Rights critique and rights of nature – a guide for developing strategic awareness when attempting to protect nature through legal rights

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Abstract

This article investigates how some influential historical forms of rights critique apply to rights of nature. Some potential risks with employing legal rights in this context are employing an inefficient strategy, unintended consequences such as empowering environmentally unfriendly actors, and an inability to intervene in areas considered private. The ability of legal rights to strengthen environmental interests is evaluated through a dominant framework for legal rights, where rights typically are (1) invoked against the state, (2) to stop it from doing something (3) by legal persons. The article discusses which types of environmental projects fit this dominant legal framework. The analysis highlights the need for strategic awareness when choosing to employ legal rights as an environmental strategy.

Introducing the relationship between the rights of nature and rights critique

This article outlines some classical forms of rights critique with a view to understanding their relationship with the emerging rights of nature.[1] The article discusses some historical forms of rights critique and attempts to tease out how they might apply to rights of nature. In particular, the text endeavours to investigate the extent to which using a legal form of rights might be a strategic choice for political movements trying to expend limited resources on action for environmental protection.[2] It thus views this particular form of legal framing of the problem to be one out of several possible avenues for political action.[3] The choice between different available approaches turns on numerous political factors, such as the exact goal of the environmental

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[1] For an overview of some of the judgements that have brought the idea of rights of nature to the fore, see Lidia Cano Pecharroma, "Rights of Nature: Rivers That Can Stand in Court", 7(1) *Resources* 13 (2018). For a broader treatment, see David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press 2017).

[2] Some famous examples of rights critique in legal scholarship are Martti Koskenniemi, "The Effect of Rights on Political Culture" and "Human Rights, Politics and Love" both reprinted in *The Politics of International Law* (Hart 2011). In order to understand the breadth of rights critique in legal scholarship, see the comparison of the critiques by David Kennedy, Anne Orford, and Makau Mutua in Ben Golder, "Beyond redemption? Problematising the critique of human rights in contemporary international legal thought", 2(1) *London Review of International Law* 77 (2014). For a review essay on more recent scholarship, see Ben Golder, *Critiquing Human Rights*, 12(2) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 226 (2021). See also Samuel Moyn, *Not Enough – Human Rights in an Unequal World* (Harvard University Press 2019).

[3] For discussions on framing power in law, see Pierre Schlag and Amy J. Griffin, *How to Do Things with Legal Doctrine* (University of Chicago Press 2020), chapter 2.

group, the receptivity of the relevant legal actors to the intended outcomes, and alternative environmental projects available. There are thus strategic choices involved in choosing between different ways of pursuing an environmental agenda. Due to the complexity of the trade-offs, this article of course cannot decide what is the better approach for any particular environmental group or politico-legal project.[4] However, this does not mean that strategic insight cannot be gathered from previous discussions on pursuing political projects through (legal) rights. In fact, there seems to be clearly discernible lessons to be drawn from earlier critiques of rights of relevance also in the context of rights of nature. Therefore, the article aims to raise strategic awareness for those faced with such choices and increase awareness about some of the potential implications of using the law for environmental protection by invoking rights. The hope is that this investigation of the promises and pitfalls of rights rhetoric in this context can help environmental movements chose wisely when it comes to how to expend limited time, resources, and political capital.

Enshrining your agenda in law has been a common goal for movements pushing for diverse forms of societal change. This stands to reason, since law in many political systems stands almost as a symbol for state power. Achieving legal recognition of your project thus becomes a sign of political success. Since the middle of the 20th century, human rights in particular has held this form of symbolic capital.[5] During this time, we have seen increasing reframing of other political projects into the language of legal rights. It is during this period, for example, that the labour movement starts arguing that labour rights are human rights.[6] Nevertheless, the attainment of legal rights has not always meant achieving the relevant aims. See for example the exposé by Cheryl Harris largely about how legal victories for Afro Americans often served as a stand-in for actual emancipation.[7] Similarly, it is unclear to what extent anti-discrimination law can come to terms with many of the forms of inequality that its proponents hoped it would solve.[8] Finally, attempts of NGOs to push for human-rights mainstreaming in the operations of the World Bank might also have done more to change the talk of the World-Bank institutions than its walk.[9]

[4] For an important discussion on the complications involved in evaluating these kinds of trade-offs, see David Kennedy, "The International Human Rights Movement: Part of the Problem?", 15(3) *Harvard Human Rights Journal* 101 (2002), pp. 102–6.

[5] Famously, Samuel Moyn in *The Last Utopia* (Harvard University Press 2012), argues that the dominance of human rights as a vehicle for political change is a relatively recent phenomenon, emerging largely as a European language creating an alternative to Soviet or American worldviews. The history of human rights has itself become a part of the contestation of the political meaning of human rights law, see Philip Alston, "Does the Past Matter? On the Origins of Human Rights", 7 *Harvard Law Review* 126 (2013). For a broader discussion on the politics of history in international law, see Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021).

[6] For some scholarly discussions on the framing of labour rights as human rights, see Judy Fudge, "Labour Rights as Human Rights: Turning Slogans into Legal Claims", 37 *Dalhouse Law Journal* 601 (2014) and Cedric Dawkins and Christina Dawkins, "Disciplining the Notion of 'Labour Rights as Human Rights'", 13(1) *Global Labour Journal* 2 (2022). A relevant recent development is the request by the ILO to the ICJ about if the right to strike is included in the Freedom of Association and Protection of the Right to Organise Convention from 1948.

[7] Cheryl Harris, "Whiteness as Property", 106(8) *Harvard Law Review* 1707 (1993), in particular pp. 1745–1757.

[8] For a famous argument along these lines, see Alan David Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine", 62 *Minnesota Law Review* 1049 (1978). For a recent example, see the excellent discussion in Maria Nääv, *(o)likabehandling – Likabehandling och jämställdhetsförbättrande åtgärder i den svenska diskrimineringslagstiftningens genealogi*, diss. (Stockholm University 2023).

[9] For such analyses, see Dimitri Van Der Meerssche, "A Legal Black Hole in the Cosmos of Virtue – The Politics

It seems the promise of legal rights historically often have created a particular allure for social movements.[10] This article attempts to highlight some underlying arguments inherent in such rights critiques, with a view to contributing to a broader discussion about the promises and pitfalls of resorting to legal rights as a strategy for environmental movements.

It seems hard to disregard that the idea of casting environmental protection as a legal right emerges at the same time that human rights have become a dominant way of framing political projects at large.[11] Ben Golder writes bluntly that "the language of human rights has come to provide the dominant mode of expression for political claims today".[12] While not explicitly (or rather, explicitly not) a *human* right, these phenomena are related; rights of nature and human rights both constitute attractive rights discourses appealing to law in order to "trump" other societal concerns.[13] By invoking the language of rights, you are typically indicating that a particular interest should take precedence over other concerns, thus removing them from other forms of politics. It might be exactly this deontological quality of rights that constitutes the crucial appeal for political movements. This also seems (laudably, to my mind) to be the core underlying thinking when reaching for rights language to protect environmental interests.[14]

Due to this complicated relationship between legal rights and emancipatory projects, it is meaningful to delve deeper into effects of resort to law, in the form of rights of nature, also for environmental groups.[15] As a heuristic tool, this text introduces a framework describing the dominant form of legal rights, springing largely from a human-rights setting. Put simply, this framework indicates that rights typically operate so as to give individuals rights to stop the state from doing something. Outlining the typical form of legal rights can help better understand the capacity of the currently dominant form of rights to transform societies. This heuristic is intended to illuminate which types of projects might be most easily pursued using legal rights rhetoric. While the framework cannot provide prescriptions for any particular environmental group, it can be employed strategically to indicate what is likely to happen when the law transforms demands by a movement. This framework can either be used as a way of better evaluating if environmental concerns at hand are likely to succeed when employing the law or to highlight how a movement might want to litigate or lobby for a particular kind of rights of nature, knowing the extent to which its agenda fits the dominant legal rights framework. Where the agenda does not fit the dominant framework, this could indicate a need to litigate strategically to change the

of Human Rights Critique Against the World Bank", 21 *Human Rights Law Review* 80 (2021), p. 92 (relying on further important sources): "Rather than bringing the political pathologies of the Bank's development practice to the fore, 'human rights mainstreaming' might then be a process of casting the organization's pre-existing institutional operations and objectives in the language of its critics."

[10] For a discussion of law from a movement perspective, see Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third-World Resistance* (Cambridge University Press 2003), in particular chapter 7, discussing the role and effects of using human rights.

[11] For the history and historiography of human rights, see the sources above (n. 5).

[12] Golder (2014), *supra* (n. 2), p. 78.

[13] This terminology comes from Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

[14] See for example, Yaffa Epstein and Hendrik Schoukens, "A positivist approach to rights of nature in the European Union", 12(2) *Journal of Human Rights and the Environment* 205 (2021), discussing "legal rights that cannot be trumped by mere utilitarian interests".

[15] For a famous discussion on how (international) law is political, see Martti Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument* (Cambridge University Press 2006, reissue with new epilogue), in particular p. 562 *et seq*.

current overarching structure of legal rights. To sum up, the framework is introduced in order to better evaluate the transformative potential of legal rights – or to help illuminate the constraints of the dominant framework of legal rights.

Simultaneous with the thirst for rights in political discourse, there have consistently been voices criticising their centrality, noting their inability to achieve their intended goals, or highlighting how rights discourse is averting attention away from more effective ways of changing society. The idea with this brief article is to introduce a variety of ideas from rights critique and try to tease out their potential applicability to different projects pursued under the banner of rights of nature. The aim is not to go into depth into either of these critiques. Each of them comes in many renditions, with their own complicated history of ideas. Rather, the idea is to draw on different forms of rights critique in order to investigate to which extent such critiques can be applied to rights of nature projects. I will thus employ the different forms of rights critique selectively, in order to take away what might be helpful for analysing the rights of nature.

Introducing the framework: a dominant mode of legal rights

By introducing the main way in which rights are operating legally, we can better evaluate how different rights projects may fit into the currently dominant form of rights. As mentioned above, this framework is not aimed to be prescriptive. Neither does it imply that this is the only available form of legal rights. To the contrary, there are many other forms of rights and the discussion below includes several exemptions to the main framework. However, it is submitted that when a social movement attempts to have a right enshrined into law, the main framework below is the taken-for-granted blueprint by lawyers. Rendering this framework clear can improve strategic awareness, for example by allowing for litigation wary of that the fact that it challenges the dominant mode of legal rights.

The dominant form of legal rights is one where a private party can bring a claim against the state in order to stop the state from doing something. This is how the most commonly discussed forms of legal rights in human rights instruments are formulated. Some ideal-typical examples include the right to not be subjected to torture, cruel or inhumane treatment or the right not to be subject to arbitrary detention. Since this way of thinking about rights is deeply ingrained in the minds of many lawyers, it makes sense to discuss separately the three facts that (1) individuals are the rights-holders, (2) that governments are the duty-holders, and (3) that the dominant form of rights are negative ones.

First, take the fact that individuals are the rights-holders in this model.[16] In general, this tends to mean that rights are interpreted to protect individual interests. While it is of course common to highlight that such individual rights are a part of broader view of society (freedom of speech is, for example, necessary for a democratic society) this idea typically still comes about through vesting the protected rights in individuals. One key part of the rights of nature project seems to be exactly to challenge the dominant model in order to make nature the rights-bearer.[17] The fact that the rights-bearer is typically an individual has not been lost on those attempting to use human rights to combat climate change, where climate change has to be recast to concern the interests of the claimants.[18] It might be that

[16] An often mentioned (but not so practically important) exemption to this is the African Charter of Human and Peoples' Rights, which explicitly lays down group rights.
[17] For example, when holding that a river is a rights holder.
[18] An illustrative example is the many climate litigation cases against parties to the European Convention on Human Rights, such as in the combined cases *Verein*

further acceptance of groups as rights-holders could be an improvement from an environmental point of view.

Changes in who constitutes the rights-bearer or interest-holder are not unheard of. The fact that lawyers often imagine all types of private actors as "individuals" appears to make it less strange for lawyers to imagine corporations as rights-holders.[19] One early significant case of this, which might highlight what can happen when rights are interpreted through typical legal imaginaries, is the case of *Société de Colas Est and Others v. France*. In the case, the European Court of Human Rights found that "the time had come" to extend the right to private life under article 8 to corporations, thereby shielding them against state intervention, in the relevant case from competition law.[20] This way of imagining the beneficiaries of rights can help illuminate some of the risks with choosing the language of legal rights as a strategy for societal transformation.[21] In particular when the environmental concern at stake fundamentally concerns transformation of the economy – such as with respect to global warming, the destruction of biodiversity, or overfertilization – the capacity of legal (human) rights language to bestow corporations with additional protection is worth taking into account.[22] To the extent an appeal to rights language is intended to weaken economic interests that harm the environment, it is worthwhile to also consider the risk of inadvertently appealing to a language that is prone to strengthen such interests.

Second, in the main model above, the duty-holder is the state. It is deeply engrained in the history of the legal human-rights tradition that such rights serve mainly to provide protection against the power of the state.[23] This is strengthened by a justification of human rights as bulwarks against historical atrocities committed by states. This also means that (legal) human rights tend to come with an anti-state bias.[24] Depending on the kind of environmental project a movement is attempting to pursue, this might be a good or a bad thing. The anti-state bias might turn out helpful in instances when legal rights are used to stop the state from taking a particular kind of action, perhaps using a state-owned company to open up a mine, start exploiting an oil field, or even potentially in order to stop the state from approving a licence that harms the environment. However, the equivalent acts taken by non-state companies – presumably a bigger issue from an environmental point of view – will typically be harder to come to terms with through this discourse. Several of the critiques discussed below concern the ways in which rights discourse operates in accordance with public-private logics, including both that the state is the typical duty-holder and that corporations (in addition to humans) are common rights-holders.

Klimaseniorinnen Schweiz and Others v. Switzerland, *Carême v. France*, and *Duarte Agostinho and Others v. Portugal and 32 Others*.

[19] I am discussing this in a forthcoming co-written article with Erik Bengtson and Oskar Mossberg.

[20] *Société de Colas Est and Others v. France*, (Application no. 37971/97), Judgement of 16 April 2002, para. 41.

[21] Frédéric Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes", in José María Beneyto, David Kennedy, Corti Varela, and John Haskell (eds), *New Approaches to International Law – The European and the American Experiences* (Springer 2012), in particular p. 24 *et seq.*, discussing the limitations of using rights language to promote ecology.

[22] In the EU context, this is particularly clear with respect to article 16 in the readings of the European Court of Justice. See e.g. Eduardo Gill-Pedro, "Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU Law", 18(2) *European Constitutional Law Review* 183 (2022). For a broader reading of how human rights and neoliberalism emerged simultaneously, see Jessica Whyte, *Human Rights and the Rise of Neoliberalism* (Verso 2019).

[23] This is often clear in arguments about human rights filling a counter-majoritarian function.

[24] Koskenniemi (The Effect), *supra*, p. 150.

Third, the main type of right in this model is a negative right. This means simply that the dominant form of rights aims to stop the state from doing something. This again is best understood when imagining this regime to have arisen in response to heinous acts committed by states, in particular during the Second World War. From this vantage-point it makes sense to view legal rights as mainly negative, in contrast with rights that might demand that the state (or some other actor) take (positive) steps to carry out an action. This means that rights are, by their legal DNA, hard to use for *constructing* societal institutions. A court can more easily demand that a state ceases to act in a certain way, than to order it to start doing something. This also appears to flow from the very capabilities and competences vested in many courts in the first place, with them seldom being asked to create institutional structures. This is of relevance when imagining how to protect many forms of environmental interests, in particular where this requires creating new institutional structures not available to courts, including putting into place things like policy specialists, training programs, a budget, or tools to establish administrative routines. The fact that rights mostly are negative might indicate which types of environmental projects are more usefully pursued through rights rhetoric. Where the main aim is to stop something, it is more likely to succeed. Where the aim is instead to create some new institutional situation, legal rights are less likely to be helpful.

There are important exemptions to these three main characteristics in the dominant form of rights. As rights of nature itself illustrates, we can imagine creating other rights holders or standing to protect other interests.[25] For example, in the European human-rights regime, there has been an increased attention to positive obligations (for states).[26] Also, there are social and economic rights, where individuals can at times claim to get something (from the state). However, lawyers have overall taken a sceptical stance to enforcing these rights.[27] Also, some legal systems have to a limited extent allowed rights to operate as between third parties (but typically mediated by the state).[28]

While these exceptions are important in some situations, they are clearly less practically important than the dominant rights framework established above. Spelling out these situations as exemptions can dispel the risk that their presence will blur the limitations of the dominant framework. There are exceptions to all the three parts of the framework. (1) It is not that humans are the only duty rights holders (corporations might also hold human rights and we cannot exclude protecting interests that are not directly individual). (2) It is not that human rights only protect against the state (sometimes they might oblige the state to create obligations for oth-

[25] The first cases concerning rights of nature did exactly proclaim rights for non-human entities, such as rivers. The classic article about the phenomenon is Christopher D. Stone, "Should Trees Have Standing – Toward Legal Rights for Natural Objects," 45 *Southern California Law Review* 450 (1972).

[26] See for example, Vladislava Stoyanova, "Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights", 28 *Human Rights Law Review* 309 (2018).

[27] Martin Scheinin, "Economic and Social Rights as Legal Rights", in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (Brill 2001), p. 29: "Many authors are of the opinion that economic and social rights, because of their very nature, are not 'justiciable' in the sense that they are not capable of being invoked in courts of law and applied by judges." See also, Aryeh Neier, "Social and Economic Rights: A Critique", 13(2) *Human Rights Brief* 1 (2006), holding on p. 3 that "it is dangerous to allow this idea of social and economic rights to flourish".

[28] Often discussed with the German word *Drittwirkung*. For a discussion from an EU-law point of view (where this might be the most discussed), see Eric Engle, "Third party effect of fundamental rights (Drittwirkung)", 5 *Hanse Law Review* 165 (2009).

ers). (3) It is not that rights are always negative (there are also some limited social and economic rights). Nevertheless, seeing these situations as exemptions to a main form of legal rights might help foster strategic awareness about what it might take to challenge the rights-framework to pursue many environmental projects. It might of course also be that some rights-of-nature projects fit well in the dominant form. Perhaps the agenda can be used to stop the state from issuing new permits in sectors that are environmentally destructive (where such permits are required). Whichever the situation, hopefully the framework can help improve our understanding of how environmental interests and the typical mode of legal rights interact.

Classical forms of rights critique

The first examples of rights critiques emerge in response to catalogues proclaiming domestic legal rights, such as in the Magna Charta or in the French Declaration of the Rights of Men and Citizens. It is worth remembering that in these declarations, rights were a part of a broad political reorganization, negotiated as a component of a larger domestic political settlement. Consequently, these rights were not universal in the sense of being intended to apply in the same way everywhere. Take for example clause 39 of Magna Charta, that imprisonment only could take place by court orders.[29] This famous negative right was a part of the political settlement attempting to strike a compromise where barons in England would enjoy relative safety in exchange for laying down arms. Thus, the right came about in a particular context to solve a specific local problem. Neither the universalist nor the international part of rights rhetoric was yet a thing. However, some universalist aspirations did come about with the rights catalogues emerging during the enlightenment, such as with respect to the French and American rights declarations. These rights were nevertheless clearly components of particular political settlements and not in that sense imagined to apply everywhere. Importantly, it is also at around this time that some famous early critiques of rights emerge, some of which echo into the present time.

One set of critiques include what we can term realist critiques. In this group, I include all arguments about rights not having their intended or imagined effects. Such critiques might either simply indicate that rights do not work, in the sense that they do not achieve what their proponents think they do, or, worse, achieve some other problematic thing. In short, these are critiques that highlight unintended effects or drawbacks of some rights regime.

One famous critique that one might place in the realist camp would be Bentham's critique of rights in the French declaration in the aftermath of the revolution. One of his critiques is of the inability of rights proponents to see the other side of rights projects. Referring particularly to laws affecting outcomes between individuals, he highlighted that the creation of liberty for some party normally came at the expense of another, and that therefore "no liberty can be given to one man but in proportion as it is taken from another".[30] In this respect, his thinking resembles Hohfeldian analysis of law, always noting that there is a relationship between rights and duties (as well as highlighting the reverse cor-

[29] The clause reads: "No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land."

[30] Jeremy Bentham, "Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution", cited from *The Works of Jeremy Bentham* (Simkin, Marshall & Co. 1843), vol. 2 (also easily available online), p. 503.

ollaries of other forms of legal relationships).[31] When the obligation side of the right is not well established, rights take on an anarchical character on Bentham's reading. For example, he highlights some of the central ways in which a right to property stands in contrast with other things. Not only is it the case that strong property rights render ownership by those that do not hold property harder, they also come in contradiction with other parts of the legal system, such as taxes and fines.[32] Similarly, he analyses the rights to security and resistance to oppression (that constitute core ideas in the French Declaration). Should total security for someone be upheld by punitive acts against others? How to decide if someone's oppression can justly be resisted?[33]

Without delineating how these rights are to be weighed against other parts of the legal system or societal interests, it becomes hard to say what they mean, or indeed to know if they mean anything at all. This seems to be one of the core reasons why Bentham believed natural rights were "rhetorical nonsense" or, famously, "nonsense upon stilts".[34] However, his critique does not stop at revealing the indeterminacy of rights and highlighting how rights to some things affect other interests. He paints a picture where the French rights regime at hand was complicit in creating the terror of post-revolutionary France. Bentham seems to argue that the lack of analytical rigour in the Declaration of Rights in combination with the appeal of rights ("right, that most enchanting of words") created the political conditions for the Reign of Terror following the revolution.[35] Thus, in this instance the vague declaratory rights led to the dissolution of order and a descent into lawlessness.[36]

A meaningful takeaway from this analysis of rights in the particular context of rights of nature might be that the allure of having rights enshrined in law leads to a risk of missing their actual impact. That is, if the goal becomes to enshrine rights into law (if one starts to treat them as enchanted words), there is a risk of missing that the actual effects of those rights might not live up to their aim.[37] Perhaps this takes place due to an inability to highlight the actual targets that will create the obligations that will make the rights come alive. In this rendition, the argument would merely amount to the attempt being less effective than intended or for groups to expend energy on projects not worth the while. More forcefully, realists might indicate a risk of rights having completely other effects than those intended. In the context of climate change for example, directing energy into a legal vocabulary that often centres on limiting the power of states might risk disempowering the very actors that might be most likely to be able to deal with the problem at hand.

A second, related, critique of rights can be found among other utilitarian thinkers. In this rendition of rights critique, it is the trumping character of rights that shroud complicated trade-offs or renders it hard to strike a correct balance between interests. The explicitly deontological character of rights excludes utilitarian weighing of societal interests in some instances.[38] By placing some interests above others,

[31] Wesley Newcomb Hohfeld, "Fundamental Legal Concepts as Applied in Judicial Reasoning", 26(8) *The Yale Law Journal* 16 (1917). For an accessible modern take on some of the core insights, see Pierre Schlag, "How to Do Things with Hohfeld", 78 *Law and Contemporary Problems* 185 (2015).

[32] Bentham, *supra* (n. 30), p. 503.

[33] Bentham, *supra*, pp. 503–504.

[34] Bentham, *supra*, p. 501.

[35] Bentham, *supra*, pp. 522–523.

[36] Bentham, *supra*, p. 523: "the mortal enemies of law, the subverters of government, and the assassins of security".

[37] Perhaps a similar strain of thinking can be found in some modern international-relations realists.

[38] A classic discussion is H.L.A. Hart "Between Utility and Rights", 79(5) *Columbia Law Review* 828 (1979). For a

meaningful evaluation of important societal choices is shrouded or rendered unachievable.[39]

An often invoked (but perhaps not particularly illuminating) example of a utilitarian argument against rights common in philosophy class is the ticking bomb scenario: The example paints a picture of a terrorist having placed a bomb that is about to kill a large group of people. The question is whether torture in order to get to the location of the bomb and disarm it can be justified.[40] As is commonly pointed out, the argument loses much of its power since we normally do not know for certain if someone holds information that they refuse to divulge. Neither do we know much about the effectiveness of torture in extracting it.[41]

An example that might resonate more for lawyers concerns human-rights law prohibitions on amnesties as a part of peace agreements.[42] The case law of the Inter-American Court of Human Rights has been much discussed from this perspective, as this court has taken a strict position on such amnesties.[43] By outlawing amnesties as a way to protect against impunity, it has been argued the Court has placed peace processes in peril.[44] In this context, it becomes clear that a deontological rights-based argument can be contrasted with a plausible broader utilitarian idea of human well-being.

Consequentialist critiques of rights are not just a historical phenomenon. A well-known modern take on right-critique from a utilitarian perspective is offered by Richard Posner. He claims that a focus on a country's human-rights record has crowded out interest in whether countries pursue policies leading to human welfare.[45] This critique suggests that the focus on a particular set of rights leads to worse overall results.

A takeaway from the utilitarian critique for the rights of nature movement might be that the deontological "trumping" character of rights make them less helpful for pushing projects of complicated social engineering. Where the main agenda is simply to protect a river, legal rights might be a helpful strategy. But where a trade-off is at stake between the river and the (perceived) need for hydropower in order to phase out coal-powered plants is at stake, rights discourse might rather simply shift power away

discussion on different utilitarian positions on rights, see Allan Gibbard, "Utilitarianism and Human Rights", 1(2) *Social Philosophy & Policy* 92 (2009).

[39] However, with the modern expansion of rights, in particular in the European context, the situation at times appears to be the opposite of precluding weighing. Instead, there typically seems to be several rights that can be invoked, leading to a perpetual situation of balancing, shifting power to the adjudicator. See Lars Karlander, *The ECJ's Adjudication of Fundamental Rights Conflicts: In Search of a Fair Balance* (Uppsala 2018) diss.

[40] For a far-reaching discussion on different aspects of the example, see Yuval Ginbar, *Why Not Torture Terrorists? Moral, Practical, and Legal Aspects of the "Ticking Bomb" Justification for Torture* (Oxford University Press 2008), in particular chapter 3 (about consequentialist arguments).

[41] The unrealistic nature of the scenario is discussed in Ron E. Hassner, "The Myth of the Ticking Bomb", 41(1) *The Washington Quarterly* 83 (2018).

[42] For a discussion, see Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights", 12 *German Law Journal* 1204 (2011).

[43] In *Barrios Altos v. Peru*, Judgment of March 14, 2001 (Merits), the Court held, at para 41: "This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

[44] For one out of many discussions (dealing both with amnesties before the ICC and the Inter-American Court of Human Rights), see, Peter Burbidge, "Justice and Peace? – The Role of Law in Resolving Colombia's Civil Conflict", 8 *International Criminal Law Review* 557 (2008). See also Binder, *supra*.

[45] Richard Posner, "Human Welfare, Not Human Rights", 18 *Columbia Law Review* 1758 (2008).

from other forms of politics to the adjudicator. Similarly, it might be hard to say if judicializing rights of nature will mean protecting the lands of indigenous people when their lands hold minerals that are imagined to be useful for green transition or seen as ideal placements for wind power plants. Where many interests that can be seen as environmental are at play, the deontological character of rights tend to revert back to weighing of interests or judicial "balancing". Whether it is in the interest of an environmental group to empower lawyers to make such decisions of course come with its own set of strategic considerations.[46] The strategic question might often be to which extent the relevant judge perceives the relevant "appropriate balance" or "weighing" in a similar way as the environmental group.

A third important early critique of rights springs from the Marxist tradition. In his essay *On the Jewish Question*, Karl Marx argues against the position of a contemporary scholar who claimed that Jewish emancipation could come only after Jewish people relinquished their religion and thereby could acquire civil rights.[47] In essence, the complicated and much-debated position of Marx argues against that Jewish people should not have to relinquish their religion to become equal citizens, but also – which is the central issue for the current text – the text more generally critiques rights as an emancipatory language.[48] In this part of the text, Marx highlights the rights in the French Declaration as being those of the "egotistical man, of the man who is separated from men and from the community".[49] In a surprisingly similar vein as Bentham, he highlights that the right to property is constructed so as to give those that hold it an individual right against other individuals and thus "allows each man to find in the other not the *actualisation*, but much more the *limit*, of his freedom".[50] The sort of freedom created by rights on this reading thus serves to uphold a separate individual sphere which does not acknowledge the need of humans to operate as social animals (what Marx calls species-beings).[51] A reading of the critique is that Marx held that rights discourse helped enforce a system where members of civil society were led to direct their claims to a legal sphere were they got splintered and depoliticalized.[52] Political emancipation by way of rights, on this account, did not entail true social emancipation.[53]

I have found a recent text by Wendy Brown helpful for thinking about Marx's rights critique. Her reading highlights how rights-projects tend to embody liberal political values, in spite of them often being discussed as ahistorical and universal.[54] This political background implies that turning to rights to combat one's subordination also changes the identity and goals of the rights-claimer.[55] For such reasons, this rights

[46] Koskenniemi "The Effect", *supra*, p. 150: "As politics lose their creative, 'imaginative' character, they are transformed from their core sense as human *vita activa* into an exercise of technical competence by experts". See also, pp. 142–145 about balancing,

[47] Karl Marx, "On the Jewish Question", in Joseph J. O'Malley and Richard A. David (eds.), *Marx: Early Political Writings* (Cambridge University Press 1994).

[48] Marx position in the text is largely debated since he, in spite of defending Jewish interests, enforces stereotypes about Jewish people. There is a large literature debating Marx relationship to his partly Jewish upbringing in general and about the stereotypes in this text in particular. See, for example, Solomon F. Bloom, "Karl Marx and the Jews", 4(1) *Jewish Social Studies* 3 (1942).

[49] Marx, *supra*, p. 44.

[50] Mars, *supra*, p. 45 (emphases in original).

[51] Marx, *supra*, p. 46.

[52] Marx, *supra*, pp. 48–49.

[53] Marx, supra, p. 50.

[54] Wendy Brown, "Rights and Identity in Late Modernity: Revisiting the 'Jewish Question'", in Thomas R. Keams (ed.), *Identities, Politics, and Rights* (University of Michigan Press 1995), pp. 86–87.

[55] Brown, *supra*, pp. 90–91. In this respect, she outlines in some detail two interesting critiques of attempts to resuscitate rights discourse.

critique has been employed to caution against confusing, first, rights with the arena of political contestation and, second, of confusing legal recognition with obtaining one's emancipatory goals.[56]

The early Marxian rights critique potentially contains some seeds of his later thinking on alienation in the sense that he imagines rights to individualize and break up political groups. This seems to hold a lesson for the rights-of-nature movement. Perhaps the rights-approach misses more potent political ways of collective organization? Moreover, his analysis foreshadows other later similar critiques of rights discourse in outlining how protecting a private sphere against the state comes with its own costs, in particular with respect to entrenching property rights. Perhaps another takeaway from this rights critique for environmental groups could be that rights often sound more radical than they are. Or, put differently, that there is something about rights discourse that makes it a powerless companion when embarking on a project of deeper structural change. One reason for this might be the tendency of rights-thinking to direct negative claims against the state (as outlined above). It is hard to use that form of law to reshape the economy at its core. In the way that Marx's later project was one of deep change to the economic system, this also goes for many present-day forms of environmentalism. After all, both degrowth and green transition are about remaking the economy, albeit in fairly different ways.

Later forms of rights critique

With the spread of human rights thinking globally after the Second World War, the project became more explicitly universalist. As discussed above, much indicates that it is only at this point in time that the idea of human rights takes on a more universal meaning and starts spreading around the world. In the influential reading by Samuel Moyn, human rights start spreading at this point in time as a less political alternative to the Capitalist-Communist power struggle of the Cold War. Starting the with Universal Declaration of Human Rights in 1948 and peaking around the year 1980, human rights takes over other forms of emancipatory languages, such as revolutionary nationalism.[57] With the spread of human-rights language in the post-World War world, new critiques of the discourse emerge.

One such critique focuses on cultural relativism. Perhaps an obvious response to the global dissemination of a set of legal ideas from the North-Atlantic world, scholars and activists started noting the particular cultural, historical, and contextual politics of human rights when transplanted to other parts of the world.[58] The relativist challenge in essence consists in numerous ways of highlighting that the human rights projects arises from particular political contexts and therefore enforces particular political priorities: for example, the project prioritises civil and political rights over economic ones;[59] it focuses on the rights of individuals (as opposed to groups);[60] and it does not sufficiently take into account the values present in non-Western societies,[61] to name a few.

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[56] Brown, *supra*, p. 129.

[57] Moyn, *supra* (n. 5), in particular the instructive graph about the spread of the idea of human rights in Anglo-American news on p. 231.

[58] For an overview, see Alison Dundes Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights", 7(4) *Human Rights Quarterly* 514 (1985), in particular footnote 1, citing many further sources.

[59] Philip Alston, "The Universal Declaration at 35: Western and Passé or Alive and Universal", 31 *International Commission of Jurists Review* 60 (1983), pp. 64–65.

[60] Alston, *supra*, pp. 63–64.

[61] Bonny Ibhawoh, "Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse", 19(1)

The cultural relativism critique was fairly prominent in scholarship for a while. Many legal academics wrote articles about how the positions could be reconciled or how the cultural relativism position did not have to affect the legitimacy of human rights etc.[62] Perhaps for that reason, the critique was somehow dismantled. Perhaps it declined because of the focus on the international agenda on questions of economic development, including on the (largely ineffective) "right to development".[63] While development projects were central in many domestic contexts, it seems the internationally recognized *right* to development in the end did little to further this agenda.[64]

An insight from the cultural-relativist critique that can be harnessed by the rights-of-nature movement, is to investigate more closely what the political stakes of rights discourse are in a particular context and think hard about how the appeal to legal rights compares to other available framings. To name a few, it might be that intergenerational justice, appeal to the Anthropocene, or critiques of corporate power or carbon capitalism, might constitute more helpful framings for diverse environmental projects.[65] Of course, for some forms of environmental projects in some contexts, the rights approach might be the most helpful one.

A critique loosely related to the one on cultural relativism came from post-colonial quarters. As the rise of human rights as a dominant emancipatory language coincided with the wave of decolonization after the Second World War, it makes sense that these in certain ways became linked. It is not uncommon to credit human rights for the decolonization wave that took place after the Second World War.[66] However, postcolonial scholars often see a darker role of the effects of universalising human rights, distorting the voices of the Global South.[67] Ratna Kapur writes: "Assertions about the universality of human rights simply deny the reality of those whom it claims to represent and speak for, disclaiming their histories and imposing another's through a hegemonising move".[68] The critique asserts that universal rights discourse distorts the very stories that have to be told to claim justice in a postcolonial context.

One way of rendering such a critique in a commonsensical form is by reference to the dominant framework of human rights described above. Recall that legal human rights mainly

Netherlands Quarterly of Human Rights 43 (2001), discussing both "Asian values" and "African values".

[62] Guyora Binder, "Cultural Relativism and Cultural Imperialism in Human Rights Law", 5 *Buffalo Human Rights Law Review* 211 (1999); Jack Donnelly, "Cultural Relativism and Universal Human Rights", 6(4) *Human Rights Quarterly* 400 (1984); and Ibhawoh, *supra*.

[63] For an analysis that foreshadows this, see Alston, *supra* (n. 59), in particular pp. 68–69.

[64] Rather, other questions stood centre stage on the agenda of law and economic development, see David Kennedy, "The 'Rule of Law', Political Choices, and Development Common Sense" in David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006).

[65] On framing in a legal context, see Schlag and Griffin, *supra* (n. 3), chapter 2. On the anthropocene and rights of nature, see Seth Epstein, "Rights of nature, human species identity, and political thought in the anthropocene", 10(2) *The Anthropocene Review* 1 (2022).

[66] For example, Jan Eckel, "Human Rights Decolonization: New Perspectives and Open Questions", 1(1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 111 (2010), p. 111: "unlike in the interwar years, the ideal of human rights was now available as a possible justification for the colonies' struggle for freedom and as a potential supporting ideology".

[67] The difficulties in representing postcolonial voices and the risks of them being co-opted by other powerful groups is famously discussed in Gayatri Chakravorty Spivak, "Can the subaltern speak?" in Patrick Williams and Laura Chrisman (eds.), *Colonial Discourse and Post-Colonial Theory: A Reader* (Columbia University Press 1994).

[68] Ratna Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side", 28 *Sydney Law Review* 665 (2006), p. 674.

operate to provide negative rights to citizens against their state. Now imagine you as a person seeking justice in a newly independent post-colonial state. Colonialism was largely an economic system whereby the former colonizer extracted value from the labour and resources of your people and land.[69] Under such circumstances, you might want to address your collective grievances towards the former colonial power to undo that economic structure. However, under the dominant model of legal rights, redress instead has to be sought (individually) *from* the postcolonial state. The dominant form of rights discourse thus shifts the main target of grievances from the formerly colonizing to the formerly colonized state. Instead of channelling such grievances collectively thorough the post-colonial state, the relevant rights-holders are now formerly colonized individuals (and potentially other legal persons). Furthermore, instead of directing such claims against the colonizer, the natural actor to claim justice from becomes the post-colonial state.

Another set of critiques emerging largely in the post-war era came from feminist thinkers. These emphasised that human rights tended not to highlight the difficulties women experienced or at least to prioritize the form of rights available to men.[70] One particularly salient critique coming from these thinkers highlights how taken-for-granted ideas about public and private enabled rights to operate more in a public (male-coded) sphere than a private (female-coded) sphere.[71] Discrimination law, to take a concrete example, can only achieve limited effects in the dominant framework, as it often mainly addresses claims against the state. Furthermore, rights even operated to shield a private sphere, where much of the oppression of women took place, according to feminist thinkers.[72] In a quote that transcends the particular gender context it emerges from, Frances Olsen holds that "any effort to keep the state out of our personal lives will leave us subject to private domination".[73] The quote gives voice to a form of analysis that has something in common with the different discussed critiques with respect to property above, but also extends it to other forms of private-coded areas, such as the home (where much domestic violence takes place).

Much can be learnt for rights of nature proponents from these forms of critique. Rights tend to shield a private sphere from intervention. When the problem one wants to deal with is located there, rights might not do what you imagine them to do. In particular, this applies to situations where environmental proponents want to influence behaviour taking place within the private sphere of individuals or corporations.[74] This could concern questions regarding consumption choices or corporate choices about

[69] For an illuminating treatment, see Erik S. Reinert, *How Rich Countries Got Rich… and Why Poor Countries Stay Poor* (Constable 2007), in particular p. 133 (on the economic aspects of colonialism).

[70] An influential treatment is Hilary Charlesworth, "Feminist Approaches to International Law", 93(2) *American Journal of International Law* 379 (1999), in particular, p. 381 *et seq*. See also, Shazia Qureshi, "Feminist Analysis of Human Rights Law", 19(2) *Journal of Political Studies* 41 (2012).

[71] Celina Romany, "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in international Human Rights Law" in Rebecca J. Cook (ed.), *Human Rights of Women National and International Perspectives* (University of Pennsylvania Press 1994).

[72] Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis", 63(3) *Texas Law Review* 387 (1984).

[73] Frances Olsen, "Liberal Rights and Critical Legal Theory: A Feminist Perspective", in Christian Joerges and David M. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (Nomos Verlagsgesellschaft 1989), p. 251.

[74] For another relevant related critique of how public-private distinctions can shield certain interests from intervention, see Cutler, A. Claire, "Artifice, ideology and paradox: the public/private distinction in international law", 4 *Review of International Political Economy* 261 (1997).

investment or between technologies with different environmental impacts. Under such conditions, rights discourse might be a part of the problem rather than the solution. Moreover, the broader question of how rights discourse construes how we view problems is also a relevant one with respect to rights of nature.

Which forms of critique might be most relevant for the environmental movement?

There are a number of common strains of thinking in the above-discussed rights critiques. Several of the critiques highlight how human right operate according to taken-for-granted public-private dichotomies. Several of them indicate how rights language is likely to crowd out or direct attention away from more effective forms of political organisation. Several of them highlight how using rights may also have unforseen repercussions that are invisible to many thinkers or activists. Several critiques indicate the centrality of how the idea of property rights shroud central political stakes. Several of the critiques seem to view rights discourse as an appealing but ultimately fairly powerless vocabulary for many projects.[75] When starting to investigate how these strains of critique might apply to rights of nature, some tentative groupings of these critiques come to mind.

First, certain types of critiques turn on the risk of resorting to the law as a substitute. Sometimes, you can get a right *instead* of the thing you wanted – almost as a recognition of the lack of something important. In the case of rights of nature, there is a risk you might achieve something like an abstract right to a clean environment, instead of a clean environment. Second, there is a risk of the right at hand not doing what you want it to. Because of the attractiveness of legal rights in political struggle, there is the risk of uncritically resorting to them. The main idea in this article is to provide information that allows for a thoughtful examination of this exact question. Here, we might imagine situations where the appeal of rights makes activists push an agenda where they get a fairly insignificant token instead of the overarching environmental goal. Perhaps rights can be used to force some environmental adjustment (in particular where they fit into the dominant framework), but still often may be a far cry from creating systematic change that can limit something like biodiversity loss. Third, there is the risk of rights doing *another* thing than you wanted them to. This is a stronger critique than not simply achieving your main aim. In this set of critiques, we might find arguments that tapping into the main form of legal rights help reinforce the very interests that you attempt to combat. One such effect might be that carrying out your struggle in the language of rights might strengthen interests that are contrary to certain environmental interests. In particular where the environmental agenda turns on changing the economy, one must consider the ability of rights discourse to also grant rights to core economic actors, such as corporations.

Another such effect might be to accidentally shift power to unforeseen groups. First, and perhaps most obviously, this might mean strengthening the hand of lawyers. In particular, in legal areas where there are many rights, the inevitable balancing that ensues might shift decision-making power to this group. In this respect, I think environmental movements should think about whether they perceive this to be a group that is

[75] I have previously tried to indicate how legal research can be helpful in the context of sustainable development, see Love Rönnelid, "What legal research in sustainable development could become", in Mattias Dahlberg, Therése Fridström Montoya, Mikael Hansson, and Charlotta Zetterberg (eds.), *De lege 2022 Hållbarhet* (Iustus 2023). Some of those ideas resemble the ones in this section, in particular on the risks of a language becoming detached from meaningful truth-claims.

likely to long-term strengthen their agenda.[76] This is not an obvious question and will in all likelihood differ depending on which environmental agenda we are contemplating. Second, in some situations an emphasis on legal rights discourse might come with a(n unintended) strengthening of the hand of private interests that are opposed to the relevant environmental project, for example due to the substantive or procedural rights that legal rights grant humans and corporations.[77] Depending on the project at hand, this risk might differ in importance. Strengthening the hand of those owning corporations in oil, coal, and gas seems an important obstacle for green transition or degrowth. However, when combating state action with respect to the use of some particular part of the natural environment, this might be less of risk.

Another strain of thinking that might be helpful is the loss of imagination about how societies can be transformed. The striking appeal of rights might make them attract political attention even when they are not the most helpful tool. Conversely, rights-discourse taking centre stage might *indicate* a loss of imagination about the concrete legal, political, and institutional changes needed in order to protect some environmental interest. In some instances, perhaps the skills of lawyers in imagining new legal-technical solutions to societal problems might be better served by thinking about how to reimagine property rights, reconstructing financial or insurance law, or imposing concrete environmental obligations on the most disruptive actors.

One characteristic of rights is that they mostly operate to (negatively) stop the state from doing things. They are by their very nature not suited for (positively) *constructing* more societally complex forms of institutional change.[78] For example, green transition (in its typical rendition) requires figuring out several sets of complicated governance choices. In that context, accessing the power of trumping other choices might seem powerful, but might risk reaching for a vocabulary whose main power is to stop things. Let us take as an example the common idea of green transition as policy that will successively make it harder, more costly, or prohibited to use oil, coal, and natural gas – while simultaneously incentivizing the use of green technologies, electrification, and modes of production and transportation that emit less greenhouse gases. This type of setup can probably only with great difficulty be carried out only or perhaps even mainly by stopping things.[79] The intended mix of sticks and carrots therefore appears hard to achieve through invoking rights. Potentially, some carrots can be created where the money is taken from the government, but would require for lawyers to litigate for positive rights. And one can theoretically imagine using rights as sticks as well, but mainly if they create obligations for the government. The more important sticks for private parties (in this case

[76] A helpful place to start for thinking about strategic litigation in this respect is, Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", 9 *Law & Society Review* 95 (1974). I have applied this framework to strategic litigation in another context, see Love Rönnelid, "The Distributive Impact of Third-Party Funding in Investment Arbitration", 1 *Juridikum – Zeitschrift für Kritik, Recht, Gesellschaft* 125 (2021).

[77] For a related (albeit different) analysis, see Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13(4) *European Journal of International Law* 815 (2002).

[78] Perhaps for this reason, many courts have resorted to sending questions back to the legislator in important environmental cases. For a discussion of this approach, see Agnes Hellner and Yaffa Epstein, "Allocation of Institutional Responsibility for Climate Change Mitigation: Judicial Application of Constitutional Environmental Provision in the Europe and Climate Cases *Artic Oil*, *Neubauer*, and *l'Affaire du siècle*", 35 *Journal of Environmental Law* 207 (2023).

[79] Some other, less politically salient ways of tackling climate change, such as degrowth, appears even less achievable through the dominant form of rights.

oil, coal and gas corporations) would require deep changes to the current legal imaginary about rights. If one imagines green transition to require a certain societal acceptance, it would seem to require difficult political compromise that would not necessarily be helped by legal intervention by way of legal rights.[80]

A related insight is that rights discourse typically identifies governments as targets. For some environmental projects this might be problematic, because much environmental destruction is not directly created by the state – even where the state is in some sense enabling it through the current legal system. In many instances, one can imagine that directing the obligations against third parties might be a significantly more effective way of making rights of nature effective.

To sum up, there seems to be numerous insights for the rights of nature project from different kinds of rights critique. Hopefully, this sort of text could be the point of departure for a deeper discussion on the viability of rights of nature as an effective form of environmentalism. Hopefully, the text can contribute to increasing strategic awareness of actors thinking about these types of claims, allowing them to litigate better. This could happen for example by explicitly challenging the dominant form of legal rights or by finding non-rights legal strategies. Due to the current state of the globe, these questions can hardly be much more urgent. Time and energy in this arena should be spent on effective strategies.

[80] For a common take discussing the need to find political acceptance for green transition, see Jeffrey D. Sachs, Guido Schmidt-Traub, Mariana Mazzucato, Dirk Messner, Nebojsa Nakicenovic, and Johan Rockström, "Six Transformations to achieve the Sustainable Development Goals", 2 *Nature Sustainability* 805 (2019). I have commented on some difficulties with this point of view, in Rönnelid, *supra* (n. 75), p. 282 *et seq*.