

Environmental Human Rights : Urgency for a Concrete Formulation.

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Abstract: In the present article, I will evaluate the utility of environmental human rights in the light of the global climate conditions prevailing in the beginning of the second decade of the 21st century. Human rights and their tools have proven useful on many occasions. Here I will promote the idea that the ecological situation we are facing now is so urgent that we should exploit their potential to the fullest. To that end, I will argue, there is a clear need to render environmental rights as explicit, precise and thus legally binding as possible. It is tried to adopt a point of view that is informed by both scientific findings and the theory of human rights; the conclusions are definitely intended to be pragmatic.

I. Introduction.

Several authors have given arguments for the idea that the protection of the ecosphere should be ensured by making environmental rights part of the official human rights (HR) as formalized by international conventions. In the present article the two main questions that are addressed have a particularly simple phrasing. They have been addressed by other authors, but it is hoped that an updated analysis, highlighting recent findings by scientific and legal experts, can contribute to this debate of highest stakes. The questions we ask are: 1) do the latest data on the global ecology, in particular on the global climate change, and the threat to life they would imply, justify the creation of “environmental HR” ? and 2) supposing an affirmative answer to the first question, under which conditions can environmental HR make a real difference ?

The article is organized as follows. Section II provides definitions and a brief overview of important literature on the theory of environmental HR. We will pay special attention to the criteria that James Nickel (1993) proposed for the formulation of environmental HR. Sections III will summarize the findings on the status of the global climate as known to date, and Section IV will formulate the premises of our position as derived from scientific facts that are accepted, at least among experts, as having a very high likelihood. Section V will have a closer look at legal studies as those of Marc Limon (2009) on the precise extent to which environmental HR have been used till date. Section VI will formulate our conclusions. In a short epilogue (Section VII) I

will once more go over an idea condensed in the term “planetary rights”, which was introduced by Edith Brown Weiss (1989).

The author believes that in the domain of environmental human rights, where the insights of such diverse fields as law, politics, ethics and science are required, much can be gained from a more intensive communication between disciplines. Thus, in the present article both practical arguments from science and law, and theoretical positions from philosophy are confronted and discussed. As a matter of fact, the author believes that the modern global society, especially in view of the urgency of the actions to be taken with respect to the environment, cannot evolve in a sustainable manner without a constructive interaction of (at least) these disciplines.

II. Environmental Human Rights: Definition.

The concept of environmental rights is not new. In the Stockholm Declaration, issued after the UN Conference on the Human Environment of 1972, it is asserted that “man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”¹ Even if, according to Gardiner (2004), relatively few moral philosophers have written on the ecological environment², authors like Weiss (1989) and Nickel (1993) did study the interface between HR and the ecological environment. In recent times philosophers like Hayward (2005), Caney (2009a, 2009b), Vanderheiden (2008) and others elaborated on their work, including the global climate change into the debate; we will come back on some of this more recent work later on in the text.

Both Weiss (1989) and Nickel (1993) defended the position to include the right to a “safe environment” (RSE) into the list of HR³. In particular, Nickel promoted in the mentioned article the “modest use of language of rights in expressing environmental norms”. The “safe environment” he referred to is an environment that is “safe, healthy, pleasant, ecologically balanced, and sustainable”, “an environment safe from contamination and pollution”⁴. According to the examples he provided, Nickel had essentially “local” pollution and contamination in mind, but even in times when the threat of a global climate change was not as acute as it is now, he made a clear case for the RS(afe)E. He did so by showing the validity of four theses:

N1) The value the right protects (i.e. a safe environment) is both endangered and fundamental. Let us call this the *thesis of relevance or importance*.

N2) Protecting that value by something weaker than a right (e.g. charitable action, small improvements in common legal processes, etc.) is not efficient enough. Call this the *thesis of necessity*.

N3) “The parties that bear duties under the right, can legitimately be subjected to the negative and positive duties required for compliance with and implementation of the right.” Let’s call this the *thesis of legal enforceability*.

N4) The proposed right is economically “feasible”, i.e. can realistically be defended in view of institutional and economic resources. Call this the *thesis of economic feasibility*.

Thus, said in a very loose manner, the RSE has high relevance, is necessary, can be made legally pertinent, and is economically realistic. Admitted, some philosophers have questioned claims N1), N2), and N4), and individuals and companies easily get away with N3). Indeed, legal obligations linked to the environment are not easily identified and enforced in present day society; industrial companies are rarely punished even for local pollutions, showing the problematic side of N3).

Despite these possible criticisms, Nickel’s arguments N1) – N4) seem quite convincing in themselves in promoting the RSE as a legitimate part of the HR. It would seem that, at least within the HR community, this position corresponds to the majority view. As I will argue further, in view of the recent ecological history, and notably the onset of a global climate change, it seems that arguments such as those of Nickel are drastically enhanced.

III. Present ecological context.

Since the nineties, the ecological environment has acquired an increasingly important place in society's concerns, in particular due to the global climate change. As a matter of fact, there is now a general consensus among climate scientists that human activity has a strong and potentially detrimental influence on the global climate, due to emission of greenhouse gases (especially CO₂). A high concentration of greenhouse gases in the atmosphere leads to an increase of the earth's temperature; and the effects of an average temperature increase of more than say two degrees are expected to be potentially devastating for the earth's populations, especially the poor ones. The most authoritative study, elaborated by the Intergovernmental Panel on Climate Change (IPCC), presents in its Fourth Assessment Report six scenarios, corresponding to temperature rises between approximately 1°C and 6°C, and increases in sea level between approximately 0.2m and 0.6m. Even in modest scenarios scientific studies as these foresee dramatic effects as floods and droughts, leading to population displacements, diseases, social instabilities etc. These effects will manifestly jeopardize HR (as argued in detail in e.g. Caney 2009a). It is also generally accepted, not only in the community of experts, that we have to take action from now on (this is for instance an important conclusion of the Stern Review). Thus the next 10 years will be decisive: if by that time no drastic measures are taken, the global heating may escalate, projecting the world into the worst case scenario. At the same time, at the time of writing (January 2010) the UN Climate Change Conference in Copenhagen, which has just ended, has lead to disappointing results: the world's nations have not agreed upon legally clear measures for emission mitigation. Thus a unique, urgent and necessary opportunity in establishing concrete solutions for the climate change has not been exploited by the world's political leaders.

One could notice that an equally important global ecological threat, and if one likes a more general formulation of it, is the rapid exhaustion of virtually all natural resources. Such vital resources as petroleum, iron, aluminum,... but even unpolluted water and air may soon become scarce. Obviously, this exhaustion of natural resources, or of the biosphere-geosphere, becomes even more acute in view of the world's rapid population increase and the people's desire to live according to western standards. Therefore, I believe a strong case can be made to include, besides the climate change, the *scarcity of natural resources* into our considerations on environmental

HR. It seems both threats can be treated on the same foot (see further for arguments). Therefore the concept of “global ecosphere change” will be used to refer both to the climate change and the scarcity of natural resources (sometimes, to fix the ideas, I will simply refer to “global climate change”).

IV. Premises of our position on environmental issues.

In this context of urgency, it seems worthwhile to consider the point of view that all helpful and efficient means should be addressed to contribute to the mitigation of the above sketched global ecosphere change. It is not difficult to summarize our position: there is no time to lose; and too much is at stake. I believe that in the present context, the principle of precaution has not been sufficiently emphasized in the philosophical literature (some authors did address the notion, see for recent examples Gardiner (2004) and McKinnon (2009)). Indeed, if one is not yet fully certain of the intensity and of all effects of the climate change, common sense strongly incites to prepare for the worst, and thus to take those measures that are needed to mitigate the *worst* case scenario (not the best case as is done now). Such a decision amounts, I believe, to nothing more than rational behavior⁵; it also presupposes that we genuinely care for our planet, for future generations and for the poor populations that will be the first victims of climate change and natural resource scarcity. I will also start from that (obvious) premise. In some more detail, the premises I will start from are the following.

P1) *Acknowledgement of importance and urgency.* The human and potentially deleterious influence on the global climate and, more generally, on the availability of natural resources, is a scientific fact, creating a situation of highest urgency to find solutions for mitigation of this human impact, leading to the depletion of the biosphere - geosphere.

P2) *Principle of precaution.* In a context of urgency and partial knowledge, we should take the measures that are needed for mitigation of the worst case scenario.

P3) *Principle of humanitarian and intergenerational care,* implying that we, especially the rich countries, should provide the necessary efforts to ensure a sustainable environment to all future generations, and to the poor populations.

Philosophers have contested principles P2) and P3). But one may, needless to say, disagree with the contestation. Indeed, one is, I believe, justified to object that this debate distracts from the urgency we are faced with. Let us here only mention that Caney (2009b) has shown in detail that critiques of P2) and P3) are unwarranted.

In above paragraphs, I have at several occasions emphasized the urgency of the present ecological situation (principle P1)). It seems clear, however, that this feeling of urgency is not shared by a majority of people. A feeling that *is* shared by a majority of persons is that of impotence. Another conclusion that seems to impose itself, simply by interviewing people, is that even persons with an academic background have not always a full understanding of the most important characteristics of the climate dynamics at stake (which is in a sense just normal). But in view of P1), in the present context one might gain a lot if more people had a better understanding of the underlying mechanisms. More specifically, I believe that a scientific fact that deserves special attention, is the fact that the climate is, in technical terms, a “non-linear” system⁶, and therefore potentially “irreversible”. That implies, among other things, that it is characterized by threshold values (or “tipping points”), and that once these are exceeded, even small causes can have gigantic and irreversible effects. If for instance the greenhouse gas concentration would exceed a certain value, global warming would escalate: it cannot be stopped anymore, even if we completely reduce emission.

Obviously, this is not the place to elaborate on this topic. But I believe that if scientists and government would pay more attention to a pedagogic presentation and explanation of the climate dynamics involved, the benefits are potentially huge - even if hardly quantifiable. I have the impression it might decisively contribute to people’s awareness of the issues at stake.

V. Are environmental HR useful ?

Should we follow, then, such authors as Nickel (1993), Weiss (1998), Hayward (2005), Vanderheiden (2008), Caney (2009a, 2009b) and others, and advocate the inclusion of environmental rights into the HR ? In view of the present ecological situation, and especially of

P1), P2) and P3) we should, if we are relatively sure that HR can have any reasonable effect and power. Let us therefore look into that matter.

Maybe the most pragmatic recent study on this topic is provided by Marc Limon (2009), an advisor at the Permanent Mission of the Republic of Maldives to the United Nations Office at Geneva. The Maldives are a group of small islands that are threatened to be flooded due to global warming. It is therefore no surprise that the most vigorous claims for establishment of environmental HR often come from countries as these. Limon's study, while advocating environmental HR, is however quite clear on the concrete benefits of such rights *until this date*: he is unable to state any concrete legal case, advantageous to either individual or state, that draws on *existing* environmental HR. An often cited example is that of the Canadian Sheila Watt-Cloutier, an Inuit representative who filed in 2005 a petition with the Inter-American Commission on Human Rights. (As is well-known, climate change threatens the Polar icecaps, and thus the living grounds of the Inuit population.) Watt-Cloutier's petition claimed that the human rights of the plaintiffs had been infringed by the United States through their ineffective measures for mitigation of greenhouse gas emission. The petition was rejected without acknowledgment of prejudice. Watt-Cloutier had made reference to declarations as the Stockholm Declaration of 1972 (see footnote 1). Limon concludes (p. 470): "Unfortunately, that text represents both the starting point and the high point of international efforts in the area" (namely the area of environmental rights).

Despite a meager track record, Limon and other authors express confidence in the in-principle possibility of beneficial application of environmental HR principles. Limon's concluding remark is (p. 475): "[...] human rights principles and concepts have the potential to complement traditional climate change negotiations and improve climate change policy by, *inter alia*, focusing attention on the impacts on individuals, especially vulnerable individuals, by emphasizing accountability, and by encouraging and strengthening international cooperation." This broadly coincides with the conclusions of Weiss's thorough study (Weiss, 1989) of the possible practical (legal) leverages for environmental HR, or "planetary rights" as they are termed in the text. (The essential difference between the "usual" environmental HR and the planetary rights of Weiss, is that the latter are intergenerational, and include therefore explicitly

rights of all future generations⁷.) Weiss, an expert in international and environmental law, asks: “If we have planetary obligations and planetary rights, what is their status ? Are we still in the stage where these are only moral values, or can we speak of them as legal obligations and rights?”⁸ According to Weiss, “in international law, we must regard planetary obligations and planetary rights as in the formative stage. [...] The first step is for society to formulate planetary obligations and planetary rights, as by a solemn declaration of principles. [...] These declarations constitute ‘soft law’ instruments, which are not mandatory and may not be applied. But we can speak of prelegal rules or emerging principles which can either prepare ‘hard law’ rules (conclusions of treaties) or contribute to the creation of rules of customary international law.” That seems indeed to correspond to the actual situation, as depicted by Limon. On the other hand, it should be clear that once environmental rights would be officially part of human rights declarations - but apparently in a more explicit way than is now the case - they do have legal force. The official declarations referred to are of the type of the 1992 Stockholm Declaration and the Kyoto Protocol of 1997, developed under the auspices of the FCCC, the U.N. Framework Convention on Climate Change⁹. Let us note that there are also quite a few national constitutions that include a (vague) reference to the conservation of the natural environment (only 3 states of the US). At present, it may seem that the new Brazilian constitution is most advanced, in stating that everyone has a right to the *ecological balance of the environment* essential to the quality of life, and that the public authorities and the community have a duty to preserve and defend it (extracted from Weiss, my emphasis). Let us note that this does not prevent that the Brazilian rainforest, the most important CO₂ sink of the planet, continues to date to be severely decimated by massive lumbering.

6. Conclusion. The need for a concrete phrasing of environmental HR.

The conclusion that can be drawn from above analysis of the recent situation, with reference to Nickel’s four test criteria for HR N1) – N4), seems twofold. The first is that the present context of extreme urgency, and notably premises P1) – P3), certainly reinforce the idea of the inclusion of environmental rights into the basic HR. More precisely, conditions N1), N2) and N4) are manifestly enhanced:

N1) In the present context, the RSE has the highest relevance. The RSE comes close to a right to *life* – if not for us, then for future generations, or for poor populations. I believe thus a strong case can be made to consider environmental rights as *basic*, e.g. in the sense of Shue (1980, p. 18-19).

N2) It has become clear during the last decades that no smooth evolution in awareness or individual initiative will curb the global society's tendency to produce ever more greenhouse gases, and to exploit the biosphere – geosphere ever more extensively. Laws to limit this deleterious process seem to be absolutely necessary.

N4) According to the authoritative Stern Review, climate change mitigation would only need financial efforts of the order of 1% - 2% of the GDP of each country. In order to avoid the worst case scenario, and to ensure survival of human kind, one would hope that one is willing to pay even more, if necessary. In the author's opinion, we have reached the state in which climate change mitigation belongs to the most important efforts in which to inject our funds. In sum, defending environmental HR is economically realistic.

A second conclusion seems to impose itself, derived from Limon's work and similar studies: namely that N3) is problematic. Indeed, Limon could not cite one example demonstrating a clear legal enforcement of environmental HR. The same conclusion is apparent in other legal studies (one other thorough and explicit study is given in (Gilbert, 2003)). Therefore, it is safe to summarize that, at the time being, environmental HR seem not to have real legal power - to the point that the severe critique of Bentham of "moral rights" comes into mind.

I believe, however, there is no real obstacle for remedying this problem. Again, in the present situation, and accepting premises P1) – P3), I believe we should use all realistic means to contribute to solutions. It seems that the reason of the weakness of environmental HR as stated in, e.g. the Stockholm Declaration, lies in the *too vague formulation*. Talking about "the right to a SE" is not precise enough to build a legal case on. What is a SE (in the ecologic sense) ? It needs the work of institutions like the IPCC to define this notion; but thanks to this work it very well can be defined. An important goal of the present article is to urge human rights theorists, and legal and other experts, to work out such a precise formulation of environmental HR.

That does not seem an impossible task. As a start, one could replace the word “safe” by “sustainable”, a word that is by now by many people associated with preservation of the biosphere. “RSE” will thus mean, in the following, “right(s) to a *sustainable* environment”. But that seems not to be enough. What exactly is a sustainable environment ? One would already gain by claiming a “human right to an environment that is sustainable, and that is ecologically balanced, in particular with respect to greenhouse gas emissions”. Nevertheless, even if such a phrasing might have some pragmatic value, it may still not suffice. Indeed, it very much seems that the only way to make environmental HR really binding, is to include a reference to quantitative thresholds – or rather to an international protocol establishing quantitative thresholds. One thus would arrive at a formulation of which the essence would be, stressing the fundamental, basic nature of the right at stake: “Every human being has the basic human right to an environment that is sustainable as defined in X”, where X is a protocol or treaty of the Kyoto type. X must include quantitative limits on greenhouse gas emissions, as distributed over countries, industries, and companies. Clearly, such a legally binding protocol was exactly what the Copenhagen Meeting in december 2009 should have given birth to. But we are not there yet.

It seems that the HR approach might be the most promising road to a solution for fundamental biosphere related threats – it may be the only one. Let us stress that it is possible to calculate the mentioned quantitative greenhouse gas budget¹⁰ and distribute it over countries, companies etc. The European Union has made partially convincing first steps into the implementation of such a regulation, as strongly recommended by the Stern Review. Let us also note that, in the light of above ideas, protocol X should not only focus on greenhouse gas limitation as beneficiary for the present generation, but also on 1) the measures that are necessary for all future generations, and 2) on the preservation of the biosphere – geosphere in its totality, in particular and most urgently of forests, seas, rivers, and nature in general. I therefore agree with Weiss (1989) when she advocates, for the formulation of environmental (or planetary) rights, the use of explicit phrasings for prohibiting certain actions that are detrimental to the environment. Weiss states several explicit examples of such actions, as the “destruction of tropical forests sufficient to affect significantly the overall diversity of species in the region”.

Needless to say, professional work is needed for adequate phrasing, but it seems that anyone who comes up with such a formulation would give a strong impetus to a political and societal process that is, arguably, too slow. From a pragmatic point of view, first addressees would be political leaders.

In conclusion, I believe that the recent ecological evolution of the earth's ecosphere, and in particular the accelerated exhaustion of the biosphere – geosphere by human activity, should mobilize our creativity and efforts to find solutions for their firm mitigation in the short timeframe that is still left to us. I have stressed in the above the relevance of the precautionary principle, which seems to govern the rationally and humanly responsible attitude to adopt. It leads us to the conviction not to spare our efforts, and to tackle the worst case scenario. Clearly, the first prerequisite for curbing present tendencies is individual awareness, and individual action to reduce one's own ecological footprint. No political action will follow if citizens are not concerned. An even more important step, because of its wider scope, is political and legal action. In this context, the tools of HR seem highly pertinent, but on the condition that environmental HR are made as concrete as possible, if not “quantitative”. The RS(ustainable)E should thus be a right that as concretely and extensively as feasible defends the possibility for all human beings, in present and future times, to live in a stabilized climate, and to enjoy a sane, biologically balanced, and resourceful nature. As a matter of fact, temperature stabilization and a preserved nature go hand in hand: human activities that deteriorate or corroborate the one, also deteriorate or corroborate the other; and vast forests are the most efficient CO₂ sinks.

Finally, it is hoped that the present ideas will contribute to the awareness among professionals of the importance of a more explicit, if possible quantitative, phrasing of environmental HR.

VII. Epilogue: “Planetary Rights”.

In the light of the conclusion exposed in the preceding section, it seems that the term “planetary rights”, proposed in (Weiss, 1989), seems to carry (somewhat more explicitly than “global rights”) an important content. When Weiss uses the notion “planetary rights”, I believe

she does so, among other reasons, because implementation of rights has its full power if done on a global, planetary basis. Indeed, in a global world, selective attribution of rights causes social tensions that in the end even disadvantage the initially advantaged. This seems especially true for environmental rights. If there will not soon exist a stronger sense of equity among the world's populations, or a regulatory mechanism ensuring it, we may very well exhaust the ecosphere to its point of irreversibility. True, the exact distribution of greenhouse gas emission licenses is a highly strategic, much debated, and (to some point) complex theme – it will be in political focus for a long time¹¹. But its complexity and strategic implications can be no valid reasons for refraining from adequate action.

That “planetary rights” is a good term may also be seen from a slightly different angle. The climate problem has highlighted in great clarity that problems are not “local” anymore: the atmosphere is an extremely complex, and “non-local” system of which all parts communicate with each other. Our actions here can have a direct impact on what happens at the other side of the globe. All, even small, ecologically relevant actions of people in all parts of the world determine, in a positive or negative sense, the condition of the world as a whole¹². This in itself seems to justify why environmental rights are a paradigmatic case of *universal rights*, in the sense of global rights. They concern a global threat that can only be countered by the efforts of all individuals.

I therefore believe that even global rights or group rights do not acquire their full sense if they are not also interpreted as individual rights, and therefore linked to individual duties. Here it seems worthwhile to mention that some individuals, like political leaders, but also for instance managers of companies, have more impact on society and therefore a proportionally higher responsibility to contribute to the solution of the problem. That seems a rational consequence of the status they chose – especially worth stressing in view of the urgency linked to global climate change. We have a strong moral duty, not only to resume our own responsibilities, but also to put political leaders in front of theirs.

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NOTES

¹ U.N. Doc. A/CONF.48/14.

² Gardiner invokes the reason mentioned before, namely the inter-disciplinary nature of the topic.

³ Weiss prefers the expression “planetary rights” (see further).

⁴ As Nickel mentions, “safe environment” can be ambiguous: it can mean “an environment safe from criminal threats” as well as “safe from contamination and pollution”. In our context the term obviously has the latter sense.

⁵ More precisely, I believe that exactly the same reasoning that leads, in Rawls’s *Theory of Justice*, to adopt the rule of “maximin”, protecting the least well-off, leads to adopt a precautionary principle that focuses on the worst case scenario. Said *en passant*, it is, I think, an interesting question whether one can base a rule like the principle of precaution on rational arguments alone. Rawlsians, for one, may believe such an endeavor to be possible. Because of the complexity of such principles, one may, however, believe that human charity and common sense are better guides in these matters than theories, which necessarily provide an approximate description of reality. That would, a fortiori, hold for an even more complex principle as principle P3) below (the principle of humanitarian and intergenerational care).

⁶ The Lorenz equations that describe the atmosphere are a set of nonlinear differential equations. That means, among other things, that the atmosphere has the potential of becoming chaotic: small causes can have exponentially growing effects. As one example, these equations are compatible with the famous metaphor stating that “a butterfly moving its wings above the Amazon forest, can cause a storm in Paris.” That is just an imaginative illustration of the general idea of chaos. Chaos implies irreversibility: we cannot go back to the initial situation anymore.

⁷ However, this difference is not always relevant: many environmental HR include the intergenerational aspect of the rights, see e.g. the Stockholm Declaration. Another aspect that Weiss highlights with her planetary rights is the ‘group’ character of environmental HR.

⁸ Most philosophers agree that rights necessarily imply duties: no rights without duties - and no duties without rights.

⁹ In order that individuals could more easily enforce environmental laws, Weiss advocates the creation of “Planetary Right Commissions”.

¹⁰ As is well known, a key parameter here is a to-be-defined CO₂ (or rather CO₂e) concentration expressed in ppm (parts pro million), which should not be exceeded for stabilization.

¹¹ It seems that the best guiding principles for this distribution are equity, and concern and generosity for less developed countries. This seems especially the case if one realizes that 1) we have the financial means to mitigate global climate change, 2) the rich countries are historically at the basis of the problem, and 3) we have to find a pragmatic solution (let us remember the principle of precaution).

¹² Weiss indeed advocates this holistic view of the ecosystem, and thus of the world.

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