

Human Rights and the Environment: in Search of a New Relationship: Editor's Introduction

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Abstract

The 2012 Oñati Workshop, 'Human Rights and the Environment: In Search of a New Relationship', began to trace out a new, imaginative and paradigm-challenging framework calling on philosophy, legal doctrine, policy, praxis and activism and drawing them together in a coherent, but non-monolithic new socio-juridical approach to the important relationship between human rights and the environment. The workshop was part of the on-going work of the Global Network for the Study of Human Rights and Environment (GNHRE) – the largest existing network of scholars in the world specifically addressing the important nexus between human rights as the dominant global language of ethical claim and the 'environment'. In short, the GNHRE workshop at Oñati developed the on-going efforts of the GNHRE network and its partners to contribute to the important task of re-imagining the human relationship with the living world. We were incredibly fortunate to be awarded an International Workshop by the Oñati Institute for the Sociology of Law – and the papers in this collection were, in the main, presented as part of the workshop. The others (by Grear; and by Morrow, Kotze and Grant) were written later, in the light of the conversations and notes taken at the Workshop, and represent a weaving together of insights and provocations emerging from the rich discussions taking place in June 2012 in Oñati, Spain.

Key words

Human Rights and the Environment; Philosophy; Law; Praxis; Multi-level Reformulation

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Resumen

El seminario 'Derechos Humanos y Medio Ambiente: En busca de una nueva relación', celebrado en Oñati en 2012, comenzó a trazar un marco nuevo e imaginativo, desafiando paradigmas, y apelando a la filosofía, la doctrina jurídica, la política, la praxis y el activismo, que elaboren juntos un nuevo enfoque socio-jurídico coherente, no monolítico, sobre la importante relación entre los derechos humanos y el medio ambiente. El taller fue parte de la labor puesta en marcha por la Red Mundial para el Estudio de los Derechos Humanos y Medio Ambiente (GNHRE) - la mayor red existente de académicos especializados en el importante nexo que existe entre los derechos humanos como lengua global dominante de reclamación ética y el 'medio ambiente'. En resumen, el seminario de Oñati desarrolló los esfuerzos en curso de la red GNHRE y sus socios, para contribuir a la importante tarea de re-imaginar la relación humana con el mundo viviente. Fuimos increíblemente afortunados al concedérsenos un taller internacional en el Instituto de Sociología Jurídica de Oñati y los documentos de esta colección fueron presentados en su mayoría como parte del taller. Un par (por Gear, y por Morrow, Kotze y Grant) se escribieron después, a la luz de las conversaciones y notas tomadas en el taller, y representan un tejido de unión de ideas y provocaciones aparecidas en las ricas discusiones que tuvieron lugar en junio de 2012 en Oñati, España.

Palabras clave

Derechos Humanos y Medio Ambiente; Filosofía; Derecho; Praxis; Reformulación de niveles múltiples

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1. Introduction to the workshop

The GNHRE Oñati International Workshop 2012 was set up in full knowledge that the relationship between human rights and the environment remains both complex and fractious. At the institutional level, these two domains of social and legal concern still have an uneasy connection, while at the philosophical and legal level it has often been asserted that the individualism of human rights makes them ill-suited, as a moral and juridical category, to address the inherently more collective – and less anthropocentric – concerns of environmentalism. The relationship between human rights law and environmental law, likewise, remains uneven – and despite the fact that it is important to understand their concerns as being mutual in a deep sense, important points of contradiction and contestation remain vividly problematic. An additional discrepant element of the relationship between human rights and environmental law is reflected in the fact that human rights are more extensively theorised than environmental law, which tends to focus on a wide range of rather technical, regulatory responses to environmental pressures, but not – as yet – engaging with its own philosophical foundations in a sustained or critical manner. Human rights scholarship and practice, by contrast, is richly reflexive, manifesting an intense, sustained and energetic degree of contestation and theoretical disputation. Human rights scholarship is multi-faceted and multi-perspectival, and its traditional accounts and assumptions are routinely interrogated by critical, subaltern perspectives and accounts. It is also true to say that despite a growing interest in so-called ‘ecocentric’ perspective, environmental law remains largely anthropo-Eurocentric, dominated, in the main, by Western cultural assumptions and practices of law and governance. These and other tensions characterising the relationship between human rights and environmental law require addressing at a multiplicity of levels if our juridical, social and political responses to the crises and challenges of the twenty-first century and beyond are to be adequate. (A task that may well include questioning – as Philippopoulos-Mihalopoulos (2013) argues in his paper (see below) – the very *possibility* of a continuing dichotomy between anthropo- and eco-centrism.) It is precisely the multi-layered complexity of the relationships between human rights and environmental law; human rights and environmentalism and humanity and the living world, that suggests the radical importance of developing a new and coherent relationship between philosophy (including jurisprudence); legal doctrine and structures and the more fluid realms of the socio-ecological lying beyond the limitations of the legal in the relationship between human rights and the environment.

The Workshop, *Human Rights and the Environment: In Search of a New Relationship*, sought to bring together a group of scholars, lawyers and activists to work together – through wide-ranging, careful and at times uncomfortable conversation – on re-imagining the relationship between human rights and the environment in these wider, multi-layered contexts. The framework of the event was explicitly designed to move from philosophical foundations, through consideration of current legal responses and frameworks, and onwards to embrace experience-led insights emerging from embedded social activism and NGO engagements.

Theme 1: Philosophical Re-investigations. Speakers were invited to reflect upon questions concerning challenges to, and possibilities for, the philosophical reformulation of the relationship between human rights and the environment. Where might the resources be found in philosophy, social theory, legal theory and other sources of systematic reflection for building a new relationship between two juridical domains all-too-easily regarded as being inimical to each other? What conceptual frameworks or insights might assist us to respond to this complex socio-juridical challenge? (See Burdon 2013, Code 2013, Philippopoulos-Mihalopoulos 2013) (introduced below).

Theme II: Reconfiguring the Legal. Speakers were invited to reflect upon the international community's current focus on state-centric responses to the contemporary crisis and to draw out the legal and doctrinal limitations of existing approaches. They were asked to reflect upon the possibilities, themes or insights holding potential for a reconfiguration of law's response to human and environmental degradation and crises – to offer fresh ways of drawing out a deeper juridical responsiveness to human and environmental vulnerabilities. The hope was that a comparative analysis of insights drawn from different legal domains could inform a relevant, rich and collective reflection on the interactions between law and the socio-ecological imaginary, bringing into view the limitations of law and the possibilities of supra-, sub- and trans-legal strategies for coordination, adaptation and response. (See Feris 2013, Turner 2013, introduced below.)

Theme III: Activism and praxis. Speakers were invited to reflect upon a wide range of issues – anything from the effects of globalisation, the energies of environmentalism, narratives of resistance from human rights and any related movement-activisms and/or community-based perceptions of the relationship between human rights and the environment. Speakers were asked to think about the methodological insights emerging from socially-embedded case studies, to reflecting on their experience and on the potency of insights brought their own and/or other socio-cultural perspectives. This reflection could include, in particular, the sub-theme of the promise and limitations of the legal – particularly of rights-based approaches. (See Kerns 2013, and Donald 2013, introduced below.) (There was also a paper presented by Gill (2012).

Theme IV: Multi-level Reformulation. This theme was, in many ways, the most important of the four themes – and took pride of place in terms of time devoted to it, drawing together insights from the foregoing themes – and bringing the speakers and other participants present into an extended set of conversational encounters and engagements with the insights – or limits – reflected by the formally presented papers. This was the space in which the participants could search together – critically challenging each other and any presuppositions (whether shared or not) – in a search for productive relationships between philosophy, law and social praxis and for insights emerging in relation to transforming the relationship between human rights and the environment. This theme accordingly addressed a set of questions designed to provoke fresh thinking. In particular, participants were encouraged to think about the following questions: What insights and themes emerge from the papers and conversations suggesting the outline of a consistent conceptual framework and any new synergies between scholarship and action? What common challenges become visible in the process of such an encounter? Is a *common* critical account possible? If not, what can we learn from this and how can we best theorise the complexity and richness of emergent approaches to the human-environmental relationship? What further research directions and questions hold out hope for the formulation of a new relationship between human rights and the environment? (See Morrow, Kotze and Grant 2013, Gear 2013, introduced below.)

2. Theme I: Philosophical re-investigations

Burdon's (2013) paper, "The Earth Community and Ecological Jurisprudence", explicitly identifies law as both a socio-cultural construct and a key articulation of a culture's dominant self-understanding/self-presentation. He identifies Western law and legal theory as being a central problem because Western law and theory reflect a long lineage of 'anthropocentric' philosophy and theology and because the "separation and hierarchical ordering of the human and non-human worlds constitutes the primary assumption from which most Western legal theory begins (Graham 2011, p. 15)".

In response to this, Burdon seeks to offer an alternative, eco-centric analysis of law based on the ecological thought of Thomas Berry. Burdon argues that Berry's concept of 'Earth community' moves decisively away from the individualistic, atomistic conception of selves in the dominant Western tradition to provide a richer, more responsive and apt foundation for jurisprudence – an ecocentric theory of law known as 'Earth jurisprudence'. Berry's invitation to embrace the "Great Work" is a call "to carry out the transition from a period of human devastation of the Earth to a period when humans would be present to the planet in a mutually beneficial manner (Berry 1999, p. 3)", by adopting a radically holistic notion of a community of inter-relationality in which all the elements of the energetic exchange characterizing life on earth are given respect for their own intrinsic value as members of the Earth community.

Burdon (along with Berry) seeks to 'collapse' the dichotomy between human beings and the environment – offering the concept of Earth community as the foundation for an urgently needed paradigm shift – which for law, in Burdon's view – is made possible by the mutability and porosity of law as an inescapably human social project: Ontological, epistemological and ethical shifts can find expression in law, and have done so at the great turning points of the human vision throughout history. In this light, Earth jurisprudence simply requires law to flex itself again in response to a new level of understanding concerning the radical interconnectedness and mutual dependence of the entire Earth community –the protection of which is now (though in a deep sense it has always been) the fundamental prerequisite for continued human existence. Indeed, argues Burdon – the notion of Earth community should now be semantically internalized by law's most widely deployed liberatory concepts and understood to undergird and give meaning to familiar Western liberal notions such as liberty, equality and justice.

Burdon's work is solidly jurisprudential in that it explicitly engages with questions fundamental to the identification of law's justificatory foundations. Burdon is interested in exploring and transforming the grounds from which law's normativity flows. In effect, he takes our current categories of reference 'law', 'human', 'environmental' – and seeks to forge new relations between them while attempting to transform the content and meaning of settled values fundamental to liberal legality by inserting beneath these established categories and values the alternative juridical foundation of Earth jurisprudence. His, in a sense, is a noble dream – yet genuine questions remain concerning the pernicious resilience of old structures of mastery and the resistive capacity of the settled practices and patterns of power and subjectivity constructed in its service.

Code's (2013) focus is directly upon the structures of mastery and their political resilience as revealed in resistive strategies deployed in their defense – specifically in the form of the practices of epistemic domination in the context of the climate-change debate. Code addresses the theme of "Doubt and Denial: Epistemic Responsibility Meets Climate Change Scepticism" with the purpose of making the interconnections between three nodes of epistemic engagement legible. Code characterizes these nodes as being, first, the fraught and politically freighted rift between ecologists and climate-change skeptics; secondly, issues concerning the evaluation of testimony as indicators of questions concerning subjectivity, agency and freedom – and in particular, the impossibility of the abstract, 'un-located' autonomous gender-neutral subject of Western epistemology; and finally, the "ongoing ad feminam treatment [of Rachel Carson's work by] the science sceptics". This third node of engagement, for Code, presents a nexus in which the first two converge and are exposed (through her examination of Carson's treatment) as being sites of the operationalization of sexed-gendered specificities constructing the epistemic 'authority' of smuggled (male) subjects hidden within and behind the structure of the generic 'objective' epistemic subject of Western mastery. Deploying a single text, *Merchants of Doubt* by Naomi Oreskes and Erik M Conway, Code notes the way in which a false neutrality operates to sustain climate doubt and ignorance

in the predominantly white, Western world and excising the fact that “specifically situated, and not disinterested, human subjects” produce a ‘science’ dedicated to climate-change scepticism. This ‘science’ is committed to the notion – fundamental to the epistemic operationalization of climate denial – of the homogenous human subject: a bland construction perfectly fitting the screen of ‘objectivity’ designed to foreclose critique and/or resistance. Code argues that the growing significance of testimony in social epistemology creates spaces for engagement with questions concerning the accepted division of intellectual-epistemic labour in Western societies. This also provides the opportunity to interrogate the related construction of the epistemic power ‘to know’.

What Code exposes is, in effect, the operationalization of a politics of *disguised* (perhaps even a denial of) epistemic *location*. She urges a conscious and resistive divergence from the ‘neutral’, individualistic mode of knowledge production towards a communal one which openly acknowledges the *limits of our knowing*. Relatedly, she argues for acknowledgment of the “need for critical analysis of some of the taken-for-granted assumptions about subjectivity that prevail in epistemic communities, and for ascertaining the place of those communities in constructing and circulating public knowledge”. She brings the politics of subjectivity into view by arguing that subjectivities elevated as “either positive epistemic exemplars or as the reverse” should be subjected to genealogical scrutiny – to examination, in short, of exactly how, and why, the epistemic status of such subjects is given or withheld.

Code’s analysis is decidedly feminist. It attacks epistemic mastery by exposing it as an exercise of power. She deliberately characterizes advocacy as being a feminized practice resistively engaging the adversarial, legalistic (and masculinist) construction of ‘authoritative’ scientific and legal knowledge. If knowledge is power (the relation implicit in epistemic mastery) then epistemically responsible, critical, unmasking of ‘neutral’ knowledge is a thoroughly necessary – and highly political – resistive act. Code invites us, in effect, into the struggle for advocacy as a powerful tool for epistemic justice. In particular, advocacy, Code suggests, requires the recognition of the need for epistemically responsible, ongoing investigation to inform it – while educators need to “learn and teach how to advocate responsibly, knowledgeably, and humbly – paradoxical as this may seem – in the minutely informed and ethically/politically respectful way Oreskes and Conway investigate: to show how zealously the [climate] deniers seek to defend places and putative values that are simply unsustainable”.

Phillipopoulos-Mihalopoulos (2013), while sharing some common ground with both Burdon and Code, problematizes, by implication at least, certain of the operative assumptions in Burdon’s paper. This is because Phillipopoulos-Mihalopoulos rejects outright both the dialectics of ‘human’/‘environment’ and of the ‘anthropocentric’/‘ecocentric’. Thus while Burdon collapses the human-environmental *dichotomy*, yet maintains a human-environment *dialectic* by retaining the notion of a relationality presupposing ‘humans’ and ‘environment’ as distinct ontological entities – Phillipopoulos-Mihalopoulos collapses familiar ontological distinctions in an account of flows, energies and folds reflecting a distinctively post-modern/post-human sensibility. While Burdon invokes a move from anthropocentrism to ecocentrism, Phillipopoulos-Mihalopoulos rejects the dichotomy in its entirety. Additionally, in relation to questions of epistemology, Phillipopoulos-Mihalopoulos necessarily moves beyond Code’s immediate concern with questions of epistemological mastery (though doubtless he would entirely agree with her critique) to seek out new ontological foundations for a “critical environmental law” lying beyond, as he would see it, the contemporary fixation with epistemological questions *in the place of* ontological ones.

Thus, when addressing the theme of “Actors or Spectators? Vulnerability and Critical Environmental Law”, Phillipopoulos-Mihalopoulos seeks to explore what it

might mean to embrace our 'thrown-ness' (to evoke Heidegger's phrase) into a new, category-confounding, vulnerability-exposing ontology – arguing that the reified ontological polarization between humans and the 'environment' has been *replaced*, of late, by an epistemological debate between anthropocentricity and eco-centricity. This is a move that he regards as being problematic in two key respects: First – it distances us from the ontology of the human/non-human interaction and in this sense, replaces "ontology with an epistemology of supposed action". Secondly, the move legitimates, in his view, the "perennial problem ... of 'the centre'" – a point having considerable political resonance with Code's critique of the dominance of Western epistemic subject.

Both related problems of the move from ontology to debates concerning epistemology are modes of avoidance – ways of avoiding exposure to the vulnerability of being in the wild and dizzying space of the "middle" rather than in the comforting dominance of the 'centre'. Philippopoulos-Mihalopoulos, by contrast, invites us to re-experience our true ontological location as beings exposed, *thrown-in*, "abandoned" to the forces of a-centricity that characterize the true complexity and energies of existence. He urges us to embrace the need for a new semantics which "move away from the glib safety of the centre and [its] consequent, misaddressed dialectics [arguing that][n]ew semantics ... must be sought on a surface of acentric continuum, traversed by velocities and pauses that do not easily subscribe to centralising generalisations". In short, this is an invitation to give up all epistemic power and privilege. It complements Code's emphasis upon the exposure and resistance to the central epistemic subject's power of 'knowing' – but moves us into a multi-planar dislocation of the 'human' viewpoint. In a sense, Philippopoulos-Mihalopoulos seeks paradoxically to 'locate' us in a plane of ever-moving uncertainty.

Code may wish to point out in response that this too is, for all its radicalism, a 'situated' viewpoint – that of a post-modern/post-human sensibility that could, in the wrong hands, perhaps, run the risk of a complex re-enactment of an epistemic power to know 'for others' their ultimate inability to 'know'. Burdon might respond that the dichotomies, while collapsed, still require a certain politically-necessary duality of semantic and semiotic reference if resistance to the Western worldview and its mechanistic assumptions is to be operationalized. Certainly, the relationship between the need for situated, located epistemic encounter and the implications for epistemology of the radical space of the middle is a subject I would dearly love to see these thinkers take further in future conversations together.

Philippopoulos-Mihalopoulos's ontological vision is indeed challenging – potentially disorientating even. He moves us beyond the ontological suppositions informing Burdon's paper to follow Deleuze and Guattari onto the "the plane of immanence" – to fall, as Philippopoulos-Mihalopoulos puts it, into the "all-embracing sum of folds and falls and connections that contains its own origin, causality and, teleology without transcendence". What might the implications of such a radically emergent and all-embracing ontological vision mean for the "Great Law" of Earth jurisprudence – and for our ways of 'knowing it'? Even ontology and epistemology do not retain any clear binary status in this account, for Philippopoulos-Mihalopoulos argues that the plane of immanence "operates on both an epistemological and an ontological level – it is both how we conceive of things and how things are". It allows, in short, no division between the observing spectator and the involved actor, no distinction along the lines of human/natural/artificial/technological – for all these "fold into each other and constantly emerge as epistemological and ontological hybrids".

On one reading, Philippopoulos-Mihalopoulos invites us (and environmental law itself) into a radical space of not-knowing which echoes and underlines Code's call for a radical epistemic humility and for radical openness to multiple positionalities. Yet at the same time, I have a sneaky suspicion that Code might wonder if this

radical space of not-knowing could be made to function as a way of dismantling the nascent powers of marginalized subjects precisely to name their experience and unique as *situated* realities. Again, this is a paradox remaining to be explored.

It is apparent to me that Philippopoulos-Mihalopoulos's account is especially prescient (without addressing them) in relation to the bio-technological hybridities now pointing to new post-human realities of a surface upon which the very distinction between human and non-human may become impossible (in certain respects) to maintain. How, for him, could the notion of 'nature' or 'Earth community' necessarily imply, for example, the privileging of the 'the natural' over the 'artificial'? After all, the plane of immanence is so complexly unified and multiple, so 'thick' with inter-being that such distinctions simply dissolve. Perhaps then, this is why Philippopoulos-Mihalopoulos invites us, nonetheless, to approach this (for many) terrifying new ontological surface by embracing vulnerability. Vulnerability breaks with the need for any observational distance. Vulnerability radically undermines the impossible neutrality that Code's paper so vigorously attacks. Vulnerability is exposure to the "space of the middle", exposure to the experience of a plane "full of momentum, surrounded by a world that folds around this throwing. There is no screen to hide behind, no distance afforded by epistemology, no negotiating moments of discourse. The surface is pure ontology, inescapably filled with a brutality of continuous, uninterrupted presence". Vulnerability also, in another register at least, implies ontological limits as well as the socio-political limits imposed by human action in the plane of ontology – the brute, hard corners of multiple ontic entities that remain meaningful in a world negotiated by bodies having bio-material characteristics and a fundamental affectability – a quintessential, vulnerable openness. Burdon and Code would both, I suspect, endorse the power of vulnerability as being a condition of limits – in both ontological and epistemic terms, and all three thinkers, I am certain, would agree with the philosophical and political importance – the non-negotiability – of embracing limits and therefore *limitations*. What remains, at this point, unresolved, however, is how far/in what ways these differing epistemic and ontological commitments yet have the power to move the realities of discrepant power relations forward without replicating their fundamental patterns in newly complex forms.

What emerges from the convergence of all three of these papers is a productive provocation to tease out some related and challenging puzzles. Key among these is the challenge of balancing open ecologies of knowledge, of embracing complexities and hybridities and dizzying multiplicities, while still allowing those marginalized subjects whose oppression is *all too tangible*, to speak in ways that allow their 'truths' to destabilize the power of hegemonic knowledge. Furthermore, what concept of 'nature' (if any) could be liberatory – and for what/whom? Is it possible even to speak, any longer, of the 'environment'? If not, how do we engage with the practices and patterns of power so central to the destruction driving our climate crisis and related ecological crises? Is Earth jurisprudence intrinsically at odds with the insights of post-humanism? How can Earth jurisprudence 'speak to' new hybrid forms of entity that put limits on our ability even to speak of 'nature' or the 'natural' anymore? The questions could be multiplied endlessly. Hidden within all these questions, moreover, is the substrate that Code's work relentlessly forces us to confront – the central question of the political and epistemic constitution of forms of subjectivity – their construction and dismantling: Who and what – and how – is privileged by the way we construct our juridical, political, scientific, social, economic and ecological imaginaries?

3. Theme II: Reconfiguring the legal

The central question of subjectivity – and the political construction or constitution of subjectivity – is never absent from law. Law 'personifies' – calls subjects into being – either as full, partial, suppressed or excised subjectivities – and in that *fiat*, lies

power. Law classifies, producing hierarchies and taxonomies of being – and as Burdon argues, is a profoundly socio-cultural exposure of our fundamental and dominant commitments – or at least – I would argue – of the dominant commitments of the *dominant* – for the ‘our’ of law is not yet (and perhaps never will be) an inclusive ‘we’. Indeed, as Code points out, the question of ‘who we are’ is always freighted with immense significance.

The shape of legal subjectivity, including human rights legal subjectivity, is implicit in all the papers ‘reconfiguring the legal’ – even though none of them ever explicitly addresses it in terms. The question of who is ‘in’ and who is ‘out’, whose needs are elevated, whose suppressed, and by what mechanisms, visions, oversights and blind-spots is always central to any question related to law. Taken together, the papers in this theme reveal rather eloquently certain limits and challenges characterizing current legal responses to environmental violations: the yawning gap between embodied human vulnerability and the priority accorded to economic power; the contrasting status and treatment of corporate entities as compared to poor, disempowered communities; the fundamental tension between law’s commitment to the market and the need for law and legal discourse to face up to – and be transformed by – the radical ontic limits presented both by human vulnerability and the vulnerability of the planetary system itself.

In “Equality – Finding Space in the Environmental Discourse”, Feris (2013) explores the relationship between environmental conditions, priorities and regulation and human rights values. She focuses, in particular, upon the human rights values of equality and dignity, including what she calls “the equality of dignity”. It is not difficult to discern the theme of struggle for political and juridical subjectivity implicit in Feris’s account and reflecting the mutually uneasy relationship between marginalized, socio-economically disempowered subjects and exclusionary politico-economic structural arrangements. Indeed, her account reflects to a significant extent the intimate interdependencies between the problem of environmental degradation and the structural impositions and practices of exclusion intimated in the claim that the current environmental crisis is also a crisis of human hierarchy.

Feris is committed to the claim that environmental impacts cannot be divorced from human rights values. She sees equality and dignity as being potentially transformative, especially when deployed for interrogating the impacts of policies affecting the environmental resources of marginalized individuals and groups of people. Rather than seeing human rights and environmental law as representing different, yet overlapping societal values, Feris argues that they are symbiotic – and that that if we construct our understanding of the ‘environment’ without building into that understanding a profound juridical responsiveness to human rights values then all we do is sustain the structural disadvantage of the most marginalized groups of human beings.

Feris’s contribution has a distinctively South African resonance. It is borne of a context in which the intimate relationship between environmental degradation and human marginalization is etched upon the very socio-geographical landscape of the country. It reflects, furthermore, a juridical context in which equality functions as both a central constitutional value and as a justiciable legal right – and where 19 years of South African constitutional jurisprudence have forged a conception of equality possessing distinctive characteristics. Equality emerges from Feris’s analysis as being a flexible, context-responsive value used to address a wide range of factors and concerns, including those directly related to socio-economic inclusion and dignity. Pointing her finger unambiguously at the structural mediation of privilege and oppression, Feris argues that there is a dense nexus between structurally disadvantaged positions attaching to a group by reason of their designation as raced, gendered, differentially-abled subjects and the reinforcement of that disadvantage by the systemic denial of socio-economic goods. Furthermore, some of these socio-economic goods are inseparable from what can be thought of

as basic environmental goods: access to basic services such as potable water; to safe, clean energy and to basic sanitation. Feris argues that denial of these basic forms of dignity exacerbates the unjust conditions of dissimilarity under which such groups are forced to live. Furthermore, undue socio-economic burdens also prevent marginalized groups from participating as equals in the political, economic and cultural processes of social negotiation and engagement. There is simply no parity of participatory access or inclusion.

Feris's participatory concerns link directly, it is suggested, to Code's critical identification of the homogenous, centrally dominant epistemic subject installed at the heart of both law and science. Feris, in effect, identifies marginalized subjectivities, linking their systemic disadvantage with what we can read as being both epistemic and socio-physical oppression. Her reflection upon environmental injustice is channeled through discussion of a series of legal cases in which the environmental/socio-economic/equality nexus is overtly in play. Perhaps radical socio-economic injustice is the ultimate base-line reality lying beneath the multiple discrepancies between the empowered, central-case economic subject/actor (especially the corporation) and the impoverished subject/impaired agent marked so clearly by systemic, patterned marginalisation in history and present of the raced, gendered, hierarchy of law's subjects.

Feris insists that South Africa's "environmental right" is an essential requirement for the advancement of environmental justice (Feris 2013). In the South African context this is reflected most significantly in the relationship between the environmental right and the other rights in the Constitution, both substantive and procedural – particularly, in the substantive rights to equality and dignity. It is time, she concludes, to find *explicit space* for 'equality as dignity' in environmental discourse if environmental justice is to be achieved. To fail to open the analysis in this way is simply to risk entrenching the structural disadvantage of the most marginalized groups when protecting the environment.

Turner (2013), by contrast, addresses a rather different group of legal subjects: powerful economic actors and institutions whose decision-making power directly impacts upon environmental conditions and whose duty to protect the environment is so thinly conceptualized by current constitutional, international and regulatory paradigms that there is now a pressing need for a new, globally applicable, substantive environmental human right. In "Factors in the Development of a Global Substantive Environmental Right", Turner draws on his extensive earlier research to offer an argument in defense of, and a formulation of, such a right.

It is clear from Turner's analysis that his main concern is the lack of normative responsiveness of three key economic actors (corporations, the WTO and multi-lateral development banks (MDBs)) concerning the environmental impacts of their decision making processes and operational commitments. Fundamentally, Turner appears to frame this concern as being a human rights issue because of the intimate causal relationship between environmental degradation and impacts upon human rights such as the right to life and the right to health. Turner points out the lack of any international treaty or agreement including a globally applicable, substantive human right to the protection of the environment. This lack becomes, by implication at least, all the more problematic when placed against the fundamental unaccountability of powerful capitalist institutional and corporate actors. Accordingly, Turner wants to establish the development of a substantive environmental right, and a corresponding normative standard for decision-making, to be framed in terms of "duties of all decision-makers" towards the environment.

The three major actors addressed in his paper emerge from Turner's analysis as sharing two key commonalities: The first is their common subjection to (by analogy at least) a 'constitutional framework' governing their own decision-making processes. The second is the fact that in none of these existing frameworks is environmental protection given any degree of priority. Turner's proposed global

substantive right overtly addresses this lack. His draft right opens by affirming that “[a]ny decision by a person, group of people, organization or government that brings about or could bring about degradation of the environment, is contrary to the human right to a good environment and as such is fundamentally unlawful”. Turner’s right makes all decision making processes – even those with the mere *potential* for degrading the environment – subject, in effect, to a human rights assessment. Indeed, the draft right, as formulated, appears to suggest that human rights-based priorities can even potentially *justify* environmental degradation in so far as it is required (‘necessary’) to satisfy other basic human rights: “Environmental degradation can be rendered lawful when brought about to satisfy other basic human rights and where other less environmentally-degrading alternatives are not viable. In the event that such decisions are sanctioned on the grounds that it is necessary to cause environmental degradation to satisfy other basic human rights, the degradation must be tied to an equitable form of compensation that in at least equal measure, benefits the environment of the community or the area of land, air, sea, ecosystem or water that is suffering or would suffer that degradation or risk of degradation”. Turner argues that the right imposes a duty which would reform the existing legal architecture to ensure that ‘non-state’ actors must ensure that their operations would be consistent with a substantive environmental right of all peoples – thus addressing the present lack of legal obligations towards the environment within the ‘constitutions’ of companies, the WTO and MDBs.

Turner is clearly right to seek to locate a more meaningful form of normative responsibility towards the environment within the frameworks shaping the accountability of corporations, the WTO and MDBs. Indeed, there is a sense in which Turner’s motivation has much in common with Feris’s concern to bring human rights values into the heart of environmental regulation. Turner’s approach can be read as, likewise, showing sensitivity to the idea that environmental and socio-economic justice issues are symbiotic – at least in so far as he appears to link basic human rights with an environmental decision-making calculus. However, Turner’s implicit subjection of environmental impacts to human rights priorities may well infuriate those who see a complex tension between human rights demands and respect for ecosystems and other fragile environmental complexes – and may alarm those who simply refuse to accept that deliberately caused environmental damage is, in any case, compensable – even by some kind of environmental off-setting. It is certainly plain that his right raises some deep ontological questions concerning the status of the environment as being anything more than a resource for human beings.

Both Feris and Turner face another challenge. Their strategies directly attempt, in a sense, (and rightly) to address the way in which corporations and other capitalist institutions and actors are disproportionately privileged by law. It is unclear, however, how far both authors read that as being problematic not just in environmental discourse but also *within* human rights discursivity and practice itself. The fractured and ambiguous nature of human rights themselves potentially presents both Feris and Turner with a deep challenge. While it is clearly vital to bring a higher degree of normative accountability and a humanitarian ethical responsiveness into our frame of analysis, it is also the case that the ambivalence of human rights with regard to the priorities of capital implies that the battle for environmental justice is not likely to be straightforwardly enhanced by incorporating human rights values in to environmental discourse or by framing environmental degradation as being a human rights issue. The challenge is both more complex and enduring than that. The battle for justice and inclusion will need to be taken into the very heart of human rights discursivity itself.

None of the papers thus far introduced and discussed, in my view, indicates that we can be anything but suspicious of claims that human rights form any kind of progressive solution to the present, profound predicaments that we face. What we

need, in thinking about human rights approaches to environmental challenges is a strong dose of lively critical attention to their complexity and to the related complexity of their part-complicity, indeed, in the genesis of the current crises. Feris's insistence that we must proceed with a vivid attentiveness to patterns of socio-economic disempowerment among human beings is well made – and for me, presents a powerful ethical imperative (the precise implications of which have yet to be negotiated). We simply cannot allow human rights to continue to be used to “advance socio-economic developmental interests while ecological interests remain at the periphery of concerns” – yet *nor* can we allow environmental goals to become a subterfuge for ongoing and systemic hierarchies of marginalization and/or exclusion forced upon human beings. This tension, amongst others, indicates the urgent need for sustained attentiveness to the limits and paradoxes of our own justice-seeking discourses – including sustainable development discourse and – centrally – for the purposes of the arguments here – human rights and environmentalism.

4. Theme III: Activism and praxis

Donald's (2013) paper captures the fundamental *ambivalence* of human rights in the environmental context very clearly. In “Human Rights Practice – a Means to Environmental Ends?” she implicitly addresses doubts concerning whether or not human rights practice in its current dominant forms can tackle the challenge of climate change and global environmental degradation. Donald argues that while the symbiosis between human rights and the environment is relatively well established, human rights – for all their potential to contribute in concrete ways to moving an environmentally responsible agenda forward – have not thus far realized it. Whether they can or not still remains a relatively open question. In fact, Donald's analysis implies that human rights cannot assist in the search for environmental justice or fuller environmental accountability unless we adopt and pursue “radical or hybrid approaches, with a view to articulating a strategy for activism and praxis that can capture the real and lived inter-connectedness of human rights enjoyment and environmental factors more meaningfully”.

In order to defend this thesis, Donald addresses three dominant existing approaches to human rights praxis – each of which reflects different understandings of the relationship between human rights and the environment. First, there is the strategy of lobbying for the adoption and institutionalisation of new environmental human rights (in a sense, this squares with Turner's proposed global substantive environmental human right – though Turner is more radical in the breadth of his ambition than are existing institutional approaches to this strategy). Secondly, there is the strategy of deploying existing human rights mechanisms to tackle environmental harms. Thirdly, there is the strategy of taking a human rights-based approach to environmental practice – arguably an approach implicit in the strategies of Turner and Feris respectively.

Donald concludes that the first strategy, while it holds out hope for activists, is unlikely to offer much in more substantive, juridical terms due to a range of institutional and political weaknesses in the dominant formulation of human rights. There are, moreover, she suggests, fundamental questions as yet unanswered by the strategy – particularly concerning its location in the unproductive dichotomization between anthropological and ecological approaches. The current challenges reflect the need to embrace both environmental and human costs of failing to respect the Earth system – but Donald remains doubtful that even a human rights treaty with universal applicability could overcome the concerns represented by the intractable questions presented by the controversies surrounding the relationship between human rights and the environment. The second strategy – of using existing human rights mechanisms (courts, UN treaty bodies, special procedures) to protect the environment – Donald considers to be “worthwhile ... in certain cases [but to have] limited capacity and reach” – noting

that while environmental issues are often united with social and economic rights, they suffer from the same weaknesses concerning their perceived justiciability status. This is a key weakness, arguably, in strategies seeking to deploy existing socio-economic human rights entitlements as an avenue for the protection of environmental rights. The third strategy, the deployment of a 'human rights-based approach' to environmental matters, is more promising – but “when applied to activism and action on the ground with a sensitivity to context”.

This third strategy arguably reflects a socio-legal critical approach – one moving into forms of eco-humanitarian grassroots organization and engagement and implying the energies emerging from responses to localized, environmental injustice – one highly connected, I would suggest, to Code's argument for advocacy conducted in the full light of detailed, situated analysis and sensitive to situated subjectivities. A rights-based approach, in Donald's analysis, and understood in the way she defines it, has the potential to be subtle, flexible and responsive to structural and multi-faceted causes of rights violations and lack of rights enjoyment. Donald gives specific core content to the third broad strategy: Her emphasis is upon accountability; equality and non-discrimination; participation and empowerment. Each of these terms, she notes, has a particular meaning in human rights contexts. These meanings, it should be noted, directly address the problem of marginalized subjectivities – and implicitly critique the dominant hegemonic subject – because they imply a notion of equality given substantive content by gender-sensitivity, non-discrimination and an implication of affirmative action. Thus, while Donald emphasizes the significant potential for rights-based approaches to “address and question structural and systemic causes of disempowerment and vulnerability to (for example) poverty or environmental harm”, it is of note that this relies upon stepping back from law's institutional provision to operationalise more fluid approaches and adaptive, ground-level strategies. This less predictable way of working holds out hope of facilitating a more reflexive, liberated and effective form of human rights-based practice.

Such approaches, however, need to keep a clear sense of the complexity of human rights as semantic, semiotic and juridical tools. It seems that what such rights-based approaches have the greatest potential to do is to place the battle for human rights meanings at a more localized, contextualized level characterized by a certain productive contingency and flexibility of response. This is to be welcomed – yet there remains a need for explicit caution concerning the assumptions to be held about human rights – a view evidently shared by Donald, who reserves her greatest enthusiasm, in the end, for a fourth, alternative “‘principled strategy’ for the embedding of the interdependence of human rights and the environment in human rights practice, based on a realistic interpretation of the strengths and weaknesses of human rights in its various shifting and contested forms”. Donald's is, then, a decidedly non-monolithic reading of human rights – one placing their haunting ambiguities firmly in view and entirely open to a creative blend of the strengths of various strategies – while aware of their weaknesses – and blurring the boundaries, potentially, between rights-based activism and other social movement claims for social and climate justice.

Indeed, it is as *claims* that human rights may do their deepest work. For Donald, “claims-making is a distinctive part of human rights practice and has intrinsic worth and radical potential”. Claim-making, on this view, forms a kind of transformative advocacy close to the advocacy that Code champions in her paper. This is the kind of claim-making, narrative-telling, argument-making intervention that produces shifts in consciousness precisely by problematizing what is taken for knowledge in the fraught environmental justice context. This makes a distinct gesture away from law to the discursive power of human rights as an *idea* animating activist resistance. This is a messy, energetic conception of rights-claims that allows us to – as Baxi puts it (cited by Donald) – to “[construct] some new alternate futures beyond the new paradigm of trade-related, market friendly and environmentally

hostile human rights". Indeed, the struggle for environmental justice, for Donald, also "has the potential to contribute to a much-needed task: the renewal and reconstruction of human rights in a more radical form". Against a background in which, despite the growing importance of the environment in human rights discourse, human rights are increasingly marginalized within international environmental fora, Donald argues that "those who are concerned with environmental protection and with human flourishing in a healthy environment should encourage, use or welcome a 'principled strategic' use of human rights, based on an analysis of what can best realize inevitably contextual visions of justice, dignity and flourishing". This re-energisation of human rights as claims for a 'beyond' becomes all the more urgent in the context of the emergence of capitalism's reinvention of ecological justice in the form of the green economy – a concept "lacking even a human focus". Human rights practice, by contrast, holds out hope for a "principled yet strategic, profoundly context-dependent" approach that accepts shifting power relations as being core to its analysis. Key to this, at all times, are the energies of social movement actors on the ground.

Kerns (2013) would undoubtedly wholeheartedly endorse the importance of this kind of ground-level claim-energy. His careful analysis, in "Schopenhauer's Mitleid, Environmental Outrage and Human Rights", drives directly at the activist's concern with the energies emerging from the lived-experience of violation, of environmental and human degradation, and the "outrage" energizing human rights in their most liberatory mode. Kern's analysis is intrinsically context-responsive, located and situated. It suggests not only the ultimate ontological unity between humans and environment but the productive, visceral intimacy between outrage, speech and the search for eco-humane justice. There is a sense in which, in Kern's paper, all the themes of the preceding papers emerge in nuanced, multi-layered ways as a kind of implicate stream of connection.

Kerns argues that suffering that results from exposure to environmental violations evoke a sense of moral outrage – and that this outrage can be grounded in Schopenhauer's important philosophical work on compassion. Human rights, argues Kerns, function as an important source and form of validation for outrage. Importantly, Kerns also argues that Schopenhauer's account leads towards an explanatory grounding for the "long-recognized importance of personal narratives in human rights work". In short, human rights confirm and publicly validate what compassion first intuits – an insight leading to three practical implications for environmental activism: the central "importance of personal narratives detailing the direct impacts that environmental assaults have caused"; "the practical value of formal, detailed human rights assessment reports specified to a given situation"; and "the value of community-led public inquiries, such as the 2006 People's Inquiry in New Zealand and the 2011 Permanent People's Tribunal in India".

Kern's central philosophical claim is that Schopenhauer's ethic of compassion, his *Mitleids-Moral*, provides a better account of the human experience of moral outrage than do the other systems of ethical thought (Aristotelian, Kantian, Millian) often called upon in human rights philosophy. Kerns analysis drives at the visceral sense of empathy lying in the radical, critical foundations of human rights when they first emerge and before they are captured, as it were, by human rights law: "As Lynn Hunt says in *Inventing Human Rights: A History*, 'we are most certain that a human right is at issue when we feel horrified by its violation' (2008, p.26). When we see or hear of such horrible injustices we are often seized with shock and outrage and blurt out, if only to ourselves: How awful! How could anyone do such a thing?" This is the response of compassion – a compassion that for Schopenhauer (and Kerns) is "participation in" another's suffering.

The mystery of this compassion is explained by an empathic openness born of the ontological reality of our fundamental unity of being: "All these multiple beings in the world of phenomena, i.e., all the temporal-spatial multiplicities of our

experience, are, for Schopenhauer, phenomenal expressions of the same underlying fundamental reality, *Der Wille*": We are all different manifestations of the same underlying reality. It is this ontological fact that provides the metaphysical explanation of our exposure to the sufferings of another.

This explanation reticulates with the idea that we can feel the sufferings of others resonate in our own embodied vulnerable being. For Schopenhauer, as Kerns makes clear, our fundamental unity with all things means that we experience the sufferings of others as if they were our own. This fundamental insistence upon a kind of empathic corporeal communication growing from ontological commonality is, in a sense, a rather different way of driving at the vulnerability central to the structure of existence. It intimates, without conforming with, the sense of the vulnerable space of the middle that Philippopoulos-Mihalopoulos emphasizes in his contribution to this collection, suggestively hinting at the radical 'suchness' of what exists as being a fundamentally vulnerable, open field of dynamic movement, shifts and interactions between 'actants' (to use Philippopoulos-Mihalopoulos's choice of term). Schopenhauer's vision also has a more direct affinity with those perspectives (especially as identified by Burdon) seeking to emphasise the fundamental continuity between humanity, Earth-systems and the ethics of juridical coordination.

Kerns suggests that Schopenhauer's ethic of compassion captures something of the personal, existential sense of outrage at unnecessary suffering. He argues that the international human rights tradition "provides another level of validation for that sense of outrage and the felt necessity of acting on it". Human rights norms take the hot energy of compassion and channel it through public structures – enabling recognition of what begins as a most personally-felt violation. Human rights, in this sense, appear in Kern's vision to function as a mode of enunciation or articulation – as a channel for engagement concerning environmental (and human) violation. From this, for Kerns, certain insights follow for environmental justice activism. He suggests that "[i]f the central claims of this paper have validity, and if Lynn Hunt's historical account of the role of empathy in the genesis of rights discourse is correct and she is right to argue that 'rights are best defended in the end by the feelings, convictions, and actions of multitudes of individuals, who demand responses that accord with their inner sense of outrage' (Hunt 2008, p. 213), then at least three practical implications follow for environmental activism". First, *telling the story*: Kerns emphasizes the power of the meaningful personal account of direct impacts and the importance of collecting and documenting these narratives of violation. Secondly, *claiming moral authority*: "Providing activists with well researched human rights assessments of their specific situation can help clarify the moral dimensions and values at stake as well as identifying potential pressure points. Foregrounding and documenting human rights standards that apply in that particular situation can publicly validate the felt sense of injustice and legitimize the outrage experienced by those whose lives have been negatively impacted". Thirdly, and finally, *exercising moral power*: Here Kerns emphasizes the potency of community-led public inquiries – pointing to successful examples of community-initiated people's tribunals, which have the advantage of being able to be truly inclusive. These are, in a sense, modes of hearing pain and outrage speak truth to power – a very practical endorsement of Code's powerful advocacy-based argument for ensuring epistemic openness in the face of tactical diminutions of the 'authority' to know, and of Donald's arguments concerning the role of flexible, rights-based approaches. Kern's emphasis upon *mitleid* also, in a sense, resonates with Feris's concern for the most marginalized and socio-economically disempowered communities and amplifies the compassion towards human beings embedded in Turner's attempt to call all decision makers to account in the form of a global, substantive environmental right.

There is a vivid sense, underlying all the contributions to the Oñati seminar collection of a profound and urgent search for a renewed responsiveness to the pain

of crisis, to the outrage of imposed suffering, to the multiple injustices enacted by well-rehearsed patterns of marginalization, exclusion and closure. There is an implicit and explicit level of rejection of the hegemony of the 'mastery' discourse and resistance to the forms of subjectivity imposed upon the master-actor's violently constructed 'others'. There is also a sense in which each contributor seeks to bring forth new forms of resistance – including blends of resistive scholarship and activism – ranging from radical ontology, critical epistemology, transformative jurisprudence and protean forms of juridical strategy, all the way through to social movement activism predicated upon resistive, a-centric, highly flexible forms of localized, ground-level, engaged, mastery-subversive responses.

5. Theme IV: Multilevel reformulation

These papers, written after the event (see Gear 2013, Morrow, Kotze and Grant 2013), attempt to capture the rich tapestry of concerns, insights and energies emerging in the extended conversation that took place at the Oñati Workshop. These papers are best read as they stand in this collection below – encountered afresh with the formal papers in mind – but what they provide, whether taken together or independently, is an attempt to delineate or sketch out the first outlines of a framework for re-imagining, re-understanding the relationship between human rights and the environment by bringing together philosophy, legal doctrine, policy, praxis and activism.

6. Conclusion

'Human Rights and the Environment: In Search of New Relationship' brings together some important arguments revealing a considerable convergence of concerns and highlighting some intractably difficult dilemmas and paradoxes. First, the concern for a more all-inclusive, holistic frame of analysis and understanding is apparent in the collection, as is a wholesale rejection of the more destructive suppositions underlying the ultimately Eurocentric philosophy implicated in the foundations of environmental crises: the search is on for new ways of knowing and being that open out new frontiers of the imagination of justice. Key differences emerge, however, in relation to strategic emphases. Secondly, a key tension emerges in relation to the idea of duality as a meaningful frame of reference: while all the writers would reject dichotomies, some embrace duality – (for example, the more 'holistic' frameworks offered by Burdon, Kerns, and Feris in particular, reach towards the ultimate unity of the human *and* the environmental). Phillipopoulos-Mihalopoulos's analysis, by contrast, suggests that 'two', thought of as a duality, is fundamentally misleading and unsustainable in ontological terms. He seeks to lead us towards a radical ontological exposure of being in a single, non-monolithic, dynamic flux of being-ness – in which even ontology and epistemology blend into a non-dual being-knowingness – and his formulation of ontology is arguably the most potentially 'disorientating'/dismantling for the Eurocentric mindset. This is an important point of tension – for there is a continuing and almost paradoxical sense in which to speak of the dual relationships remains both meaningful and necessary – even if, ontologically, it makes no ultimate 'sense'. In epistemic terms, not least for the justice-sensitive and detailed calculations necessitated by the fact that the climate crisis is also a crisis of human hierarchy – it remains vital to be able to conceptualise (without reifying or fixing) categories, dualities, oppositions – as Code's ultimately justice-sensitive epistemic critique of hegemony reveals. Other differences emerge: varying levels of faith and suspicion concerning the human rights project as a means of achieving environmental justice. While Feris and Turner both announce faith in the normative power of human rights, Donald, embraces both their promise and their instability as a strategic matter – making a hermeneutic of suspicion, in a sense, an immanent element of human rights practice, activism and scholarship. Kerns, meanwhile, takes us to rights as validations of outrage – reading them in this light both as institutional, public

structures and as cries giving rise to law. It is not impossible to unite all these views, but the tensions between them should be cherished, in fact, as fertile sources of imaginative encounter. Finally, all the papers ultimately share a profound concern for new forms of inclusion: conceptual, epistemic and political. Despite the lingering of difficult questions, this points to a strong sense of political direction: the fundamental importance of broadening and deepening the search for a new way of understanding, knowing and being human in a world on the brink of hurling us, perhaps irrevocably, against its ontic limits. How then, given the ongoing need to speak and think in terms of a duality for political purposes, and in the light of the fact that 'on the ground' environmental justice and rights-based approaches can clash with ecological imperatives, can we navigate the difficult tensions we face? How can we do full justice to the ontological reality of our existence in a moving plane of 'suchness', *our inseparability* from everything we think of as 'else' or 'not me' while retaining deep sensitivity to *differential subject-locations* whether juridical, socio-political, socio-economic or bio-material?

One thing is certain. The conversation begun at Oñati in 2012, which is but a part of a far wider global conversation, requires continuing engagement with the questions, insights, further questions and conversations emerging from that encounter – not in a linear sense, but in order to capture the living, powerful strands of critique, convergence and divergence in ways vivid and clear enough to all us to begin to move our activism, policy, praxis and legal imaginary into a new age of responsiveness to the suffering of the world in the search for an endlessly elusive (but vital to reach-for) possibility of environmental justice.

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