomitantly with the rise of the epistolary novel in the 18th century, which allowed readers to relate to the inner

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[65] Neil Stammers, "Social Movements and the Social Construction of Human Rights" (1999) 21:4 Hum Rights Q 980 at 981.
[66] *Ibid*.
[67] Lynn Hunt, *Inventing Human Rights: A History* (New York; London: W. W. Norton & Company, 2007) at 19.
[68] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), online: <http://www.refworld.org/docid/3ae6b3712c.html>.
[69] Philippe Cullet, "Definition of an Environmental Right in a Human Rights Context" (1995) 13 Neth Q Hum Rights 25 at 1–2.

emotions of people unlike themselves.[70] This in turn contributed to a deeper understanding of equality, opening possibilities for political action.[71]

Regardless of its origins, human rights discourse has catalyzed significant behavioral change on the part of States and other actors since the latter part of the 20th century. Networks and individuals have harnessed it in order to redefine certain behaviors, such as torture or the denial of voting rights, as reprehensible and morally unjust. To this end, much fruitful research has been undertaken on the role of discourse and human rights norm entrepreneurs.[72] For example, drawing on Sunstein's description of the two-stage process of social norm emergence and broad norm acceptance (or "norm cascades"),[73] Keck and Sikkink have explored the ways in which transnational advocacy networks come together on the basis of shared values and common discourse to not only "influence policy outcomes, but [also] to transform the terms and nature of the debate."[74] Indeed, Keck and Sikkink have described rights claims as "the prototypical language of advocacy claims".[75]

Discursive approaches have also come into favour with environmental researchers since the 1980s.[76] Such approaches have been particularly useful in examining how environmental norms spread, how we conceptualize the environment, and, in turn, how we interact with it on the basis of these conceptualizations. Discourse analysis has also been employed in relation to animal rights[77] — for example, to examine the ways in which the relationship between human and non-human animals have been structured.

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[70] Hunt, *supra* note 67 at 35.
[71] *Ibid* at 40. Of course, rights as conceived in the late 18th century were significantly less inclusive than human rights today.
[72] See, e.g.: Cass R Sunstein, "Social Norms and Social Roles" (1996) 96 Columbia Law Rev 903; Margaret E Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (1998); Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Int Organ 887.
[73] Sunstein, *supra* note 72.
[74] Margaret E Keck & Kathryn Sikkink, "Transnational Advocacy Networks in International and Regional Politics" (1999) 51:159 ISSJ Int Soc Sci J 89 at 90.
[75] *Ibid* at 93.
[76] Cristina Espinosa, "The Advocacy of the Previously Inconceivable: A Discourse Analysis of the Universal Declaration of the Rights of Mother Earth at Rio+20" (2014) 23:4 J Environ Dev 391 at 394.
[77] See, e.g.: Ted Benton, *Natural Relations: Ecology, Animal Rights, and Social Justice* (Verso, 1993); Davina Swan & John C McCarthy, "Contesting Animal Rights on the Internet Discourse Analysis of the

Discursive understandings of the environment and the natural world have, of course, shifted over time. For example, Purdy traces environmental public language and environmental imagination in the United States from the time of initial colonization to the last half-century, demonstrating that "the deep political and cultural structure of American environmental law is one of conflict […] about how to use and value the natural world".[78] The four major stages he identifies are *providential republicanism* (the idea that nature has a *telos* and is made for productive use); *progressive management* (the understanding that natural systems must be governed and administered at the system level in order to serve human, utilitarian ends); *romantic epiphany* (an aesthetic sensibility, with the power to "salvage individuality and meaning from a disenchanted and pervasively managed world"); and finally, *ecological interdependence* ("a view of life as continuous with a vast and complex web of natural phenomena").[79] Each of these understandings "involves both factual beliefs about how nature works and closely entwined normative ideas", while also "persist[ing] in the ideas that individual Americans carry about their place in the larger natural world."[80] Purdy's analysis demonstrates that the ways in which the environment has been conceived in the American imagination have indeed shaped and continue to influence the governance of natural resources and environmental issues in tangible ways.

Dryzek reiterates this point, noting that "[t]he environment did not exist as a concept in politics and policy making in any country until the 1960s", although there was of course "concern with particular aspects of what we now call the environment, such as open spaces, resource shortages, and pollution."[81] Even the conception of the earth itself "as a finite planet with limited capacities to support human life" only gained currency in the late sixties, coinciding with the first photographs of the planet taken from space.[82]

Social Construction of Argument" (2003) 22:3 J Lang Soc Psychol 297; James M Jasper & Jane D Poulsen, "Recruiting Strangers and Friends: Moral Shocks and Social Networks in Animal Rights and Anti-Nuclear Protests" (1995) 42 Soc Probl-N Y- 493.

[78] Purdy, *supra* note 48 at 172.

[79] *Ibid* at 173–174.

[80] *Ibid* at 172–173.

[81] Dryzek, *supra* note 7 at 4.

[82] *Ibid* at 5.

A social-constructivist discursive analysis therefore reveals that there is no coherent, *a priori* idea of what we now call "the environment". Instead, this understanding has developed through particular socio-historical circumstances. The terms "environment" and "nature" are themselves freighted with meanings and associations that in turn shape the discourses of which they are a part. As Luke argues, "[i]n and of itself, Nature arguably is meaningless until humans assign meanings to it by interpreting some of its many signs as meaningful".[83]

This insight is linked to the idea that, in order for solutions to environmental problems to be found, there must first exist a concept of something called the environment, as well as the formulation of a problem to be remedied. Policy-making thus requires the shaping and construction of social phenomena in ways that render them intelligible and enable solutions to be found.[84] In turn, the types of solutions envisioned depend upon the ways in which phenomena are formulated through discourse. As discourse differs, so will the framing of issues, determining the range of possible political consequences. As Hajer notes, "[e]nvironmental change is of all times and all societies but the meaning we give to physical phenomena is dependent on our specific cultural preoccupations."[85]

Of course, there are many competing discourses within the environmental realm. As Hajer points out, "environmental discourse is fragmented and contradictory […] an astonishing collection of claims and concerns brought together by a great variety of actors."[86] This "proliferation of perspectives on environmental problems […] has accompanied the development and diversification of environmental concern since the 1960s",[87] constituting a struggle over the very definition of environmental problems.[88]

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[83] Timothy W Luke, "On Environmentality: Geo-Power and Eco-Knowledge in the Discourses of Contemporary Environmentalism" (1995) 31 Cult Crit 57 at 58.
[84] Hajer, *supra* note 15 at 2.
[85] *Ibid* at 18.
[86] *Ibid* at 1–2.
[87] Dryzek, *supra* note 7 at 8.
[88] Hajer, *supra* note 15 at 14–15.

A discursive understanding of nature or the environment is distinct from a discursive analysis of how human societies structure or govern their relationship to nature. While the former seeks to understand the "natural world" itself as always already inflected by discourse in our attempts to make contact with it, the latter examines the discursive formations emerging from such contact – the ways in which we govern, exploit, and otherwise position ourselves vis-à-vis this "natural" world. Yet while these things are not identical, the governance of the environment by humans – whether from a human rights-based approach or a rights of nature-based approach – is inextricably linked to the ways in which humans articulate nature in discourse. To this end, the analysis in this paper takes as a starting point the idea that "[a]ny understanding of the state of the natural […] environment is based on representations, and always implies a set of assumptions and (implicit) social choices that are mediated through an ensemble of specific discursive practices."[89]

Assuming a discursive understanding of nature, this analysis is therefore subject to a number of theoretical objections to postmodern conceptualizations of nature. The first of these objections is what Dingler terms "solipsism", following from assertions of post-structural theory that "all discursive phenomena can be treated as texts".[90] This objection posits that a discursive understanding of nature implies that it has no material existence, which in turn denies the reality of environmental problems. If the environment is discursive, then global warming, species extinction and oil spills are also mere discursive processes. A variant of this argument is the objection of idealism – the idea that the social construction of nature "implies that a discourse would actually create what it constructs."[91] While the objection of solipsism "totally denies reality, idealism accepts its existence but interprets it as a causal product of the symbolic."[92] What these objections misapprehend is that a discursive understanding of the natural world does not deny its reality or predicate its material existence on discursive creation; rather, "[n]ature

[89] *Ibid* at 17.
[90] Johannes Dingler, "The Discursive Nature of Nature: Towards a Post-Modern Concept of Nature" (2005) 7:3 J Environ Policy Plan 209 at 211.
[91] *Ibid* at 210.
[92] *Ibid* at 220.

enters the discursive sphere at the very moment it is conceptualized."[93] As a result, it cannot be separated from the socio-historical context from which it derives.[94] Thus, to insist on the socially constructed quality of nature is to assert that we cannot apprehend anything outside of its conception in discourse; it is to "[challenge] the possibility of a non-discursive access to that reality."[95]

Another objection identified by Dingler is that of relativism – the notion that "a discursive concept of nature leads to relativism because it is not possible to decide between the validity of claims of competing constructions of nature."[96] Critics of the post-modern approach argue that, from this perspective, it is "impossible to distinguish a more adequate construction of nature from a less adequate one because none of them can be verified with regard to extra-discursive reality."[97] Indeed, such a position would seem to undermine evidence-based approaches to environmental policy-making. The answer to this argument is not unique to the environmental domain; rather, it relates to postmodern approaches more generally. Dingler responds to this objection by citing Flax's observation that "[r]elativism has meaning only as a partner of its binary opposite – universalism […] If the hankering for a universal standard disappears, 'relativism' would lose its meaning. We could turn our attention to the limits and possibilities of local productions of truth."[98] In other words, "once the unachievable Cartesian dream of absolute security is abandoned, the post-modern position does not appear as relativism anymore. Rather, it is an approach that accepts the unavoidable situatedness and contingency of any knowledge claim."[99] In the realm of environmentalism, this means acknowledging contingency and seeking out those conceptual framings that open possibilities for a more sustainable relationship between humans and the natural world.

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[93] *Ibid* at 214.
[94] *Ibid*.
[95] *Ibid* at 215.
[96] *Ibid* at 210.
[97] *Ibid* at 217.
[98] *Ibid* at 218.
[99] *Ibid*.

2.2. Dominant discourses in international environmental governance

Before focusing on rights-based approaches to environmental governance, it is useful to survey several of the most dominant discourses in environmental governance more generally, in order to better understand the context. Bäckstrand and Lövbrand have identified three of these discourses as green governmentality, ecological modernization, and civic environmentalism. This section will also discuss sustainable development as a fourth dominant discourse, although it is also incorporated to some extent in the other three. While a full account of the historical development of these discourses is beyond the scope of the paper, this section will explore the primary features of each.[100]

Green governmentality is described by Bäckstrand and Lövbrand as "epitomiz[ing] a global form of power tied to the modern administrative state, mega-science and big business" and entailing "the administration of life itself – individuals, populations and the natural environment."[101] It is a variant of the concept of governmentality, first articulated by Michel Foucault in the late 1970s. Foucault's governmentality refers to the "techniques and strategies by which a society is rendered governable."[102] The disciplining practices of governmentality involve "power over and through the individual", impacting choices, lifestyles, and aspirations.[103] Rather than exercising control *over* territory, security of the state thus occurs through the ceaseless "monitoring, shaping and controlling of the people living on that territory."[104] In this way, the concept of governmentality provides a useful lens through which to understand the multiplicity of locations of disciplinary practices and authorities, and to examine the

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[100] For a more in depth account of these discourses, see: Dryzek, *supra* note 7; Hajer, *supra* note 15; Karin Bäckstrand & Eva Lövbrand, "Planting trees to mitigate climate change: Contested discourses of ecological modernization, green governmentality and civic environmentalism" (2006) 6:1 Glob Environ Polit 50; Luke, *supra* note 83; Rutherford, *supra* note 46; Timothy W Luke, "Eco-Managerialism: Environmental Studies as a Power/Knowledge Formation" in Frank Fischer & Maarten Hajer, eds, *Living with Nature: Environmental Politics as Cultural Discourse* (Oxford: Oxford University Press, 1999).

[101] Bäckstrand & Lövbrand, *supra* note 100 at 53–54.

[102] Martin Jones, Rhys Jones & Michael Woods, *An Introduction to Political Geography: Space, Place and Politics* (London; New York: Routledge, 2004) at 173.

[103] Bäckstrand & Lövbrand, *supra* note 100 at 54.

[104] Karin Bäckstrand & Eva Lövbrand, "Climate Governance Beyond 2012: Competing Discourses of Green Governmentality, Ecological Modernization and Civic Environmentalism" in Mary E Pettenger, ed, *The Social Construction of Climate Change: Power, Knowledge, Norms, Discourses* (Ashgate Publishing, Ltd., 2007) at 126.

constitution of spheres of activity and knowledge as administrable.[105]

As a variant of this approach, green governmentality draws on these ideas to describe the ways in which such disciplinary practices are manifested in environmental governance and natural resource management – extending the techniques of governmentality to the entire planet, including its natural elements and constituents. The rise of green governmentality has occurred in part through a growing "expertification" of the environmental arena. Bäckstrand and Lövbrand describe the effect of green governmentality in the following terms:

> In the name of sustainable development and environmental risk management a new set of administrative truths have emerged that expand bio-politics to all conditions under which humans live. These new eco-knowledges and practices organize and legitimize common understandings of the environmental reality and enforce "the right disposition of things" between humans and nature. The numerous scientific expert advisors that have emerged on the environmental arena during the past decades play an authoritative role in the construction of these eco-knowledges. Resting upon a notion of sound science, these well-trained environmental professionals provide credible definitions of environmental risks as well as legitimate methods to measure, predict and manage the same risks.[106]

In its current form, green governmentality encompasses aspects of geopower, eco-knowledge and enviro-disciplines, including a tendency to define environmental issues in terms of security threats, the justification of continued growth through the discourses of sustainable development, and the techno-scientific management and supervision of ecosystems and their components.[107]

The discourse of ecological modernization, by contrast, "represents a decentralized liberal market order that aims to provide flexible and cost-optimal solutions".[108] To this end, it emphasizes "the compatibility of economic growth and environmental protection",[109] challenging the Club of Rome's conclusion in the early

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[105] Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London; Thousand Oaks, Calif.: Sage Publications, 1999) at 29.
[106] Bäckstrand & Lövbrand, *supra* note 100 at 54.
[107] Angela Oels, "Rendering Climate Change Governable: From Biopower to Advanced Liberal Government?" (2005) 7:3 J Environ Policy Plan 185 at 194.
[108] Bäckstrand & Lövbrand, *supra* note 104 at 124.
[109] Bäckstrand & Lövbrand, *supra* note 100 at 52.

1970s that civilization was confronting the limits to growth.[110] Instead, the ecological modernization discourse contends that development and capitalism can be greened, in a win-win scenario of continued economic growth within a liberal market order, alongside increased environmental protection. According to ecological modernization, "environmental problems can be solved in accordance with the workings of the main institutional arrangements of society",[111] which merely require refinement and reform, rather than a wholesale re-imagination. As a result, this approach favours "a gradual transformation of the state and market to promote green regulation, technology, investment and trade",[112] rather than more radical restructuring or transformation. As Oels points out:

> At the heart of ecological modernization is the application of economics to thinking about environmental problems and solutions, which had traditionally been formulated in natural science terms. Ecological modernization reconceptualizes the ecological crises as an opportunity for innovation and reinvention of the capitalist system.[113]

These characteristics of ecological modernization are related to what Bäckstrand and Lövbrand identify as the weaker variant of the discourse.[114] A stronger version of ecological modernization adopts a more critical approach, moving "beyond a Eurocentric perspective on clean production and instead highlight[ing] the equity and justice dimension embedded in the environment-development nexus of sustainable development debates".[115] It also incorporates a greater emphasis on public participation and stakeholder engagement.[116]

The stronger version of ecological modernization shares some characteristics with civic environmentalism. Bäckstrand and Lövbrand also identify more and less radical variants of this discourse. The former "emphasizes relations of power and powerlessness as the core of international institutions and negotiations processes" and "is informed by a

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[110] *Ibid*.
[111] Hajer, *supra* note 15 at 3.
[112] Bäckstrand & Lövbrand, *supra* note 100 at 53.
[113] Oels, *supra* note 107 at 196.
[114] Bäckstrand & Lövbrand, *supra* note 104 at 129.
[115] *Ibid*.
[116] *Ibid*.

radical ecology agenda that advocates a fundamental transformation of consumption patterns and existing institutions to realize a more eco-centric and equitable world order."[117] It also critiques the neoliberal bias of global environmental governance and its dominant paradigms of ecological modernization, "contest[ing] the structures […] that revolve around the liberalization of markets, free trade and sovereignty based practices".[118] By contrast, the less radical form of civic environmentalism – the reformist discourse – "stresses how the vital force of a transnational civil society and global deliberative processes can complement state-centric practices."[119]

Finally, the discourse of sustainable development arose in the 1970s, and came to prominence in the 1980s with the publication of the Brundtland Commission report in 1987. The most widely quoted definition of sustainable development, found in the Brundtland Report, is development that "meets the needs of the present without compromising the ability of future generations to meet their own needs".[120] It can be described as "a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations."[121]

In this sense, sustainable development has features in common with both the discourse of green governmentality and that of ecological modernization. For example, sustainable development tends to share a faith in the disciplinary practices of natural resource management characteristic of green governmentality, while also aligning with the market logic of ecological modernization. As Dryzek notes, sustainable development "seeks perpetual growth in the sum of human needs that might be satisfied not through simple resource garnering, but rather through intelligent operation of natural systems and human systems acting in combination."[122] This formulation recalls the win-win notion of

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[117] *Ibid* at 132.
[118] *Ibid*.
[119] *Ibid* at 134.
[120] World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).
[121] *Ibid* at 46.
[122] Dryzek, *supra* note 7 at 124.

the reconcilability of capitalist growth with "greener" practices, which typifies the discourse of ecological modernization. Indeed, sustainable development is frequently viewed as prioritizing economic development at the expense of environmental and human rights protections, holding economic growth "as the first element in the relationship between development and environment".[123]

The discourse of sustainable development is particularly pervasive at the international level, for example in UN processes, and in the work of large intergovernmental organizations and conservation organizations such as the International Union for the Conservation of Nature, and the World Wildlife Fund.[124] It has also arisen at the national level, as well as in the realm of international business, which has "hitched itself to the sustainability bandwagon."[125]

The UN's post-2015 development agenda exemplifies the salience of this discourse. Following on from the Millennium Development Goals (MDGs), the post-2015 agenda focuses on a new set of 17 goals – the Sustainable Development Goals (SDGs) – which aim to end poverty, fight inequality and injustice, and tackle climate change by 2030.[126] Like the MDGs, the SDGs play an influential role in orienting and shaping the development agendas of UN member states, mobilizing to achieve a set of social priorities.[127] They "embrace the so-called triple bottom line approach to human wellbeing", in an attempt to integrate economic development, environmental sustainability and social inclusion.[128]

The four foregoing dominant discourses form a backdrop against which the discourses of human rights and the rights of nature in the international climate regime will be examined in Chapter 4. First, however, the following chapter will examine the

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[123] Cullet, *supra* note 69 at 3.
[124] Dryzek, *supra* note 7 at 126.
[125] *Ibid* at 128.
[126] UNDP, "Sustainable Development Goals (SDGs)", online: <http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda.html>.
[127] Jeffrey D Sachs, "From Millennium Development Goals to Sustainable Development Goals" (2012) 379:9832 The Lancet 2206 at 2206.
[128] *Ibid*.

development of human rights-based and rights of nature-based approaches to environmental governance.

3. Human Rights-Based and Rights of Nature-Based Approaches to Environmental Governance

Over the last forty years, much has been written about the status of the right to a healthy environment in its various incarnations in international and comparative law.[129] Codified in national constitutions, pronounced in international declarations, and read into existing human rights, the status of the right to a healthy environment nevertheless remains uncertain. Most scholars now view it "as an emerging global right whose further recognition could play a critical role in strengthening environmental laws and policies and addressing important environmental challenges",[130] and human rights-based approaches to environmental governance have become increasingly prevalent amongst practitioners and scholars. There is also a growing body of literature and increasing political activism around the rights of nature, although this concept has received somewhat less attention than anthropocentric rights-based approaches on the international stage.[131]

While the last chapter laid out the discourse analytic method and began to explore discursive approaches in the areas of human rights, environmental studies, and environmental governance more broadly, this chapter will take somewhat of a step back, in order to delineate the emergence of human rights-based and rights of nature-based approaches to environmental governance from a politico-legal perspective. It will begin with a description and analysis of the right to environment, tracing its development in international law (section 3.1). It will then explore rights of nature-based approaches to environmental governance, as well as legal developments relating to the rights of nature (section 3.2). While these accounts of the development of human rights and rights of nature in the context of environmental governance are not exhaustive, they will lay the

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[129] Sébastien Jodoin, "Should We Be So Positive about Environmental Rights: A Review of David R Boyd's *The Environmental Rights Revolution*" (2012) 8 McGill Int J Sustain Dev Law Policy 131 at 11.
[130] *Ibid* at 12.
[131] See, e.g., Thomas Fatheuer, *Buen Vivir: A Brief Introduction to Latin America's New Concepts for the Good Life and the Rights of Nature* (Heinrich Böll Stiftung, 2011).

groundwork for an examination of human rights and rights of nature-based approaches to climate governance and a discourse analysis of the same in Chapter 4.

3.1. The human rights-based approach to environmental governance

Human rights approaches to environmental governance draw on the interrelationship between the protection of human rights and the protection of the environment. As Cullet notes, "[i]nternational environmental law and human rights law have intertwined objectives and ultimately strive to produce better conditions of life on earth."[132] Indeed, the linkages between these domains have become increasingly evident "in view of the recognition of the pervasive influence of local and global environmental conditions upon the realization of human rights."[133]

Nevertheless, the nature of the relationship between human rights and environmental protection is neither clear nor uncontested.[134] The overlap between the realms of international human rights law and international environmental law has led some to question the need for environmental rights at all, while other commentators disagree about the form these rights should take.

3.1.1. The development of the right to environment in law

Since the Second World War, the recognition and expansion of human rights protections has grown tremendously. The so-called "rights revolution" that entrained the proliferation of human rights instruments in the mid- to late-20th century "result[ed] in unprecedented recognition and protection of these rights and extension of rights to previously "right-less" groups."[135] Instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights codified rights that were

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[132] Cullet, *supra* note 69 at 1.
[133] *Ibid*.
[134] Alan E Boyle & Michael R Anderson, *Human Rights Approaches to Environmental Protection* (Oxford; New York: Clarendon Press ; Oxford University Press, 1996) at 3.
[135] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver, BC: UBC Press, 2012) at 7.

seen as pressing issues at the time, but environmental rights did not figure amongst these earlier instruments.

In 1962, Rachel Carson was the first to write in favour of a specific human right to a healthy environment in her groundbreaking book *Silent Spring*.[136] She argued, "[i]f the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons […], it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem."[137] Indeed, the same could be said of international human rights instruments. As Boyd points out, "[s]ociety's awareness of the magnitude, pace, and adverse consequences of environmental degradation was not sufficiently advanced during the era when these instruments were drafted and negotiated to warrant the inclusion of environmental concerns."[138]

This awareness did begin to develop throughout the 1960s and 1970s, however. The UN General Assembly explicitly connected human rights and environmental degradation for the first time in 1968, in a resolution calling for the convening of the 1972 UN Conference on the Human Environment.[139] The outcome of this conference – the 1972 Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration) — included a formal recognition of the right to a healthy environment. The Declaration 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."[140] Although it is not legally binding, and its impact on the development of international environmental rights may have been

[136] Rachel Carson, *Silent Spring* (Boston; Cambridge, Mass.: Houghton Mifflin ; Riverside Press, 1962).
[137] *Ibid* at 12–13.
[138] Boyd, *supra* note 135 at 12.
[139] UNGA Res. 2398(XXII) (1968).
[140] UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994, online: <http://www.refworld.org/docid/3b00f1c840.html>.

limited, [141] the Stockholm Declaration has had an influence on the inclusion of environmental rights in many of the national constitutions adopted since 1972.[142]

Following the Stockholm Declaration, the World Commission on Environment and Development (WCED) released its report, *Our Common Future* (or, the *Brundtland Report*) in 1987. The report was the first to coin the term sustainable development, "in a bid to reconcile the increasingly polarized debate on environmental protection and economic development."[143] Defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs",[144] sustainable development has since become the "buzzword […] of most of the international political and legal debate on environmental issues since the mid-1980s".[145] The *Brundtland Report* also included, as an annex, a "Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development", which were adopted by the WCED Experts Group on Environmental Law. The first of these principles states: "All human beings have the fundamental right to an environmental adequate for their health and well-being."

However, by the time of the Rio Declaration on Environment and Development, adopted at the 1992 United Nations Conference on Environment and Development, the rights language found in the Stockholm Declaration and the Proposed Legal Principles of the *Brundtland Report* had been tempered. Instead of a fundamental right to environment, Principle 1 of the Rio Declaration states: "Human beings are at the centre of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[146] This language of entitlement is weaker than the declaration of a

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141 UN General Assembly, *Stockholm Declaration (Declaration of the United Nations Conference on the Human Environment)* (1972).
142 *Ibid*.
143 Sumudu Atapattu, "The Right to a Healthy Life or The Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law" (2002) 16 Tulane Environ Law J 65 at 75–76.
144 World Commission on Environment and Development, *Our Common Future* (Oxford; New York: Oxford University Press, 1987) at 43.
145 Marc Pallemaerts, "International Environmental Law from Stockholm to Rio: Back to the Future?" (1992) 1:3 Rev Eur Community Int Environ Law 254 at 261.
146 United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development* (New York: United Nations, 1992).

fundamental right to environment contained in earlier instruments. At the same time, the principle has also been criticized for what Pallemaerts calls its "delirious anthropocentrism"[147] – placing human interests squarely at the core of environmental concerns.

Amongst binding human rights agreements, the 1981 African Charter on Human and Peoples' Rights was the first instrument to explicitly include a right to a clean environment, protecting the right of peoples to the "best attainable standard of health", as well as their "right to a generally satisfactory environment favorable to their development."[148] The 1988 Protocol of San Salvador (the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights) also includes the "right to live in a healthy environment and to have access to basic public services."[149] Article 24 of the Convention on the Rights of the Child – the right of the child to the highest attainable standard of health – also addresses environment, albeit somewhat obliquely, providing that "States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures" with respect to "the dangers and risks of environmental pollution."[150] Nevertheless, environmental protection is not addressed in the International Bill of Rights, nor in any other human rights instrument of universal application.[151]

If environmental rights find scant protection in binding international and regional human rights instruments, regional human rights bodies have been more willing to recognize the nexus between human rights and environmental protection, enlarging existing human rights such as the right to life and the right to privacy to include environmental considerations. For example, the European Court of Human Rights'

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147 Marc Pallemaerts, "International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process" (1995) 15 J Law Commer 623 at 642.
148 Organization of African Unity, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), online: <http://www.refworld.org/docid/3ae6b3630.html>.
149 Organization of American States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, 16 November 1999, A-52, online: <http://www.refworld.org/docid/3ae6b3b90.html>.
150 Atapattu, *supra* note 143 at 98.
151 *Ibid*.

> willingness to recognize the nexus between environmental protection and human rights in its latest environmental decisions reflects a growing recognition of the importance of environmental issues, specifically the quality of the environment, and the need to protection against and information about environmental threats.[152]

In the case of *Guerra & Others v. Italy*, the Court found that Italy had violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – the right to privacy and family life – by failing to provide the applicants with essential information that would have allowed them to assess the environmental risks of their habitation in close proximity to a chemical factory.[153] Similarly, in *Powell & Rayner v. United Kingdom*, the applicants also alleged violations of the right to privacy. In that case, the Court recognized the interrelationship between the environment and quality of life, finding the noise pollution from Heathrow Airport interfered with quality of life, despite finding that on the balance, the economic interest of the broader community justified the infringement.[154] In the case of *Oneryildiz v. Turkey*, the Court invoked the right to life (Article 2), in a case where 26 people died as a result of an explosion at a municipal landfill site.[155]

The Inter-American Commission on Human Rights has also issued recommendations in cases where it has found that environmental degradation has impacted the enjoyment of human rights. For example, the Commission in the Yanomami Case found that the construction of a highway in Brazil, as well as authorizations for resource exploitation, violated the Yanomami people's rights to life, health, liberty, personal security and freedom of movement.[156] The jurisprudence of the Inter-American Court of Human Rights, while not addressing the right to a healthy environment directly, has drawn the connections between environmental degradation and human rights, and in

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[152] Mariana Acevedo, "The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights" (2000) 8 NYU Environmental Law Journal 437 at 437.
[153] *Guerra & Others v. Italy*, 26 Eur. Ct. H.R. 357 (1995).
[154] *Powell & Rayner v. United Kingdom*, 12 Eur. Ct. H.R. 355 (ser. A) (1990). See also, *inter alia*: *Lopez Ostra v. Spain*, 20 Eur. Ct. H.R. 277; *Fadeyeva v Russia,* No. 55723/00, 9 June 2005; *Moreno Gomez v Spain*, No. 4143/02, 16 November 2004.
[155] *Oneryildiz v Turkey*, No. 48939/99, Grand Chamber, 30 November 2004.
[156] *Yanomani Case*, Report 12/85, Annual Report 1984-1985.

particular indigenous rights, in a number of cases.[157]

Finally, in Africa, the Ogoni case,[158] brought before the African Commission on Human and Peoples' Rights, found that Nigeria was responsible for multiple violations of the African Charter on Human and Peoples' Rights on the basis that the state owned Nigerian Oil Company (in a joint venture with Royal Dutch Shell) had caused environmental degradation in the homeland of the Ogoni people. The rights at issue included the rights to health, food, shelter/housing, a clean environment, and family rights.

Since the mid-1970s many of the new and amended constitutions around the world have also incorporated a constitutional right to a healthy environment, fuelled in part by a growing awareness of the global environmental crisis.[159] Indeed, as of 2012, three-quarters of the world's constitutions contain explicit references to environmental rights and/or environmental responsibilities. [160] Even in countries whose constitutions do not have an enforceable right to environment, some domestic courts have been willing to read in stronger rights-based protections. For example, Article 48A of the Indian Constitution, provides only that "[t]he state shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country." While this article does not create an enforceable right, "it has encouraged Indian courts to give other human rights, including the right to life, a very vigorous environmental interpretation", resulting in "a jurisprudence, which, more than in any other country, uses human rights law to address questions of environmental quality."[161]

The UN Human Rights Council appointed an independent expert in July 2012 to prepare a report on "human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment".[162] As Jodoin notes, this appointment may indicate

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[157] See, e.g.: *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001); *Twelve Saramaka Clans v. Suriname* (2007), No. 12,338. Judgment of 28 November 2007.
[158] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001).
[159] Boyd, *supra* note 135 at 47.
[160] *Ibid*.
[161] Boyle, *supra* note 141 at 479.
[162] UNHRC, *Human Rights and the Environment*, 19th Sess, UN Doc A/ HRC/19/L.8/Rev.1, (2012) at

"enduring global interest in this right", while also "serving as a reminder that much of the debate, at least internationally, may not have advanced very far in the last forty years."[163] Nevertheless, the mandate of the Independent Expert, Professor John Knox, was extended in 2015 and converted into a Special Rapporteur position. Since his appointment, Professor Knox has issued several reports on the environment and human rights.[164] The Human Rights Council has also adopted a number of resolutions relating to human rights and the environment.[165]

3.1.2. Differing approaches to environmental rights

From the foregoing survey of the development of environmental rights under international and national law, we can distill three main sub-approaches or theories of the relationship between human rights and environmental protection: the broadening of existing human rights, the use of procedural rights, and the formulation of a standalone, substantive human right to the environment.[166]

The first of these approaches (what Leib dubs the "expansion theory"[167]) broadens or reinterprets well-established human rights such as the right to life, the right to privacy, and the right to health to encompass an environmental dimension. This is also known as

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para 2.

[163] Jodoin, *supra* note 129 at 12.

[164] "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Preliminary report" (A/HRC/22/43); "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report" (A/HRC/25/53); "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Compilation of good practices" (A/HRC/28/61); "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Implementation Report" (A/HRC/31/53); "Annual thematic report on human rights obligations relating to climate change (31st session of the Human Rights Council)" (A/HRC/31/52).

[165] See, e.g.: "Report of the Human Rights Council on its nineteenth session" (A/HRC/RES/19/10); "Report of the Human Rights Council on its twenty-fifth session" (A/HRC/RES/25/21); "Resolution adopted by the Human Rights Council 28/11. Human rights and the environment" (A/HRC/RES/28/11).

[166] See Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical, and Legal Perspectives* (Leiden; Boston: Martinus Nijhoff Publishers, 2011) at 71.

[167] *Ibid*.

the "greening" of human rights[168] – the interpretation of human rights instruments "to address environmental issues not anticipated when these instruments were formulated."[169] For example, while the European Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly recognize environmental rights, the European Court of Human Rights has interpreted certain of its provisions, such as the right to privacy and family life, to include environmental protections.[170] With respect to the "expansion" approach to existing human rights, Atapattu notes that the lack of enforcement machinery for environmental issues is another pragmatic reason for the application of existing human rights mechanisms to the environment.[171] But while the expansion of existing rights has opened the door to environmental protection and redress for environmental harms, and may serve as a transitional phase towards the recognition of a freestanding right to environment, some commentators argue that it "is not sufficient to protect a wider environmental agenda".[172]

In contrast to the expansion theory, the second theory – the "environmental democracy theory"[173] – focuses on procedural environmental rights, such as access to information, public participation, and access to justice. These rights can help educate the public, and raise the profile of environmental issues in the public consciousness. They can lead to more informed decision-making, greater public scrutiny, and greater governmental accountability.[174] Principle 10 of the Rio Declaration exemplifies this approach, stating: "environmental issues are best handled with the participation of all concerned citizens, at the relevant level."[175] On this basis, Principle 10 calls for "appropriate access to information concerning the environment that is held by public

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168 *Ibid*.
169 Acevedo, *supra* note 152 at 439.
170 *Ibid* at 437. For example, in the case of *Guerra & Others v. Italy*, the Court held that Italy did not fulfill its obligation to secure the applicants' right to respect for their private and family life, in breach of the Convention, by failing to provide essential information that would have enabled them to assess the risks of living in close proximity to a fertilizer factory.
171 Atapattu, *supra* note 143 at 70.
172 Leib, *supra* note 166 at 72.
173 *Ibid* at 81.
174 Bende Toth, "Public Participation and Democracy in Practice—Aarhus Convention Principles as Democratic Institution Building in the Developing World" (2010) 30:2 Utah Environ Law Rev, online: <http://epubs.utah.edu/index.php/jlrel/article/view/335> at 298.
175 United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes", "public awareness and participation by making information widely available", and "[e]ffective access to judicial and administrative proceedings, including redress and remedy".[176] The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters also codifies a number of important procedural rights in the domain of environment at the regional level.[177]

While such procedural rights are a vital component of environmental governance, Cullet points out their limitations, noting that

> in practice these procedures are mostly used in the framework of industrial development or urban problems, and will tend to reflect mainly concerns about the quality of life of people, whose lives are not directly threatened by their physical environment, and who have the financial capacity to vindicate their rights.[178]

As a result, they may be insufficient to encompass the whole range of environmental interests.

Finally, the third theory – the "genesis theory"[179] – calls for the recognition of a standalone substantive right to environment. Proponents of this theory argue that a reliance on pre-existing human rights is "limited in scope and restricted in effect",[180] and the recognition of substantive environmental rights is thus necessary to ensure a more robust protection of human life and well-being vis-à-vis the environment.

In definitional terms, such a right is not easily articulated, as qualifiers like 'healthy', 'clean', and 'satisfactory' are inherently vague, raising questions of

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[176] *Ibid.*
[177] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447; 38 ILM 517 (1999).
[178] Cullet, *supra* note 69 at 7.
[179] Leib, *supra* note 166 at 88.
[180] *Ibid*.

justiciability.[181] Generally speaking, the right to environment should not be thought of as a right "to an ideal environment with zero pollution or a right to a pristine nature", but rather "a right to an appropriate degree or environmental protection and conservation necessary for the enjoyment of basic human rights."[182] Cullet reiterates this approach, noting that a substantive right "should take into account the need to preserve the very existence of life on earth necessary for humankind's survival, and […] ensure that the conditions of life provided to humans are conducive to a decent quality of life."[183] The draft principles of the UN Sub-Commission on Human Rights and the Environment[184] also elucidate some of the components of such a right, including:

- freedom from pollution, environmental degradation and activities that adversely affect the environment, or threaten life, health, livelihood, well-being or sustainable development;
- protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems;
- the highest attainable standard of health;
- safe and healthy food, water and working environment;
- adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment;
- ecologically sound access to nature and the conservation and sustainable use of nature and natural resources;
- preservation of unique sites;
- enjoyment of traditional life and subsistence for indigenous peoples.[185]

In addition to these three theories or sub-categories, environmental rights have also been categorized according to the taxonomy of the three generations of rights first proposed by jurist Karel Vasak.[186] According to this division, some have placed environmental rights as first generation rights (using the perspective of civil and political

[181] This is a concern held in common with economic, social and cultural rights, such as the right to health and the right to an adequate standard of living, or indeed with the concept of sustainable development itself.
[182] Leib, *supra* note 166 at 92.
[183] Cullet, *supra* note 69 at 4.
[184] Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).
[185] Boyle & Anderson, *supra* note 134 at 48.
[186] See Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights" (1977) 30:11 UNESCO Courier.

rights aimed primarily at protecting the individual from excesses of the State); others as second generation rights (economic, social and cultural in nature); and finally others as third generation, or solidarity, rights. This third approach is the most controversial, as not all human rights lawyers agree with the recognition of third generation rights.[187]

As the disagreement over classification demonstrates, the right to environment does not easily fit within one category; rather, it incorporates elements of each generation of rights, reminding us "of the inanity of a tight separation between positive and negative rights, individual and collective rights or political and economic problems."[188] Thus, while there is variation in rights-based approaches to environmental protection, none of them are mutually exclusive, and there are advantages and drawbacks to each.[189]

3.2. Rights of Nature-based Approaches to Environmental Governance

Rights of nature-based approaches to environmental governance have been less prominent in international forums than human rights-based approaches, perhaps because they tend to be viewed as more "extreme" in their conceptual foundations. If the human rights approach advocates for greater environmental protections on behalf of the inherent rights of humans, then the rights of nature-based approach pushes the rights argument farther, insisting on fundamental rights for non-human and in some cases inanimate entities in the natural world.

The way in which western legal systems have traditionally governed humans' relationship to the natural world is closely tied to restrictions and limitations on the use of property, and the regulation of resources.[190] Laws that have traditionally been applied to cases involving environmental quality, such as those concerning nuisance, trespass, and riparian rights, are all grounded in property. For this reason, in these legal systems, "environmental ideas, particularly within the law, will inevitably be closely tied to

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[187] Boyle, *supra* note 141 at 472.
[188] Cullet, *supra* note 69 at 2.
[189] Leib, *supra* note 166 at 107.
[190] Sean Coyle & Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Bloomsbury Publishing, 2004) at 4.

prevailing legal conceptions of property and proprietary rights."[191] The idea of the rights of nature – of rights inhering in entities such as ecosystems and their constituent parts, traditionally viewed as the objects of property – thus marks a radical departure from this perspective.

The following section will trace the development of the concept of the rights of nature in a broader set of sites and forms of law – from its intellectual roots in Indigenous conceptions of Mother Earth and 19th century environmental ethics, to modern efforts to incorporate the rights of nature into environmental governance in domestic legal systems.

3.2.1. Intellectual foundations of the rights of nature

The rights of nature find their conceptual origins to a great extent in aspects of Indigenous worldviews, and in particular, in the social and cosmological systems of Latin American Indigenous peoples. As Fitz-Henry points out, in many of these belief systems, "the lines between the natural, the social, and the supernatural are highly permeable, and many features of the natural world – mountains, lakes, and now rapidly disappearing glaciers – are perceived as having human-like force, feeling, and agency."[192] In this context, "the spectrum of personhood is animated by human/non-human distinctions that are fundamentally unlike those that undergird Western property law", [193] and hence much of Western environmental law. Non-human entities are believed to possess consciousness and agency. The components of the earth – animate and inanimate, human and non-human – are interconnected and interdependent. This "Andean cosmo-vision" revolves around four primary principles of relationality, correspondence, complementarity and reciprocity: [194]

> It is a vision […] that is neither biocentric nor anthropocentric, but one committed to what the Indigenous call, in direct opposition to the aspirations of endless

[191] *Ibid* at 5.
[192] Erin Fitz-Henry, "The Natural Contract: From Lévi-Strauss to the Ecuadorian Constitutional Court" (2012) 82:3 Oceania 264 at 266.
[193] *Ibid*.
[194] *Ibid* at 269.

> growth that remain mainstream economic sense in much of the world, '*sumac kawsay*,' or balanced living.[195]

From this belief system has arisen much of the impetus for movements recognizing the rights of nature in domestic law that have occurred in Latin America in recent years.

The notion of the inherent rights of the natural world also finds intellectual roots in the environmental ethics of the 19th and early 20th centuries. In America, naturalist and environmental activist John Muir proposed respect for "the rights of all the rest of creation" as early as 1867.[196] Strongly inspired by the thought of Ralph Waldo Emerson and Henry David Thoreau, Muir's "[r]omantic reverence for wild nature"[197] led to the founding of the Sierra Club, and in turn influenced the strong current of environmental ethics that began to develop in the first half of the 20th century, from the "reverence for life" discussed by Albert Schweitzer[198], to the "land ethic" of Aldo Leopold, and the scholarship of Arne Næss and James Lovelock.

As the 20th century progressed, the expansion of rights to previously "rights-less" groups and entities began to inspire similar arguments with respect to rights for nature and the expansion of legal protections "to ensure the intrinsic value of diverse entities".[199] In his seminal 1972 work on the rights of nature, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, Christopher Stone drew on this phenomenon of expanding rights to advocate for a further extension of rights to nature.[200] Stone argued that over time, history has seen "a continual evolution in the types of things that can be owned, who was considered capable of ownership and the meaning of ownership itself".[201] In the past, groups such as women, children and slaves were considered property under the law and treated accordingly, until they were finally conferred rights of

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195 *Ibid*.
196 John Muir, quoted in Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press, 1989) at 6.
197 Purdy, *supra* note 14 at 123.
198 Nash, *supra* note 196 at 6.
199 Espinosa, *supra* note 76 at 402.
200 Christopher D Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (New York, N.Y.: Oxford University Press, 2010).
201 Peter Burdon, "The Rights of Nature: Reconsidered" (2010) 49 Australian Humanities Review 69 at 69.

their own. In each case, the idea of extending rights protections was "unthinkable" until it occurred.[202] Prior to being recognized as a rights-holder – a *subject* of rights – each rightless entity was viewed as an *object* for the use of those who did enjoy such rights.[203]

Nor has the law limited its recognition of "personhood" to human beings; it is replete with inanimate rights-holders such as corporations, trusts, municipalities, and nation states.[204] Stone therefore argued that like corporations, natural objects should indeed have rights, and should have standing to defend these rights in court, via the representation of a guardian.[205] In proposing that the environment and its constituent elements such as trees and rivers could themselves be rights-holders, Stone also set out a careful explanation of how such rights could practically and effectively be considered by the courts.

His essay had an immediate impact on the case of *Sierra Club v. Morton*.[206] In that case, the Sierra Club was appealing a decision by the Ninth Circuit Court of Appeals denying an injunction against the development of a large leisure complex in a wilderness area in the Sierra Nevada Mountains. The Ninth Circuit denied the injunction on the basis that the Sierra Club Legal Defense Fund lacked standing to bring suit. While the Supreme Court upheld the Ninth Circuit's decision, Justice Douglas, citing Stone in his dissent, argued that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."[207] He went on to state that

> the critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated […] in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage.[208]

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[202] Stone, *supra* note 200 at 2.
[203] *Ibid* at 3.
[204] *Ibid* at 1–2.
[205] *Ibid* at 7.
[206] *Sierra Club v Morton,* 405 US 727 (1972).
[207] *Ibid*. (Douglas , J., dissenting).
[208] *Ibid*.

Despite the majority's reluctance in *Sierra Club v. Morton*, the "story line" of the expansion of rights has been used in other arenas, including by the animal rights movement, which also arose largely in the early 1970s.[209] The notion of expanding rights to non-human entities also aligns with what Fitz-Henry views as a "growing concern with the agency of things",[210] exemplified by the work of Bruno Latour (and to some extent anticipated by the earlier work on "the rights of the living" by Claude Lévi-Strauss).[211]

3.2.2. International and domestic legal developments relating to the rights of nature

(a) International legal developments

Internationally, there have been increasing efforts to develop norms relating to the rights of Mother Earth in international law and policy. One of the earliest international instruments to take a distinctly ecocentric approach was the World Charter for Nature, adopted by the UN General Assembly in 1982. The Charter proclaims "principles of conservation by which all human conduct affecting nature is to be guided and judged",[212] emphasizing the protection of nature as an end in itself.[213] Although it is non-binding, and does not use the language of rights explicitly, it does set out duties towards nature on the part of individuals and political collectivities.

A number of the Charter's provisions are also now reflected in treaties, "[a]s a standard of ethical conduct."[214] Aside from the "General Principles" contained in Section I of the Charter, Section II – "Functions" – includes provisions for the consideration of the proper functioning of natural systems in decision-making processes, as well as in the planning and implementation of development activities; restrictions on activities likely to cause irreversible damage to nature; precautions regarding pollutants; and provisions against the overexploitation and waste of natural resources. Finally, Section III, entitled

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[209] Peter Singer, *In Defense of Animals: The Second Wave* (Malden, MA: Blackwell Pub., 2006) at 2.
[210] Fitz-Henry, *supra* note 192 at 266.
[211] *Ibid* at 267.
[212] UN General Assembly, "World Charter for Nature", 28 October 1982, (A/RES/37/7), at Preamble. Available: http://www.un.org/documents/ga/res/37/a37r007.htm
[213] Philippe Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003) at 45.
[214] *Ibid*.

"Implementation", includes techniques and means for implementation – many of which have been endorsed by subsequent environmental agreements.[215]

More recent developments include the World Peoples' Conference on Climate Change and the Rights of Mother Earth, held in Bolivia in April 2010, which was attended by over 35,000 people and concluded with the adoption of a draft Universal Declaration of the Rights of Mother Earth (UDRME).[216] Article 2 of the Declaration addresses the "Inherent Rights of Mother Earth":

> (1) Mother Earth and all beings of which she is composed have the following inherent rights:
>
> (a) the right to life and to exist;
>
> (b) the right to be respected;
>
> (c) the right to continue their vital cycles and processes free from human disruptions;
>
> (d) the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being;
>
> (e) the right to water as a source of life;
>
> (f) the right to clean air;
>
> (g) the right to integral health;
>
> (h) the right to be free from contamination, pollution and toxic or radioactive waste;
>
> (i) the right to not have its genetic structure modified or disrupted in a manner that threatens its integrity or vital and healthy functioning;
>
> (j) the right to full and prompt restoration for the violation of the rights recognized in this declaration caused by human activities;
>
> (2) Each being has the right to a place and to play its role in Mother Earth for her harmonious functioning.

[215] *Ibid* at 46.
[216] Burdon, *supra* note 201 at 76.

> (3) Every being has the right to wellbeing and to live free from torture or cruel treatment by human beings.

Proponents of the UDRME were also present at the United Nations Conference on Sustainable Development (Rio+20), advocating for the adoption of the Declaration and in opposition to the underlying "hegemonic green economy discourse" of the Conference.[217] Thanks in part to their advocacy, the language of the rights of nature appeared in the Rio+20 outcome document, *The Future We Want.* Article 39 states:

> We recognize that the planet Earth and its ecosystems are our home and that Mother Earth is a common expression in a number of countries and regions and we note that some countries recognize the rights of nature in the context of the promotion of sustainable development. We are convinced that in order to achieve a just balance among the economic, social and environment needs of present and future generations, it is necessary to promote harmony with nature.[218]

The ecocide movement is another instantiation of the growing international effort to accord protections and recognize the legal personality of nature. The concept of ecocide refers to the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished.[219] It has been proposed that the Rome Statute of the International Criminal Court be amended so as to include ecocide as an international crime.[220] While the concept of ecocide does not rely on recognizing the *rights* of nature per se, it does recognize that actions harming the environment are morally reprehensible and should be treated as crimes internationally and domestically.

(b) Domestic legal developments

Following the invocation of the rights of nature in *Sierra Club v. Morton,* there have been further legal developments at the domestic level in the United States. The work of the Community Environmental Legal Defense Fund (CELDF), founded in

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[217] Espinosa, *supra* note 76 at 393.
[218] United Nations General Assembly, "The Future We Want" (A/RES/66/288).
[219] Eradicating Ecocide, "Fact Sheet: Proposed Amendment to the Rome Statute," online: <http://eradicatingecocide.com/the-law/factsheet/>.
[220] *Ibid.*

Pennsylvania in 1995, is one such development. Beginning in 2006, CELDF began helping communities around the United States recognize and safeguard the rights of ecosystems in municipal ordinances – for example, by allowing citizens to defend the rights of ecosystems without the burden of proving standing, and by measuring damages based on harm caused to the ecosystem itself.[221] While state laws and the constitution do trump municipal ordinances in cases of conflict, the inclusion of rights for ecosystems in these instruments nevertheless represents a fundamental shift in the conceptualization of environmental governance in various communities around the United States.[222]

The work of the CELDF in turn had an influence on the drafting of the Ecuadorian constitution, which was promulgated in 2008 and is the first national constitution in the world to recognize the rights of nature. A number of factors catalyzed this development, particularly the strong mobilization of environmental and Indigenous groups in Ecuador; leadership from individuals within the government; and a desire amongst lawmakers to lead the world in advancing progressive constitutional rights.[223] To a large extent, the history of devastating environmental impacts from extractive industries in the country was also a key galvanizing factor.[224] Beginning in the 1980s, the dumping of millions of barrels of oil into unlined pits by Chevron-Texaco caused acute environmental destruction in the country, coupled with other poor environmental indicators such as high rates of deforestation.[225]

Against this contextual backdrop, the work of CELDF in the United States had attracted the attention of the nonprofit Fundación Pachamama, who invited CELDF

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[221] Burdon, *supra* note 201 at 73.
[222] In 2014, the CELDF filed the first motion to intervene in a lawsuit by an ecosystem in the case of *Pennsylvania General Energy Company (PGE) v Grant Township*, 45 ELR 20196, No. 14-209, (W.D. Pa., 10/14/2015). In that case, the court struck down portions of the "Community Bill of Rights" that sought to ban the disposal of waste materials from oil and gas extraction within its borders. In August 2015, CELDF also filed a motion to intervene in the case of *Seneca Resources Corporation vs. Highland Township* (1:15-cv-00060). The motion was made on behalf of the Crystal Spring Ecosystem in Highland Township, Pennsylvania.
[223] Mihnea Tanasescu, "The Rights of Nature in Ecuador: The Making of an Idea" (2013) 70:6 Int J Env Stud Int J Environ Stud 846 at 851.
[224] Burdon, *supra* note 201 at 74.
[225] Fitz-Henry, *supra* note 192 at 268.

representatives to meet delegates from the Ecuadorian Constitutional Assembly.[226] CELDF assisted Fundación Pachamama in writing draft constitutional provisions that were very similar to those that appear in the final constitution.[227] These provisions come under Title II, Chapter 2, which is entitled "Rights of the Good Way of Living (Buen Vivir)". They state:

> Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.
>
> All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.
>
> The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.
>
> Article 72. Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.
>
> In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.
>
> Article 73. The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles.
>
> The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.
>
> Article 74. Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.

[226] Burdon, *supra* note 201 at 74.
[227] Tanasescu, *supra* note 223 at 853.

> Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.

While these constitutional provisions are significant for being the first in the world to codify the rights of nature, they must also be placed into context amongst the myriad other rights contained in the Constitution, including "universal access to […] communications technologies", "the right to recreation and leisure, the practice of sports and free time", "the right to fully enjoy the city", and the right of elderly persons to be exempt "from paying the costs for notarial and registration services, in accordance with the law."[228] The result is a kind of "laundry list" of rights, which appears to complicate the prioritization of enforcement.[229] Commentators also point to the "ease and frequency" with which the constitutions of Latin American countries have been re-written over the years – a phenomenon which has been dubbed "wiki-constitutionalism".[230]

Whether these factors detract from the impact of these novel provisions can perhaps best be judged in relation to their enforcement or effectiveness in the realm of environmental governance. In March, 2011, in the case of *Wheeler c. Director de la Procuraduria General Del Estado de Loja*, a provincial court in Ecuador became the first court in the world to vindicate the rights of nature – or Pachamama[231] – on the basis of their consecration in the Ecuadorian constitution.[232] In that case, landowners sued following the dumping by local government authorities of large amounts of rocks, gravel and other debris in the Vilcabamba River, in connection to the construction of a road. The dumping caused erosion and flooding to downriver lands.[233]

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[228] Constitution of the Republic of Ecuador, art. 16, 24, 31 and 37, online: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.
[229] Daniel Lansberg-Rodriguez, "Wiki-Constitutionalism", *New Repubublic* (25 May 2010), online: <http://www.newrepublic.com/article/politics/75150/wiki-constitutionalism>.
[230] Denis J Galligan & Mila Versteeg, *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) at 368.
[231] Pachamama is a goddess worshiped by the Indigenous people of the Andes. The term Pachamama is typically translated as "Mother Earth".
[232] *Wheeler c. Director de la Procuraduria General Del Estado de Loja*, Juicio No. 11121-2011-0010.
[233] Erin Daly, "The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature" (2012) 21:1 Rev Eur Community Int Environ Law 63 at 63.

The plaintiffs pursued their case on the basis of the newly enshrined constitutional rights of nature, rather than relying on property rights. In addition to the rights protections for Pachamama, another constitutional change in 2008 introduced an *acción de protección* – a form of action designed to remove procedural barriers relating to standing and pleading formalities.[234] In finding for the plaintiffs, the decision in *Wheeler* was enthusiastic in its embrace of the new constitutional provisions. As Daly notes:

> In support of this strong commitment to protecting the environment, the court quoted Alberto Acosta, President of the Constituent Assembly: 'The human being is a part of nature, and [we] must prohibit human beings from bringing about the extinction of other species or destroying the functioning of natural ecosystems.' The court recognized that if there were a conflict between the environment and other constitutional rights (which was not the case here), the rights of nature would prevail because, as the court stated, a 'healthy' environment is more important than any other right and affects more people. In other words, the court emphasized the need to protect the environment at all means necessary.[235]

Notwithstanding the outcome that purportedly vindicated the rights of nature in this case, however, the enforcement of the court's decision has been difficult. While the court ordered a number of "sophisticated" remedies, as of 2012, construction of the road had not stopped, and the government had not cleared the debris from the riverbed or remedied the damage.[236]

In addition, the decision reveals some of the conceptual and practical difficulties behind such legal measures. The plaintiffs in the case were in fact two American residents who lived part-time in Ecuador and owned property downstream of the disputed road construction.[237] The flooding and erosion affected a valuable portion of land, which "cost thousands of dollars to repair and resulted in a diminution in the value of the plaintiffs' property".[238] Thus, while the case was ostensibly decided on the basis of the

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[234] *Ibid*.
[235] *Ibid* at 64.
[236] *Ibid*.
[237] Laura Fish, "Homogenizing Community, Homogenizing Nature: An Analysis of Conflicting Rights in the Rights of Nature Debate", online: <http://web.stanford.edu/group/journal/cgi-bin/wordpress/wp-content/uploads/2013/05/SURJ_2012-13_1.pdf > at 8. In that case, the Provincial Court of Loja granted Constitutional Injunction 11121-2011-0010.
[238] Erin Daly, "Ecuadorian Court Recognizes Constitutional Right to Nature", *Widener Environmental Law Center: The Blog* (12 July 2011), online:

constitutionally enshrined rights of Mother Earth, the ruling aligns well with private and arguably powerful interests. Indeed, a critique of the very nature of such rights – relying as they do on human parties to represent the best interests of Mother Earth – is the extent to which they might effectively obscure underlying power dynamics. In this way, the constitutional provisions, by decontextualizing the rights of nature from the web of competing rights that surround them, and failing to interrogate the interests of those coming forward to vindicate such rights, might neutralize or render invisible the operation of power, making these rights claims vulnerable to cooption.[239]

Moreover, the results of several subsequent cases brought on the basis of these constitutional provisions have been mixed. For example, in the El Condor Mirador mine case, the Collective for the Defense of the Condor Mountains – a group of activists and Indigenous groups in the Condor region of Ecuador – brought an action against an environmentally destructive mining project. The Appeal Court of Pichincha dismissed the action on the basis that there was no evidence of an imminent threat to the environment, given that mining operations had not yet commenced.[240]

In December 2010, Bolivia also adopted a declaratory "short law" titled the "Law of Mother Earth".[241] The first of its kind in the world, this law enshrined a wide range of rights for nature, including the right to life and the right to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to balance; the right not to be polluted; the right to not have cellular structures modified or genetically altered; and the right of nature to not be affected by mega-infrastructure and development projects that affect the balance of ecosystems and

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<http://blogs.law.widener.edu/envirolawblog/2011/07/12/ecuadorian-court-recognizes-constitutional-right-to-nature/>.

[239] Fish, *supra* note 237 at 6.

[240] Carlo Ruiz Giraldo, "Does Nature Have Rights? Successes and Challenges in Implementing the Rights of Nature in Ecuador", online: *ConstitutionNet* <http://www.constitutionnet.org/news/does-nature-have-rights-successes-and-challenges-implementing-rights-nature-ecuador>.

[241] Estado Plurinacional de Bolivia, *Derechos de la Madre Tierra, Ley N° 071* (December 2010), online <http://www.scribd.com/doc/44900268/Ley-de-Derechos-de-la-Madre-Tierra-Estado-Plurinacional-de-Bolivia>.

local communities.[242] Commentators note that the law is "heavily influenced by a resurgent indigenous Andean spiritual world view which places the environment and the earth deity known as the Pachamama at the centre of all life", and which recognizes humans as "equal to all other entities."[243] In October 2012, Bolivia adopted a further law to the "Law of Mother Earth", the "Framework Law for Mother Earth and Holistic Development to Live Well." But despite the historic aspects of these legal developments, their efficacy in protecting the environment has been limited. There has been "immediate non-compliance"[244] on the part of the government, which has supported fracking[245] and other destructive resource extraction projects, and which recently announced that it would open Bolivia's national parks to oil and gas operations.[246]

As a final example of how the rights of nature have been enshrined at the national level, in 2012, the Whanganui iwi indigenous community and the New Zealand government signed an agreement recognizing the rights of New Zealand's Whanganui River, and establishing it as a legal person.[247] The agreement recognizes the Whanganui iwi as the custodians of the river, which they had been seeking to protect under the law since 1873.[248] In this way, the river is not owned by anyone, but rather is recognized "as an integrated and living whole entity […] with legal rights and interests, and the "owner" of its own river bed."[249]

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[242] John Vidal, "Bolivia enshrines natural world's rights with equal status for Mother Earth", (10 April 2011), online: *The Guardian* <http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>.
[243] *Ibid*.
[244] Kevin Munoz, "Corrupted Idealism: Bolivia's Compromise Between Development and the Environment", online: *Council on Hemispheric Affairs* <http://www.coha.org/corrupted-idealism-bolivias-compromise-between-development-and-the-environment/#_edn1>.
[245] David Hill, "Is Bolivia going to frack 'Mother Earth'?", *The Guardian* (24 February 2015), online: <http://www.theguardian.com/environment/andes-to-the-amazon/2015/feb/23/bolivia-frack-mother-earth>.
[246] David Hill, "Bolivia opens up national parks to oil and gas firms", *The Guardian* (5 June 2015), online: <http://www.theguardian.com/environment/andes-to-the-amazon/2015/jun/05/bolivia-national-parks-oil-gas>.
[247] Alison Fairbrother, "In New Zealand, A River Becomes A Legal Person", (18 September 2012), online: *Huffington Post* <http://www.huffingtonpost.com/2012/09/18/new-zealand-whanganui-river_n_1894893.html>.
[248] Kate Shuttleworth, "Agreement entitles Whanganui River to legal identity", *NZ Herald* (30 August 2012), online: <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10830586>.
[249] "Earth Law Precedents", online: *The Gaia Foundation* <http://www.gaiafoundation.org/earth-law-precedents>.

4. The discourses of human rights and the rights of nature in the international climate change regime

Having examined human rights- and rights of nature-based approaches to environmental governance more broadly, I now turn to these approaches in the context of climate change more specifically. Climate change presents a high stakes case study in which to examine the impacts or implications of different rights-related discourses for environmental governance. This chapter will explore how the discourses of human rights and the rights of nature have apprehended and responded to climate change – including how these discourses offer different frames for formulating and understanding climate change as a problem, as well as potential ways to address it.

The analysis will focus on the international climate change regime, broadly speaking. As scholars point out, transnational climate governance is fragmented and decentralized in nature, involving multiple organizations and entities, across multiple sites of authority, with little centralized coordination.[250] While the United Nations Framework Convention on Climate Change (UNFCCC) remains the primary site of multilateral intergovernmental cooperation, non-governmental organizations, corporations, sub-national governments, governmental and inter-governmental agencies are also actively involved, resulting in a governance regime that is multi-faceted and multi-level.[251] Indeed, action on climate change outside the UNFCCC has arguably outpaced action within.[252]

This chapter will begin with a survey of dominant discourses in climate change governance (section 4.1), before turning to analyses of human rights-based approaches and discourse (sections 4.2 and 4.3) and rights of nature-based approaches and discourse (sections 4.4 and 4.5) in the realm of climate change.

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[250] Kenneth W Abbott, "The Transnational Regime Complex for Climate Change" (2012) 30:4 Environ Plan C Gov Policy 571 at 571.
[251] Liliana B Andonova, Michele M Betsill & Harriet Bulkeley, "Transnational Climate Governance" (2009) 9:2 Glob Environ Polit 52 at 52.
[252] Remi Moncel & Harro van Asselt, "All Hands on Deck! Mobilizing Climate Change Action beyond the UNFCCC" (2012) 21:3 Rev Eur Community Int Environ Law 163 at 163.

4.1. Dominant discourses in international climate change governance

There is a growing body of literature written from a social constructivist and discourse analytical perspective on the topic of climate change.[253] Much of this literature has focused on the discursive aspects of the science/policy interface relating to climate change – that is, on the contested and politicized nature of the role of science in climate change policy making, and the extent to which "the overwhelming evidence/knowledge" of anthropogenic climate change "has not led to power",[254] nor has it affected meaningful change on a global scale.

To say that climate change as a problem is socially constructed is emphatically *not* to deny its physical reality. Indeed, "just because something is socially interpreted does not mean it is unreal".[255] Rather, it is to assert that the ways in which the problem itself is articulated delimit the range of possible solutions available. It is to say that the terms used to describe and frame climate change as an issue (including the term "climate change" itself) are value laden and non-neutral, and to underline the ways in which material facts are connected and interpreted to form a narrative.

The emerging literature identifies green governmentality, ecological modernization, civic environmentalism and sustainable development (described in Chapter 2) as being four predominant discourses in global environmental governance more broadly, and in global climate change governance specifically.[256] Nevertheless, the

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[253] Bäckstrand & Lövbrand, *supra* note 100; Oels, *supra* note 107; Mary E Pettenger, *The Social Construction of Climate Change: Power, Knowledge, Norms, Discourses* (Ashgate Publishing, Ltd., 2013); Bäckstrand & Lövbrand, *supra* note 104; Nicole Detraz & Michele M Betsill, "Climate Change and Environmental Security: For Whom the Discourse Shifts" (2009) 10:3 Int Stud Perspect 303; Diana M Liverman, "Conventions of Climate Change: Constructions of Danger and the Dispossession of the Atmosphere" (2009) 35:2 J Hist Geogr 279; Anabela Carvalho, "Ideological Cultures and Media Discourses on Scientific Knowledge: Re-reading News on Climate Change" (2007) 16:2 Public Underst Sci 223; Karen O'Brien et al, "Why Different Interpretations of Vulnerability Matter in Climate Change Discourses" (2007) 7:1 Clim Policy 73; Terry Cannon & Detlef Müller-Mahn, "Vulnerability, Resilience and Development Discourses in the Context of Climate Change" (2010) 55:3 Nat Hazards 621.

[254] Pettenger, *supra* note 253 at 3.

[255] Dryzek, *supra* note 7 at 10.

[256] Bäckstrand & Lövbrand, in their analysis of forest sequestration projects in developing countries under the Kyoto Protocol, also identifies civic environmentalism as a third discourse at play (Bäckstrand & Lövbrand, supra note 100 at 53).

negotiation of the post-2015 climate regime has re-opened the struggle for competing discourses and the construction of meaning in the realm of climate governance, and the mixed reactions to the Paris Agreement bring this discursive contestation to the forefront.

In relation to climate change governance, green governmentality emphasizes "a science-driven and centralized multilateral negotiation order, associated with top-down climate monitoring and mitigation techniques implemented on global scales."[257] It is epitomized by aspects of the UNFCCC and Kyoto Protocol that emphasize monitoring, reporting and verification requirements for efforts to reduce greenhouse gas emissions, as well as by extensive technological apparatuses such as the satellite monitoring of forest cover, land use change, and sea ice, and advanced computer modeling of climate systems.[258] The central role of the Intergovernmental Panel on Climate Change as the primary authority on scientific, technical and socio-economic information relating to climate change is also linked to green governmentality. While these top-down modes of governance have tended to privilege technocratic understandings of the natural world, Bäckstrand and Lövbrand point to the potential emergence of a more "reflexive version"[259] of the green governmentality discourse, with the rise of "adaptation and vulnerability narratives"[260] that may gain a greater hold in the post-2015 climate regime.

The weaker variant of ecological modernization has also dominated climate governance at the international level. This discourse is evident in areas such as the carbon market, where the climate has been commodified in the management of greenhouse gas emissions, allowing private entities to "optimize" their emissions reductions. The flexibility mechanisms under the Kyoto Protocol – the Clean Development Mechanism, Joint Implementation, and emissions trading – provide industrialized states with "the flexibility to purchase emission reductions from countries where these reductions can be carried out at a lower economic cost", a solution "framed as the most cost-efficient way to come to terms with the climate problem."[261] Indeed, some have argued that the wide

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[257] Bäckstrand & Lövbrand, *supra* note 195 at 124.Bäckstrand & Lövbrand, *supra* note 25 at 124.
[258] Bäckstrand & Lövbrand, *supra* note 104 at 127.
[259] *Ibid* at 128.
[260] *Ibid* at 129.
[261] *Ibid* at 130.

array of public-private partnerships and voluntary commitments under the umbrella of the UNFCCC signals a movement away from "the centralized command and control logic of green governmentality" in favour of ecological modernization in the domain of climate governance.

While a movement towards more decentralized, bottom-up approaches is apparent, however, Bäckstrand and Lövbrand argue that such "deregulated and partnership-based modes of networked climate governance" are not only compatible with, but also dependent upon the more top-down architecture of "political decisions, rules and policies negotiated in the multilateral climate regime."[262] The Paris Agreement, negotiated and concluded at COP21 in December 2015, in many ways reflects this model, with an internationally-agreed upon "top-down" global target, and "bottom-up" nationally determined mitigation pledges.

In contrast to green governmentality and ecological modernization, the discourse of civic environmentalism has been less dominant in the climate regime. Nevertheless, the more radical variant has provided a strong counter-narrative grounded in the principles of equity and ecological sustainability,[263] helping to highlight the unequal power relations within institutions of climate governance. This discourse also emphasizes the ways in which the drive towards market-based mechanisms and market liberalization in the realm of climate governance serves the interests of developed Northern countries, at the expense of less developed Southern states.

The weaker variant of civic environmentalism takes a less radical position. While it does not subscribe to the notion that market-based solutions are sufficient in and of themselves, it does acknowledge their validity as part of a suite of solutions, and views private sector actors as key partners and stakeholders. This form of civic environmentalism also recognizes a plurality of governance arrangements and stresses the active participation of non-state actors in the climate regime.

Civic environmentalism has tended to be marginalized by the discourses of green

[262] *Ibid* at 131.
[263] *Ibid* at 132.

governmentality and ecological modernization. For example, Bäckstrand and Lövbrand point to the ways in which the carbon market deriving from the Kyoto Protocol's flexibility mechanisms, by promising mutual benefits for public and private actors in North and South, has had the effect of silencing the principles of equity and burden sharing at the heart of the civic environmentalist discourse.[264]

Finally, sustainable development is perhaps the most recognizable discourse in the climate change regime, as the term has now become a byword for climate change-related measures that attend to issues of human development and the economy. Indeed, the Paris Agreement itself contains numerous references to sustainable development. For example, Article 2 states: "This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty […]".

In turn, the United Nations sustainable development agenda has also recognized climate change as a key determinant of development outcomes. The Sustainable Development Goals, adopted in 2015 include a goal on climate action – SDG 13 – which includes the following targets:

- Strengthening resilience and adaptive capacity to climate-related hazards and natural disasters in all countries;
- Integrating climate change measures into national policies, strategies and planning;
- Improving education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning;
- Implementing the funding commitments undertaken by developed-country parties to the UNFCCC; and
- Promoting mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities.

[264] *Ibid* at 124.

In a number of ways, the discourse of sustainable development in the climate regime borrows and blends elements of the other discourses – particularly the focus on markets and "green growth" that is central to ecological modernization, as well as an emphasis on monitoring, reporting and verification of commitments and benchmarks that typifies green governmentality.

The dominant discourses of green governmentality, ecological modernization, civic and environmentalism and sustainable development provide the normative structures that constrain, facilitate, and mediate the emergence, evolution and effectiveness of the human rights and rights of nature discourses in the international climate regime, which the following sections will examine. Actors that have internalized these discourses will view arguments grounded in the right to environment and the rights of nature differently, helping to shape and operationalize these arguments in particular ways.

As Oels notes, "[t]here are always multiple discourses present at any one time, and they form a pattern which is an effect and an instrument of overlapping strategies of power and techniques of knowledge."[265] To be sure, the human rights and rights of nature-based approaches are minority positions within the wider discursive field of climate change. On the whole, the institutional framework at the international level, "through which states have rendered climate change governable",[266] is itself constituted by and constitutive of the dominant discourses around climate change, and the concentration of attention and decision-making power at this level is itself telling. It is thus worth thinking about whether and how the human rights and rights of nature-based discourses may merge with, oppose, or be co-opted by these more dominant discourses.

4.2. Human rights-based approaches to climate change governance

Climate change and human rights intersect in a number of ways. As the climate changes, the impacts on ecosystems, the increased frequency and intensity of natural disasters and slow onset events such as droughts and sea level rise, and the potential for

[265] Oels, *supra* note 107 at 190.
[266] *Ibid* at 199.

increased conflict, will all affect the enjoyment of a number of rights, including the rights to life, food, water, health, shelter, education, culture and an adequate standard of living.[267] The rights of Indigenous peoples are also implicated,[268] as are the rights to self-determination and to economic, social and cultural development.[269] Mitigation and adaptation response measures taken by States and other entities also have the potential to negatively affect the enjoyment of rights. For example, mitigation projects under the Clean Development Mechanism of the Kyoto Protocol have drawn extensive criticism for their lack of human rights protections and documented rights violations.[270]

The impacts of climate change will not be felt evenly around the globe. Indeed, it is primarily those populations bearing the least historical responsibility for greenhouse gas emissions that will be the most affected by climate change. This observation holds as between States, as well as within them. While the most vulnerable States, such as least developed countries, will be harder hit than more developed, affluent States, the most vulnerable segments of the populations within States – for example, women and girls, Indigenous communities, the poor, and other marginalized groups – will be hit hardest of all.

One of the first formal petitions linking climate change and human rights was the 2005 Inuit Petition to the Inter-American Commission on Human Rights (IACHR). The petition was brought against the United States, and was submitted by Sheila Watt-Cloutier, the elected Chair of the Inuit Circumpolar Conference, on behalf of the Inuit of Canada and the United States. It argued that climate change caused by greenhouse gas

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[267] See, e.g.: Stephen Humphreys, *Human Rights and Climate Change* (Cambridge University Press, 2010); Jon Barnett & W Neil Adger, "Climate Change, Human Security and Violent Conflict" (2007) 26:6 Polit Geogr 639; Jonathan A Patz et al, "Impact of Regional Climate Change on Human Health" (2005) 438:7066 Nature 310; Anthony J McMichael, Rosalie E Woodruff & Simon Hales, "Climate Change and Human Health: Present and Future Risks" (2006) 367:9513 The Lancet 859; Sébastien Jodoin & Katherine Lofts, eds, *Economic, Social, and Cultural Rights and Climate Change: A Legal Reference Guide* (New Haven, Ct: CISDL, GEM & ASAP, 2013).

[268] This thesis does not focus on Indigenous rights as a separate discourse in the realm of climate change. Nevertheless, it is important to note that, in additional to human rights more broadly speaking, Indigenous peoples also possess rights that are particular to them as Indigenous peoples.

[269] Andrea Schapper & Markus Lederer, "Introduction: Human Rights and Climate Change: Mapping Institutional Inter-Linkages" (2014) 27:4 Camb Rev Int Aff 666 at 669.

[270] See: Jeanette Schade & Wolfgang Obergassel, "Human Rights and the Clean Development Mechanism" (2014) 27:4 Camb Rev Int Aff 717.

emissions was already having dangerous impacts on the Inuit and other people in the Arctic, and that the projected impacts were expected to be far worse.[271] It further argued that "[m]any of the dangers currently facing the Inuit – retreat of protective sea ice, impaired access to vital resources, loss of homes and other infrastructure – rise to the level of human rights violations."[272] At the time of the petition, the United States was the world's biggest emitter of carbon dioxide, but had taken no meaningful action to curb its emissions, thus violating the rights of the Inuit as protected by the American Declaration of the Rights and Duties of Man, as well as other international human rights instruments.[273] As the petition stated:

> […] notwithstanding its ratification of the UN Framework Convention on Climate Change, United States has explicitly rejected international overtures and compromises, including the Kyoto Protocol to the UN Framework Convention on Climate Change, aimed at securing agreement to curtail destructive greenhouse gas emissions. With full knowledge that this course of action is radically transforming the arctic environment upon which the Inuit depend for their cultural survival, the United States has persisted in permitting the unregulated emission of greenhouse gases from within its jurisdiction into the atmosphere.

The petition was ultimately rejected by the IACHR, on the basis that there was insufficient evidence of harm.[274] Nevertheless, the petitioners were granted a thematic hearing to "begin investigating the connection between [climate change and human rights] from a general perspective."[275]

The linkages between human rights and climate change have also been recognized by the UN Human Rights Council, which adopted its first resolution on human rights and climate change in 2008 (resolution 7/23). This decision recognized "that climate change poses an immediate and far-reaching threat to people and communities around the world

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[271] Inuit Circumpolar Conference, "Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States", (7 December 2005), online: <http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf>.
[272] *Ibid*.
[273] *Ibid*.
[274] Andrew C Revkin, "Inuit Climate Change Petition Rejected", *NY Times* (16 December 2006), online: <http://www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html>.
[275] Marcos Orellano & Alyssa Johl, *Climate Change and Human Rights: A Primer* (CIEL, 2013) at 4.

and has implications for the full enjoyment of human rights".[276] It also requested that the Office of the United Nations High Commissioner for Human Rights (OHCHR) produce a study on the issue. With the publication of its report in January 2009, the OHCHR became "the first international human rights body to examine the relationship between climate change and human rights."[277] While the report concluded that "[c]limate change-related impacts […] have a range of implications for the effective enjoyment of human rights",[278] it did not go so far as to state that climate change *violated* human rights.[279] Indeed, the report states that:

> The physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change-related harm often cannot clearly be attributed to acts or omissions of specific States. Yet, addressing that harm remains a critical human rights concern and obligation under international law. Hence, legal protection remains relevant as a safeguard against climate change-related risks and infringements of human rights resulting from policies and measures taken at the national level to address climate change.[280]

In relation to the report's conclusion that climate change itself does not violate human rights, Knox has argued that "it is understandable that the OHCHR sought to avoid the technical as well as political obstacles to concluding that countries violate human rights law merely by emitting greenhouse gases."[281] Nevertheless, this position is at odds with the position taken by many members of civil society and other actors.

Within the UNFCCC, a number of States, including small island developing states (SIDS) and least developed countries (LDCs), with the support of countries such as Bolivia and Switzerland, as well as coalitions of non-State actors and members of civil society, have also been advocating for the recognition of the human rights impacts of

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[276] UN Human Rights Council Resolution 7/23, 7th Sess, UN Doc A/HRC/7/78, (14 July 2008); UN Human Rights Council, Resolution 7/23, Human Rights and Climate Change, 10th Sess, UN Doc UN Doc A/HRC/10/L11, (25 March 2009). See also: UN Human Rights Council, Resolution 10/4, 41st Mtg, UN Doc UN Doc A/HRC/10/L.11, (25 March 2009).
[277] John H Knox, "Linking Human Rights and Climate Change at the United Nations" (2009) 33 Harv Environ Law Rev 477 at 477.
[278] OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights", U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) at para. 92.
[279] Knox, *supra* note 277 at 477.
[280] OHCHR, *supra* note 278 at para 96.
[281] Knox, *supra* note 277 at 478.

climate change.[282] In 2010, the decision of the Ad Hoc Working Group on Long-term Cooperative Action, adopted at the 16th Conference of the Parties to the UNFCCC (the Cancun Agreements), officially recognized:

> that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status and disability.[283]

The decision further stated that "Parties should, in all climate change-related actions, fully respect human rights."[284]

The Cancun Agreements also took steps to address certain "[r]ights-neglecting practices"[285] relating to climate change response measures. To this end, procedural criteria for the realization of REDD+ programmes[286] were introduced in the 2010 Cancun Agreements,[287] including safeguards on "[r]espect for the knowledge and rights of indigenous peoples and members of local communities" and "[t]he full and effective participation of relevant stakeholders".[288]

In the lead up to COP21 in Paris, a large coalition of campaigners and other stakeholders advocated strongly for the inclusion of human rights language in the text of

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[282] Jodoin & Lofts, *supra* note 267 at 7. See also: Malé Declaration on the Human Dimension of Global Climate Change (adopted by SIDS on 14 November 2007), online: CIEL <http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf> (calling for assistance from the UNHRC and the OHCHR in assessing the human rights implications of climate change); Organization of American States, Human Rights and Climate Change in the Americas, AG/RES 1896 (XXXII-O/02), online: OAS <http://www.oas.org/dsd/FIDA/documents/res1819.htm>.
[283] Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, adopted by the Conference of the Parties to the UNFCCC, Decision 1/CP16, (4 December 2010) at Preamble.
[284] *Ibid* at para 8.
[285] Schapper & Lederer, *supra* note 269 at 671.
[286] REDD+ is an acronym that stands for countries' efforts to reduce emissions from deforestation and forest degradation, and foster conservation, sustainable management of forests, and enhancement of forest carbon stocks.
[287] Cancun Agreements, *supra* note 283 at 68–79.
[288] *Ibid* at Appendix 1.

the new Paris agreement. [289] While such references were not ultimately included in the operative sections of the agreement, the preamble

> [a]cknowledg[es] that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity […].[290]

On the domestic front, as citizens and civil society have increasingly turned to litigation in the face of inaction on climate change, human rights principles have also come into play. In a recent lawsuit in the Netherlands, a Dutch environmental group sued the government for failing to adequately address climate change in the first climate liability case to be brought under human rights and tort law. The environmental group – Urgenda – along with almost 900 individual citizens, called on the government to reduce its greenhouse gas emissions by 25 to 40 percent below 1990 levels by 2020, as opposed to its plans to cut emissions by just 14-17%.[291] By not contributing its proportional share to the mitigation of climate change, the plaintiffs argued that the government was breaking Dutch human rights and tort laws.[292] The judgment of the Hague District Court, handed down in June, 2015, ruled in favour of the plaintiffs, finding that the Dutch government's failure to cut its emissions by a greater amount was unlawful in light of the threat posed by climate change. This decision marks the first time a court has determined that States have independent legal obligations towards their citizens relating to climate

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[289] Certain States also stepped forward as advocates for human rights in climate change action. For example, in February 2015, 18 countries pledged to promote and protect human rights in climate action by signing the Geneva Pledge on Human Rights and Climate Action. The pledge is a voluntary initiative undertaken by countries to facilitate the sharing of best practices and knowledge between human rights and climate experts at the national level.

[290] COP21 Paris Agreement, Draft decision -/CP.21 at Preamble.

[291] "Dutch lawsuit takes aim at government for failing to slow climate change", online: *Al Jazeera America* <http://america.aljazeera.com/articles/2015/4/14/dutch-lawsuit-govt-failed-to-slow-climate-change.html>.

[292] *Ibid*.

change, and not only towards other States in international treaties.[293]

4.3. Analysis of human rights discourse in the realm of climate change

As with some of the other discourses examined in earlier sections, is it possible to distinguish between a weaker and stronger form of human rights discourse in the climate change regime. The former largely seeks to maintain the broader socio-economic status quo, with certain provisions and modifications to ensure greater rights protections. This variant is perhaps most closely aligned with the discourse of sustainable development, which emphasizes the betterment of living conditions for human populations – including "greener" societies – while still prioritizing continual economic growth. In this weaker form of human rights discourse, mitigation to limit the adverse impacts of climate change on the enjoyment of rights and human rights protections in climate response measures are part of an ensemble of responses linked to "sustainability" – harmonizing the economy, the environment and the rights of individuals and communities in ways that also lead to better outcomes for environmental protection and a growing economy.

The weaker variant of human rights discourse in the climate regime also shares some features with the discourse of ecological modernization – namely, a deep faith in human resilience in the face of challenges, and an understanding of humans as rational decision makers acting in their own best (social and economic) interests. In this way, empowered communities and individuals able to fully exercise their rights will be better able to meet the social and environmental challenges of climate change, as well as enjoy a number of co-benefits that will further improve their lives.

Advocacy around the adoption of human rights safeguards for projects relating to reducing emissions from deforestation and forest degradation, and enhancing forest carbon stocks in developing countries (REDD+) is illustrative of this weaker variant of human rights discourse. The term REDD+ "is a shorthand for both a set of *policies* and *actions* that aim to reduce emissions and increase removals [the sequestration of carbon

[293] Arthur Neslen, "Dutch government ordered to cut carbon emissions in landmark ruling", online: *The Guardian* <http://www.theguardian.com/environment/2015/jun/24/dutch-government-ordered-cut-carbon-emissions-landmark-ruling>.

from the atmosphere], and for the final *outcomes* of those policies or actions".[294] Pitched as a win-win solution for the climate and for forest dependent communities, proponents of human rights-based approaches to REDD+ argue that mitigation outcomes will be better for those REDD+ projects that implement human rights safeguards. As Savaresi points out, with respect to the rights implications of REDD+:

> Human rights concerns associated with REDD+ activities are particularly conspicuous with regard to matters concerning access to land and forest resources, as well as procedural rights concerning participation to the design and implementation of REDD+ policies. The establishment of incentives to reduce emissions from deforestation and secure the maintenance of forest carbon stocks requires dramatic reforms in access and use of forest resources. Such reforms may have significant human rights consequences, disrupting traditional lifestyles and forest-based livelihoods, with implications for the enjoyment of economic social and cultural rights, such as the right to food, as well as civil and political rights, such as the right to property, and the right to respect for private and family life.[295]

Proponents of REDD+ safeguards argue that by addressing these potential rights implications – for example, by implementing safeguards; ensuring the free, prior and informed consent of Indigenous and local communities to engage in REDD+ projects; and implementing equitable benefit-sharing – REDD+ will ultimately be more successful as a mitigation tool. As a report by the USAID-funded Forest Carbon, Markets and Communities project points out, "clarity around rights to forest resources (both decision-making, as well as ownership and use rights) can enhance the long-term sustainability of efforts and facilitate equitable benefit-sharing."[296] Such justifications also tie into the more utilitarian, efficiency-based arguments characteristic of ecological modernization.

In contrast to this weaker, win-win version of human rights discourse on the topic of REDD+, the stronger variant is more critical, arguing that REDD+ enables industrialized Western nations to continue polluting, while commodifying forest carbon and inserting it into a global capitalist system that is inherently unjust.

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[294] Arild Angelsen, "Introduction" in Arild Angelsen, ed, *Realising REDD+: National Strategy and Policy Options* (Center for International Forestry Research (CIFOR), Bogor, Indonesia, 2009) at 2.
[295] Annalisa Savaresi, "REDD+ and Human Rights: Addressing Synergies between International Regimes" (2013) 18:3 ES Ecol Soc.
[296] Kristen Hite, *Tenure Rights, Human Rights and REDD+: Knowledge, Skills and Tools for Effective Results* (Washington, DC, US: Forest Carbon Markets and Communities Program) at 1.

This stronger version of human rights discourse seeks more transformative change, and is closely aligned with concepts such as "climate justice" and equity – emphasizing the need for deeper, more abiding shifts in the world socio-economic order to ensure dignity, human rights and justice for all. For example, the Delhi Climate Justice Declaration, which emerged from the Climate Justice Summit in New Delhi in October 2002, cites unsustainable consumption and the practices of transnational corporations as amongst the key causes of climate change:

> We recognize that the impacts of climate change are disproportionately felt by the poor, women, youth, coastal peoples, indigenous peoples, fisherfolk, *dalit*s, farmers and the elderly;
>
> We recognize that climate change is being caused primarily by industrialized nations and transnational corporations;
>
> We recognize that local communities, affected people and indigenous peoples have been kept out of the global processes to address climate change;
>
> We recognize that market-based mechanisms and technological "fixes" currently being promoted by transnational corporations are false solutions and are exacerbating the problem;
>
> We recognize that unsustainable production and consumption practices are at the root of this and other global environmental problems;
>
> We recognize that unsustainable consumption exists primarily in the North, but also among elites within the South;
>
> […]
>
> We, representatives of the poor and the marginalized of the world […] resolve to actively build a movement from the communities that will address the issue of climate change from a human rights, social justice and labour perspective. We affirm that climate change is a human rights issue – it affects our livelihoods, our health, our children and our natural resources. […][297]

The stronger variant of human rights discourse therefore also shares some of the features of more radical civic environmentalism in its critique of existing power relations

[297] India Climate Justice Forum, "Delhi Climate Justice Declaration" (2002), online: India Resource Centre <http://www.indiaresource.org/issues/energycc/2003/delhicjdeclare.html>.

and its emphasis on equity, as well as with "green radicalism."[298] Dryzek identifies two variants of green radicalism: green romanticism and green rationalism. The former "seeks to change and save the world by changing the way individuals approach and experience the world, in particular through cultivation of more empathetic and less manipulative orientations toward nature and other people".[299] The latter, while also rejecting certain tenets of Enlightenment thought as "complicit in the destruction of nature and the production of injustice", nonetheless emphasizes what it sees as the more positive Enlightenment principles of "equality, rights, open dialogue, and critical questioning of established practices".[300] For example, the environmental justice movement – which Dryzek identifies as coming under the umbrella of green rationalist discourse – shares a concern with human rights discourse in the realm of climate change in its observation that environmental risks (like the adverse impacts of climate change) are felt most acutely by the poor and vulnerable.[301]

(a) Basic entities whose existence is recognized or constructed

In general, the basic entities stressed in human rights discourse are individual human beings – viewed as the primary unit of moral concern, regardless of their geographic location, nationality, or other characteristics. According to this discourse, individuals are the possessors of inherent rights by virtue of their humanity. As such, "international human rights are not designed as a form of collective power or vehicle of popular governance, but as individual shields against power".[302] Indeed, the conceptual project of human rights has been critiqued for espousing a Eurocentric form of individualism that does not necessarily translate across cultures.[303]

Not only are individuals predominantly viewed as rights holders, but the stronger

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[298] Dryzek, *supra* note 7 at 153.
[299] *Ibid*.
[300] *Ibid*.
[301] *Ibid* at 177.
[302] Wendy Brown, "'The Most We Can Hope For …': Human Rights and the Politics of Fatalism" in Aakash Singh Rathore & Alex Cistelecan, eds, *Wronging Rights: Philosophical Challenges for Human Rights* (New Delhi: Routledge, 2011) at 144.
[303] Fernanda Bragato, "Human Rights and Eurocentrism: An Analysis from the Decolonial Studies Perspective" 5:3 Glob Stud J 49.

variant of human rights discourse also emphasizes individuals in the context of climate justice. For example, a discussion paper on REDD+ produced by the Global Forest Coalition and the International Union for the Conservation of Nature addresses the concept of "equal per capita emission rights" as a key element of climate equity in the context of REDD+, noting:

> This concept has an important human rights dimension; it is founded on the recognition that all human beings are equal, and born with equal rights regarding the earth's environment. It is of utmost importance that policy proposals to reduce emissions from deforestation and forest degradation in developing countries are being analyzed within the framework of this equity dimension of the climate regime in general.

Here, the individual "right" to emit greenhouse gas on the basis of equality between humans is the focus of arguments in favour of more equitable climate policy. The discourse individualizes in seeking to equalize each person's portion of the carbon budget.

In recognizing individual human beings as the basic entities in this discursive field, the human rights discourse also emphasizes the ontological separateness of humans from other non-human entities. For the most part, ecosystems, elements of the natural world, and non-human animals are recognized less as entities in their own right than as factors that impact human beings. This observation leads to several related assumptions about natural relationships within human rights-based discourse, which will be discussed below.

This individualization is also in tension with a tendency to recognize "vulnerable groups" or "vulnerable segments of the population",[304] which are seen to be particularly in need of human rights protections. For example, the Delhi Climate Justice Declaration recognizes that climate change impacts "are disproportionately felt by the poor, women, youth, coastal peoples, indigenous peoples, fisherfolk, dalits, farmers and the elderly."[305] These groups are differentiated vis-à-vis less vulnerable populations, but may themselves be treated as internally homogeneous.

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[304] See, e.g.: Cancun Agreements, *supra* note 283.
[305] India Climate Justice Forum, *supra* note 297.

In addition, the individualism of human rights discourse has also been tempered somewhat in the climate change arena by the scale of impacts around the world and the large numbers of people affected – factors that have highlighted the plight of entire communities, regions and, in some cases, nation-states whose very existence is threatened by sea level rise, such as some small island developing states. "Peoples" and "local communities" are often referred to, emphasizing the collective dimensions of certain rights impacts, as well as their potential scale and pervasiveness. This collective recognition is also prevalent in aspects of the human rights discourse that overlap with the discourse of Indigenous rights, which are more communal in nature than civil and political rights, and some economic, social and cultural rights. The more communal aspect of climate change threats to human rights has been recognized in cases such as the Inuit petition.

In human rights discourse relating to climate change, the State also looms large – as a potential protector and promoter of rights, as well as that which threatens to interfere with the enjoyment of an individual's rights and freedoms. As Mutua points out: "The state is the guarantor of human rights; it is also the target and *raison d'être* of human rights law."[306] As States are the primary duty bearers with respect to human rights, the system of State sovereignty is actually reinforced, with an emphasis on the duties States owe to their citizens.

Nevertheless, the private sector and entities such as corporations are also increasingly recognized within the discourse, if not as primary duty holders, then as nonetheless powerful players. In the strong variant of human rights discourse, this recognition of the power wielded by corporate actors manifests as a rejection of capitalist, market-based solutions to climate change, which are viewed as inherently unjust and inequitable. Instead, this discourse recognizes "that unsustainable production and consumption practices are at the root of this and other global environmental problems",[307] and that corporate power must be restricted, rather than further enabled through the green

[306] Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 Harv Int Law J 201 at 203.
[307] India Climate Justice Forum, *supra* note 297.

economy, carbon markets and other capitalist solutions.

On the other hand, the weaker variant of human rights discourse takes the capitalist market economy more or less for granted. Indeed, it views corporate concern for the human rights implications of climate change as essential to tackling the problem. An op-ed piece on the website openDemocracy is illustrative of this perspective, arguing that "[a]t the core of the solution [to climate change] lie new forms of conceiving and regulating the economy, of producing and consuming goods, of rethinking the role of the market and the meaning of investments."[308] To this end, "adaptation and mitigation policies need to lead to better employment, and long-term social security and justice principles need to regulate possible conflicts and trade-offs."[309] This argument is amenable to utilitarian justifications as well, as the author notes that "a shift toward climate resilient pathways needs to be equitable for instrumental reasons", requiring "the participation of emerging economies and less developed countries."[310]

(b) Assumptions about natural relationships

While human beings are viewed as separate, autonomous entities, the environment serves largely as the medium in which human beings survive, and ideally, thrive. The human being is the figure and the environment – conceptually and terminologically – is the ground. Although the wellbeing of humans is inextricably tied to the environment, the relationship is hierarchical, with the environment serving human needs. In this way, and perhaps unsurprisingly, the human rights discourse relating to climate change remains anthropocentric. As with sustainable development discourse, "[i]t is the sustainability of human populations and their wellbeing which is at issue, rather than that of nature."[311]

In this way, ecosystems are in a subservient relationship to humans, providing

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[308] Asuncion Lera St Clair, "Corporate Concern for Human Rights Essential to Tackle Climate Change", online: *Open Global Rights* <https://www.opendemocracy.net/openglobalrightsopenpage/asuncion-lera-st-clair/corporate-concern-for-human-rights-essential-to-tack>.
[309] *Ibid*.
[310] *Ibid*.
[311] Dryzek, *supra* note 7 at 130.

vital "services" or amenities, such as water filtration, pollination, or flood control, which facilitate human existence. The disruption of these services due to climate change is measurable in relation to their decreased utility to humans. When anthropogenic climate change impacts natural processes, jeopardizing humans' ability to meet their needs as they have in the past, these changes are framed as infringements on the enjoyment of human rights – including the rights to life, health, food and clean water, but also more intangible cultural rights. For example, a report submitted to the Committee on Economic, Social and Cultural Rights by several non-governmental organizations notes that "[t]he right to culture is implicated for indigenous peoples to the extent their climate-sensitive ways of life are undermined by global warming, such as the loss of hunting opportunities for the Inuit or the loss of traditional territories of pastoral forest and coastal communities."[312] Similarly, referring to the International Covenant on Economic, Social and Cultural Rights, the UNEP Compendium on Human Rights and the Environment is illustrative of the ways in which this discourse recognizes and constructs ecosystems in terms of human utility, noting, for example, that "[e]nvironmental degradation can affect the right to culture (Article 15) through loss of natural sites and ecosystem services which form part of cultural identity or perform an important cultural role."[313]

Furthermore, to the extent that the components of ecosystems are themselves viewed as being in an interconnected relationship with one another, this interconnection is "premised on an Apollonian assessment of connectedness, and a call to efficient management of resources in a closed system."[314] Ecosystems – if permitted to function as they should – will do so in a predictable and "productive" way.

As between individuals, the human rights-based discourse emphasizes equality as a basic starting point for all human rights. In the stronger variant of human rights discourse relating to climate change, this notion of equality is also closely tied to equity, emphasizing the injustice of climate change's unequal impacts on more vulnerable

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[312] Marcos Orellano, Miloon Kothari & Shivani Chaudhry, *Climate Change in the Work of the Committee on Economic, Social and Cultural Rights* (CIEL, 2010) at 5.
[313] *UNEP Compendium on Human Rights and the Environment: Selected International Legal Materials and Cases* (UNEP, CIEL) at 13.
[314] Sean Cubitt, "Affect and Environment in Two Artists' Film and a Video" in Alexa Weik von Mossner, ed, *Moving Environments: Affect, Emotion, Ecology and Film* 249.

populations. In his recent Papal Encyclical on climate change, Pope Francis cites material inequality between individuals on a global scale as a root cause of environmental degradation. He notes:

> Inequity affects not only individuals but entire countries; it compels us to consider an ethics of international relations. A true "ecological debt" exists, particularly between the global north and south, connected to commercial imbalances with effects on the environment, and the disproportionate use of natural resources by certain countries over long periods of time.[315]

In this conceptualization, the relationships between individuals within countries, as well as between the populations of different countries, are out of balance and exploitative, rather than equal and harmonious as they should be.

Between individuals and the State, there is a presumption that interference by the State with the enjoyment of human rights must be guarded against. In particular, the strong variant of human rights discourse tends to see collusion between the State and corporate actors, threatening the rights of citizens. For example, in a 2013 statement opposing the inclusion of REDD+ in California's cap-and-trade scheme, the "Global Alliance of Indigenous Peoples and Local Communities on Climate Change against REDD+ and for Life" – a group which denounces the green economy and REDD+ as the privatization of nature – frames REDD+ mitigation mechanisms as an extension of colonialism, and "a perverse attempt by corporations, extractive industries and governments to cash in on Creation by privatizing, commodifying, and selling off the Sacred and all forms of life and the sky […]."[316] As a result, the statement argues that "REDD initiatives, current or future, cannot guarantee safeguards to prevent human rights abuses."[317]

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[315] Pope Francis. "Laudato Si' - Encyclical Letter of the Holy Father Francis." Vatican: the Holy See. Vatican Website. Libreria Editrice Vaticana, 2015 at para. 51.
[316] Chris Lang, "'There is no safe REDD': Global Alliance of Indigenous Peoples and Local Communities on Climate Change against REDD+ and for Life", online: *REDD-Monitor* <http://www.redd-monitor.org/2013/05/10/there-is-no-safe-redd-global-alliance-of-indigenous-peoples-and-local-communities-on-climate-change-against-redd-and-for-life/>.
[317] *Ibid*.

The weaker variant of human rights discourse also sees the threat of interference by the State with the enjoyment of human rights, but places more emphasis on the role of the State as the entity responsible for protecting the rights of its citizens. For example, in a 2012 report on national safeguards systems for REDD+, the World Resources Institute notes that REDD+ activities "have caused many […] actors to be concerned that this new influx of investment and competing interests for forested lands could further compromise the rights and resources of forest-dependent local communities."[318] This statement suggests that such impacts may result from a failure by the State to take precautionary measures against rights violations. However, in contrast to the stronger variant of the discourse, the report suggests that the implementation of safeguards can prevent such violations. If human rights considerations are taken into account in the development, implementation, and monitoring of climate finance mechanisms such as REDD+, then these initiatives can be regulated in a way that protects and promotes human rights, ensuring that "[i]f an investment results in harm beyond the acceptable threshold, some form of corrective action [will] take place."[319]

(c) Agents and their motives

According to the human rights discourse, climate change is primarily an issue of justice and equity. In this context, it should come as no surprise that the primary agents of human rights discourse are individuals. As conventionally conceived, human rights discourse presents "a model presupposing atomistic individuals with equal potential for rationality".[320] Indeed, the concept of human rights is underpinned by "a set of assumptions about individual autonomy."[321] In order to become the subject of human rights, "people had to be perceived as separate individuals who were capable of exercising independent moral judgment".[322] This notion of autonomy is also linked to narratives of empowerment. As Brown points out, "to the extent that human rights are understood as the ability to protect oneself against injustice and define one's own ends in

[318] Florence Daviet & Gaia Larsen, *Safeguarding Forests and People: A Framework for Designing a National System to Implement REDD+ Safeguards* (World Resources Institute) at 15.
[319] *Ibid* at 16.
[320] Peterson, *supra* note 64 at 304.
[321] Hunt, *supra* note 67 at 27.
[322] *Ibid*.

life, this is a form of 'empowerment' that fully equates empowerment with liberal individualism."[323]

Nevertheless, the concept of agency is complicated to some extent in the human rights discourse relating to climate change. There is a tendency on the part of some (primarily Northern) non-governmental organizations and others to emphasize the vulnerability of populations as "victims" of climate change. For example, a 2012 report by the UK-based Environmental Justice Foundation on the impact of climate change on human rights and forced migration in Bangladesh includes a chapter entitled "Bangladesh – victim of climate change".[324] It includes profiles of Bangladeshis whose lives are being impacted by the changing climate in various ways. For example, the profile of a 70 year-old farmer details the failure of his crops and the scarcity of food that he and his family are experiencing, along with a quote in which he expresses concern for his disappearing livelihood. While such testimony can give voice to people who are not normally heard in international fora, and while "[n]o-one doubts that climate change has victims – specific individuals who undergo suffering"[325] – this framing in terms of victimhood and vulnerability diminishes the agency of affected individuals. The implicit conclusion of such framing is that corporate actors and the governments of industrialized countries – those who are responsible for emissions and have failed to act – are the ones who truly possess agency, while affected populations suffer passively.[326]

On the other hand, strains of human rights discourse that espouse a more radically participatory view of climate governance tend to promote the agency of these vulnerable populations through their active engagement and involvement in decision-making. For example, People's Climate Forums and People's Summits – events organized by grassroots and other non-governmental organizations – recognize the agency of the public by promoting engagement on climate change, and opening discussion to a broader

[323] Brown, *supra* note 302 at 137.
[324] Environmental Justice Foundation, *A Nation under Threat: The Impacts of Climate Change on Human Rights and Forced Migration in Bangladesh* (2012).
[325] International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (ICHRP, 2008) at 65.
[326] Climate change litigation founded on human rights grounds also involves framing in terms of victims and victimization, requiring – as a condition of justiciability – the identification of specific victims, along with the articulation of specific injuries caused by specific perpetrators.

range of participants. The following excerpt from a policy paper by the International Indigenous Peoples Forum on Climate Change is indicative of this broader recognition of agency amongst various segments of the population, including Indigenous peoples and local communities, women and young people:

> Climate change governance must transcend state-governments' negotiations, to recognize the rights of Indigenous Peoples which includes the full and effective participation in all negotiations by Indigenous Peoples' traditional governments, institutions and organizations. It must also embrace diverse contributions and inter cultural collaboration, recognizing distinct and valuable contributions from children and youth, women, indigenous peoples and local communities. All voices need to be included in climate governance and decision-making: we are all learners and teachers together in addressing human-induced climate change.[327]

In terms of the agency of corporate actors within human rights discourse, the stronger variant regards these actors with suspicion. In this view, corporate actors possess too much agency, exerting an undue influence within the international climate regime and exacerbating unequal power dynamics that are already present. For example, a report entitled "Corporate Conquistadors: The Many Ways Multinationals Both Drive and Benefit from Climate Destruction"[328] notes that "[m]ultinational corporations are relentlessly expanding their operations into ever more vulnerable and remote regions of the planet", at the expense of the rights and wellbeing of local communities, while simultaneously gaining unprecedented access to climate policymaking spaces.[329] Corporate actors are thus viewed as powerful agents capable of subverting the processes intended to protect communities from climate change and related rights violations.

In the weaker variant of human rights discourse, corporations tend to be viewed more favorably, as agents who might be persuaded – by means of carrot or stick – to respect and promote rights. They are thus seen as potential allies, and numerous business and human rights initiatives seek to harness the influence and power of corporations in

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[327] International Indigenous Peoples Forum on Climate Change, "IIPFCC Policy Paper on Climate Change", (2009), online: <http://www.tebtebba.org/index.php/content/152-iipfcc-policy-paper-on-climate-change>.
[328] Corporate Europe Observatory, "Corporate Conquistadors: The Many Ways Multinationals Both Drive and Profit from Climate Destruction", online: <http://corporateeurope.org/sites/default/files/corporate_conquistadors-en-web-0912.pdf>.
[329] *Ibid* at 4.

trying to secure greater human rights safeguards and in the service of "sustainable development."

Finally, it is worth noting that the human rights discourse does not recognize non-human agency – that is, agency on the part of the environment, climate systems or the "natural" world.

(d) Key metaphors and other rhetorical devices

Mutua has argued that the "damning metaphor" of human rights is a tripartite division "pitting savages, on the one hand, against victims and saviors, on the other."[330] In this metaphor – or complex of metaphors – the State is presented as the savage, or the "operational instrument of savagery" which must be guarded against.[331] The victims constructed by rights discourse are those whose dignity has been violated by the State, and the savior – the one "who protects, vindicates, civilizes, restrains, and safeguards" – comes in the form of the United Nations, charities and NGOs, and Western governments.[332]

In the weaker variant of human rights discourse relating to climate change, it is possible to see this dynamic at play. As already mentioned, the human rights discourse tends to emphasize the victimization of individuals and communities. In this dynamic, we can also see the "naming and shaming" of certain States, private actors, or other entities that have violated human rights (for example, in relation to the dispossession of communities from their traditional lands due to a project under the Clean Development Mechanism), along with the championing of other States' "best practices" relating to human rights. The Inuit Petition provides another example of this rhetoric of civilization in the realm of climate change, noting that "[p]rotecting human rights is the most fundamental responsibility of civilized nations."[333] It is also tied to the metaphor of progress – "the essential idea of history moving in the direction of social

[330] Mutua, *supra* note 306 at 201.
[331] *Ibid* at 202.
[332] *Ibid* at 204.
[333] Inuit Circumpolar Conference, *supra* note 271.

improvement"[334] – with measures relating to human rights protections in climate change actions being judged as progressive or regressive.

Connected to this metaphor is the rhetoric of violation and responsibility, which is particularly prominent in the weaker variant of human rights discourse. Climate change is framed as a violation of human rights, and those who have caused climate change are responsible for the violation. For example, the Inuit Petition argues that "the United States is obligated by its membership in the Organization of American States and its acceptance of the American Declaration of the Rights and Duties of Man to protect the rights of the Inuit",[335] as well as the principles contained in the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The Petition goes on to point out, however, that:

> notwithstanding its ratification of the UN Framework Convention on Climate Change, United States has explicitly rejected international overtures and compromises, including the Kyoto Protocol to the U.N. Framework Convention on Climate Change, aimed at securing agreement to curtail destructive greenhouse gas emissions. With full knowledge that this course of action is radically transforming the arctic environment upon which the Inuit depend for their cultural survival, the United States has persisted in permitting the unregulated emission of greenhouse gases from within its jurisdiction into the atmosphere.
>
> […] Because climate change is threatening the lives, health, culture and livelihoods of the Inuit, it is the responsibility of the United States, as the largest source of greenhouse gases, to take immediate and effective action to protect the rights of the Inuit."[336]

In contrast, the stronger variant of human rights discourse tends to focus more heavily on metaphors of colonization and corporate imperialism. For example, a report by the non-profit research group Corporate Europe Observatory entitled "Corporate Conquistadors: The Many Ways Multinationals Both Drive and Benefit from Climate Destruction"[337] explicitly compares foreign-owned corporate actors to conquering nations exploiting local populations.

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[334] Dryzek, *supra* note 7 at 132.
[335] Inuit Circumpolar Conference, *supra* note 271 at 5.
[336] *Ibid* at 6–7.
[337] Corporate Europe Observatory, *supra* note 328.

This metaphor is also tied to the construction of a strong division within the discourse between those who are perceived as having caused the problem of climate change (namely, developed countries and large corporate emitters) and those who are suffering from global warming's effects. The latter group "[face] disproportionate and increasing impacts of environmental change and resource insecurity", which is linked to "a history of western colonialism fuelled largely by the inequitable and unsustainable use of colonial resources" and "followed in the modern era by the onset of post-industrial western lifestyles of mass consumption and waste causing serious global environmental harm."[338] This dynamic means that environmental summits, such as the UNFCCC Conference of the Parties, "are characterized by a divide: on the one side those who caused the problem but insist that everyone participate in the solution; and on the other, those who did not cause the problem and thus refuse to tolerate any limits placed on their development choices."[339] Along with this metaphor of colonization is a focus on inclusion and exclusion. Representative of this rhetoric is the Delhi Climate Justice Declaration, which states: "We recognize that local communities, affected people and indigenous peoples have been kept out of the global processes to address climate change".[340]

Finally, the rhetoric of "false solutions" is also prevalent in the strong form of human rights discourse. This rhetoric identifies a number of the solutions to climate change espoused and promoted within the discourses of ecological modernization and green governmentality as being ineffective and perpetuating injustices. For example, the Delhi Climate Justice Declaration recognizes "that market-based mechanisms and technological "fixes" currently being promoted by transnational corporations are false solutions and are exacerbating the problem [of climate change]".[341] Such false solutions are framed as dangerous – lulling the population into thinking that the problems of climate change are being addressed, while in fact continuing to perpetuate the systems and power relations that caused the problem in the first place.

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[338] Usha Natarajan, "Human rights - help or hindrance to combatting climate change?", (9 January 2015), online: *openDemocracy*.
[339] *Ibid*.
[340] India Climate Justice Forum, *supra* note 297.
[341] *Ibid.*

4.4. Rights of nature-based approaches to climate change governance

In comparison to human rights-based approaches to climate change governance, the concept of the rights of nature has gained less traction in the international negotiations, although it has been prominent in certain segments of civil society.

The concept has been promoted particularly amongst Indigenous peoples' groups, aligning as it does, in many cases, with certain Indigenous worldviews. For example, the spiritual traditions of the Indigenous peoples of the Andes places Pachamama at the centre of all life, with human beings considered equal to all other entities, rather than above them.[342] In Canada, too, while the belief systems and cultural practices of various Aboriginal groups differ in a number of important ways, they also share some common features, including "a lack of division between humans and the rest of the environment, a spiritual relationship with nature, [and] concern about sustainability".[343]

Civil society groups, sometimes in collaboration with governments, have also been active in advancing the concept of the rights of nature in relation to climate change. The World People's Conference on Climate Change and the Rights of Mother Earth, held in Cochabamba, Bolivia, in April 2010, convened approximately 30,000 people from around the world, including members of civil society and government representatives. President Evo Morales and the government of Bolivia hosted the event, in partnership with civil society. The Conference was largely viewed as a response to the unsuccessful climate talks at COP15 in Copenhagen in December 2009, which failed to deliver a new global agreement. Prior to the conference, the Bolivian government made four proposals: a "Universal Declaration of Mother Earth Rights"; the establishment of a Climate Justice Tribunal; the provision of compensation for poor countries suffering from climate-related harms; and a "World People's Referendum on Climate Change" to enable people around the world to express their views on the subject.[344] Global civil society representatives were then invited to form working groups to discuss the details via online forums,

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[342] Vidal, *supra* note 242.
[343] Randy Kapashesit & Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1990) 36 McGill Law J 925 at 929.
[344] Naomi Klein, "A New Climate Movement in Bolivia", *The Nation* (10 May 2010), online: <http://www.thenation.com/article/new-climate-movement-bolivia/>.

culminating in the Cochabamba Conference. At the conference, members of the working groups and other participants worked together to produce the People's Agreement[345], as well as the Universal Declaration of the Rights of Mother Earth[346] – both of which proclaim the necessity of recognizing the rights of nature in order to address the crisis of climate change.

The Rights of Nature Tribunal is another example of how this concept has been promoted in the context of climate change. The Tribunal is organized by the Global Alliance for the Rights of Nature – a global network of organizations and individuals committed to the universal adoption and implementation of legal systems that recognize, respect and enforce the rights of nature. The Tribunal was first held in Quito, Ecuador, in January 2014, and then again in Lima, Peru in December 2014 on the sidelines of the COP20. It was formally established in December 2015, in Paris, France, alongside COP21, with the adoption of the "People's Convention for the Establishment of the International Rights of Nature Tribunal".[347] The Tribunal's panel of judges is made up of prominent lawyers and environmental leaders, and hears cases presented on a range of issues, including climate change and fossil fuel extraction. Although the Tribunal has no official power or jurisdiction, witnesses present testimony on the impacts of environmental harms they have experienced, supported by expert evidence, and the judges decide the cases on the basis of "Earth Laws" – including laws recognizing the rights of nature, as stated in the Universal Declaration for the Rights of Mother Earth, the crime of ecocide, and the laws of the commons.

Nevertheless, within the UNFCCC, much of the discourse around the rights of nature has remained relatively marginal. Some countries – notably, Bolivia and Ecuador – have included the rights of Mother Earth in various submissions to the UNFCCC. For example, in its "Proposal on draft decisions" to the Ad Hoc Working Group on Long-

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345 World People's Conference on Climate Change and the Rights of Mother Earth, "Peoples Agreement", online: <https://pwccc.wordpress.com/support/>.
346 World People's Conference on Climate Change and the Rights of Mother Earth, "Rights of Mother Earth", online: <https://pwccc.wordpress.com/programa/>.
347 "Peoples' Tribunal Convention for the Establishment of the International Rights of Nature Tribunal", online: *Global Alliance for the Rights of Nature* <http://therightsofnature.org/?page_id=20493>.

term Cooperative Action under the Convention's thirteenth session (November 2010, Cancun), Bolivia proposed that the Conference of the Parties "[agree] to recognize and defend the rights of Mother Earth to ensure harmony between humanity and nature, and that their [sic] will be no commodification of the functions of nature, therefore no carbon market will be developed with that purpose."[348] With respect to Decision /CP16, on policy approaches to issues relating to forests, Bolivia proposed that the implementation of REDD+ activities "[b]e consistent with the objective of environmental integrity, the multiple functions of forests and the rights of nature."[349] Similarly, a submission from Ecuador on behalf of Dominica, Ecuador, Nicaragua and Venezuela to the Ad Hoc Working Group on Long-term Cooperative Action under the Convention's fourteenth session (Bangkok, 5–8 April 2011, and Bonn, 7–17 June 2011), states, as a guiding principle:

> We support the issues that have been already mentioned, particularly the rights of Nature or Mother Earth considering Mother Earth has the right to be respected integrally in its existence and in the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.[350]

Yet for the most part, this language has not appeared in the final text of UNFCCC COP decisions.

The new Paris Agreement, concluded at COP21 in December 2015, provided another opportunity for proponents of the rights of nature to advocate for the inclusion of such language in the text. While reference to the "protection of the integrity of Mother Earth" did appear several times in earlier draft versions of the text of the agreement, only one reference appears in the preamble of the final text, which notes "the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for

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348 "Proposal on draft decisions submitted by the Plurinational State of Bolivia", Ad Hoc Working Group on Long-term Cooperative Action under the Convention (Thirteenth session, 29 November 2010), online: UNFCCC <http://unfccc.int/resource/docs/2010/awglca13/eng/crp04.pdf>.
349 *Ibid.*
350 "Submission from Ecuador on behalf of Dominica, Ecuador, Nicaragua and Venezuela (Bolivarian Republic of)" Ad Hoc Working Group on Long-term Cooperative Action under the Convention (Fourteenth session, 5–8 April 2011 and 7–17 June 2011), online: UNFCCC <http://unfccc.int/resource/docs/2011/awglca14/eng/crp10.pdf>.

some of the concept of 'climate justice', when taking action to address climate change".[351] Nor does "nature" figure anywhere in the text, although there are several references to the notion of "environmental integrity" in the COP decision[352] and the Paris Agreement itself.

Some countries' Intended Nationally Determined Contributions (INDCs) – climate pledges made under the new agreement – have included extensive references to the rights of nature and Mother Earth, however. For example, Bolivia's INDC discusses Mother Earth at length, presenting an INDC that coheres with, and draws inspiration from, the country's legislation on the rights of nature. The INDC states:

> The structural cause that has triggered the climate crisis is the failed capitalist system. The capitalist system promotes consumerism, warmongering and commercialism, causing the destruction of Mother Earth and humanity. The capitalist system is a system of death. Hence, capitalism is leading humanity towards a horizon of destruction that sentences nature and life itself to death. In this regard, for a lasting solution to the climate crisis we must destroy capitalism.
>
> The capitalist system seeks profit without limits, strengthens the divorce between human beings and nature; establishing a logic of domination of men against nature and among human beings, transforming water, earth, the environment, the human genome, ancestral cultures, biodiversity, justice and ethics into goods. In this regard, the economic system of capitalism privatizes the common good, commodifies life, exploits human beings, plunders natural resources and destroys the material and spiritual wealth of the people.
>
> Thus, Bolivia presents its intended contribution consistent with its vision of holistic development, according to the provisions of the State Constitution, Law No. 071 of The Rights of Mother Earth and Law N°300 of Mother Earth and Integral Development to Live Well, guided by the 2025 Patriotic Bicentennial Agenda and its 13 pillars, as well as national plans for medium and long-term.
>
> Bolivia understands Living Well as the civilizational and cultural horizon alternative to capitalism, linked to a holistic and comprehensive vision that prioritizes the scope of holistic development in harmony with nature and as structural solution to the global climate crisis. Living Well is expressed in the complementarity of the rights of peoples to live free of poverty and the full realization of economic, social and cultural rights and the rights of Mother Earth, which integrates the indivisible community of all systems life and living,

[351] COP21 Paris Agreement, *supra* note 290.
[352] "Adoption of the Paris Agreement", Draft decision -/CP.21.

> interrelated, interdependent and complementary beings who share a common destiny. [353]

The INDC also calls for the "[c]onstruction of a climate system based on responsibility to Mother Earth", the "[p]rotection of the Rights of Mother Earth in an articulated and complementary manner to the rights of peoples to their development", as well as the establishment of an International Court of Justice, Climate and Mother Earth.

Ecuador's INDC also references the rights of nature, taking into account a number of legal instruments, including the 2008 Constitution, which enshrined the rights of nature, or Pachamama.[354]

4.5. Analysis of the rights of nature discourse in the realm of climate change

Compared to human rights discourse, the discourse of the rights of nature in the climate change arena has tended to be more marginal and politicized – linked primarily to a more "radical" agenda that also decries systems of domination such as capitalism. It is associated primarily with a handful of States that have enacted rights of nature legislation domestically (i.e. Bolivia and Ecuador), as well as with Indigenous groups.

While at first blush there may appear to be "weaker" variations of this discourse that have taken a more prominent role in the international climate regime, on closer examination, these differ significantly from the rights of nature. For example, a number of countries' INDCs refer to so-called "nature-based solutions" for climate change mitigation, adaptation and risk management. These include measures such as reintegrating natural drainage corridors and slope stabilization techniques into cities in order to manage increased urban flooding caused by climate change. The discourse of nature-based solutions is in many ways antithetical to the rights of nature, however, as it emphasizes the utilitarian aspects of nature, including "natural capital" and ecosystem

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353 "Intended Nationally Determined Contribution from the Plurinational State of Bolivia", online: UNFCCC <http://www4.unfccc.int/submissions/INDC/Published%20Documents/Bolivia/1/INDC-Bolivia-english.pdf>.

354 "Ecuador's Intended Nationally Determined Contribution (INDC)", online: UNFCCC <http://www4.unfccc.int/submissions/INDC/Published%20Documents/Ecuador/1/Ecuador%20INDC%2001-10-2015%20-%20english%20unofficial%20translation.pdf>.

services. In contrast to this utilitarian view of nature, in which "the notion of commons is strongly associated with that of a particular type of 'resources'", the rights of nature discourse instead frames the commons as "a systemic entity and a relational field in which 'things' qua resources are only part of."[355]

Thus, while the discourses of green governmentality and ecological modernization present "solutions" such as increased energy efficiency and carbon markets within existing socioeconomic structures, the rights of nature discourse emphasizes the idea that addressing the challenge of climate change "implies entering a transformative journey that changes the whole of social relations through which we reproduce our livelihoods."[356]

(a) Basic entities whose existence is recognized or constructed

It is perhaps redundant to say that one of the primary entities recognized by this discourse is nature itself. In this conceptualization, however, nature is discursively constructed with specific qualities or attributes. Nature as composed of systemic and environmental aspects (ecosystems and natural landscapes), as well as their component parts. These component parts are both animate and inanimate – including plants, animals, rocks, and streams. For example, Article 4(1) of the Universal Declaration of the Rights of Mother Earth (UDRME) states: "The term "being" includes ecosystems, natural communities, species and all other natural entities which exist as part of Mother Earth." Taken together, therefore, these systems and entities form Mother Earth, who is a living being.[357]

In addition to physical entities and natural systems, nature or Mother Earth is simultaneously discursively constructed as a "relational field and a set a processes at a scale that comprises and binds pretty much everything."[358] As all things arise from

[355] Massimo De Angelis, "Climate Change, Mother Earth and the Commons: Reflections on El Cumbre" (2011) 54:2 Development 183 at 184.
[356] *Ibid* at 183.
[357] World People's Conference on Climate Change and the Rights of Mother Earth, *supra* note 346 at Article 1.
[358] De Angelis, *supra* note 355 at 185.

Mother Earth and will ultimately return to her, so she is the source and facilitator of all relation – "a unique, indivisible, self-regulating community of interrelated beings that sustains, contains and reproduces all beings."[359]

To this end, the discourse also recognizes humans, but as merely one component of Mother Earth. Human beings are not granted any special ontological status, as they are in the discourse of human rights. Rather, the inherent rights of human beings arise from the same source as, and are therefore equal to, the rights of all other entities. As Article 1 of the UDRME states:

> (4) The inherent rights of Mother Earth are inalienable in that they arise from the same source as existence.
>
> (5) Mother Earth and all beings are entitled to all the inherent rights recognized in this Declaration without distinction of any kind, such as may be made between organic and inorganic beings, species, origin, use to human beings, or any other status.
>
> (6) Just as human beings have human rights, all other beings also have rights which are specific to their species or kind and appropriate for their role and function within the communities within which they exist.

As a result, the field of moral concern in the discourse of the rights of nature is greatly expanded.

(b) Assumptions about natural relationships

The discourse of the rights of nature posits familial relationships between human and non-human entities. It speaks of an anthropomorphized "Mother Earth", who cares for the systems and beings that she has created, and of which she is composed. Human and non-human entities alike are both a part of and sustained by this mother figure. For example, Article 1(3) of the UDRME states: "Each being is defined by its relationships as an integral part of Mother Earth."

These relationships are by their nature nurturing, mutually supportive and

[359] World People's Conference on Climate Change and the Rights of Mother Earth, *supra* note 346 at Article 1(2).

harmonious. The preamble of the UDRME proclaims: "[W]e are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny".[360] While such interdependency and harmony are framed as the default state of relationships amongst systems and entities on Earth (and indeed, in the cosmos more broadly), the discourse recognizes that many of our actions as humans have disrupted these relationships. For example, the UDRME recognizes that in "an interdependent living community it is not possible to recognize the rights of only human beings without causing an imbalance within Mother Earth".[361] Indeed, this discourse posits such imbalance as one of the root causes of the climate crisis. It is only by recognizing the roles and responsibilities of all beings that Mother Earth can maintain her harmonious functioning. The flipside of this observation is the idea that the protection of the rights of nature is essential for the protection of human rights; more often than not, violations of the rights of nature are accompanied by violations of human rights and the rights of Indigenous peoples.[362]

The discourse also links destructive relationships that involve the domination of human beings over nature to other systems of violence and domination that exist amongst and between humans, including patriarchy, militarism and capitalism. For example, commentators have pointed out that the Paris Agreement includes the words "economic" and "economy" dozens of times, but only includes the word "Earth" once, and does not mention the word "nature" – a situation indicative of the way in which the international climate regime has destructively framed the earth as an exploitable resource in a capitalist system.[363] In this view:

> Our overarching legal and economic systems accelerate co-violations by treating nature and workers as "resources" to fuel short-term profit maximization for the few. Nature is particularly mistreated in light of its characterization as merely

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[360] World People's Conference on Climate Change and the Rights of Mother Earth, *supra* note 346.
[361] *Ibid* at Preamble.
[362] Linda Sheehan & Grant Wilson, *Fighting for our Shared Future: Protecting Both Human Rights and Nature's Rights* (Earth Law Center) at 8–11.
[363] See: Linda Sheehan, "Economics for Earth's Rights", (4 January 2016), online: *New Economic Law Center* <http://wordpress.vermontlaw.edu/nelc/2016/01/04/economics-for-earths-rights/#_edn2>.

"property" to be bought, sold, and ultimately degraded for profit.[364]

Similarly, the preamble of the UDRME "recogniz[es] that the capitalist system and all forms of depredation, exploitation, abuse and contamination have caused great destruction, degradation and disruption of Mother Earth, putting life as we know it today at risk through phenomena such as climate change".[365]

(c) Agents and Their Motives

The rights of nature discourse posits that "Nature" has agency, as do the animate and inanimate entities and systems of which nature is composed. As a result, non-human elements such as rivers, trees, and animals are not considered to be *objects* or property – as they are by the majority of the world's legal and economic systems – but rather *subjects* with legal standing in their own right. In this regard, the rights of nature include, as per Article 2(1)(c) of the UDRME, the right of the earth "to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions", and as per Article 2(1)(j), "the right to full and prompt restoration for violation of the rights recognized in this Declaration caused by human activities".[366] The agency of nature is thus derived from and also subtends the rights of nature.

The "motives" of Nature or Mother Earth, as an entity with agency, are perhaps less clear in the discourse. For the most part, nature is anthropomorphized and framed as a benevolent, nurturing mother who will love and provide for her children – human and otherwise – if they respect and love her in return. In this way, the rights of nature discourse posits that Earth is driven by a desire for balance, and will seek to maintain equilibrium and ecological homeostasis.

People – particularly communities – also hold tremendous power and agency. While governments are largely beholden to powerful and destructive corporate interests, proponents of the rights of nature view grassroots human collectivities as points of resistance and agents of change. While the 2010 World Peoples' Conference on Climate

[364] Sheehan & Wilson, *supra* note 362 at 8.
[365] World People's Conference on Climate Change and the Rights of Mother Earth, *supra* note 346.
[366] *Ibid*.

Change and the Rights of Mother Earth was hosted by the Bolivian government and included governmental participation, it was framed as a response to the failures of state actors to take meaningful action on climate change in Copenhagen, at COP15. Moreover, the discourse views humans and other entities as being members of a community of interrelated beings, independent of states or other political entities.

Finally, corporate entities are recognized as being powerful agents, whose profit-driven bottom line and exploitative, instrumental view of nature are antithetical to the rights of Mother Earth.

(d) Key Metaphors and Other Rhetorical Devices

One of the primary metaphors espoused by the rights of nature discourse is that of balance. The earth is seen to be a self-stabilizing and interconnected system, which is in turn part of a larger cosmic order. If each component fulfills its proper role, the system functions harmoniously, to the mutual benefit of all. If, on the other hand, aspects of the system become unbalanced, the harmony is destroyed. In the context of climate change, many of the modern structures and systems that humans have put into place have caused this imbalance, leading to the current climate crisis. For example, capitalism, as an economic system of "boundless accumulation",[367] has caused human populations to exceed the planetary boundaries within which human beings must operate in order to maintain balance and harmony.

In this sense, the rights of nature discourse tends to place an emphasis on the root causes of climate change, whereas the discourse of human rights in the climate regime focuses more on its effects. This causal emphasis is connected to an emphasis on the need for radical transformation, rather than "false solutions." The kind of abiding change necessary to correct and redress the broken relationship between human beings and Mother Earth cannot come from ineffective, symptom-based responses to the effects of climate change, but rather, must come from the transformation of how human individuals and collectivities navigate their place in the world and their relationship to nature. Indeed,

[367] De Angelis, *supra* note 355 at 184.

in this view, climate change is a symptom of a more fundamental failure of humans to understand their proper role in the interconnected and interdependent web of existence.

Finally, the discourse of the rights of nature espouses the idea that to move forward into the future, societies must return to traditional ways, which are viewed as more compatible with the rights of nature. The so-called modern world has lost its way and has forsaken the interdependent relationship with the natural environment that it once had. The discourse recognizes that many Indigenous communities have managed to maintain a harmonious relationship with the land and with nature; however, the preservation of their traditional ways is under extreme threat and the goal is to return to a state of harmony. To this end, the preamble of the UDRME "affirm[s] that to guarantee human rights it is necessary to recognize and defend the rights of Mother Earth and all beings in her and that there are existing cultures, practices and laws that do so".[368]

5. Conclusion: Rights Discourse in the Age of the Anthropocene

The foregoing analysis reveals a range of ideological and moral commitments that both underpin and are constructed by the discourses of human rights and the rights of nature. In their strongest forms, these rights-based discourses call for transformative change, including the dismantling of existing power structures and the destructive systems and relations of exploitation that perpetuate the climate crisis. They represent utopian visions, "draw[ing] on the image of a place that has not yet been called into being".[369] But each discourse is also susceptible to cooption in support of the socio-economic status quo, advocating for individual protections or for greater recognition of nature, while simultaneously propping up existing dominant interests.

The variations within each discourse therefore have significant implications for environmental governance. For example, while "nature-based solutions" and "rights of nature" may sound like points along a spectrum, they entail very different sets of ideological assumptions – ways of understanding the world and one's place within it.

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[368] World People's Conference on Climate Change and the Rights of Mother Earth, *supra* note 346.
[369] Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2010) at 1.

Governance solutions tied to the former could involve harnessing and monetizing so-called "ecosystem services", incorporating them into the existing economic order, whereas approaches linked to the rights of nature might take a radically different approach, recognizing a natural entity's right to exist and flourish free from human interference and independently of its utility to human beings.

But beyond the differences and points of convergence between the stronger and weaker forms of these discourses in the realm of climate change, the foregoing analysis also reveals the different forms of social and environmental imagination that the human rights and rights of nature discourse espouse – that is, the different ways in which they conceive of and construct the "natural" world and humans' place within it, and the essence of relationships amongst entities and systems on the planet and with the earth itself. As Purdy notes, the concept of environmental imagination matters: "What we become conscious of, how we see it, and what we believe it means – and everything we leave out – are keys to navigating the world".[370] If we accept in turn that "[l]aw is used by a society as a means of creating and defining itself in accordance with its worldview"[371], then our environmental imagination will shape our laws governing the natural world as much as these laws will shape the natural world itself.

Of course, it would be disingenuous to compare the discourses of human rights and the rights of nature within the climate regime as though they were somehow on opposite ends of a spectrum of possible human responses to the social, environmental and indeed existential challenges posed by climate change – one end anthropocentric, the other ecocentric. Operating within the socially-constructed framework of rights already situates both discourses firmly within the realm of the human.

This framing is perhaps in contradistinction to the recent turn in a number of disciplines – including anthropology, art, and philosophy – towards object-oriented ontology, which rejects the privileging of human existence over non-human existence. Proponents of the rights of nature have thus made efforts to

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[370] Purdy, *supra* note 14 at 7.
[371] Cormac Cullinan, *Wild Law: A Manifesto for Earth justice* (White River Junction, VT: Chelsea Green Pub., 2011) at 57.

> 'widen the circle of the human' and to thereby include, as active agents with a kind of personhood, history, voice, freedom, and responsibility of their own, 'those subaltern members of the collective, things, that have been silenced and "othered" by the imperialist social and humanist discourses' […].[372]

Yet even this call to "re-think the personhood, and particularly the potential juridical personhood, of trees, rivers, and mountains"[373], is a far cry from true object-oriented ontology, which acknowledges that other objects – be they animals, forest ecosystems or specks of dust in the atmosphere – are ultimately unknown and unknowable to us, inaccessible to our human understanding. Post-human egalitarianism of the sort discussed in relation to object-oriented ontology would presumably be at odds with attempts to bestow upon rivers and other "objects" the entirely human construct of juridical personhood.[374]

At the same moment that we are witnessing an "object turn" and "post-*human*" shift in many disciplines, we have also seen the widespread embrace of the concept of the Anthropocene – the notion that we now live in a post-*natural* world, in which all the major earth system processes – atmospheric, biospheric, geologic, and hydrologic – have been altered by humans. As Purdy states:

> The Anthropocene finds its most radical expression in our acknowledgement that the familiar divide between people and the natural world is no longer useful or accurate. Because we shape everything, from the upper atmosphere to the deep seas, there is no more nature that stands apart from human beings. There is no place or living thing that we haven't changed. Our mark is on the cycle of weather and seasons, the global map of bioregions, and the DNA that organizes matter into life.[375]

How, then, can we at once acknowledge that human beings have altered the world to such a great extent that nature is no longer natural, while also taking account of the post-human – the ontology of objects that exceed our human knowing? For Purdy, these positions are not irreconcilable. In fact, the very acknowledgement that we are now living

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[372] Fitz-Henry, *supra* note 192 at 267.
[373] *Ibid*.
[374] See, e.g.: Eduardo Kohn, *How Forests Think: Toward an Anthropology beyond the Human* (Berkeley: University of California Press, 2013). Anthropologist Eduardo Kohn attempts to address the human-nonhuman divide through an exploration of the semiotics of the other-than-human world.
[375] Purdy, *supra* note 14 at 2–3.

in the Anthropocene entails the corollary acknowledgement of the otherness of all that surrounds us:

> Once we recognize that the "meaning" of nature has always been a way of talking about human life and purposes, all our relations to the nonhuman world must be touched by the uncanny. We simply do not know what is behind another pair of eyes, and what is projection from behind our own.[376]

In this way, human-induced climate change, as the Anthropocenic crisis *par excellence*, is both an existential crisis – a very real threat to the continued survival of humans, nonhumans and planetary systems as we know them – as well as an ontological one, challenging our fundamental notions of humanness, naturalness, and artifice. As Purdy points out, "[a]s greenhouse-gas levels rise and the earth's systems shift, climate change has also begun to overwhelm the very idea that there is a 'nature' to be saved or preserved."[377] Climate change – articulated as the product of discursive struggles, and rendered "governable" through discourse – thus requires us to fundamentally rethink our relationship with an environment that has already irrevocably changed, and in so doing, to reconceive of its ontological status and our own. This precludes any simple reliance on the old binaries that have underpinned Western thought, and have consequently structured Western legal orders[378] – human / non-human, nature / artifice, subject / object, thinking / unthinking. At the same moment that the illusion of our ontological separateness as humans and our hubris as masters of our earthly domain can no longer be sustained, we are also confronted with the radical otherness of that which is "not us".

In this context, then, the consideration of rights-based discourses within the climate change regime brings the challenges and paradoxes of environmental governance in our era into sharp focus. Can the discourses of human rights and the rights of nature come to grips with the post-human, post-natural state of the Anthropocene? Can they help facilitate the transformations necessary to ensure modes of environmental governance suited to such a world?

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[376] *Ibid* at 244.
[377] *Ibid* at 249.
[378] Of course, it is important to acknowledge that for millennia, many non-Western cultures and their legal orders have held similar conceptions to those currently being "discovered" or coming into fashion in Western academic thought.

The work of Emmanuel Lévinas, although drawn from a very different context, can perhaps help frame our thinking in this regard. His notion of the "ethics of alterity"[379] signals a need to move away from totalizing ontology, conceptualizing a theory of Same and Other in which these entities are separate and yet held in relationship to one another. It captures, in many ways, the tension of the paradoxical condition in which we now find ourselves – the condition of the Anthropocene – in which we must simultaneously recognize radical otherness while also acknowledging that human interference has now largely eradicated the "natural", the "wild". As Jodoin states, "Lévinas's main concern is […] to elaborate a philosophy of the Same and the Other in which both are preserved as independent, but are in a relation with one another."[380] The relation between Same and Other must be defined by a lack of intelligibility; "in order to think of the Other as Other, the Same must fail to understand the Other".[381] Moreover, the identity of the Other cannot simply be defined in terms of its opposition or difference in relation to the Same, as to do so would be to encompass it within a totality inhabited by the Same.

In the context of environmental governance and climate change, the Other is that contemplated by the rights of nature discourse: it is Mother Earth, the river estuary, the atmosphere, the caribou and the lichen. It is also the Other of human rights discourse – that is, anyone who is not "I", who possesses inherent worth by virtue of their humanity, but who is nevertheless distinct, and cannot be assimilated to our own subjectivity.

The encounter with the Other is nonetheless, and inextricably, one of relationship. As Jodoin notes: "The encounter of the Self with the Other is primarily an ethical one, as it leads the Self to realize that it must share the world with the Other. The subject therefore is constituted by his relationship to the Other […]".[382]Yet this is a "'relation without relation' between the Same and the Other. It is a relation because an encounter takes place, but it is without relation because that encounter does not establish parity or

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[379] E. Levinas, "Totality and Infinity: An Essay on Exteriority" (Alphonso Lingis, transl. Pittsburgh: Duquesne University Press, 1969).
[380] Sébastien Jodoin, "International Law and Alterity: The State and the Other" (2008) 21:1 Leiden J Int Law 1 at 19 (references removed).
[381] Jodoin, *supra* note 380.
[382] *Ibid*.

understanding – the Other remains absolutely Other."[383]

Indeed, as Kohn points out, in our interactions with the Other, we have been "colonized" by our ways of thinking about relationality:

> We can only imagine the ways in which selves and thoughts might form associations through our assumptions about the forms of associations that structure human language. And then, in ways that often go unnoticed, we project these assumptions onto nonhumans.[384]

The subjectivity of the natural world – that "most subaltern of all"[385] – and of all the non-human objects surrounding us, has been myopically and selfishly disregarded or else subsumed into our own subjectivity. As Jodoin notes, Lévinasian ethics are "grounded in a responsibility to the Other in its uniqueness and alterity."[386] Cultivating an ethics of alterity might therefore be a way to begin thinking about how to redress the harmful phenomenology of earlier centuries that perceived the earth solely in terms of the human subject, while also coming to grips with the post-natural condition.

The role of rights and rights-based discourse in this context remains important. Rights are a social construct, but they are nonetheless morally persuasive and rhetorically powerful. They "represent reasonable minimum demands upon society that are rooted in moral values and thus place compelling principles on the side of the person [or entity] asserting a right."[387] When enshrined in constitutions at the State-level, "systems of constitutional rights as limits to the power of governments have been important institutional means for articulating a society's core values and for holding governments accountable to those values."[388] Incorporating rights language in international agreements, or deploying it in public campaigning, can have a similar effect. Rights-based discourse can therefore articulate the "moral case" for action on climate change, linking it to broader issues of global justice and equity, and creating rallying points around which legal tools for the furtherance of rights and protections can be honed.

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[383] *Ibid* at 20.
[384] Kohn, *supra* note 374 at 21.
[385] Fitz-Henry, *supra* note 192 at 267.
[386] Jodoin, *supra* note 380 at 20.
[387] Boyd, *supra* note 135 at 8.
[388] Nedelsky, *supra* note 7 at 231.

Yet in order to remain useful and progressive, our understanding of rights must be reconceptualized in the age of climate change, as old categories no longer hold and unexamined rights-based approaches may risk perpetuating the kinds of relationships that have led to the current climate crisis. In this respect, Nedelsky argues cogently in her book *Law's Relations: A Relational Theory of Self, Autonomy and Law*, that the traditional liberal conception that views rights variously as barriers or boundaries around a free-standing individualist Self has failed to account for the fundamentally constitutive nature of relationships vis-à-vis the self. This includes not only intimate relationships, such as those between spouses or between parents and their offspring, but also relationships with strangers, broader economic and societal relationships, and relationships between the human and non-human world.

This "rights as trumps" or "rights as shield" conception has underpinned much of the Western liberal tradition, and continues to define it. As Nedelsky points out: "rights serve to mark and protect the bounded self and, thus, the legitimate scope of the state. But neither the 'bounded self' nor the 'boundaries of state power' are optimal concepts for articulating and protecting core values, such as autonomy or equality."[389] Nor, I would argue, is this conception of rights well suited to the kind of re-imagining necessary in a post-nature Anthropocene era. In reality, if "human beings are both constituted by, and contribute to, changing or reinforcing the intersecting relationships of which they are a part", then "the earth itself is both condition and effect of these relationships."[390] Indeed, as Nedelsky notes "[t]he very concept of ecology is relational. It is about fundamental interdependence."[391]

We must therefore expand our notion of the types of entities with whom we have relationships – recognizing and protecting certain types of relationships between and amongst humans, other organisms, and ecosystems – rather than zealously erecting rights as further barriers to relationality. The challenge lies in how to recognize and attend to

[389] *Ibid* at 91.
[390] *Ibid* at 22.
[391] *Ibid* at 12.

such interdependence in a way that does not also assimilate the Other to our understanding, or exploit it only for human purposes. Absent a radical appreciation of relationality and the position of the Other, the discourse of human rights in the realm of climate change risks the continued totalizing ontology cautioned against by Lévinas – subsuming all that is nonhuman within our own subjectivity, as raw material for human interests and uses. Endowing non-human entities with rights runs a similar risk, and moreover, is a difficult concept to reconcile with the increasing "unnaturalness" of the Anthropocene.

In particular, the discourses of human rights and the rights of nature run into trouble when confronted with complex situations extending beyond the realm of the human. The need to "balance" competing rights and interests of different actors has been a mainstay of human rights jurisprudence – weighing, for example, freedom of expression against the prohibition of the incitement of hatred. But expanding the field of relationality beyond the human requires new tools; the infinite incommensurability of the Other cannot be apprehended by any straightforward balancing of rights as trumps.

Imagine the types of interests at stake in a REDD+ project. Such a project may affect numerous parties or actors (both passive and active), implicating various rights and interests, and leading to many possible varieties of conflict. For example, a government or development agency may champion the proposed REDD+ project, offering to pay the community to keep the forest standing, or providing market-based incentives for improved forest management. Some members of the local community may support this project, wishing to leave a section of forest intact or to manage it in their traditional way. Other members may wish to clear a section of the forest for money, or in order to plant crops for food, to graze cattle, or to cultivate a palm oil plantation. Still others may be ideologically opposed to the notion of "monetizing" the forest. In addition, the international community may claim an interest in a healthy atmosphere, viewing the forest as a carbon sink, while the forest itself, along with the creatures that inhabit it, may have an interest in its own continued existence. The rights to life, development, livelihood, an adequate standard of living, culture, health, and environment may all be invoked.

However, imagining each of these particular interests as a bounded right effectively frames out much of the context – the intricate web of relations and structures that surround and construct the various actors in this scenario. It creates a series of freestanding entities, rather than an integrated, fluid fabric of relationships. It may also exclude hierarchies and power dynamics within a community; the social, economic and political legacies of colonialism; the pressures placed on natural resources and human populations by the global economic system; or the ways in which so-called "green" solutions such as REDD+ or payment for ecosystem services schemes may actually reinforce broader oppressive economic and geopolitical systems. By contrast, taking a relational approach can "[make] the role of law and the state in structuring relations of power clearer."[392] Establishing the conditions for equality, autonomy, environmental health and the sustainable coexistence of various actors – human and nonhuman – requires attention to these complex relationships.

My aim in this project has been to unpack and make visible some of the assumptions, values, and interests that underpin the discourses of human rights and the rights of nature in the international climate regime, in order to contribute to the understanding of the broader relationship between rights and environmental governance. The ascendancy of the concept of rights is not likely to abate anytime soon. But in order for rights discourse to lead us in the direction of better conditions on planet Earth, contributing to greater environmental and social justice, the content and context of rights, and the impact of framing situations in terms of rights, must be better understood. Much work remains in interrogating the foundations and manifestations of rights discourses in the environmental realm, particularly considering their rapid proliferation and expansion in recent years, and in the face of the shifting challenges of the Anthropocene.

My hope is that as rights discourses continue to be adopted and mobilized by activists, advocates, scholars and others involved in climate and environmental governance, a parallel questioning and ongoing re-evaluation will occur – one which takes up the call for a more relational understanding of rights and expands it to encompass the non-human. In this way, we may perhaps bridge some of the paradoxes

[392] *Ibid* at 72.

and challenges of reconciling the rights of humans and non-humans, and of living sustainably and ethically in both a post-human and post-natural world.

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