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Collective human rights as an (onto)logical solution to climate change: reconceptualizing, applying and proceduralizing an overlooked category of human rights

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Summary

Climate change is posing enormous challenges for international law due to its cross-cutting, temporally and spatially complex character. To date, the response to climate change has been insufficient and is met with political deadlocks that are hard to solve (Chapter 1). Given such complexities and the fact that climate change is not neutral but disproportionately affects those often already in marginalized positions, climate change is increasingly recognized as a human rights issue. However, human rights law due to its scope and characteristics is also faced with constraints in guiding the climate response. What is more, if not conceived of carefully, the increased urgency of climate change can further engrain some of human rights' inherent shortcomings, ultimately not aiding in providing just solutions. In particular, the three universalisations at the core of the dominant individual rights system – that of the exclusionary subject, governance and the state, and the human/nature dichotomy – constrain the effectiveness of the human rights approach to climate change.

Collective human rights, however, have long been characterized as at odds with these universalisations. They represent an abandonment of excessive individualism, implicate a myriad and break out of the state/individual dichotomy. Additionally, their association with nature – initially through their link with the common good but now in particular expressed in relation to Indigenous rights – could provide the rights regime with more environmental relevance to reflect humanity's inextricable link with nature. Given these *prima facie* advantages of collective rights, this research explores this potential of the concept in the climate context in-depth through a 'lifecycle-approach' – (re)conceptualization, application and proceduralization.

Collective human rights are most commonly associated with the right to self-determination and – albeit more contested – the right to a healthy environment and the right to development. More so, contemporary development such as rights of peasants and small-scale farmers and rights of nature depend on collective rights. Still, an exploration of underlying theories of collective human rights do not provide them with a coherent theory. The few accounts that do have a theoretical focus look at their justification – often from a Western gaze – from the perspective of impacts on individual rights. In other words, they provide an account of why we *should not* have collective rights instead of asking why we *should* and what protection gaps remain if there are no such rights. A lack of a coherent theory, combined with the advancement of col-

lective rights through various concepts and discourses, could lead to the misuse of the concept and ultimately undo hard-fought gains, such as Indigenous rights.

Indeed, the Indigenous rights discourse holds an important place in the theory of collective human rights provided in this study (Chapter 2). Tracing the philosophical roots of the individual rights doctrine, it is revealed that the enlightenment theories it represents are the expression of one particular way of being or ontology – naturalism – where there exist many. Naturalism centres the rational individual – an individual that has often been equated to the white, cis, able-bodied man – and separates it from the materiality of the world. It holds that what makes humans unique is their ratio which differentiates humans from the (inferior) material world, including nature. Human beings as rational individuals are assumed to accept the entity of the state through a social contract, anchoring the state as vital for of human rights. The Indigenous context, however, represents other-than-naturalist ontologies. The basic constituents of naturalism, moreover, do not fit other collective rights expressions – in particular African philosophical accounts of personhood reflected in the African Charter on Human and Peoples' Rights and the role and position of the peasantry in society. More broadly, anthropological and new materialist and posthumanist philosophical accounts all reveal the fallacy of the individual as separate from the 'external' world, instead relying on collectives or human/non-human assemblages to characterize the human experience.

Through this examination of anthropology, philosophy and existing collective rights discourses it is found that collective human rights must be regarded a space for ontological flexibility within human rights. This ontological character entails the elevation of the issue to that of naturalism and individual rights, which aid an abandonment of stubborn notions such as statehood and affectedness that are impairing the climate response.

The identification of the collective for the purpose of collective rights is dependent on two elements that can be derived from the ontological analysis of Indigenous, African and peasant rights. First, a 'closeness' to a 'common good' that together represent a hybrid entity in-between the leading dichotomies of human rights law. Multispecies, collective entanglement can consequently be defined by a close connection to nature and this close connection, in turn, on the basis of values apparent from the interdisciplinary analysis of collective systems such as relationality, responsibility and indivisibility with natural environments. This gives the collective a strong local, place-based character but could similarly be wider the larger the threat to livelihoods. Second, another important identified consequence of the ontological theory of collective rights is that it breaks out of the state/individual dichotomy and assumed social contract as other-than-naturalist ontologies exist in absence of the entity of the state. Such a conception is similarly found in (legal) theories of collective human rights.

These two elements are found to benefit the climate response through the expansion of both spatiality and temporality and the abandonment of the subjugation of nature to human utility and dependency on the state. The conceptual possibility to address non-state actors further enhances its potential as it correlates with the multisector characteristic of climate change and generally more accurately reflects the enormous (economic) power these entities can have.

Still, an analysis of the current practice and interpretation of collective rights, the right to self-determination, the right to development, and the right to a healthy environment, reveals the current chasm between an ontological theory of collective rights and practice, particularly in relation to climate change (Chapter 3). While all three rights were found to be invoked most often in the Indigenous context – a context hence compatible with an ontological lens – their current invocation in the climate context reveals the tendency to elevate the rights to the global level, in line with climate change's global narrative. Such a globalist conception constitutes the assimilation into naturalism and is incompatible with the rationale of human rights as a corrector of power imbalances. More generally, all three analysed rights show practical constraints due to diminished justiciability and/or reluctance due to persistent unclarities of the content and scope.

The analysis does reveal that self-determination is most compatible with the ontological frame through its centring of the idea of a destiny and its invocation when this collective destiny is under threat from (Global North) exploitation, subjugation or domination. As it also undoes itself most from practical constraints, the role of collective rights in practice ('application') is most feasible through this right, particularly its inclusion of the prohibition that 'in no case may a people be deprived of their means of subsistence' (Chapter 4).

Historically, the inclusion of this excerpt was related to decolonization and the establishment of 'strong state'. It aimed to undo the chackles of foreign intervention by odious capitalists by placing the disposal over natural resources firmly with peoples. While it was at that time often conflated with a state right, its inclusion as a component of the human right to self-determination and the *travaux préparatoires* differ from a permanent sovereignty of natural resources-perspective, instead holding that it might be invoked in the context of 1) the displacement of an Indigenous tribe, and 2) the depletion of phosphates of Nauru by foreign companies. This would correspond with the ontological theory of this study since it 1) reflects Indigenous peoples as rightsholders and particularly affected, and 2) implicates other-than-states duty bearers. This, additionally, corresponds with the ontological analysis of self-determination of Chapter 3 as it reflects acute pressures on one's destiny by (foreign) domination.

Another overlap with the ontological frame of this study can be found in the analysis of means of subsistence and its deprivation in the work of inter-

national human rights bodies. The research defines observes 3 different approaches – subsistence as economy, subsistence as environment and subsistence as identity – which correspond with naturalism/other ontologies. Subsistence as economy regards subsistence as money (individually) and the national economy (collectively). Such an interpretation is by-and-large found in the European and partly in the international context. Deprivation consequently is found to constitute a high threshold given the economical interpretation in isolation of the environment. The second interpretation – subsistence as environment – already more closely reflect the interconnectedness with the material world. However, in this interpretation (coinciding with the analysis of the RHE) there is a risk of elevation to the global environment. Interpreted more locally, it is intertwined with identity, which is what the third approach holds. This approach is predominantly invoked in the Inter-American system and Indigenous context and premised on three components: physical, spiritual and intergenerational impacts. The focus on these three components is found to not only reflect anthropological analyses of subsistence, but to provide the most ontological flexibility. Deprivation in this context is at a minimum concluded in cases of dispossession of Indigenous lands.

Adapting this norm to the ontological context at hand is found to lower the threshold for ambitious climate action and to enable more pre-emptive climate action such as in the case of inundation of small island states. What is more, the inclusion of ‘in no case’ aimed to undo naturalist concessions within the Twin Covenants and was meant as an absolute norm. This would transcend the boundaries of individual rights to implicate either a myriad of states or non-state actors, based on the power imbalances in place.

That being said, before such a case can be made, it needs to jump several procedural hoops that have already impaired other rights-based climate litigation. This study specifically analyses what a proceduralization of collective human rights would mean for legal standing, extraterritoriality and redress (Chapter 5).

An individualizable injury or victimhood is hard to prove given climate change’s complex spatiality and temporality. The criterium of legal standing is also incompatible with collective injuries. The *lex lata* shows a restrictive approach that is utilised in the European and partly international rights systems and a more expansive approach in the Inter-American and African systems – a difference also coinciding with the possibilities for collective, or collective-type litigation. The restrictive approach – whilst further embedding the exclusionary individual – does recognise its shortcomings in the climate context. In particular, the European Court provides a climate expansion to victimhood by identifying an NGO as victim. This, however, is solely an expansion of the naturalist ontology and does not constitute ontological flexibility. The expansive approach, on the other hand, can provide flexibility but is found to not sufficiently differentiate between individual and collective. It does, however, hint at an openness towards the consideration of environ-

mental harm *per se* through its reference to legal standing for nature which provides opportunities for the climate context.

Drawing on an observed 'closeness-paradigm' and the admission of various collectives in the *lex lata*, a *lex ferenda* approach is offered that provides the ontological flexibility required. The focus on hybridity is supported by this paradigm which is found in the conflation of victimhood for those close to the victim: family members (European system specifically) and future generations. The inclusion of nature for the purposes of standing (Inter-American system) and intergenerational equity (European system) similarly reflects collectiveness within classically individual standing. The inclusion of future generations and nature through centring the relationships hereto alters thresholds of individualizable injury, severity and temporality often prevalent in legal standing and limiting to climate litigation.

Extraterritoriality is found to be incompatible with climate change as an issue that transcends borders and is whose causes and effects are not equally distributed. The term, moreover, is premised upon an epistemologically biased conception of territory – synonymous to statehood and associated legal authority and erasing its environmental connotations.

The *lex lata* of extraterritoriality is divided in two approaches: state control and alternative control. State control is a limited model that provides little to no space for the consideration of climate change and is epistemologically incompatible due to its dependence on the entity of the state. The alternative control approach is an extension specifically provided for the environmental context and looks at effective control over a (polluting) activity to provide jurisdiction instead of the 'classic' effective control over territory or persons. However, this expansion is identified as an extension of the biased and narrow conception of territory and while environmentally relevant, does not provide sufficient epistemological flexibility.

A *lex ferenda*, relational approach is formulated which draws from other fields of law. It centres on the local, embodied context, looking at different perceptions of territory and sovereignties. For the establishment of jurisdiction, it focuses on a paradigm of influence, providing jurisdiction there where the causes of damaging activities can be identified. Such an amorphous rationale, moreover, can be a vehicle for the expansion of duty bearers identified throughout as a component of collective human rights and more accurately reflect climate change's Global North/Global South disparities.

Redress is dependent on standing and extraterritoriality but generally struggles to effectively address climate change as this would entail the provision of redress by virtually the whole world (albeit different intensities). Generally, its *lex lata* is held to provide either a state-centric or victim-based approach. The state-centric approach works from a position of either political sensitivity or subsidiarity and is found in the International and European system. The victim-based approach focuses on the victim and provides a

large variety of redress measures, including the need for provisional measures, providing a more precautionary approach as climate change warrants.

Generally, both approaches combine individual and collective redress measures and are to different degrees suited to accounting for the collective. For the *lex ferenda* approach, however, it is found to require a recentring from either state or individual to community and the maintenance of relationships to place. For climate change specifically, common redress measures such as cessation and non-repetition can be reconceived to provide for non-retrogression of climate policies, or, in line with this study, the cessation of continued colonial violence as a strong non-intervention principle.

Ultimately, while finding support in practice, there is a continued resistance to collective human rights and throughout its full lifecycle, a tendency to conceive of collective rights as an assimilation tool. This is not only morally reprehensible, it is also damaging from a climate change perspective as the naturalist ontology is responsible for the root causes of the climate crisis through its imperial, colonial and capitalist tendencies. This dissertation calls for a reinterpretation of collective human rights as a vehicle for ontological flexibility. It holds that the climate advantages can function as both a shield and sword. As a shield it will provide enhanced protection to other-than-naturalist ontologies, more strongly protecting them from the encroachment of naturalist – both generally and in the climate context through the imposition of biased climate ‘solutions’. As a sword it can elevate the discussions to provide other-than-naturalist ontologies with more weight and, by providing clarity to the term, be taken on board in the multitude of discussions and developments currently taking place on human rights and climate change.