Transnational Environmental Law, 11:3 (2022), pp. 447–461 © The Author(s), 2022. Published by Cambridge University Press.
doi:10.1017/S2047102522000383

EDITORIAL

The Possibility of Radical Change in Transnational Environmental Law

1. INTRODUCTION

It is axiomatic that law evolves in response to change, including ecological change.[1] Sometimes change is slow, with the law taking decades to evolve. Sometimes it is sudden and dramatic, or at least appears that way at first glance. Either way, the law evolves to accommodate changing social norms, changing political and economic conditions, and changing physical and ecological realities.[2] The field of transnational environmental law is defined by efforts to envision and achieve changes in the rule of law. Notable legal evolution has come from projects at the intersection of human rights and the environment,[3] climate justice,[4] private law regimes for environmental protection, rights of/for nature,[5]

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1 E.g., '[W]e have only to say *tempora mutantur*; and if men themselves change with the times, why should not also laws undergo an alteration?': *Pierson* v. *Post*, 3 Cai. R. 175, 181 (NY Sup. Ct. 1805) Livingston, J., dissenting.

2 See, e.g., C.P. Carlarne, 'Climate Creep' (2022) 52 *Environmental Law Reporter*, pp. 10374–79; K.S. Börk, 'An Evolutionary Theory of Administrative Law' (2019) 72(1) *SMU Law Review*, pp. 81–138; E.D. Elliott, 'The Evolutionary Tradition in Jurisprudence' (1985) 85(1) *Columbia Law Review*, pp. 38–94.

3 See, e.g., S. Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law*, pp. 113–43.

4 See, e.g., J. Wenta, J. McDonald & J.S. McGee, 'Enhancing Resilience and Justice in Climate Adaptation Laws' (2019) 8(1) *Transnational Environmental Law*, pp. 89–118.

5 See L. Burgers, 'Symposium Foreword: Private Rights of Nature' (2022) 11(3) *Transnational Environmental Law*, pp. 463–74; B. Hoops, *What If the Black Forest Owned Itself? A Constitutional Property Law Perspective on Rights of Nature* (2022) 11(3) *Transnational Environmental Law*, pp. 475–500; A. Putzer, T. Lambooy, I. Breemer & A. Rietveld, 'The Rights of Nature as a Bridge between Land-Ownership Regimes: The Potential of Institutionalized Interplay in Post-Colonial Societies (2022) 11(3) *Transnational Environmental Law*, pp. 501–23; V.A.J. Kurki, 'Can Nature Hold Rights? It's Not as Easy as You Think' (2022) 11(3) *Transnational Environmental Law*, pp. 525–52. See also Borràs, n. 3 above; M. Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9(3) *Transnational Environmental Law*, pp. 429–53; E. O'Donnell et al., 'Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature' (2020) 9(3) *Transnational Environmental Law*, pp. 403–27; L. Schimmöller, 'Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador' (2020) 9(3) *Transnational Environmental Law*, pp. 569–92; P. Villavicencio Calzadilla & L.J. Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) *Transnational Environmental Law*, pp. 397–424; L. Kotzé & P. Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6 (3) *Transnational Environmental Law*, pp. 401–33; S. Jolly & K.S. Roshan Menon, 'Of Ebbs and Flows: Understanding the Legal Consequences of Granting Personhood to Natural Entities in India' (2021) 10(3) *Transnational Environmental Law*, pp. 467–92; Martuwarra River Of Life et al.,

and ecocide.[6] Many of these projects have been, and continue to be, divisive and seemed unlikely to succeed when they were first proposed, or even decades later.[7] Nevertheless, change – big, impactful change – is possible. In every (positive or negative) case, as sudden and dramatic as the change appears, it is the result of decades' worth of effort that builds on local, state, and transnational legal efforts, litigation, as well as the persistence of political actors, scholars, and supportive social movements.[8]

What does change look like?

It can look grim, at least initially. For example, on 30 June 2022, in *West Virginia* v. *Environmental Protection Agency*[9] the United States (US) Supreme Court issued a decision restricting the ability of the Environmental Protection Agency (EPA) to limit one of the most significant sources of greenhouse gas emissions (GHGs) – power plant emissions – with the effect of undercutting critical climate mitigation efforts in the United States. The decision in *West Virginia* v. *EPA* dealt a clear blow to the ability of the EPA – and, thus, of the United States – to develop an efficient and effective GHG regulatory regime under existing law.[10] It constrained the EPA's ability to draw upon the US Clean Air Act as a tool to curb climate change, and it advanced a theory of constitutional law that the US Supreme Court is likely to continue to adopt in future cases to limit federal rulemaking in other contexts, including in other areas related to environmental protection and climate change.[11]

The decision was bad news for anyone – in the United States and around the world – who hoped that transnational legal evolution on climate change would (finally) influence the development of federal climate law in the United States, a chronic holdout in the field of national climate lawmaking.[12] However, the Supreme Court's decision in *West Virginia* v. *EPA* has failed to stem the tide of the development of US climate law. As discussed below, in the wake of the Supreme Court's attempt to constrain the hand of the federal government in addressing climate change, the almost unthinkable happened: the US Congress passed climate legislation.[13]

'Recognizing the Martuwarra's First Law Right to Life as a Living Ancestral Being' (2020) 9(3) *Transnational Environmental Law*, pp. 541–68.

6 See, e.g., P. Higgins, D. Short & N. South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59(3) *Crime, Law and Social Change*, pp. 251–66.

7 See, e.g., Burgers, n. 5 above, p. 474.

8 See, e.g., C.P. Carlarne, 'Climate Courage: Remaking Environmental Law' (2022) 41 *Stanford Environmental Law Journal*, pp. 125–93; A.A. Akbar, S.M. Ashar & J. Simonson, 'Movement Law' (2021) 73 *Stanford Law Review*, pp. 821–84; A. Akbar, 'Toward a Radical Imagination of Law' (2018) 93(3) *New York University Law Review*, pp. 405–79.

9 142 S. Ct. 2587 (2022).

10 For a more in-depth discussion of the case in the context of larger regulatory efforts under the Clean Air Act, see D.A. Farber & C.P. Carlarne, *Climate Change Law*, 2nd edn (Foundation Press, 2022 forthcoming).

11 See, e.g., D. Farber, 'Climate Change and the Major Question Doctrine', *Legal Planet*, 12 July 2022, available at: https://legal-planet.org/2022/07/12/the-major-question-doctrine-and-climate-change (exploring whether and how the major question doctrine might apply to other climate-related administrative rules).

12 See, e.g., Carlarne, n. 2 above.

13 H.R. 5376, An Act to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14, 117th Congress, available at: https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_of_2022.pdf (Inflation Reduction Act).

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

In the interim, legal change was taking place elsewhere. On 18 July 2022 – during the United Kingdom (UK) Met Office's first ever red alert for extreme heat – the High Court of England and Wales found that the UK's Net Zero Strategy,[14] which sets out an ambitious strategy for decarbonizing the economy, fails to meet the government's obligations under the Climate Change Act 2008 to produce detailed climate policies that show how the UK's legally binding carbon budgets will be met.[15] In contrast to the United States, the English High Court pushes a (comparatively ambitious) government to do more to address climate change in response to legal obligations set out in the 2008 Act. This case reflects patterns of legal development across Europe (as well as in other parts of the world)[16] wherein states have adopted climate laws that courts have subsequently found the state to be violating for lack of ambition.[17] These state-based actions are indicative of transnational learning and evolution in the development of climate law.[18]

Even bigger change was afoot. On 28 July 2022, after almost 30 years of advocacy, the United Nations (UN) General Assembly adopted Resolution 76/300, recognizing the human right to a clean, healthy and sustainable environment.[19]

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[14] HM Government, 'Net Zero Strategy: Build Back Greener', Oct. 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033990/net-zero-strategy-beis.pdf.

[15] *R (Friends of the Earth Ltd and Others)* v. *Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin).

[16] *Ashgar Leghari* v. *Federation of Pakistan* (WP No 25501/2015), Lahore High Court Green Bench, Orders of 4 and 14 Sept. 2015; *Earthlife Africa Johannesburg* v. *Minister of Environmental Affairs* (Case 65662/2016) [2017] ZAGPPHC 58, [2017] 2 All SA 519 (GP) (8 Mar. 2017).

[17] E. Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (2022) 11(2) *Transnational Environmental Law*, pp. 263–89; V. Ritz, 'Towards a Methodology for Specifying States' Mitigation Obligations in Line with the Equity Principle and Best Available Science' (2023 forthcoming) *Transnational Environmental Law*, pp. 1–26, available at: https://doi.org/10.1017/S2047102521000327; M. Zhu, 'The Rule of Climate Policy: How Do Chinese Judges Contribute to Climate Governance without Climate Law?' (2022) 11(1) *Transnational Environmental Law*, pp. 119–39; X. He, 'Mitigation and Adaptation through Environmental Impact Assessment Litigation: Rethinking the Prospect of Climate Change Litigation in China' (2021) 10(3) *Transnational Environmental Law*, pp. 413–39; F. Thornton, 'Of Harm, Culprits and Rectification: Obtaining Corrective Justice for Climate Change Displacement' (2021) 10(1) *Transnational Environmental Law*, pp. 13–33; A.-J. Saiger, 'Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach' (2020) 9(1) *Transnational Environmental Law*, pp. 37–54; J. Setzer & L. Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9(1) *Transnational Environmental Law*, pp. 77–101; G. Winter, '*Armando Carvalho and Others* v. *EU*: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9(1) *Transnational Environmental* Law, pp. 137–64; B. Mayer, '*The State of the Netherlands* v. *Urgenda Foundation*: Ruling of the Court of Appeal of The Hague (9 October 2018)' (2019) 8(1) *Transnational Environmental Law*, pp. 167–92; P.G. Ferreira, '"Common But Differentiated Responsibilities" in the National Courts: Lessons from *Urgenda* v. *The Netherlands*' (2016) 5(2) *Transnational Environmental Law*, pp. 329–51; J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57.

[18] See, e.g., Case C-565/19 P, *Armando Ferrão Carvalho and Others* v. *The European Parliament and the Council*, ECLI:EU:C:2021:252; *Notre Affaire à Tous and Others* v. *France*, Nos 1904967, 1904968, 1904972, 1904976/4-1 (14 Oct. 2021); *Urgenda* v. *The Netherlands*, Supreme Court, ECLI:NL:HR:2019:2007.

[19] UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment', 28 July 2022, UN Doc. A/RES/76/300.

The relationship between human rights and environmental quality has been recognized since the emergence of modern international environmental law at the 1972 UN Conference on the Human Environment in Stockholm. However, very little was done during the first two decades of legal development to explore or cultivate these linkages.[20] Finally, in 1994, the UN designated Special Rapporteur on Human Rights and the Environment, Fatma Zohra Ksentini, presented a Draft Declaration on Principles of Human Rights and the Environment to the UN Economic and Social Council.[21] This 1994 declaration proposed the creation of a new category of human rights that would recognize a right to a safe and healthy environment. The report received considerable attention in the press and helped in driving forward the movement around human rights and the environment, but it did not lead to legal change within the UN system.

In 2012, almost two decades after the initial report, growing concern about the links between human rights and the environment (now including climate change) prompted the UN Human Rights Council (HRC) to establish a mandate on human rights and the environment to 'examine the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', and 'promote best practices of the use of human rights in environmental policymaking'.[22] Still, a decade after the UN HRC established this mandate there was no recognized right to a healthy environment at the international level.

While these debates percolated at the international level, national legal systems have undergone parallel developments.[23] More than 100 states now recognize the right to a healthy environment at the national level through constitutional or legislative provisions.[24] Moreover, the right to a healthy environment has been incorporated into numerous regional human rights agreements and environmental treaties.[25] As then Special Rapporteur, John Knox, reported to the UN General Assembly in 2018, '[n]o other "new" human right has gained such widespread constitutional recognition so rapidly'.[26]

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[20] See C. Carlarne, 'Climate Change, Human Rights, and the Rule of Law: Untangling the Rights-Rule of Law Relationship in the Climate Change Context' (2020) 25(1) *UCLA Journal of International Law and Foreign Affairs*, pp. 11–40.

[21] UN Economic and Social Council, 'Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned: Human Rights and the Environment – Final Report of Fatma Zohra Ksentini, Special Rapporteur', 6 July 1994, UN Doc. E/CN.4.Sub.2/1994/9, Annex I, available at: https://digitallibrary.un.org/record/226681?ln=en.

[22] UN Office of the High Commissioner for Human Rights, 'Special Rapporteur on Human Rights and the Environment', available at: https://www.ohchr.org/en/Issues/environment/SRenvironment/Pages/SRenvironmentIndex.aspx.

[23] See, e.g., E.J. Macpherson & P. Weber Salazar, 'Towards a Holistic Environmental Flow Regime in Chile: Providing for Ecosystem Health and Indigenous Rights' (2020) 9(3) *Transnational Environmental Law*, pp. 481–519.

[24] See C. Jeffords & J.C. Gellars, 'Constitutionalizing Environmental Rights: A Practical Guide' (2017) 9(1) *Journal of Human Rights Practice*, pp. 136–45, at 136–7.

[25] J.H. Knox, 'Framework Principles on Human Rights and the Environment', UN Human Rights Special Procedures, 2018, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf.

[26] UN General Assembly, 'Report of the Special Rapporteur [J.H. Knox] on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment',

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

Then in 2022, suddenly, and almost 30 years on from the first formal presentation of the Draft Declaration on Principles of Human Rights and the Environment, the UN General Assembly adopted a resolution recognizing the human right to a clean, healthy and sustainable environment by a vote of 161 to 0 (8 abstentions).[27]

The rapid diffusion and embedding of environmental rights in national and regional law reflects the growth and power of transnational environmental law, something with which *TEL* has engaged in depth since its inception. The move (finally) to recognize a right to a clean, healthy and sustainable environment at the international level – as sudden and radical as it felt – was made possible through decades of advocacy and transnational legal development and learning.

The radical, unanticipated change continued. Even as the environmental community absorbed the weight of the recognition of a human right to a clean, healthy and sustainable environment, the United States was on the brink of profound legal evolution with regard to climate change.

Prior to August 2022, it was easy to 'bemoan the failure of Congress to design a comprehensive federal response to climate change'.[28] For the first 30 years of the development of climate law[29] the United States lagged dramatically. While other countries began to develop climate laws (and environmental and climate rights regimes), the US legislature stood still. For 30 years Congress failed to respond to climate change in any meaningful way. Even after the release of the sixth – and most dire yet – assessment report of the Intergovernmental Panel on Climate Change, and even as legal systems evolved all over the world, the US Congress stood still. To put it bluntly, at the start of 2022 the United States – one of the largest historic and contemporary emitters of GHGs – lacked any kind of comprehensive legislative framework for responding to climate change. This, of course, is why the Supreme Court's decision in *West Virginia* v. *EPA* appeared so devastating; it pulled the rug out from under the only viable legislative tool for addressing climate change. But then things changed.

The first signs of change appeared in late 2021, when Congress passed the US$ 1.2 trillion Infrastructure Act.[30] This Act was not a climate bill, but it was the closest the United States had yet come to enacting climate legislation.[31] In brief, the Infrastructure Act prioritized funding for transitioning to a clean energy economy

19 July 2018, UN Doc. A/73/188, para. 30, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/231/04/PDF/N1823104.pdf?OpenElement.

27 The abstentions were Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russia, and Syria.

28 Carlarne, n. 2 above, p. 10375.

29 The UN Framework Convention on Climate Change (New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int/resource/docs/convkp/conveng.pdf) was negotiated 30 years ago in 1992.

30 Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

31 The White House, 'Fact Sheet: The Bipartisan Infrastructure Deal Boosts Clean Energy Jobs, Strengthens Resilience, and Advances Environmental Justice', 8 Nov. 2021, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/08/fact-sheet-the-bipartisan-infrastructure-deal-boosts-clean-energy-jobs-strengthens-resilience-and-advances-environmental-justice (suggesting that the Act would 'strengthen our nation's resilience to extreme weather and climate change while reducing greenhouse gas emissions, expanding access to clean drinking water, building up a clean power grid, and more').

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

and investing in climate-friendly infrastructure and climate resiliency. It offered the largest investment up to that point in limiting GHG emissions and creating a climate-resilient economy. Following enactment of the Infrastructure Act, however, efforts floundered to push through a more expansive bill,[32] which would invest in additional climate actions. In the weeks following the decision in *West Virginia* v. *EPA*, it seemed as if the law would not, in fact, evolve in response to change.

Then, on 27 July 2022, perpetual climate law holdout, Senator Joe Manchin (a Democratic senator from West Virginia), went from climate-law obstructionist to climate-law enabler[33] and, suddenly (after decades of failed efforts), 'climate legislation went from being impossible to inevitable in roughly 2 weeks'.[34] While Senator Manchin's abrupt about-face allowed a climate bill to proceed in Congress, three decades of persistent work inside and outside the Hill made the bill possible.[35] This bill builds on local and state efforts, litigation, executive action, the stubborn persistence of a handful of Senators and Representatives, transnational experience, and a swelling international and transnational climate social movement.[36] The resulting bill, the Inflation Reduction Act (IRA), provides for historic investments in climate action. It is anticipated that the IRA will reduce US carbon emissions by roughly 40% by 2030.[37] The extent and impact of legal evolution over the summer months of 2022 was epic. However, as epic as it was, and as sometimes sudden as it seemed, each one of these legal changes (with the exception of the Supreme Court decision in *West Virginia* v. *EPA*) reflected years of effort and extensive amounts of transnational learning.

This is similarly true for the debates about the expansion of rights-based models for achieving environmental objectives. As documented in *TEL* over the years, the Rights of Nature movement has now become a fixture in the (transnational) environmental law landscape. This is a topic that, as Laura Burgers suggests in the Foreword to the Symposium Collection in this issue, 'is perhaps the most fascinating legal development of our time',[38] but the 'idea that non-human entities should be recognized as rights holders seemed mostly an intellectual exercise for decennia'.[39] As this Symposium Collection, in exploring the private law dimensions of Rights of Nature shows, these questions are no longer purely academic. Complementing the three symposium

[32] The White House, 'The Build Back Better Framework', available at: https://www.whitehouse.gov/build-back-better.

[33] N. Sobcyzk & J. Dillon, 'Manchin Revives Climate Bill: What's in the $369B Bill', *E&E News*, 28 July 2022, available at: https://www.eenews.net/articles/manchin-revives-climate-deal-whats-in-the-369b-bill; Kelsey Snell, 'After Spiking Early Talks, Manchin Agrees to a New Deal on Climate and Taxes', *NPR*, 27 July 2022, available at: https://www.npr.org/2022/07/27/1114108340/manchin-deal-inflation-reduction-act.

[34] V. Arroyo, *Twitter*, 12 Aug. 2022, 10:03pm, available at: https://twitter.com/Vicki_A_Arroyo/status/1558272968681308165.

[35] E.g., Carlarne, n. 8 above, pp. 160–93.

[36] Ibid.

[37] H.R. 5376, An Act to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14, 117th Congress, available at https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_of_2022.pdf.

[38] Burgers, n. 5 above, p. 464.

[39] Ibid., p. 464.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

pieces are three additional contributions which engage with developments regarding intergenerational perspectives on the rights of nature and on animal rights.

Alongside these rights-based analyses, this issue includes two other articles that advance thinking on transnational environmental governance. In the first article, 'EU–Third Country Dialogue on IUU Fishing: The Transformation of Thailand's Fishery Laws', Yoshiko Naiki and Jaruprapa Rakpong examine the persistent problem of illegal fishing and the effectiveness and legitimacy of transnational efforts (focusing on the European Union (EU)) to address the problem.[40] Then, in 'Bringing Multilateral Environmental Agreements into Development Finance: An Analysis of the Asian Infrastructure Investment Bank's Environmental and Social Framework', Wei-Chung Lin explores the role of multilateral development banks in advancing environmental goals and considers how independent accountability mechanisms can help to incentivize multilateral development banks to operate in ways that advance the objectives of multilateral environmental agreements.[41]

2. THE EVOLVING RIGHTS OF NATURE REGIME

This Symposium Collection consists of three articles, which are introduced in a Foreword by the symposium convener, Laura Burgers. In her Foreword, Burgers situates the evolving Rights of Nature debate within larger developments in international and transnational environmental law before arguing for a deeper inquiry into the private law dimensions of efforts to expand the rights of nature. For Burgers, '"nature" is seen increasingly as not only being of public interest, but also as having private interests of its own', thus 'enabling the application of private law to "nature"'.[42]

The symposium articles explore three different dimensions of private rights of nature: how existing private law will influence the effectiveness of such rights;[43] what impact rights of nature will have on private law;[44] and how developments in Rights of Nature will influence and implicate private law theory.[45] Collectively, the Symposium offers novel insights into an under-explored set of questions on the Rights of Nature and helps to deepen the conversation around practical and theoretical challenges at the intersection of private rights (especially property rights) and the rights of nature. Equally, the articles offer insight into how far Rights of Nature jurisprudence has evolved and helps to map out a research agenda for future scholarship to explore the intersection between rights of nature and private law.

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[40] Y. Naiki & J. Rakpong, 'EU–Third Country Dialogue on IUU Fishing: The Transformation of Thailand's Fishery Laws' (2022) 11(3) *Transnational Environmental Law*, pp. 629–53.

[41] W.-C. Lin, 'Bringing Multilateral Environmental Agreements into Development Finance: An Analysis of the Asian Infrastructure Investment Bank's Environmental and Social Framework' (2022) 11(3) *Transnational Environmental Law*, pp. 655–81.

[42] Burgers, n. 5 above, p. 469.

[43] Hoops, n. 5 above.

[44] Putzer et al., n. 5 above.

[45] Kurki, n. 5 above.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

3. THE TRANSNATIONAL DIFFUSION OF RIGHTS-BASED LEGAL REASONING

Complementing the symposium articles and continuing *TEL*'s standing as a productive space for cutting-edge thinking on questions of rights-based jurisprudence are three thematically related articles that explore questions at the intersection of the rights of nature, intergenerational rights, and animal rights.

Peter Lawrence continues the Rights of Nature conversation started in the Symposium by exploring whether normative arguments for rights of nature and intergenerational rights involve common or conflicting value assumptions.[46] That is, can we sustain evolving rights-based jurisprudence that argues both for the rights of nature and for the rights of future generations, or are these two evolving areas of thought in conflict? As a preface to his article, Lawrence suggests that 'it is apparent that human beings are currently locked into discourses, institutions, and patterns of behaviour – underpinned by vested interests – which have catastrophic impacts for earth systems'.[47] This lurching towards catastrophe, he suggests, is intensifying calls for the creation of institutions that can represent future generations and nature, presumably as a counterbalance to our self-destructive instincts.

In his thoughtful engagement with these questions, Lawrence suggests that while the normative arguments justifying representation of future generations and nature appear, at first glance, to rest on contradictory values, there are actually strong synergies between these discourses. Lawrence concludes that the 'values underpinning justice can justify the representation of both future generations and nature'.[48] He reaches this conclusion by comparing arguments for the creation of institutions for future generations based on human rights with justifications for proxy representation of nature based on ecological justice, Indigenous ecological justice, and socio-ecological justice. To do so, he draws upon case studies involving the Future Generations Commissioner for Wales (UK), which he contrasts with the Aotearoa New Zealand Parliamentary Commissioner for the Environment, and a second study examining mechanisms that ascribe legal personality to nature, here focusing on recent legal developments in Aotearoa New Zealand and Australia.

To contextualize his exploration of these two evolving areas of thought, Lawrence begins by examining the complexities of developing systems of proxy representation for group(s) that are unable to communicate their own needs and interests. He then ties together the interests of nature and future generations by suggesting that the push for representation of future generations and nature is backed by a common drive for intergenerational justice. Prioritizing intergenerational justice, Lawrence suggests, would ensure that future generations have core human rights, but would also allow rights to be extended to non-human nature based on the idea that the 'continuing functioning of planetary ecosystems is essential for preserving the core human rights of

[46] P. Lawrence, 'Justifying Representation of Future Generations and Nature: Contradictory or Mutually Supporting Values?' (2022) 11(3) *Transnational Environmental Law*, pp. 553–79.

[47] Ibid., p. 553.

[48] Ibid., p. 577.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

future generations'.[49] That is, this vision of justice is inclusive enough to see and respond to the linkages between the rights of future generations and the rights of nature.

After offering a broad normative analysis of proxy representation, Lawrence concludes that advocating for future generations to advance intergenerational justice may be the most effective way to bolster sustainability and to protect ecological systems, given human dependence on nature. He then draws upon his case studies to 'identify which of the normative arguments [he engages] … are likely to have the most traction in political campaigns to establish relevant institutions at the international level'.[50] That is, what do ongoing efforts in this context teach us about how to draw upon the rule of law effectively to achieve real change? Ultimately, Lawrence suggests that although the 'values supporting institutional representation of future generations have tended to be anthropocentric … these values can also justify the representation of nature, given human reliance on functioning ecological systems' and that the 'case studies demonstrate that apparent conflicts between values, as they manifest in the discourse, may be less significant in practice'.[51] Thus, he sees normative compatibility and legal possibilities at the intersection of efforts to advance the rights of future generations and the rights of nature.

The articles by Eva Bernet Kempers and Christine Parker & Lucinda Sheedy-Reinhard shift the debate to the rights of animals. In their contributions, the authors offer important new insights into the evolving debates over animal rights, animal welfare, and animal personhood. While Bernet Kempers engages the jurisprudential question of how to approach animal legal personhood,[52] Parker and Sheedy-Reinhard take on the role of private governance in advancing animal welfare.[53] More specifically, they argue that banks should adopt animal welfare policies as part of the growing movement for responsible banking. Both of these contributions reflect Burgers' insight that 'rights of animals have an even less systemic character than rights of nature', perhaps because much of the scholarship and advocacy on animal rights focuses on individual animals whereas the 'rights of nature, because of their more systemic character, allow humans more freedoms than rights of animals would if they were recognized'.[54] Whatever the case might be for the lagging pace of development in animal rights, these two contributions do much to advance scholarly thinking on both the theory and practice of advancing animal rights and animal welfare.

To begin, Bernet Kempers interrogates the argument that for animals to be given adequate legal protection, they must be granted legal personhood. Given the judiciary's

[49] Ibid., p. 559.

[50] Ibid., p. 569.

[51] Ibid., p. 577.

[52] E. Bernet Kempers, 'Transition rather than Revolution: The Gradual Road to Animal Legal Personhood through the Legislature' (2022) 11(3) *Transnational Environmental Law*, pp. 581–602.

[53] C. Parker & L. Sheedy-Reinhard, 'Are Banks Responsible for Animal Welfare and Climate Disruption? A Critical Review of Australian Banks' Due Diligence Policies for Agribusiness Lending' (2022) 11(3) *Transnational Environmental Law*, pp. 603–28.

[54] Burgers, n. 5 above, p. 469.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

persistent reluctance to grant personhood to animals, Bernet Kempers suggests we rethink our approach to thickening the rights to which animals are entitled. In key part, she advocates abandoning the all-or-nothing approach to animal legal personhood advanced by the Animal Rights Pyramid, which situates legal personhood at the bottom of the pyramid as a precondition for all other rights. Instead, Bernet Kempers proposes 'an alternative non-judicial route to animal legal personhood',[55] which focuses on granting specific rights to animals rather than conditioning all animal rights on an initial judicial grant of personhood.

Bernet Kempers also offers a theoretical and practical critique of existing approaches that over-emphasize the human-like cognitive qualities of animals when advocating for animals to be granted legal personhood. These approaches, she suggests, both over-emphasize human-animal similarities and over-estimate judicial receptiveness to such arguments. Based on these critiques, Bernet Kempers offers an alternative to existing approaches. This approach, the Alternative Animal Rights Pyramid, places simple rights which are not rights *per se* but 'have all the ingredients to be rights in a doctrinal or conceptual sense … such as the duty not to harm an animal unnecessarily'[56] at the bottom of the pyramid. The second tier of the pyramid would include fundamental rights, which protect animals' substantive interests and give them legal rights, while the third tier would include the 'appropriate incidents of legal personhood'.[57] Finally, as opposed to being the base (and necessary starting point) of the pyramid, legal personhood would be at the top of the pyramid.

This alternative approach, Bernet Kempers suggests, would allow animals to attain 'personhood-related burdens and benefits, even before they are recognized as legal persons'.[58] Moreover, this approach is also more reflective of emerging legal regimes, which are more likely to include animal welfare laws, laws focused on duties of care towards animals, and prohibitions on the use of animals for production, as opposed to approaches centred on legal personhood. By shifting away from the dominant approach and its fixation on legal personhood, Bernet Kempers suggests, it becomes possible 'to establish those incidents of legal personhood that are most relevant for specific animals, which may be possible without needing to acknowledge that animals are legal persons'.[59] This approach would be more readily accepted and create greater opportunities for incremental but meaningful change.

Bernet Kempers' nuanced analysis of the debate over animal rights and animal legal personhood is complemented by Parker and Sheedy-Reinhard's deep dive into how Australian banks are, or are not, taking animal welfare into account in their agribusiness lending policies. The authors persuasively make the case that banks should adopt animal welfare policies 'in the light of the growing acceptance of the need for

[55] Bernet Kempers, n. 52 above, p. 582.
[56] Ibid., p. 587.
[57] Ibid., p. 589.
[58] Ibid., p. 589.
[59] Ibid., p. 599.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

"responsible banking", which incorporates environmental, social and governance [(ESG)] analysis into credit risk and due diligence processes'.[60]

To advance their argument, Parker and Sheedy-Reinhard highlight banks' growing investment in agribusiness and, in turn, 'the vicious cycle through which animal agribusiness can both contribute to, and be impacted by, climate disruption'.[61] At the intersection of these two trends – that is, growing investment in agribusiness and the threats that agribusiness poses to climate change – there is a gap in thinking with regard to the role that banks should play in protecting animal welfare and minimizing climate disruption. To help to fill this gap, the authors first introduce the concept of responsible banking before setting out reasons why banks should adopt responsible banking, including the management of credit and reputational risks, and the promotion of social and environmental values. They then link the rationales for responsible banking to animal welfare and climate disruption, showing how it is essential for banks to consider animal welfare and climate disruption risks for both practical and normative reasons.

Parker and Sheedy-Reinhard then narrow their lens and offer a comprehensive review of the extent to which seven major Australian retail banks and agribusiness lenders are addressing animal welfare and climate disruption in their lending practices. They offer a detailed look at the banks' ESG policies and lending practices to show that, even though the banks ostensibly make commitments to animal welfare and climate policies, these commitments often 'amount to little more than greenwashing'.[62] Having carefully reviewed the policies of these seven major banks, the authors conclude that addressing animal welfare and climate disruption through systems of self-governance is an inadequate way to deal with the depth of challenges we are facing at the intersection of animal welfare, climate change, and changing social values. To support their contention that there are changing norms and expectations in this space, the authors look to evolving systems of transnational law and policy, including new Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, which apply to all companies (including banks) headquartered in OECD countries. The new OECD Guidelines reference animal welfare and the climate impacts of animal agribusiness in their guidance material for banks.

Ultimately, the authors suggest, we are at a critical turning point. Agribusiness is dependent on loans; governments are not adequately addressing agribusiness-animal welfare-climate disruption challenges; and national and transnational norms are evolving to recognize the importance of animal welfare. Existing banking norms and lending policies, however, fail to address these intersecting challenges.

Similar to Bernet Kempers, Parker and Sheedy-Reinhard see possibilities for incremental change. They set out data-driven strategies for banks to develop more substantive ESG reporting requirements to address animal welfare and climate disruption through their lending policies, while also highlighting the important role that civil society and governmental agencies can play in creating pressure for change.

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[60] Parker & Sheedy-Reinhard, n. 53 above, p. 603.
[61] Ibid., p. 603.
[62] Ibid., p. 603.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

4. POWER, LEGITIMACY AND EFFECTIVNESS IN TRANSNATIONAL ENVIRONMENTAL LAW

In addition to continuing to advance innovative thinking on questions of rights-based jurisprudence, this issue of *TEL* features two articles exploring questions of regulatory legitimacy, effectiveness, and transnational learning on critical issues of illegal fishing and environmental finance.

In their contribution, Yoshiko Naiki and Jaruprapa Rakpong dive into the world of illegal, unreported, and unregulated (IUU) fishing.[63] IUU fishing is a persistent and well-chronicled transnational environmental challenge.[64] In their contribution, the authors help to deepen the scholarship on IUU by analyzing the EU's efforts to regulate IUU fishing through the use of a third-country carding system. This carding system, which was introduced in 2008,[65] creates a layered procedure for 'non-cooperating third countries' that the EU deems to be taking insufficient evidence to stop IUU fishing. The two phases involve the issuing of a 'yellow card', which is a formal warning of non-compliance and 'the *possibility* of being identified' as a non-cooperating third country.[66] Once a yellow card has been issued, if the recipient country fails to improve the situation, the EU will issue a 'red card', which identifies the state as a non-cooperating third country. A country in receipt of a red card will be subject to penalty measures, including import prohibitions.

The carding system is thus a potentially powerful form of transnational environmental control. After introducing the carding system, the authors examine how it exemplifies one of many EU efforts to use its market power to exert regulatory influence on third countries; they then contemplate both the effectiveness and the legitimacy of this use of power by analyzing the carding system in the context of the issuing of a yellow card to Thailand in 2015, and subsequent Thai efforts to reform its fisheries practices.

Using this case study, the authors unpack the interactions between the EU and Thailand in the wake of issuing the yellow card to track modes of communication and forms of response to assess how effective the carding system was in motivating change. Beyond pure effectiveness, however, Naiki and Rakpong use the case study to explore the different forms of power at play in the EU carding system, considering how it embodies and employs powers of 'expertise' and 'monitoring' as facilitative tools alongside traditional, more coercive forms of economic and political power. In so doing, the authors explore what factors encourage third countries to engage in regulatory reform and consider the sources and legitimacy of the EU's exercise of power.

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[63] Naiki & Rakpong, n. 40 above.

[64] See, e.g., B. Soyer, G. Leloudas & D. Miller, 'Tackling IUU Fishing: Developing a Holistic Legal Response' (2018) 7(1) *Transnational Environmental Law*, pp. 139–63.

[65] Regulation (EC) No. 1005/2008 establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, amending Regulation (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulation (EC) No. 1093/94 and (EC) No. 1447/1999 [2008] OJ L 286/1.

[66] Naiki & Rakpong, n. 40 above, p. 631.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

Naiki and Rakpong's careful analysis of the problems of IUU fishing and the effectiveness and legitimacy of the EU carding system does not seek definitively to answer the question of the legitimacy of these forms of extraterritorial exertion of power to achieve environmental goals (here, ultimately finding that certain parts of the programme are more legitimate than others). Instead, it offers critical insight into the operation of a high-profile and established system of transnational environmental governance at a moment when these systems are growing in number and influence. The authors successfully offer a detailed analysis of the EU carding system while also offering tools for comparative analysis of other transnational environmental governance systems.

In the final contribution to this issue, Wei-Chung Lin picks up on themes of responsibility and legitimacy in the context of responsible finance.[67] Like rights jurisprudence and extraterritorial application of fisheries' controls, responsible finance is also a site of ongoing transformation and interest in the context of transnational environmental governance. Here, Lin offers a valuable contribution to sustainable finance scholarship by analyzing the evolving role of multilateral development banks (MDBs) in facilitating state efforts to comply with the goals and obligations established by multilateral environmental agreements (MEAs). More specifically, Lin focuses on the world's newest MDB, the Asian Infrastructure Investment Bank (AIIB), to see what lessons can be drawn from the AIIB's early efforts to develop and implement an Environmental and Social Framework (ESF).

Although MDBs exist to promote economic growth, Lin suggests that they also have incentives to acknowledge and limit the negative environmental and social impacts of their projects. Efforts to minimize the negative environmental and social impacts of projects, however, have been modest. Moreover, 'analysis of the relationship between the AIIB ESF and MEAs has thus far been limited'[68] – a shortcoming that Lin seeks to remedy with his contribution. To do so, he begins by analyzing the pervasive impacts of development finance on the environment, and the undermining impact of many development finance projects on ongoing efforts to comply with MEAs. He then considers how the concept of sustainable development has taken hold and is increasingly integrated into the mandates of MDBs worldwide alongside other efforts to develop environmental and social frameworks. Lin then takes a closer look at the AIIB, which is still in its incipient stages of growth and thus is an important site for learning and innovation. Lin's analysis of the AIIB ESF demonstrates the bank's 'willingness to incorporate and put in place environmental treaty obligations in its lending operations'.[69] In the light of growing interest and amenability to responsible finance, Lin then explores how many banks, including the AIIB,[70] are establishing independent accountability mechanisms (IAMs) and the role that these IAMs can play in facilitating compliance with MEAs, and better overall environmental and social performance.

[67] Lin, n. 41 above.
[68] Ibid., p. 656.
[69] Ibid., pp. 656–7
[70] The AIIB created the Project-affected People's Mechanism (PPM) in 2019 to facilitate efforts to monitor and promote compliance with MEA obligations: ibid., pp. 657, 679.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

To interrogate the role of IAMs as accountability tools for MDBs, Lin looks at two distinctive examples, the World Bank Inspection Panel and the Compliance Advisor Ombudsman, to show how various IAMs have adopted different approaches to evaluating environmental compliance. Despite differences in form and function, Lim makes the case that IAMs are important tools for 'holding MDBs to account for the way in which they exercise their powers in international law'.[71] One of the most important aspect of IAMs, including the AIIB's IAM – the Project-affected People's Mechanism – is their ability to receive private complaints from those affected by MDB-supported development projects. As Lin suggests, this 'provides opportunities for those affected by development projects to raise their concerns and seek remedies to redress ill-designed or poorly implemented projects'.[72] In this sense IAMs are essential accountability mechanisms and important sites of evaluation and interpretation of environmental obligations.

Lin's contribution offers insights into responsible banking, the emergence and operation of the AIIB, and the evolution of efforts to integrate environmental and social considerations into development finance, with a particular focus on the important role of IAMs. His piece provides a critical intervention into the growing body of scholarship on responsible finance at an opportune moment as the AIIB begins the process of operationalizing its own IAM. This is all the more valuable given that, as also evidenced by the contribution of Parker and Sheedy-Reinhard in this issue, conversations around responsible banking are deepening around the world.

5. CONCLUSION

We are living in a period of rapid change. A key type of change that we – especially those of us thinking about systems of environmental governance – focus on is, of course, climate change. This is no surprise as, on a near daily basis, we are experiencing punctuated moments of change in the form of storms, heat, fires, and water scarcity. Climate change is altering our planetary circumstances in rapid and dramatic fashion and in slow and incremental ways. However, alongside these sometimes shocking and always troubling planetary changes, we are also experiencing discernible shifts in the rule of law. With the recent developments in human rights and the environment, Rights of Nature, and even domestic climate law in the United States, we are witnessing what could be experienced as sudden inflection points in environmental law and policy. These changes, of course, are not sudden; they have been facilitated by decades of efforts to effect change in how we envision and use the rule of law as a tool to protect our planet, ourselves, non-sentient beings, and future generations.

The ongoing changes feel radical and important, and they are, but they are also just the beginning of more change that is needed, and more challenges that will emerge. This is the role of *TEL* moving forward – to continue to be a home for innovative legal thinking that pushes at the boundaries of existing jurisprudence, that offers cutting-edge

[71] Ibid., p. 679.
[72] Ibid., p. 679.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press

analysis, and that creates space for transnational learning that will continue to compel us forward down a pathway towards more effective and equitable systems of transnational environmental law. The articles in this issue advance this form of creative, careful, and even transformative thinking, and we are excited to create room for these important conversations.

6. *TEL* EDITORIAL BOARD ANNOUNCEMENTS

We are delighted and grateful to announce that *TEL*'s Impact Factor again increased, to 3.925 for 2020–2021 (5-yr Impact Factor 4.075). This confirms *TEL*'s position as highest-ranking environmental law journal. It also places *TEL* sixth on the general law journal ranking in the Clarivate Journal Citation Reports (JCR). This continued positive trend for *TEL* in these and other citation index rankings and usage metrics is a wonderful recognition and motivation for the entire *TEL* team, as well as for our contributing authors, reviewers, and readers, without whom this success would not be possible.

https://doi.org/10.1017/S2047102522000383 Published online by Cambridge University Press