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Rights of Nature and the Precautionary Principle

There is an emerging body of environmental law that seeks to give formal rights to Nature's ecosystems. These laws are intended to surpass standard environmental regulations that have provided weak opposition to the mass degradation of ecosystems. The most radical advancements in the Rights of Nature movement have been the inclusion of Rights of Nature in Ecuador's 2008 constitution, followed thereafter by Bolivia's passing of The Law of Mother Earth in 2010. These laws provide a powerful opportunity to reshape our uncritical models of economic "development," address our unmet moral obligations to future generations, and challenge our understanding of what it means to live a flourishing life. However, there are challenges that must be faced in getting Rights of Nature laws into the public consciousness and political decision-making chambers. This is especially true in Europe, where Rights of Nature laws are nonexistent and groups advocating them have only recently begun to emerge. Moreover, it must be ensured that these laws are advanced in a way that is conceptually coherent and rigorous enough to deliver shared prosperity across generations. Central to fulfilling this goal is the identification of connections between Rights of Nature and other conceptually similar environmental laws. With that in mind, this article argues that progress in environmental protection can be made by highlighting the mutually supportive relationship between Rights of Nature laws and the long established, though increasingly threatened, Precautionary Principle.

There is no single definition of the Precautionary Principle, and its multiple competing formulations are highly contested. However, a way of articulating the concerns of some of the more robust definitions can be put like this: when we encounter uncertain yet plausible threats of severe harm to the environment or public health, *scientific uncertainty should not be used as a reason for failure* to take protective or preventative action. Rather, *uncertainty about the potential of harm should be a reason for implementing regulation.* In other words, the Precautionary Principle looks to transfer the burden of proof; instead of one party having to prove that an action of another is potentially harmful, the burden is on those who wish to pursue the allegedly harmful action to demonstrate sufficient evidence of safety. The Precautionary Principle is often appealed to in cases where there are reasons to believe that the quantification of risk is impossible to

make with any degree of accuracy. Indeed, a large part of its appeal is in its recognition that uncertainty cannot always be usefully numericized and represented as a probability.

While the Precautionary Principle has existed in the academic literature since the 1980s, it has seen a recent bloom in success. Most notably, the European Union (EU) included it in Article 191 of the 2007 Lisbon Treaty. More recently, in late 2015, the Supreme Court of the Philippines upheld a national ban on the cultivation of genetically-modified eggplant by appealing to the Precautionary Principle.[1] However, these recent successes have not been without resistance. One of the main concerns highlighted by Greenpeace in their 2015 leak of documents pertaining to the negotiations over the proposed US-EU free-trade agreement (TTIP), was that the Precautionary Principle could be dropped from EU law and replaced by a "risk based" approach that manages hazards instead of proactively preventing them.[2] Presumably, this approach would be modelled upon the various US executive orders issued by successive presidents of both the Democratic and Republican parties. These explicitly require a cost-benefit analysis of proposed regulations and do not permit the application of the Precautionary Principle in cases of uncertain threats. Indeed, the United States has a long history of hostility towards the Precautionary Principle, having successfully won a case arbitrated by the World Trade Organization (WTO) against the EU for its ban on the sale of beef reared with growth hormones, which was based on the Precautionary Principle. The EU refused to comply with the WTO ruling and thereby incurred trade sanctions worth $116.4 million on unrelated EU goods.[3]

One of the most influential critiques of the Precautionary Principle is articulated by Cass Sunstein. He argues that weak formulations of the principle are trivially true, while strong formulations are incoherent.[4] Sunstein points out that if all that the Precautionary Principle requires is that we consider the risks posed by uncertainty in our deliberations, then standard cost-benefit analysis approaches to valuing environmental harms can factor these risks into their calculations. However, if we opt for a stronger interpretation of the Precautionary Principle that requires uncertain threats of harm to be an overriding

1 See the press release from Greenpeace International. "Philippines' Supreme Court bans development of genetically engineered products," 11 December 2015. http://www.greenpeace.org/international/en/press/releases/2015/Philippines-Supreme-Court-bans-development-of-genetically-engineered-products-/

2 See the BBC's coverage of the leaks. "TTIP trade talks: Greenpeace leak, shows risks of EU-US deal," 2 May 2016. http://www.bbc.co.uk/news/world-europe-36185746.

3 For more information, see Woodin and Lucas, *Green Alternatives to Globalisation*, 42–43.

4 See Sunstein, *Laws of Fear: Beyond the Precautionary Principle.*

consideration in our decisions, then the principle is incoherent because "risks exist on all sides." His claim is that the act of regulating something can also lead to uncertain threats of harm in much the same way that refusing to regulate does. For example, it is possible to imagine the existence of a whole range of absurd threats which, while incredibly unlikely, are still conceptually possible. Therefore, according to Sunstein, the Precautionary Principle provides no way of deciding between public policy options.

This problem warrants careful consideration. However, it can be solved if a minimum plausibility threshold is set as a prerequisite for the Precautionary Principle to take effect.[5] Applying this threshold can filter out the infinitesimally unlikely threats of harm that can be ascribed to almost any action or inaction. Moreover, this must be coupled with a minimum harm threshold so that only those threats that present a genuinely harmful outcome will allow the principle to come into effect, thereby filtering out plausible threats of minute harm that can also be widely identified.[6] Such thresholds allow the Precautionary Principle to function as a decision-making rule, and stop precaution from being appealed to on both sides of the argument. In those rare cases where plausible threats of severe harm do exist on both sides of the argument, then we will need an alternative decision-making rule to arbitrate. Nevertheless, a methodology that delineates threats based on their plausibility and scale of harm is promising. Clearly there is much work to be done in deciding how to construct such a framework. It may well be, as Rupert Read argues, that "[t]he distinction between absurd threats and credible threats is too *fundamental* for there to be any algorithmic criterion."[7] If this is the case, then democratic debate and practical intelligence are likely to play a large role in identifying uncertain yet plausible threats of severe harm.

The implementation of the Precautionary Principle may sound like common sense, yet it is remarkable how often uncertainty has historically been used to prevent, or more often delay, environmental regulations. The book *Merchants of Doubt* (2010) by Naomi Oreskes and Erik Conway is a useful resource in chronicling just how effectively doubt has been weaponized by corporate lobbyists to delay urgent action on environmental and public health hazards. While what Oreskes and Conway primarily show is how doubt is often manufactured and used to cloud what are, scientifically, relatively clear

5 This suggestion comes from Stephen Gardiner's paper, "A Core Precautionary Principle," 52.
6 Carolyn Raffensberger and Joel Tickner call the approach of requiring uncertainty and harm thresholds "dual trigger" mechanisms. See their chapter "Introduction: To Foresee and Forestall", 1-11.
7 Quoted from his paper, "How to Think about the Climate Crisis via Precautionary Reasoning," 142.

threats. The more fundamental lesson from their work is that we need public decision-making that does not react to doubt with inertia. After all, there have been precautious cases against a litany of environmental and public health hazards well before scientific consensus of harm has emerged.[8] Formalizing the Precautionary Principle in national and international law is one way of ensuring rapid responses to uncertainty of harm when it is discovered, while also requiring more rigorous testing of new technologies and practices before their use is sanctioned.

From this, we can infer that the Precautionary Principle can be useful to discussions about Rights of Nature. If legal rights for ecosystems are to be sufficiently protective, there needs to be an accompanying criterion that sets out the circumstances in which actions violate an ecosystem's rights. The Precautionary Principle can provide this criterion, and can effectively arbitrate in instances of uncertainty when the potential harm to ecosystems is unpredictable. This is especially important given that the complexity of ecosystem health can make it difficult to detect and prove harm over shorter periods of time. Moreover, the Precautionary Principle can also provide a corrective against the power imbalances that so often characterize attempts to enforce environmental protection laws, where environmentalists often cannot match the legal spending power of multinational corporations and governments that are financially invested in ecosystem destruction. Without setting a high evidential barrier for proof that actions are harmless, we risk Rights of Nature laws being ineffective in the face of competing interests.

Interestingly, Ecuador's 2008 constitution clearly sets out both the rights that ecosystems possess: "The right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes," and also the State's requirement that, in environmental cases, "the burden of proof regarding the absence of potential or real danger shall lie with the operator of the activity or the defendant."[9] In this way, there is precedent for utilizing precaution as the basis for the harm criterion in Rights of Nature laws. Explicit articulation of the Precautionary Principle could benefit effective construction and implementation of these laws internationally.

8 See Harremoës et al, *The Precautionary Principle in the 20th Century*, for a list of public health and environmental harms that more precautious regulation may have prevented.

9 Articles 71 and 397 respectively. See George Town University's translation of Ecuador's constitution. http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

Moreover, one can reach the position of supporting Rights of Nature laws by thinking about the environmental crises through the lens of the Precautionary Principle. Current widely-used systems of valuing Nature, such as "natural capital" valuations, are premised on the idea that through careful analysis we can optimize human wellbeing by balancing the benefits of ecosystem destruction against its harms on a case-by-case basis. The Precautionary Principle offers an alternative to such balancing methods by arguing that, while the harms of individual ecosystem destruction are not comprehensively measurable, given that we know their aggregation to be catastrophic, we ought to resist potentially fatal, "managed" ecosystem destruction to begin with by adopting Rights of Nature laws. Public policy based on the Precautionary Principle may therefore entail the adoption of Rights of Nature laws. In this way, the Precautionary Principle serves as a justification for Rights of Nature laws and is central to the harm criterion needed for those laws to provide meaningful protection.

Given that the Precautionary Principle has a strong enough precedent in international law to be under threat from global free-trade deals, there is a good case to think that it should form a part of ecologically protective legal frameworks. However, it could still be objected that despite its practical utility, it does not occupy anywhere near as radical a position as Rights of Nature laws do in reforming our relationship with the environment. The Precautionary Principle can be seen as anthropocentric in its essence, and unchallenging of the owner-object paradigm. Instead, it simply recognizes limits to the extent to which we can exploit Nature without undermining our own living conditions. While this might be true, this criticism misses the extent to which anthropocentrism has become conflated with a whole host of other ideals, such as *technophilia, growthism*, and *scientism.*[10] To conflate anthropocentrism with these other concepts is to misconstrue its essence. There are good reasons for believing that anthropocentric interests are not necessarily as far away from the ecocentric worldview as we might think. The work of Richard Wilkinson and Kate Pickett has been crucial in showing how increased material wealth does not equate to an increased quality of life, thus challenging the need for economic growth and increased consumption as an anthropocentric demand.[11] Similarly, the work of postgrowth economists such as Tim Jackson are showing the likely impossibility of continuing economic growth without seriously undermining our own living conditions and leading to radically decreasing quality of life in the (not so distant) future.[12]

10 For a discussion of how anthropocentrism and progress have become conflated with these ideas, see Read, "Wittgenstein and the Illusion of 'Progress,'" 265–84.
11 See their book, *The Spirit Level.*
12 See his book, *Prosperity Without Growth.*

Without the need for (and possibility of) an economic model based upon ever-increasing consumption, the contrast between ecocentrism and anthropocentrism is not so stark. Through their work, these authors show that the perceived conflict can be reduced if we are willing work on reforming anthropocentrism and envision alternative definitions of human flourishing. Rights of Nature laws explicitly based upon the Precautionary Principle can provide a significant step towards this goal.

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