Introduction

Environmental Human Rights in the Anthropocene

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The title of this volume applies the increasingly popular concept of the *Anthropocene*[1] to what have come to be known as *environmental human rights* (EHRs) (Knox et al., 2018; May, 2020; May & Daly, 2014, 2019). At its core, the Anthropocene reflects the idea that the human and non-human elements of the earth system have become so completely intertwined that no change can occur in one without impact on the other (Young et al., 2017). This new state of affairs imposes upon us a responsibility our species has never faced – that of determining both own our fate and the fate of all living things, and the role that law plays in the mix of environmental law and governance (Kotzé, 2017). However, with great responsibility sometimes comes great opportunity. If every *environmental* challenge is now also a *human* challenge, it may be that human interests and the interests of the non-human (or, more-than-human) environment are gradually converging (Baber & Bartlett, 2015). If so, then the protection of human rights may afford new opportunities to protect the environment (and vice versa). It remains to be seen whether we are astute enough to recognise those opportunities and take advantage of them.

There is at least some reason for optimism. It stands to reason that as this convergence continues it should be most readily identifiable in the areas of humanity's most fundamental and urgent needs – in precisely those areas that are of central concern to defenders of human rights (Baber & Bartlett, 2020). What is needed, then, is an *analytical framework* that will allow us to both recognise the opportunities that this convergence may offer and to map the contours of those opportunities so that it they can be successfully exploited.

In this introduction, we adapt the existing research on legal opportunity structures (LOS) for cross-cultural use in identifying *environmental rights opportunity structures* (EROS) and evaluating their potential for the advancement of environmental human rights (EHR). An EROS is a configuration of normative, sociopolitical, and institutional circumstances that are supportive of civil society

interventions into environmental decision-making through either litigation or participation in legislative/regulatory processes.

While these configurations vary in each polity, there is already evidence to support the assumption that they are likely to vary within recognisable patterns. The rising level of interest in potential synergies between the promotion of human rights and pursuit of the United Nations Sustainable Development Goals (SDGs) is one such pattern (Knox, 2015). The wave of environmental constitutionalism (EC) that has resulted in the entrenchment of the right to a "healthy" (or "clean" or "sustainable") environment in many of the world's national constitutions is yet another (Daly & May, 2018; May, 2005, 2020; May & Daly, 2014, 2016; Turner et al., 2019).

If a systematic and comprehensive analytical framework can be developed to help explain instances of sustained (even successful) EHR advocacy, it may eventually serve as a guide for those who wish to actually *transform* EROS patterns through action-oriented research and research-driven advocacy at multiple levels of governance. However, at this early stage, developing the ability to document causal chains that explain EHR outcomes within earth system law is paramount. As a first step, it is essential to describe in more detail the analytical approach that is suggested by the concept of an environmental rights opportunity structure.

The concept of *legal opportunity* and its development into the analytical framework of LOS first appeared in the study of law and its impact on the development of social movements (Hilson, 2002). Its original elements included access to the courts (which may be affected in particular by the law on standing or *locus standi*); various litigation costs rules; legal stock or the set of available precedents on which to predicate a case; and judicial receptiveness to the arguments that legal intervention requires. The concept's initial function was to distinguish, analytically, between legal factors and political considerations (understood as *political* opportunity). The concept soon appeared in both environmental (Vanhala, 2012) and human rights (Suh, 2014) research as well as the study of other areas of social movement activism.

As the LOS concept diffused from specifically legal to more broadly social scientific research, its original focus on characteristics of governmental institutions (primarily judicial) broadened to include considerations of rhetorical framing, sense of grievance, and ability to mobilise resources (Andersen, 2009). With the addition of these sociological variables, the legal opportunity structure became an even more useful framework for explaining decisions of social movement organisations (SMO) to engage in litigation as a complementary strategy (or tactical alternative) to lobbying.

However, even this expanded version of LOS is not sufficient to meet our present challenge. The values, perspectives, and priorities of those who govern and those who lead SMOs (even if taken in combination) are not coextensive with the normative and social commitments that animate an entire polity. For some purposes, perhaps, that gap might safely be ignored. However, neither human rights advocacy nor environmental protection afford us that option because both endeavours are normatively fraught, and unavoidably so.

It might be thought unproblematic – even unremarkable – to observe that human rights are necessarily normative. However, it will be helpful for our purposes to be more concrete about the matter. From a normative perspective, human rights can usefully be conceived of as summations of "natural emotional dispositions" that amount to a multifaceted form of altruism, which "can be fostered and institutionalized by cultural means, in various forms of socialization" (Gregg, 2016). Like other kinds of law, rights are anchored in (but not coextensive with) some form or another of social consensus respecting the *legitimate* exercise of authority. Whether authority is legitimated on rational, traditional, or charismatic grounds, law represents a belief in the legitimacy of that authority and the coercive forms it often takes (Weber, 1978, pp. 215–16). The balance of those forms of legitimation and the precise contours of the legal order they support is, of course, culturally specific.

As elements of those legal orders, rights operate as a form of "final vocabulary". They are (among other things) rhetorical trump cards that we use when we want to abbreviate the justificatory regression that highly charged political disputes often seem to impose upon us (Baber & Bartlett, 2019). However, as legitimate (and sometimes necessary) as that use of rights talk can be, it is important to remember that it involves the "thinning down" (through abstraction) of what was originally a thick form of local normativity. This thinning makes our notions of rights more "portable" – easier for us to carry across borders, international and otherwise. The danger, however, is that we forget about the normative content we leave behind and misread the norm onto communities of belief into which we venture. When we do that, human rights talk risks losing the capacity for self-critique that is central to rights that are acknowledged to be "social constructions initially valid only locally" (Gregg, 2012, p. 74). And, the risk is not merely that we will misinterpret or ill-serve the other normative communities we encounter. It is, rather, that we will lose sight of the fact that *all* normative communities subscribe to locally valid norms but that this "does not preclude the possibility of creating shared standards of argument and judgment" and even "plausible criticism across political communities or cultures" (Gregg, 2012, p. 75).

Our other substantive field of interest, environmental protection, may be less obviously normative than human rights advocacy. However, even so basic an

environmental concept as "sustainability" can fairly be viewed as a *Grundnorm* – based on "the proposition that respect for planetary boundaries defining the safe operating space for humanity with respect to the Earth system constitutes a moral imperative in the Kantian sense" (Young et al., 2017). In fact, a core project for the environmental movement in the decades ahead is to rescue sustainability from its fate as an empty signifier – rendered devoid of any normative meaning at all in the hands of a global technocratic elite (Baber & Bartlett, 2019). This task, as crucial as it may be, is but one of many that the inherent normativity of EHR advocacy poses for our efforts to promote rights-respecting and ecologically sustainable legal institutions and apply them to the diverse social, political, and economic issues that threaten each of us and our planet (May & Daly, 2018). We will explore some of these challenges in the chapters that follow. The task of these chapters is not to explicate the EROS analytical framework, or any other intellectual construct. Rather, our objective is to better understand the environmental human rights *problematique*, circling back only at the conclusion to a summary of the opportunity structures for the advancement of environmental human rights that our explorations may have revealed.

The chapters in the first section of this volume lay some conceptual groundwork for a better understanding of the EHR opportunities that may be available to us. In Chapter 1, Michelle Scobie describes the rationale for and foundation of environmental human rights in the Anthropocene. Her chapter examines the nature of environmental rights, distinguishing between the rights of the environment and the human right to the environment. And, although the Anthropocene is the historical context and trigger for the growing environmental degradation and of the need for an urgent international response to protect substantive and procedural environmental rights, Scobie raises the disquieting possibility that the Anthropocene may also mask the true nature of environmental rights challenge in the modern age. It may not be humans per se that are the problem. Rather, it may be the normative biases and conceptual blind spots of our institutions that pose the central problem. Scobie concludes "that despite legal and political objections, environmental rights are increasingly recognised at both international and national scales as a new category of rights, largely driven by a greater concern for the environment and environmental justice".

Next, in Chapter 2, Bridget Lewis describes how to account for impacts on future generations. These problems exist today but have effects that reach across decades. Climate change is an obvious example. In other cases of environmental degradation, the full consequences of our current actions may not manifest themselves for some time, or may present risks to human rights only after some threshold impact on the

environment is reached. This poses the wicked problem of protecting the human rights, proactively, of persons who have yet to be born. How can we protect the rights of those who in the very nature of things cannot appear on their own behalf? Should we even try? Lewis concludes that "[t]o protect the interests of future generations effectively, environmental human rights frameworks need justiciable rights that protect against long-term environmental harm accompanied by principles and processes to enable legal enforcement of those rights".

Concluding the first section, in Chapter 3 Peter Gottschalk tackles the question that most environmental human rights advocates avoid like the plague – does nature, itself, have rights? While the popular imagination is piqued by this notion, scholars of EHR dodge it when they can for the same reasons that people who view themselves as strong allies usually avoid the few issues about which they actually disagree. Gottschalk removes the "human" from EHR long enough to do justice to the concerns of rights-of-nature advocates without adopting their ontology (much less, their metaphysics). By focusing on the issue of biodiversity, he shows a path by which the careful use of existing human rights conventions can produce narratives in which humans represent the rights of the more-than-human environment on terms that require no dubious assumptions – about either humans or nature.

These three chapters serve the purpose of describing the environmental human rights terrain and drawing boundaries around it that are reasonably clear without being completely impenetrable. EHR is presented as an arena in which human institutions are confronted by human norms and values. It does not, however, exclude the possibility that those who are in the arena at any given time can reasonably and legitimately act on behalf of those who are not. And, it provides a foundation for our exploration of the next analytical element of environmental rights opportunity structures – the levels of governance at which their institutional content is to be found.

Several of the contributions to this volume employ a technique familiar to EHR advocates – the piecing together of elements of existing human rights agreements into an argument in support of a right not already recognised to be part of those agreement. Exploring the "penumbra" of legal texts in this way is likely to remain a part of EHR advocacy for as long as human language falls short of complete clarity and human policy-making remains less than perfectly prescient. But many in the field wish to create a more direct approach by explicitly declaring an omnibus human right to a clean and sustainable environment – either in a widely adopted international convention or by replication in the fundamental documents of governments below the international level.

In the second section our exploration of the implementation dimensions of EHRs begins in Chapter 4 with a discussion by José Juste-Ruiz and María del Mar

Requena Quesada regarding the prospects of and alternatives to a Global Pact for the Environment (GPE). While the GPE is but one example of the form that such a convention could take, it is useful for our purposes because it has been developed sufficiently to permit focus on the conceptual and practical implications of the international convention approach to securing environmental human rights. Juste-Ruiz and Requena Quesada conclude that "the draft GPE can serve as a basis for further discussions on possible responses to the environmental challenges of the Anthropocene [and] that the forthcoming political declaration should incorporate ambitious provisions to protect environmental rights and halt environmental deterioration in the Anthropocene". James R. May then turns in Chapter 5 to the complementary and central role Social, Economic and Cultural Rights – such as the right to life, dignity and health – can play in environmental contexts associated with the Anthropocene. He notes that courts and tribunals around the globe have utilised SECRs to engage a variety of environmental concerns, including access to clean water and healthy air, pollution control, biodiversity protection, and climate change, often with EHRs in the lurch. He concludes that "[t]here are advantages to deploying classic SECRs in the Anthropocene. SECRs exist without need for further political declaration or resolution, a global pact, multilateral recognition, domestic constitutional incorporation, or lack of judicial acceptance or acumen. SECRs are here and now, standing at the ready to address Anthropocentric challenges." With this foundation, in Chapter 6 Martha F. Davis homes in on the implications of the EHR discourse for governance at the city level. Her analysis positions cities directly in the cross-fire between the ongoing Paris Agreement process and the pressures on cities around the world to perform the roles expected of them in pursuing the SDGs. The presence of EHR language in both of those documents, fortunate as it is, actually does little to clarify the role of human rights in navigating the uneven terrain between the climate crisis and the demands of economic development. As Davis shows, cities face a constant pressure to focus on the technocratic when the secret to our EHR success may be the pressure from below that cities could generate if they are able to keep EHR concerns firmly centred in their development discourses.

May had suggested that pursuing environmental human rights requires changes in both institutional practice and social norms that have complex preconditions for success. This is, obviously, no small challenge. And, in the third section, we explore several of those challenges in greater detail, when we turn from the institutional considerations of governance to its grittier social, economic and political issues. If our normative considerations have suggested *what* and *why* questions environmental human rights pose and our institutional speculations the *where* and *how* of addressing them, then socioeconomic variables pose the issue of *who* must be at the table when decisions are made.

One important aspect of the "who" question is presented by Margot Hurlbert in Chapter 7. When previously excluded participants (like indigenous peoples) come to the table, they bring more than a new set of socioeconomic interests and a new political dynamic. They also bring a new normative orientation grounded in their unique historical experience. And, they may also bring a new suite of institutional options – a new inventory of potentially winning arguments – that can produce changes in both the cognitive and political ground of the discourse at hand.

The potential importance of such change is made even clearer in Chapter 8 by Ottavio Quirico's subsequent discussion of the right to a sustainable climate. The fact that climate change comes as close as any issue ever could to being a universal human interest offers no guarantee that partial and sectoral perspectives will not crowd out more impartial and universal outlooks. If we allow that, we will (as he suggests) lose for any of us the sustainable climate that can only be achieved if it is achieved for all of us.

To conclude the section, in Chapter 9, Emily Reid brings the "who" question into sharper focus by returning to the subject of sustainable development. Her explication of a partnership-driven approach to achieving sustainable development goals provides a fine appreciation of the potential for more meaningful inclusivity in development planning and implementation.

Finally, in the fourth section (Chapter 10), Walter F. Baber returns to the EROS analytical framework put forward earlier in the Introduction, showing how guarded but useful conclusions about the future of EHR can be pulled together from the varied explorations the contributors have undertaken. In closing, Baber remarks: "invoking the twin concepts of advocacy-research and research-advocacy … suggests an important future element in the development of environmental human rights research that traces new paths from the local through the national and towards the global, and from policy theory to political practice and back again".

Notes

1 As of 5 December 2019, a key-word search of *Academic Search Complete* returned 5,474 citations since 2010.

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1

Framing Environmental Human Rights in the Anthropocene

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1.1 Introduction

One of the defining characteristics of the Anthropocene, characterised by a new and destructive human–nature relationship, is that for the first time in humanity's history, the access to a clean and healthy environment is uncertain for large groups of persons and ecosystems. This transformational shift in humankind's relationship to nature was the catalyst for a debate between scholars, policy-makers and environmental and human rights activists on whether there is a right to the environment and who would be the right and duty holders. To the extent that the intrinsic value and agency of nature is recognised, there is also the related question of the rights of nature, or the right of the environment not to suffer the effects of the Anthropocene.

What are environmental rights? The categories of human rights (see Table 1.1), environmental human rights (see Table 1.2) and the rights of nature (Villavicencio Calzadilla & Kotzé, 2018) are to greater and lesser degrees well recognised today. But what are the tensions and debates that underlie the nature and context of environmental rights, their necessity, feasibility, and use in international and national law and policy? And what are the drivers of this new category of rights?

The chapter addresses these debates in three sections. First, it defines environmental rights and discusses the types of actors and related rights that the concept incudes and cautions that using the Anthropocene as an explanatory and historical context is problematic for rights and justice debates. Second, the chapter considers the merit of recognising this new category of rights and the arguments related to the ambiguity, redundancy, enforceability and so on of these rights. Third, the chapter points to the evidence and drivers of, and inhibitors to the incorporation of environmental rights into international and national policy and law.

Table 1.1. *Chronological list of the main treaties related to international human rights*

Name of instrument	Date
1. International Convention on the Elimination of All Forms of Racial Discrimination	1965
2. International Covenant on Civil and Political Rights	1966
3. International Covenant on Economic, Social and Cultural Rights	1966
4. Optional Protocol to the International Covenant on Civil and Political Rights	1966
5. Convention on the Elimination of All Forms of Discrimination against Women	1979
6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1984
7. Convention on the Rights of the Child	1989
8. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	1989
9. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	1990
10. Optional Protocol to the Convention on the Elimination of Discrimination against Women	1999
11. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	2000
12. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	2000
13. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	2002
14. International Convention for the Protection of All Persons from Enforced Disappearance	2006
15. Convention on the Rights of Persons with Disabilities	2006
16. Optional Protocol to the Convention on the Rights of Persons with Disabilities	2006
17. Optional Protocol to the Covenant on Economic, Social and Cultural Rights	2008
18. Optional Protocol to the Convention on the Rights of the Child on a communications procedure	2011

The chapter concludes that despite legal and political objections, environmental rights are increasingly recognised at both international and national scales as a new category of rights, largely driven by a greater concern for the environment and environmental justice.

1.2 Environmental Rights in the Context of the Anthropocene

What are environmental rights and how are they related to human rights and to the rights of nature? Is the Anthropocene a good explanatory context for environmental rights? Environmental rights include the rights of humans and of nature and provide a rights-based response (Ensor & Hoddy, 2021) to the environmental degradation caused by human activity (Rockström et al., 2009). Environmental rights create