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How to cite:

Tabios Hillebrecht, Anna Leah. "Disrobing Rights: The Privilege of Being Human in the Rights of Nature Discourse" In: "Can Nature Have Rights? Legal and Political Insights," edited by Anna Leah Tabios Hillebrecht and María Valeria Berros, *RCC Perspectives: Transformations in Environment and Society* 2017, no. 6, 15–20. doi.org/10.5282/rcc/8210.

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Leopoldstrasse 11a, 80802 Munich, GERMANY

ISSN (print) 2190-5088
ISSN (online) 2190-8087

SPONSORED BY THE

Federal Ministry of Education and Research

Deutsches Museum

LMU LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

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Disrobing Rights: The Privilege of Being Human in the Rights of Nature Discourse

Dolphins, chimpanzees, jaguars, trees—often they are overlooked in traditional legal discourse. More specifically considered, in traditional environmental legal discourse, the focus centers on humankind's access to resources and to a healthy natural environment. Even the reference to living beings apart from the human species as "stakeholders" is fraught with further questions and is perhaps delivered with hesitation. Although it is clear that flora and fauna are physically part of the natural environment, the question that may be raised at this point is: Do these parts of nature—or Nature itself, at that—in fact have *legal rights*?

Rights are those sets of inalienable fundamental norms that entail protection within the recognizing jurisdiction, and right holders are entitled to seek redress in case of violations. While the Universal Declaration of Human Rights (UDHR) provides for rights and freedoms in "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family," it clearly limits "right holders" to human beings and does not mention the natural environment. This exclusion is understandable: it was precisely "barbarous acts" *against humanity* that the UDHR aimed to protect its right holders from. Barbarous acts *against the natural environment* were not within its scope. The UDHR notwithstanding, environmental rights emerged in the front line of world politics decades thereafter.[1] Anthropocentric as it may be, the human right to a healthy environment provided a check on the extent to which human beings could impact their natural surroundings. Still, the framework treated the natural environment as an object, rather than as a right holder herself.

Getting to Know the Rights of Nature

The Andean worldview of Rights of Nature, now recognized as legal rights in the Constitution of Ecuador and in the Framework Law of Mother Earth and Integral Development for Living Well of Bolivia, unequivocally acknowledges Nature as a legal entity. Breaking

1 See "The Stockholm Declaration." *Declaration of the United Nations Conference on the Human Environment* (Stockholm, June 1972), available at http://www.un-documents.net/unchedec.htm.

its traditional legal assignment as an object of rights, Nature is a right holder. Nature has standing to sue—Nature must be protected, not as a means to ensure human rights and the protection of the human race, but as a separate entity who holds rights in her own name: *Pachamama* or Mother Nature.

According to Article 71 of the Ecuadorian Constitution, flora and fauna generally have "the right to exist, persist, maintain, and regenerate their vital cycles, structure, functions and their processes in evolution." Any act that infringes this right enables Nature, via representatives, to sue in her name and on behalf of her interests. While very straightforward, this underlines a vital element: representation. Nature still needs, even out of practicality, a "person, people, community, or nationality," according to the Ecuadorian Constitution, to demand the recognition of her rights before tribunals and offices.

Constructing Rights

The recognition of the rights of nature presents a significant leap forward in rights-based approaches to environmental protection. The "Rights of Nature" approach dares to stand against heavily anthropocentric notions of environmental rights and carves out a *sui generis* group of rights. Rights of Nature command the recognition and, subsequently, the enforcement of the rights and wellbeing of entities other than present-day humans.

But while doing so, these categories of rights also highlight the role and influence of humans. In these contexts, human beings lodge their influence in the rights-determination and enforcement process. Two elements stand in the way or, at the very least, blur these processes to the extent that determining the rights of Nature to be non-anthropocentric rights may prove to be a misconception. Here, I identify two interwoven elements which affect the postulation that environmental protection by way of *human* rights, or even basically *via* positive actions of human beings, works. The first element refers to the layers of power involved in Human-Nature relations. The second element, I term "survival compulsion" and it is rooted in self-preservation.

The fallacies of power

Last month, an Olympic Jaguar, Juma, was killed after a torch ceremony in Brazil. After tigers and lions, jaguars are the third-largest species in the feline family. Their numbers are also declining and the International Union for Conservation of Nature has categorized them as "Near Threatened." That the jaguar, or wild animals at that, could be "used" to serve human beings' purposes at the Olympics, is a clear demonstration of power that is, in this case, tilted in favor of human beings.

The act of chaining Juma exhibits the first layer of power relations between humans and Nature. Humans have the capacity to tame Nature. The killing of Juma further accentuated this power.

However, the authority that enshrines such "usage" of wildlife, and that sets forth its political face and its regulation, represents another shroud of this power, this time not simply apparent but more benevolent in a sense. Erik Swyngedouw describes the Nature subscribed to this process as a "treacherously deceitful Nature" and as one that is "packaged, numbered, calculated, coded, modeled, and represented by those who claim to process, know, understand, and speak for the 'real Nature.'"[2] This then represents the second layer of Human-Nature power relations. With these sets of rules and regulations, human beings further *design* and delineate the nuances between the exploitation and management of Nature. Outright, such a benevolent display of power—via legislation and a framework for rights—may contribute to the protection of Nature (be it theoretically or in actuality). Still, it is wielded not by Nature but by human beings—the same party that can also hold Nature on a leash according to how the wielders themselves behold Nature, pursuant to the first layer of power.

Protection of Nature via human beings and societal structure thus also attempts to improve the dialogue between the two. While the first layer of power shows that humans can tame and destroy Nature, the second layer demonstrates how humans, as Nature's stewards, can wield their power over Nature *and* fellow humans *for Nature's sake*.

2 Swyngedouw, Erik. "Impossible 'Sustainability' and the Postpolitical Condition." In *The Sustainable Development Paradox*, edited by Rob Krueger and David Gibbs, 21. New York: Guilford Press, 2007.

The third layer of power requires a reconsideration of Juma's case, although an attempt to do so from a legal perspective would reveal a stretch of the unknown. What would have happened if the shooting had *not* been done? The paradigm of uncertainty and the lack of knowledge at hand trigger fear in humans of powers potentially greater than their own, that could pose a challenge or threat—whether such greater sources of power are imagined or otherwise. Juma represented an unmistakable greater source of power to that of humans. And such powers threaten to expose human beings as weaker parts of the same Nature they seek to control.

Even in dormancy and amid the safeguards, benevolent or otherwise, that human beings have erected and established to guard society from the unpredictability of "Nature's power," the recognition of this "greater" source of power triggers the second element: the survival compulsion.

The "survival compulsion"

In late May of this year, I read critical, mostly passionate, opinions on the Cincinnati Zoo incident, which resulted in the death of a 17-year-old western lowland gorilla named Harambe. A three-year-old boy went over or through a barrier and shrubbery, and thereafter fell into Harambe's enclosure. Although a long discussion could be had on whether or not the shooting was necessary, I would rather underline one fact: the choice between two lives, one human and one classified as "nature." With the risk of perhaps appearing to be trivializing human life, I submit the Harambe case to careful scrutiny, very much in the spirit of a non-anthropocentric rights-based discussion.

From the crude example of gorilla vs. child, we must first determine who was making the choice in rights protection. Submitting the determination of interests, such as life, to a third party is a common procedure in rights-based approaches. In adjudication, for example, the third party determines which interests to uphold in a binding decision. In the scene involving Harambe and the child, the choice of survival and of death was made by a third party: a zoo official, one tasked with overseeing animals within the protective fences of a controlled environment, an onlooker who had to protect life. But whose life? Whose right to life?

The choice was made in Harambe's case and ended Harambe's life. In the human's case, the choice prolonged his. The choice that the zookeepers had to make was between a fellow living human being and a living gorilla. The third party making the choice was not in danger; but his choice to pull the trigger on Harambe protected one of his own species and, in a way, damned another species he could identify less with.

Choosing (legal) battles

The rights of Nature defy the anthropocentric character of rights discourse. The suitability of representation itself is open to question.[3] Rights of Nature offers access to legal relief to what we have identified to be the traditionally overlooked stakeholders—that is, flora and fauna. The authority of representatives to act in Nature's interests, however, is limited by the knowledge and motivation of these representatives. Akin to guardianship procedures and corporate personality cases in specific jurisdictions, these representatives stand in representation of Nature, submitting their pleas and judicial requests before the public office on the premise that these will be in the best interests of the right holders.[4] The court and tribunals, in turn, deliver judgments based on the presents of the case, and pronounce the actions that may, most probably, determine the fate (or part of it) of Nature.

The privilege to act

While developments in the law in selected jurisdictions have recognized Nature's legal personality or personhood, the privilege of enforcing them still lies with human society. Hence, even though environmental rights—namely, the human right to a healthy environment and the rights of Nature—are to be treated on equal footing, albeit in a different category, it cannot be denied that humans themselves have the practical primacy in enforcing these rights.

3 Marcus Taylor writes that representing nature "is an intrinsically political process." See Taylor, Marcus. *The Political Ecology of Climate Change Adaptation: Livelihoods, Agrarian Change and the Conflicts of Development.* London: Routledge, 2015.

4 This is not an exotic practice, however. Guardianships of both natural and juridical persons (e.g., corporations and organizations) require the representatives to act in the best interests of the represented.

Seen from this angle, the adage "first among equals," if we can put it so crudely, applies. Humans hold the privilege to choose when, how, and whether or not to legally act on these rights.

Overcoming Disparities of Interests: One Step at a Time

Yet, there is the question of suitability for the categorization and distinction between the rights of Nature and human rights. Are human beings not part of Nature itself,[5] so much so, that the scope of Rights of Nature necessarily encapsulates the human species as well?

It may be argued that humanity is an all-encompassing interest—that humans are necessarily linked to Nature and, as such, the protection of one redounds to that of the other. The human right to a healthy environment, for example, would have the correlative duty to protect the environment for the entire human community. Thus, in protecting their own interests, human beings are also enforcing their correlative duties to Nature in general, without the necessity of treating Nature as a separate right holder.

By embracing Nature within the anthropocentric rights discourse and highlighting its key role as right holder and right protector, we therefore render moot and unnecessary the concept of representation. But while it may hold water in the traditional sense of legal discourse, the question of whether such inclusion is enough or even appropriate to trump the "survival compulsion" of humankind, without detracting from the aims and values of Rights of Nature, is, however, doubtful. A separate set of rights—that of Nature's—cannot be foregone; the difficulty only lies in ensuring that the representatives protecting these rights *do* further the right holder's aims and values and not the representatives' own.

5 See Raymond Williams's three-dimensional definition of nature. Williams, Raymond. *Keywords: A Vocabulary of Culture and Society.* New York: Oxford University Press, 1983, 219–24. In his second and third definitions of nature, Williams explains nature to be the "inherent force which directs either the world or human beings or both" and the "material world itself, taken as including or not including human beings," respectively.