

HUMAN AND NONHUMAN
RIGHTS APPROACHES TO
ENVIRONMENTAL PROTECTION

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ABSTRACT

This thesis is concerned with the legal theory behind environmental rights. There are a number of different approaches that deploy rights as a mechanism to bring about environmental protection within international law, all of which can be termed 'environmental rights'. These include a human right to a healthy environment and procedural environmental rights. But there are also theories that support a more innovative or extensive use of legal rights for protecting the natural world. Notably, many of these theories concern the introduction of nonhuman rights (animal rights or rights of nature). This thesis investigates the theory behind and the practical structure of these various approaches, as well as analysing the very concept of 'rights'.

The original contribution to knowledge is threefold. I present a case for a human right to a healthy environment to be defined broadly: measured according to human and ecosystem health, and conceived as a right of both individuals and peoples; I rigorously apply both Interest Theory and Hohfeld's analysis of rights to human rights and thus construct a clear model for the structure of the sort of rights found in human rights (termed 'vital rights'); and I extend the philosophical theory behind human rights (and in particular the concept of dignity) towards the growing field of rights of nature.

Considered holistically, the thesis presents and suggests modes of thinking that seek to soften the divide between humanity and nature. This is done through a consideration of lived experience as always already ecologically embedded. As a result, the subject of vital rights (human rights included) should be understood as ecologically embedded living beings, opening the door to both nonhuman rights and new fields for human rights.

Preliminary Material.....	i
----------------------------------	----------

INTRODUCTION.....	1
--------------------------	----------

Part I - 29

CHAPTER ONE.....	30
-------------------------	-----------

1.1 Introduction.....	30
-----------------------	----

1.2 A Very Brief History of Human Rights.....	32
---	----

1.2.1 The Emergence of The Individual in International Law.....	32
---	----

1.3 The Design of Contemporary Human Rights.....	36
--	----

1.3.1 The Developing Content of Human Rights.....	40
---	----

1.3.2 The Developing Applicability of Human Rights.....	47
---	----

1.3.3 Summary.....	61
--------------------	----

1.4 Group Rights.....	62
-----------------------	----

1.4.1 Further Enrichment.....	65
-------------------------------	----

1.4.2 Right-Holders.....	67
--------------------------	----

1.4.3 Representation and Standing.....	70
--	----

1.4.4 Summary.....	72
--------------------	----

1.5 Dignity.....	73
------------------	----

1.5.1 Dignity as the Foundation of IHRL.....	74
--	----

1.5.2 The Dignity of the Human Rights Subject.....	79
--	----

1.5.3 Dignity as Justification and Metric.....	84
--	----

1.6 Conclusion.....	89
---------------------	----

CHAPTER TWO.....	93
-------------------------	-----------

2.1 Introduction.....	93
-----------------------	----

2.2 The 'Greening' Of Existing Human Rights.....	95
--	----

2.2.1 Europe.....	95
-------------------	----

2.2.2 Elsewhere.....	102
----------------------	-----

2.3 Defining A Human Right To Environment.....	104
--	-----

2.3.1 A Survey Of Current Law.....	105
------------------------------------	-----

2.3.2 Defining A 'Healthy Environment'.....	108
2.3.3 Developments Beyond Health.....	118
2.4 Actors.....	122
2.4.1 Subjects.....	122
2.4.2 Duty Bearers.....	131
2.5 Nature Of Duties.....	132
2.5.1 Adopting A Legal Framework.....	135
2.5.2 Procedural Duties.....	138
2.5.3 Scope Of Duties.....	142
2.5.4 Remediation.....	145
2.6 Determination Of A Breach.....	146
2.6.1 Causation.....	147
2.7.2 Balancing.....	149
2.7 Conclusion.....	151
CHAPTER THREE.....	155
3.1 Introduction.....	155
3.2 Compatibility.....	156
3.2.1 Moral Legitimacy.....	157
3.2.2 Legal Viability.....	164
3.2.3 Summary.....	167
3.3 Redundancy.....	167
3.4 Focus.....	174
3.5 Conclusion.....	187
Part II - 191	
CHAPTER FOUR.....	195
4.1 Introduction.....	195
4.2 What Kind Of Rights?.....	196
4.3 Understanding Rights.....	200
4.3.1 The Static Group.....	203
4.3.2 The Dynamic Group.....	211

4.4 Bundled Hohfeldian Positions.....	216
4.5 Which Entitlements Are Rights?.....	218
4.5.1 Rights And Duties.....	219
4.5.2 Rights And Liberties.....	221
4.5.3 Rights And Importance.....	224
4.6 A Model For Vital Rights.....	227
4.7 Conclusion.....	231
CHAPTER FIVE.....	235
5.1 Introduction.....	235
5.2 Will Theory.....	237
5.3 Problems With Will Theory.....	240
5.3.1 Powerless Rights.....	240
5.3.2 Right-Holder Restriction.....	245
5.3.3 Summary.....	248
5.4 Interest Theory.....	248
5.5 Problems With Interest Theory.....	251
5.5.1 Uninteresting Rights.....	252
5.5.2 Cascading Interests.....	256
5.5.3 Third Party Beneficiaries.....	259
5.5.4 Summary.....	262
5.6 A Revisionary Argument For Wt?.....	264
5.7 Conclusion.....	273
CHAPTER SIX.....	277
6.1 Introduction.....	277
6.2 Grounding.....	279
6.2.1 Rights Are Grounded In Interests.....	280
6.2.2 Complications In The Process.....	283
6.2.3 Vital Rights Are Grounded In Vital Interests.....	287
6.3 Why Vital Rights Are 'Vital'.....	289
6.3.1 Protecting The Living.....	290

6.3.2 Protecting What Is Essential.....	293
6.4 Dignity And Vitality.....	295
6.4.1 Dignity Is Inherent In Living Beings.....	296
6.4.2 Dignity Captures What Is Essential.....	301
6.4.3 Dignity Is Not Necessarily Exclusively Human.....	305
6.5 Dignity And Vital Interests.....	313
6.5 Conclusion.....	317

Part III - 319

CHAPTER SEVEN.....	326
7.1 Introduction.....	326
7.1.1 An Animal Rights Approach?.....	328
7.1.2 An Earth Jurisprudence Approach?.....	334
7.1.3 A Nonhuman Vital Rights Approach.....	338
7.2 Cases.....	339
7.2.1 Primates.....	339
7.2.2 Cetaceans.....	344
7.2.3 Animal Rights In The Indian Courts.....	345
7.3 Legislation.....	347
7.3.1 1978 Unesco Declaration Of Animal Rights.....	348
7.3.2 Helsinki Declaration.....	349
7.3.3 Rights Of Nature.....	350
7.3.4 Te Urewera And Te Awa Tupua.....	353
7.4 Conclusion.....	355
CHAPTER EIGHT.....	358
8.1 Introduction.....	358
8.2 Interests In IHRL.....	359
8.2.1 Interests In The International Bill Of Rights.....	363
8.2.2 Summary.....	379
8.2.3 Alternative Formulations.....	380
8.3 Nonhuman Vital Interests.....	387

8.3.1 Organisms.....	388
8.3.2 Ecosystems.....	396
8.3.3 Summary.....	399
8.3.4 Nonhuman Dignity.....	402
8.4 Dignity, Vital Interests And Intrinsic Value.....	404
8.4.1 Intrinsic Value.....	405
8.4.2 A Definition For Dignity.....	410
8.4.3 How Many Vital Interests?.....	413
8.5 Conclusion.....	417
CHAPTER NINE.....	420
9.1 Introduction.....	420
9.2 The Relationality Of Autopoietic Systems.....	423
9.2.1 Definition.....	424
9.2.2 Autopoiesis And Intrinsic Value.....	426
9.2.3 The Autopoietic Self.....	428
9.3 An 'Ecological' World.....	433
9.3.1 Biological Relations.....	434
9.3.2 Ecological Integrons.....	439
9.3.3 A Vital Interest In Forming Ecological Communities.....	446
9.4 Organisms-In-Their-Integrons.....	448
9.4.1 Being-Intra-Active.....	450
9.4.2 Umwelt.....	455
9.5 Multistable Phenomena.....	457
9.5.1 Gestaltism And Phenomena.....	458
9.5.2 Multistability.....	462
9.6 Corporate Ecosystem Rights.....	466
9.6.1 Four Reasons For Adopting Ecosystem Rights.....	468
9.6.2 Comparison With Peoples' Rights.....	478
9.7 Making Sense Of Rights Of Nature.....	479
9.7.1 Rights And Interests In The UDRME.....	479

9.7.2 Structures For Rights Of Nature.....	482
9.5 Conclusion.....	488
CONCLUSION.....	493
10.1 Overview.....	493
10.2 Vital Rights: A Summary.....	495
10.3 Key Environmental Rights.....	500
10.3.1 A Human Right To A Healthy Environment.....	501
10.3.2 Rights Of Nature.....	505
10.3.3 Individual Nonhuman Rights.....	511
10.4 Dignity, Humanity, Animality.....	513
10.4.1 Dignity Signposts What Matters And Why It Matters.....	513
10.4.2 Dignity Arises When More Than Survival Matters.....	514
10.4.3 Dignity Captures What Is Essential To Living Beings.....	515
10.4.3 Dignity Inheres In Embedded Organisms.....	516
10.5 Conclusion.....	518
Bibliography.....	522

ABBREVIATIONS, SYMBOLS AND TERMINOLOGY

Aarhus Convention	Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
ACHPR	African Charter on Human and Peoples' Rights
ACommHPR	African Commission on Human and Peoples' Rights
AJIL	The American Journal of International Law
ATP	Adenosine triphosphate
BMJ	British Medical Journal
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLJ	Cambridge Law Journal
CoE	Council of Europe
COP	Conference of the Parties
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CUP	Cambridge University Press
DNA	Deoxyribonucleic acid
DR	Decisions and Reviews
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECI	European Citizens' Initiative
ECtHR	European Court of Human Rights
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EIA	Environmental Impact Assessment
EJIL	The European Journal of International Law
ESCR	Economic, social and cultural rights
ETS	European Treaty Series
EU	European Union
GIELR	Georgetown International Environmental Law Review
Heritage Convention	Convention Concerning the Protection of the World Cultural and Natural Heritage

HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
HUP	Harvard University Press
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IEL	International Environmental Law
IHRL	International Human Rights Law
IHRR	International Human Rights Reports
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
IT	Interest Theory
IUCN	International Union for Conservation of Nature
JHRE	Journal of Human Rights and the Environment
Ksentini Report	ECOSOC, 'Human Rights and the Environment' E/CN.4/Sub.2/1994/9
NhRP	Nonhuman Rights Project
OAS	Organization of American States
OAU	Organization of African Unity
OED	Oxford English Dictionary
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
PETA	People for the Ethical Treatment of Animals
Rio Declaration	UN Conference on Environment and Development, 'Rio Declaration on Environment and Development' A/CONF.151/26/Rev.1
RoN	Rights of Nature
San Salvador Protocol	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
Stockholm Declaration	UN Conference on the Human Environment, 'Declaration of the UN Conference on the Human Environment' A/CONF.48/14/Rev.1
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

UNEP	United Nations Environment Programme
UNESCO	United Nations Educational Scientific and Cultural Organization
UDRME	Universal Declaration of the Rights of Mother Earth
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNTS	United Nations Treaty Series
US/USA	United States of America
WCN	World Charter for Nature
WHO	World Health Organization
WT	Will Theory
YJIL	Yale Journal of International Law
≡	'is identical to'
¬	'not'
φ/θ/ψ	A verb

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INTRODUCTION

This thesis examines how rights can be used to protect the natural world within international law. To this end, it surveys, analyses and critiques environmental human rights, nonhuman rights (of both organisms and ecosystems), and the structure of rights themselves. It deploys the concept of dignity – the foundation of contemporary international human rights law – to bind these three aspects together. That dignity is neither a solely individual nor an exclusively human trait will be demonstrated through an examination of the content of human rights and by developing a conceptualisation of dignity that sits alongside related concepts from both scientific and philosophical ecological thought.

The thesis is a doctrinal analysis. The inherently multifaceted nature of environmental rights requires drawing from a wide range of sources. Existing international law, relevant legal and ecological theory, and emerging legal principles are used to examine and critique the pathways available for environmental rights. Whilst there will inevitably be facets of environmental rights that lie beyond its frame, the varied subject matter of the thesis means that it will have a wide reach.

The thesis is based around an observation, a realisation, and a suggestion. It observes that rights have a particularly potent normative force; realises that this potency could be deployed in order to further the goals of environmental law; and suggests that this can best take place by understanding the subjects of rights (whether they be human or nonhuman) in an ecologically embedded way. The observation and

realisation generate the central question of the thesis: how can rights be used to protect the natural world through international law? The suggestion demarcates where answers to this question lie: in a broadly defined human right to a healthy environment, and in rights of ecosystems.

This introductory chapter will explore the nature of rights in order to demonstrate that it is worth investigating how rights can be used to protect the natural world.

RIGHTS IN LAW AND MORALITY

Rights are the primary legal tool discussed and analysed in this thesis. In order to discuss and analyse how rights can be used to protect the natural world within international law, this introduction will clarify (i) why rights form a focal point of the thesis; (ii) which rights in particular will be under consideration; and (iii) who those rights belong to. This is necessary because the word 'right' has a number of meanings,¹ and so it is important to be clear regarding exactly what sort of rights this thesis is concerned with.

The rights under consideration in this thesis are the sort of rights found in international human rights law (IHRL). This introduction will demonstrate that rights have a particular normative force that arises through their connection to both legal and moral discourse, and that this force manifests itself most potently within the framework of IHRL. At the outset, it is worth

¹ Chapter 4.1 (§4.1).

being clear about what is meant by both 'law' and 'morality' within the confines of this thesis.

Firstly, the domain of law under consideration is international law: the set of norms and principles that have been accepted by the international community as governing relations between states, and between states and other international actors. Although this thesis is ultimately concerned with international law, legal principles more generally will be relied on as and when appropriate, since international law is a subset of law as a whole.² For example, jurisprudential analyses of 'rights' will be used in this thesis even if they have been performed with other domains of law in mind.

The concept of morality employed in this thesis³ also refers to a set of norms and principles. People and societies adhere to these because they believe them to be ethically correct and indicative of appropriate behaviour. Moral norms and principles set out a code of conduct that determine and guide whether certain behaviour is 'right' or 'wrong', 'desirable' or 'undesirable', according to some underpinning theory.⁴ Unlike international law, there is no single definitive set of norms and principles that 'morality'

² See David Harris, *Cases and Materials on International Law* (7th edn, OUP 2010) 1-9. Consider also Article 38(1)(c) ICJ Statute, which states that general principles of law apply to international law.

³ For other definitions, see 'morality', *The Penguin Dictionary of Philosophy* (Penguin 1996).

⁴ Bernard Gert and Joshua Gert, 'The Definition of Morality' in Edward Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Spring 2016 edn) <<https://plato.stanford.edu/archives/spr2016/entries/morality-definition/>> (accessed 14/5/2016).

necessarily refers to.⁵ The fact that there are many different versions of morality does not mean that moral codes necessarily lack precision in themselves, but rather that there are many different such codes.

Both law and morality thus entail the formulation of rules regarding which actions must, or must not, be performed.⁶ These two systems of norms (ie international law and morality) may hold principles and rules in common,⁷ but they remain distinguishable codes. Furthermore, the precise nature of the relationship between (international) law and morality is dependent on the underpinning theory of morality under consideration.

The underpinning theory of morality adopted by this thesis does not restrict 'morality' to a narrow or restrictive domain whereby only humans can be beneficiaries of the norms and principles it embodies. Although it may be only humans that can have their actions regulated by morality⁸ – and it is human duties that this thesis is concerned with – there is no a priori reason why morality should only be concerned with how actions affect humans. In short, even if only humans can be moral agents, this does not mean that only humans are moral patients.⁹

⁵ *ibid.* cf Article 38(1) ICJ Statute.

⁶ Or should, or should not, be performed. Note that international law commitments are sometimes phrased using the word 'should' rather than 'shall'.

⁷ Harris (n2) 1-2.

⁸ Although this claim is, at best, only valid within human codes of morality since there is evidence that nonhuman moral codes exist: see Margaret Gruter, 'The origins of legal behavior' (1979) 2 *J Social Biol Struct* 43, 46-48; Chris Robinson, 'Biological Foundations of Human Rights' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2015) 60-68, 76-77.

⁹ See Paola Cavalieri, *The Animal Question* (OUP 2001) 28-29.

The notion of morality employed in this thesis is based on theories of environmental ethics, which frequently extend the moral community far beyond the human to include a wide variety of lifeforms.¹⁰ Importantly, such theories have already contributed to the shape and content of international law: the clearest example of this is the World Charter for Nature, in which the UN General Assembly affirmed that it was “convinced that ... every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action”.¹¹ Recognition of the moral value of nonhumans can also be found within binding international law, such as the Convention on Biological Diversity,¹² whose opening recital states that it is

¹⁰ See eg Aldo Leopold, *A Sand County Almanac* (OUP 1949); Arne Naess, ‘The Shallow and the Deep, Long-Range Ecology Movement’ (1973) 16 *Inquiry* 95; Richard Sylvan, ‘Is There a Need for a New, An Environmental, Ethic?’ (1973) 1 *Proceedings of the XV World Congress of Philosophy, Varna, Bulgaria* 205; John Rodman, ‘The Liberation of Nature?’ (1977) 20 *Inquiry* 83; Bill Devall and George Sessions, *Deep Ecology* (Gibbs Smith 1985); Paul Taylor, *Respect for Nature* (Princeton University Press 1986); Holmes Rolston III, *Environmental Ethics* (Temple University 1988); Warwick Fox, *Toward A Transpersonal Ecology* (SUNY Press 1990); Val Plumwood, ‘Nature, Self, and Gender: Environmental Philosophy, and the Critique of Rationalism’ (1991) 6 *Hypatia* 3; Bryan Norton, *Toward Unity Among Environmentalists* (OUP 1991); Freya Mathews, *The Ecological Self* (Routledge 1991); Robin Attfield and Andrew Belsey (eds), *Philosophy and the Natural Environment* (Royal Institute of Philosophy Supplement 36, CUP 1994); Gary Varner, *In Nature’s Interests?* (OUP 1998); J Baird Callicott, *Beyond the Land Ethic* (SUNY Press 1999); Andrew Light and Holmes Rolston III (eds) *Environmental Ethics* (Blackwell 2003); Timothy Morton, *The Ecological Thought* (HUP 2010); Patrick Curry, *Ecological Ethics* (Polity Press 2011); Alexander Gillespie, *International Environmental Law, Policy, and Ethics* (2nd edn, OUP 2014).

¹¹ (1982) UNGA Resolution A/RES/37/7, Preamble. The WCN is an example of ‘soft law’, which falls within the scope of ‘international law’ considered in this thesis, in particular since soft law is in widespread use and of considerable significance within international environmental law: Patricia Birnie et al, *International Law & the Environment* (3rd edn, OUP 2009) 34-37.

¹² (1992) 1760 UNTS 79.

“conscious of the intrinsic value of biodiversity”. These instruments¹³ demonstrate the overlaps between law and morality. They also demonstrate the appropriateness of understanding the category of moral patients as extending beyond the human, especially as this thesis enquires into how international law can use rights to protect the natural world, which necessarily encompasses nonhumans. The first step in this process is to detail why rights are worth considering in the first place.

WHY RIGHTS?

In his thought experiment of *Nowheresville*, Joel Feinberg imagines a world without rights.¹⁴ He postulates a society that has similar legal rules and compatible moral attitudes to ours, but specifically lacks the legal tool of a right. Feinberg points out that legal duties exist in *Nowheresville*, but that they are owed to ‘the Law’ or to God.¹⁵ Yet Feinberg argues that there is something missing, and that the “absence [of rights] is morally important”.¹⁶ The implication is that rights are not simply legal tools, but carry moral heft too: the term ‘rights’ refers to “legal entitlements as well as to moral responsibilities”.¹⁷ This section will detail the important role that ‘rights’ play within both morality and law.

¹³ As well as others, see §3.4.

¹⁴ Joel Feinberg, ‘The Nature and Value of Rights’ (1970) 4 *The Journal of Value Inquiry* 243, reprinted in Patrick Hayden (ed), *The Philosophy of Human Rights* (Paragon 2001).

¹⁵ *ibid* 176-79.

¹⁶ *ibid* 179.

¹⁷ Costas Douzinas and Conor Gearty, ‘Introduction’ in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 1.

MORAL RIGHTS

Feinberg is not alone in arguing that there is an important moral function contained within the term 'right'. For example, Neil MacCormick argues that there is "a significant difference between asserting that every child ought to be cared for, nurtured, and, if possible, loved, and asserting that every child has a right to care, nurture, and love".¹⁸ MacCormick's point is that using the language of 'rights' generates a more powerful and urgent moral argument than can otherwise be achieved. HLA Hart agrees with this assessment, believing that "the expression 'a right' has a specific force and cannot be replaced by ... other moral expressions [such as wrong, proper or ill-treatment]".¹⁹ The moral potency that comes alongside the language of 'rights' has resulted in a situation whereby "rights dominate modern understanding of what actions are permissible and which institutions are just".²⁰

The difference between rights-language and other normative language is that rights invoke a particular potency through their sense of urgency and seriousness. Furthermore, MacCormick believes that "it is morally important that we should recognise the moral importance and the significance of moral rights".²¹ The concept of 'rights' is thus not only *relevant* to morality, but in fact plays a key role within it: rights indicate

¹⁸ Neil MacCormick 'Children's Rights' in *Legal Right and Social Democracy* (OUP 1984) 154, 158-59.

¹⁹ HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175, 181.

²⁰ Leif Wenar, 'Rights' in Zalta (n4, Fall 2015 edn).

²¹ MacCormick (n18) 158.

particularly important and significant moral norms. LW Sumner

summarises this role of rights by noting that “rights function normatively as relatively insistent or peremptory moral considerations”.²² Rights have an elevated moral force, the use of which is reserved for particularly important moral matters.

The function of rights as indicators of particularly important matters bestows on them a distinct rhetorical power. This rhetorical power is often seized on by those campaigning for social and legal change because the language of ‘rights’ provides a powerful way to immediately imbue the issue under consideration with moral urgency. For example, movements for ‘civil rights’ in 1960’s America, for ‘women’s rights’ in 1920’s Britain, or for ‘animal rights’ today have all deployed the language of rights, even though the very lack of legal rights forms part of their concern.

‘Rights’ identify where an issue of moral urgency (and potentially an accompanying legal lacuna) lies: ‘X has, or ought to have, a right to Y’. Furthermore, the rhetorical power found simply in the language of the word ‘right’ automatically adds considerable weight to any associated demands.²³ Rights can both describe a better world (one where ‘X does have a right to Y’), and capture the urgency of demands for that world. Given that “getting law on your side is what all activists for a particular point of view pine for”,²⁴ rights provide a neat mechanism for doing this:

²² LW Sumner, *The Moral Foundation of Rights* (Clarendon 1987) 12.

²³ In this regard note the difference between claim-rights and power-rights §4.3.

²⁴ Conor Gearty, *Can Human Rights Survive?* (CUP 2006) 66.

they both describe a desirable legal relation and call for its establishment or upholding. In this way, rights can reach beyond the 'now' of law to the 'not-yet' of justice.²⁵ The legal character of rights also merits consideration.

LEGAL RIGHTS

Rights are also manifestly central to the legal domain. Indeed, the word for 'law' and the word for 'right' is the same in a number of European languages (German *Recht*, French *droit*, Italian *diritto*) attesting to the central importance of rights to law. It is worth examining what it is about 'rights' that makes them a useful weapon in the arsenal of the modern lawyer.

As well as elucidating the moral character of rights, Feinberg's thought-experiment also reveals something crucial about the legal role of rights. Feinberg's most significant observation for the purposes of this thesis is that, without rights, the notion of a duty being owed (ie being *due*) to a particular entity (viz the right-holder) is lost.²⁶ The fact that legal duties do not exist *in abstracto* (as they do in *Nowheresville*), but are owed to a particular entity is crucially captured by the notion of a right: "rights belong to people, they exist only with the support of a subject".²⁷ A right is vested in a right-holder.

²⁵ Costas Douzinas, *The End of Human Rights* (Hart 2000) 40.

²⁶ Feinberg (n14) 177-79. Feinberg also believes that the 'activity of claiming' (179) is crucial to rights. However, this confuses claim-rights and power-rights, and in particular the difference between *having* a (Hohfeldian) claim and *making* a claim. See §4.3.

²⁷ Douzinas (n25) 233, though one must interpret the word 'people' here broadly.

This important legal role of rights is drawn out in Finnis' comparison between *ius* and rights.²⁸ The Roman concept of *ius*, parsed by Finnis as "the what's fair",²⁹ functioned without the legal tool of a right. This is because 'what is fair' need not be owed to a particular right-holder, but can instead be justified as being a matter of God's will,³⁰ of *pietas*,³¹ or of duties to a *Volksgemeinschaft*.³² Rights, on the other hand, are vested in specific subjects and so demonstrate that fairness (or rightness) is not simply a general duty, but a duty owed to that specific subject: "ordinary language-speakers and lawyers in all modern languages ... think of 'a right' as something beneficial which a person *has* (a 'moral [including legal] quality')".³³

Finnis' analysis leads him to assert that "the modern idiom of rights is more supple and, by being more specific in its standpoint or perspective, is capable of being used with more differentiation and precision than the pre-modern use of 'the right' (*ius*)".³⁴ In particular, the purpose of a modern

²⁸ John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 205-10. See also Douzinas (n25) 48-50, 61-72.

²⁹ Finnis (n28) 206.

³⁰ Douzinas (n25) 54, 150; Exodus 20:1-17.

³¹ "An attitude of respect towards an ancestor, institution etc" that drove Aeneas' actions in the Aeneid: '*pietas*', *Shorter OED* (6th edn, OUP 2007).

³² 'Folk community', used to express the National Socialist concept of unification. Note that it is possible in each of these cases to consider 'God' etc as the 'right-holder', though such a perspective misses an important justification for the existence of a duty. See §4.3; §5.3.1.

³³ Finnis (n28) 208.

³⁴ *ibid* 209, emphasis removed.

right can be identified through this 'standpoint or perspective': a right exists to benefit the right-holder.³⁵

The precision that rights afford in identifying to whom duties are owed makes them ideal tools for this thesis. Through an investigation of the function of rights, the thesis will go on to argue that rights are grounded in interests of right-holders. Rights do not only identify to whom duties are owed but can even assist in determining *why* those duties exist: to protect interests. This will allow the thesis to investigate the possibility of new nonhuman legal right-holders through consideration of the interests of nonhumans.

Rights are vested in a right-holder to whom duties are owed. As such, rights have two perspectives: they can be viewed either through the eyes of the right-holder, or through the eyes of the duty-bearer. The first perspective demonstrates why a right exists: rights exist for the sake of the right-holder, not merely for the sake of 'what's fair'. The second perspective reveals that rights have normative force: if a right exists, then a duty must be performed.

*

Rights are crucial to the functioning of modern law thanks to their creation of 'right-holders' to whom duties are owed; and they allow the identification of important moral issues. As such, rights have more than one 'character': they exist within the law, as elementary components

³⁵ See discussion of Interest Theory in §5.4-5.5.

central to law's functioning, and they exist beyond the law as signposts of morally important issues. Rights are thus powerful weapons in the arsenal of both the lawyer and the campaigner that bridge between the related domains of law and morality.

WRONG RIGHTS?

That rights are of great value within both law and morality does not mean that they lack drawbacks. Two critiques of rights that are particularly relevant to this thesis are those of legalism and individualism. As identified by Conor Gearty, the critique of legalism is concerned with "the dangers inherent in the successful entrenching of the term 'human rights' in law and legal discourse".³⁶ Gearty looks at what happens *after* the language of rights has been successfully deployed to demand and effect legal reform: what happens when the moral rhetoric of 'rights' becomes packaged into legal structures?

The central problem that Gearty identifies of having rights enshrined in the law is that "custodianship of the idea [of rights] moves from the political to the legal sphere, from the NGOs, the MPs and so on to the judges and the lawyers".³⁷ This gives judges control over the content and the meaning of rights, which they may not exercise in the same emancipatory spirit that led to the establishment of the rights in the first place.³⁸

³⁶ Gearty (n24) 61, see also 60-99.

³⁷ *ibid* 71. See also Douzinas (n25) 8, 12, 119-20, 175, 229ff.

³⁸ See Gearty's historical examples of judges exercising their power in questionable fashions: Gearty (n24) 76-78. See also Upendra Baxi, 'Human rights in an era of hyper-globalisation' in Gearty and Douzinas (n17) 156-60.

In this way, the legalisation of rights can dislocate them from the political communities in which they were born and in which they function, thus potentially changing their nature from tools of rhetorical power and moral importance accessible to all, to the technical terminology of an unelected in-crowd.³⁹ There is a risk that “the rationalism of rights discourse makes their formulation so abstract and general as to render them unreal and unrealisable”.⁴⁰ Although all law is susceptible to this potentially problematic process, it is particularly serious for rights precisely because of their moral importance, which can lead to rights being (incorrectly) perceived as static ‘extra-political’ norms⁴¹ and so beyond the purview of non-legal communities.⁴² Almost paradoxically, the moral importance of rights could lead to the guardians of rights (ie the judges etc) shielding them from the very processes (ie societal deliberation) that give them their moral importance.

However, Gearty notes that the problems of legalism can be reduced through careful legal design. He cites the UK Human Rights Act as a good example because it contains exceptions and caveats that throw the adjudication of rights back into the political realm.⁴³ Furthermore, there

³⁹ Gearty (n24) 81-82.

⁴⁰ Douzinas (n25) 152, 150-53.

⁴¹ Baxi (n38) 161.

⁴² Gearty (n24) 72, 84.

⁴³ *ibid* 94-96. Some similar exceptions and caveats are also contained in the Human Rights Act’s ‘parent’ document within international law, the ECHR.

are judicial processes emerging in South Africa⁴⁴ and South America⁴⁵ that seek to involve and engage, rather than exclude, the political community from the legal processes that accompany legal rights. Such participatory approaches diminish the threat posed by legalism's deflation of rights, since they open and return rights to society, preventing them being trapped within a legalistic discourse.

Another relevant critique of rights is their perceived individualism. Because rights shift focus from the general 'what's fair' to the particular rights of the right-holder, the subject of rights can come across as "an isolated monad, withdrawn into himself ... into the confines of his private interests and private caprice, and separated from the community".⁴⁶ This Marxist critique of rights – one that is also pertinent to ecological critiques⁴⁷ – would hold water if it were impossible for subjects other than individuals to be right-holders.⁴⁸

⁴⁴ Sandra Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication' (2014) 32 *Nordic Journal of Human Rights* 312.

⁴⁵ César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socio-Economic Rights in Latin America' (2011) 89 *Texas Law Review* 1669.

⁴⁶ Karl Marx, 'On the Jewish Question' (first published 1844, reprinted in Hayden (n14)) 131, 132-33.

⁴⁷ See PS Elder, 'Legal Rights for Nature - The Wrong Answer to the Right(s) Question' (1984) 22 *Osgoode Hall Law Journal* 285; Prudence Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1997-1998) 10 *GIELR* 309; Mariachiara Tallacchini, 'Human Right to the Environment or Rights of Nature?' (1997) 67 *Archiv fur Recht und Sozial Philosophie* 125, 125.

⁴⁸ See Jeremy Waldron, 'Nonsense upon Stilts? – a reply' in Jeremy Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen 1987) 183ff.

However, this thesis supposes no such technical restriction regarding who can have rights. There is nothing in the language of rights per se that presumes individualism; it is rather the deployment of rights according to an individualistic morality whereby only individuals can have rights that perpetuates individualism. This can be avoided by simply adopting a non-individualistic morality that understands that there are important moral issues which cannot be captured through the perspective of the individual, and so is open to vesting rights in holders other than individuals.⁴⁹ An additional way in which the individualism of rights can be tempered is through acknowledging the social context in which rights operate. This is already recognised within IHRL, for example in the European Convention on Human Rights' statements that a number of rights can be interfered with when this is "necessary in a democratic society".⁵⁰

USING RIGHTS

Though rights may have shortcomings, they are crucial tools in both the development and the functioning of law and morality. In order to see further the important position that rights have within both law and morality, one can consider a number of characterisations of rights within the literature. For example, Dworkin's classification of "rights as trumps";⁵¹ Maine's observation that a legal right "seems to us elementary";⁵² Raz's

⁴⁹ §1.4; §9.6.

⁵⁰ (1950) 213 UNTS 222, Article 8(2), Article 9(2), Article 10(2), Article 11(2); §2.2.1; §8.2.1.6.

⁵¹ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) xi.

⁵² Cited in HLA Hart, 'Legal Rights' in *Essays on Bentham* (Clarendon 1982) 163.

claim that a “special feature” of rights is their “peremptory force”;⁵³ Douzinas’ analysis that rights “act as if they are the underlying grammar of the sentences of law”;⁵⁴ and Kramer’s noting that there is “political prestige attach[ed] to the language of ‘rights’”⁵⁵ all point towards the fact that rights are a driving force behind both law and morality and so worthy of consideration as a tool to protect the natural world through international law.

Not all rights exhibit these two characters to the same degree. Some rights are primarily legal – such as rights created under a contract; some are predominantly moral – such as many current invocations of animal rights. But many rights straddle law and morality,⁵⁶ and although “there is no simple identification to be made between moral and legal rights[,] there is an intimate connection between the two”.⁵⁷ A consequence of this intimate connection is that in many instances when a right is referred to, what is meant is a tool that is both moral and legal.

Rights are central to law, important to morality, and valuable in connecting the two together. Together, these features of rights result in them having a distinctive and definitive normative force, the existence of which is

⁵³ Joseph Raz, *The Morality of Freedom* (OUP 1986) 192.

⁵⁴ Douzinas (n25) 246-47.

⁵⁵ Mathew Kramer, ‘Rights in Legal and Political Philosophy’ in Keith Wittington et al (eds), *The Oxford Handbook of Law and Politics* (OUP 2008) 414, 421.

⁵⁶ There is a continuous spectrum between ‘moral rights’ and ‘legal rights’ and consequently many different ‘species’ of rights. See §4.1-4.6.

⁵⁷ Hart (n19) 177.

manifest in all the analyses referred to above. It is precisely this normative force that justifies a consideration of the role of rights when (new) legal theory is under consideration. In the quest for new, more forceful, ways for international law to protect the natural world, an analysis of the role rights can play may well turn out to be crucial.⁵⁸ However, having already seen that rights have more than one character, there is a need to be clear about exactly which kind of rights are under discussion in this thesis.

WHICH RIGHTS? VITAL RIGHTS

The rights under consideration in this thesis are both moral and legal. They must be legal, since this is a legal analysis considering tools that international law can use to protect the natural world. But they must also be moral, since the analysis seeks to make use of the normative force that arises through rights' moral dimension.

It is possible to narrow the scope of the thesis further by identifying a subset of rights that exhibits the normative force of rights in the most compelling way. There is a category of rights that have a "special character",⁵⁹ that are "resistant to trade-offs"⁶⁰ and are "of paramount importance".⁶¹ These rights are "the utopian element behind legal rights".⁶²

⁵⁸ Focussing on the potential value of rights in this regard does not deny the value of other alternative ways to protect the natural world through international law. However, the purpose of this thesis is to assess the virtues of one particular approach (ie rights) that seems promising.

⁵⁹ HRC, General Comment 24, HRI/GEN/1/ (Vol I) [18].

⁶⁰ James Griffin, *On Human Rights* (OUP 2008) 76.

⁶¹ Maurice Cranston, *What are Human Rights?* (Bodley 1973) 67-68.

⁶² Douzinas (n25) 245.

These four quotations all refer to those rights found in international human rights law (IHRL).⁶³ The rights in question are undeniably both moral and legal, as captured by Jürgen Habermas in his characterisation of them as “Janus-faced, looking simultaneously toward morality and the law”.⁶⁴ Furthermore, such rights have “law-exceeding energies and institutionally elevated juridical status”⁶⁵ because “human rights have a particularly potent level of symbolic and rhetorical appeal”.⁶⁶ It is this particular potency that the thesis will tap into as a potential source for new ways to protect the natural world through international law.

It is essential to point out that the thesis is not concerned exclusively with IHRL per se, but rather with the particular sort of rights found in IHRL: legal rights that have a particularly potent normative force. This difference is important because such rights are not the exclusive prestige of IHRL. Constitutional rights, for example, also carry a potent moral force above and beyond that of rights *simpliciter*,⁶⁷ whilst also having a definitive legal status. Hart’s analysis of legal rights led him to realise that there is an “important deployment of the language of rights by the constitutional lawyer ... for whom the core of the notion of rights is ... basic or

⁶³ See also Gearty (n24) 71.

⁶⁴ Jürgen Habermas and William Rehg, ‘Remarks on Legitimation Through Human Rights’ (1998) 24 *Phil & Soc Criticism* 157, 161; Jürgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights (2010) 41 *Metaphilosophy* 464, 470.

⁶⁵ Anna Grear and Louis Kotzé, ‘An invitation to fellow epistemic travellers’ in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Elgar 2015) 2.

⁶⁶ *ibid* 1.

⁶⁷ Such as legal rights established under a contract.

fundamental individual needs".⁶⁸ Notwithstanding his unwarranted restriction to the needs of individuals, Hart is referring to the same category of rights as those found in IHRL. And his characterisation is in fact a useful one: these rights seek to protect issues of fundamental, rather than merely incidental or circumstantial, moral importance.⁶⁹

Although constitutional rights provide a useful comparison, the focus of this thesis on international law means that IHRL will remain the paradigmatic example of the rights under analysis. To be clear then, the rights investigated in this thesis are *the sort of rights found in contemporary IHRL*.

These rights will be characterised in this thesis as 'vital rights'.⁷⁰ This terminology is suitable because the word 'vital' captures two important features of such rights. Vital rights are *essential*, and they are vested in *living beings*.⁷¹ The term 'vital rights' is thus a suitable moniker for the sort of rights that this thesis will investigate, and will be used with this meaning throughout the thesis.

Having already noted that vital rights are not only found in IHRL, there is an important observation to be made for the purposes of this thesis. There is no a priori reason why only individual humans can have vital rights. This

⁶⁸ Hart (n52) 193.

⁶⁹ See §6.3.2.

⁷⁰ See §6.3 for more detailed explanation of this terminology.

⁷¹ See §1.3; §6.3.

observation opens up the possibility of a plethora of vital right-holders: peoples, nonhuman organisms, ecosystems, even the Earth itself.

The possibility of using vital rights to protect the natural world is evidenced by a number of burgeoning approaches to use them to such an effect.⁷² This includes the growth of environmental human rights, and proposals for rights of nature. These two topics will form the primary areas of substantive discussion in the thesis: human and nonhuman rights approaches to environmental protection. Both will be examined in order to respond to the research question posed by this thesis, which can now be more precisely defined as 'how can vital rights be used to protect the natural world through international law?'

WHOSE RIGHTS?

It has already been noted that an important feature of rights is that they are specifically vested in a right-holder. Because rights are so vested, their content is connected to the nature of the right-holder: as Chapter Five will show, rights protect an interest of the right-holder.⁷³ It has also been noted that this thesis is open to the possibility of a wide inventory of right-holders; and it is therefore necessary to make some preliminary remarks regarding right-holders themselves.

There are two connected points to be made in this regard. Firstly, and more simply, it is worth re-iterating that although the thesis is open to a wide variety of (potential) right-holders, there are some in which it is

⁷² See §2.2; §7.2-7.3.

⁷³ §5.

particularly interested. Currently, humans are the only holders of vital rights within international law, and the thesis will initially exploit this observation. As such, it will analyse the possibility of using and developing IHRL to protect the natural world. In this regard, although the majority of human rights belong to individual human beings, there are also a number of rights within IHRL that belong to peoples. The thesis acknowledges this significant development, as peoples' rights may turn out to be a particularly useful legal construct for responding to environmental degradation.

The thesis is also interested in the possibility of vital rights being vested in nonhumans. In the first instance, this opens up the possibility of right-holding to organisms other than humans. But beyond this, the thesis will also investigate the possibility of rights being vested in subjects such as ecosystems. There is a useful analogy to be made here between individual/group human rights and organism/ecosystem rights of nature, which the thesis will draw out. The analogy is not a perfect one (since ecosystems are not sets of individuals of a particular species⁷⁴), but will help to develop some theoretical matters regarding the interests of individual organisms (including humans) and how these relate to the composite entities of which they form a part (including peoples). The important observation to note is that peoples' rights recognise the important *social* dimensions of being human, and that rights of ecosystems

⁷⁴ Though a 'people' is more than just a collection of individuals too: they also embody common histories, cultures, languages and worldviews: see §1.4; §9.6.1(a).

could be used to recognise that there are also important *ecological* dimensions of being an organism.

The reason why the thesis is compelled to look beyond human rights is because of their unavoidably anthropocentric focus.⁷⁵ Anthropocentrism means holding humans at the centre of a particular consideration.⁷⁶ Claiming that human rights are anthropocentric does not refer to the fact that they are created by humans (ie anthropogenic), but rather that they exist *for the sake of humans*. Since rights are vested in their holders, their holders are necessarily at the centre of their (moral and legal) consideration. It is important to note that no matter how the subject of human rights is conceptualised, whilst it is a human that is the holder of a right, it is to that human that the consequent duties are owed. Rights of humans are therefore unavoidably anthropocentric.

The second point to be made concerning the subjects of rights under consideration in this thesis is somewhat more complex. As well as asking 'who is the right-holder?', we must also ask 'how is this right-holder conceptualised?'. This is necessary because of the nature of the rights discussed in this thesis – ie vital rights. Vital rights protect issues that are of essential importance *to the holder* (their 'vital interests'⁷⁷). Knowing what is of vital importance to a particular right-holder requires

⁷⁵ §3.4.

⁷⁶ 'anthropocentric', *Shorter OED* (6th edn, OUP 2007). See Peter Burdon, 'The Great Jurisprudence' in Peter Burdon (ed), *Exploring Wild Law* (Wakefield 2011) 59-60.

⁷⁷ §6.2-6.3.

understanding the nature of said subject, and so how (potential) right-holders are conceptualised becomes a significant theme for the thesis.

In this regard, it will be seen that the content of human rights has enriched alongside developments in understanding of the nature of human nature.

In investigating how IHRL can be used to protect the natural world, the underpinning theoretical question is whether IHRL has encompassed an enriched enough view of the human rights subject for IHRL to provide suitable levels of protection to the natural world.

As just noted, IHRL will be hampered in this task by its unavoidable anthropocentrism. Part III of the thesis therefore responds to this limitation of human rights by considering nonhuman vital rights. Since the content of any such rights must be based on the 'vital interests' of organisms and/or ecosystems, the thesis must develop an understanding of what these interests are. This requires a careful consideration of the nature of organisms and ecosystems. The thesis will therefore develop a relational-ecological ontology both as a response to the limitations seen in Part I, and also in response to the deeply relational nature of the natural world. This ontology describes living organisms as always already ecologically embedded, composed as much of relations as of matter. It also conceives of the natural world as amenable to a number of perspectival descriptions. For example, ecosystems and organisms are equally primary

manifestations of the natural world. There is no definitive answer to the question 'which came first: the organism or the ecosystem?'.⁷⁸

It is worth pointing out at this juncture that even if IHRL were to understand its human subjects in line with the ontology developed in Part III (ie as ecologically embedded organisms), then it still cannot escape its unavoidable anthropocentrism. A re-imagining of the human rights subject can take place in an ecological context, but it cannot re-orientate the direction of the duties arising through human rights. These are inevitably owed to humans, and human rights are inevitably anthropocentric, even if understanding of the *anthropos* changes.

Nonhuman rights offer a potential solution to this problem because here the legal duty, and the connected moral obligation, is owed to a nonhuman right-holder. Understanding the interactions (or indeed intra-actions⁷⁹) between organisms and their ecosystems (and indeed ecosystems and their organisms) is necessary in order to develop the most fitting legal structure for nonhuman rights.

CHAPTER OUTLINE

The thesis will proceed in three Parts, each with three Chapters. Part I of the thesis will survey and analyse human rights approaches to environmental protection; Part III will survey and analyse nonhuman rights approaches to environmental protection. These two parts will contain the main responses to the research question (how can rights be used to

⁷⁸ Michel Jacob Morange, *Life Explained* (Yale University Press 2008) 108.

⁷⁹ §9.4.1.

protect the natural world through international law?). Connecting these two approaches, Part II will conduct an analytical exposition of rights, which will improve understanding of the structure and function of vital rights.

Part I begins by establishing some key features of IHRL. In particular, **Chapter One** identifies IHRL as a method by which humans and peoples have received international legal personality, demonstrating the flexibility that international law exhibits in this regard. It also investigates the developing content of IHRL in order to demonstrate that the subject of IHRL is conceived of as a real-life physically embodied and socially embedded living being, rather than simply a legal persona. The chapter also introduces the concept of dignity, which serves as both metric and justification within IHRL. In other words, dignity both captures what constitutes human suffering and flourishing, *and* why the former should be prevented and the latter promoted. A significant consequence of the embedded nature of the human rights subject is that this flourishing happens in community, as acknowledged by IHRL through, *inter alia*, group rights.

Direct analysis of how IHRL can be used to protect the natural world takes place in **Chapter Two**. In particular, the chapter will analyse a human right to environment. The central themes considered are the right's definition, its actors, and its duties. None of the matters raised within these themes are trivial, but a particularly significant matter is defining the content of the right: even once identified as a 'right to a *healthy* environment', there is still room for manoeuvre regarding how this can be

understood. The chapter will argue that a 'healthy environment' should be understood broadly: multiple reference points should be used to determine what counts as a 'healthy environment' in terms of both human health and ecosystem health.

Chapter Three investigates some theoretical concerns regarding the justification of a human right to environment. The three key challenges in this regard are its compatibility with IHRL, its potential redundancy, and the anthropocentric focus of human rights. Although all of these pose searching questions, it is anthropocentrism that most severely limits the value of using human rights for environmental protection. Human rights, as they are vested in humans, are unavoidably anthropocentric. This motivates the thesis' subsequent exploration of nonhuman rights.

Before doing so however, an enquiry must take place into the nature of 'rights' themselves. Part II thus marks a change of tack: it analyses rights in order to determine whether rights technically can be vested in nonhumans, and what the function of these rights might be. Based on the Hohfeldian schemata of rights, **Chapter Four** analyses the concept of rights from a formal standpoint. It demonstrates the logical distinctions between claim-rights, duties and power-rights (inter alia), and constructs a model for the structure of vital rights. Vital rights are shown to be complex bundles of Hohfeldian positions that are specifically secured by legal rights.

Building on the foundations of the previous chapter, **Chapter Five** considers what rights do. This entails investigating the merits of Will Theory and Interest Theory. It will be shown that Will Theory is too restrictive to explain the function of both rights and vital rights: not least

because autonomy (the helmsman of Will Theory) is an unsuitable substitute for dignity as the foundation for vital rights. Interest Theory must therefore be preferred in providing a description of rights' function: rights protect interests of the right-holder.

Chapter Six examines more closely the nature of vital rights. It first explains that vital rights are vital in two senses of the word: they are vested in living beings and they protect what is essential to these living beings. That is, vital rights are grounded in the essential interests of living beings ('vital interests'). The chapter then re-visits the notion of dignity due to the important observation that vital rights protect both dignity (rhetorically) and interests (functionally). It will argue that insight can be gained into the nature of dignity by understanding it as being specified through 'vital interests'.

These observations are taken to their logical conclusion in Part III's investigation of nonhuman rights. **Chapter Seven** sets the scene by surveying attempts to have nonhuman rights recognised. The diversity of nonhuman rights will become apparent: they can be attached to individual organisms or ecosystems as a whole; they can protect a variety of interests; and they can be established through the judiciary or through legislation. Because of this diversity of nonhuman rights approaches, the thesis will use the Interest Theory approach developed in Part II (whence vital rights are grounded in the essential interests of living beings) in order to stabilise the foundations of nonhuman rights and to link them to IHRL. This will allow for greater clarity over the justification and content of

nonhuman rights. The following two chapters use this chapter as a foothold for their theoretical consideration of nonhuman rights.

Chapter Eight is primarily concerned with the content of rights. It constructs a list of eight vital interests that are protected by IHRL, and then demonstrates the presence of these vital interests outside the human genus. Having shown that (at least some) nonhumans have (at least some) vital interests, the chapter then returns to the concept of dignity to see whether it can be meaningfully applied to nonhumans. In order to do this, the chapter compares the concepts of vital interests, intrinsic value and dignity in order to show that having dignity can be parsed as having a vital interest *additional to* the one in continued biological functioning. This is because it is not just mere survival that matters to something with dignity, the *kind of life* matters too: those with dignity should not suffer but flourish.

The thesis concludes by arguing that all living organisms have a vital interest in forming ecological communities in **Chapter Nine**. This interest arises because organisms (the subjects of vital rights) are ecologically embedded and so their flourishing happens in ecological community. This is a result of the deeply relational nature of living systems. The presence of this interest opens the door to nonhuman dignity and hence the establishment of nonhuman vital rights. The chapter also argues that this dignity is best protected through vesting rights in ecosystems in a comparable fashion to how the socially embedded nature of humans is protected through peoples' rights in IHRL.

PART I

Part I examines how international human rights law (IHRL) can be used to protect the natural world. The bulk of Part I is concerned with the concept of a human right to a healthy environment, as it is the most direct way to use IHRL to protect the natural world.¹ However, there are other approaches which use the norms, institutions and rhetoric of human rights for environmental ends that are clustered alongside this right. These include the 'greening' of existing human rights and procedural environmental rights. All of these together are termed 'environmental human rights'.

That IHRL already exists entails both advantages and disadvantages for its use in environmental contexts. It is already operational, but it may operate under certain (at times implicit, unclear and/or unnecessary) standpoints, which make extending its reach non-trivial. Part I therefore explores some of these standpoints – in particular regarding how the subject of human rights is conceived, and the anthropocentric focus of human rights – and considers whether and how current IHRL can be deployed or extended to respond to environmental concerns. To do this, it will first detail some key aspects of human rights and then consider the development of environmental human rights within IHRL.

¹ Note that in this thesis the terms 'the natural world' and 'the environment' will be used interchangeably to mean the living systems found on Earth. The term 'environment' should not necessarily be understood to be referring specifically to 'the human's environment'. See §3.4; §9.4.2.

CHAPTER ONE

HUMAN RIGHTS: AN OVERVIEW

1.1 INTRODUCTION

This chapter situates human rights historically and conceptually, and analyses some key aspects of their content and their design. In particular, Chapter One will demonstrate that human rights can adapt in response to developments in understanding of humans and human nature, and so have the potential to address issues related to the state of the natural world.

The Introduction detailed the potent nature of rights, and in particular of the sort of rights found in international human rights law (IHRL). IHRL for the sake of this thesis means those rights established and developed by the United Nations (UN) and by regional human rights bodies from 1948 onwards. Part I investigates whether the potency of these rights can be used to protect the natural world. Chapter One will set the scene for this, and the thesis as a whole, by examining some theoretical aspects of human rights in order to allow a fuller understanding of the nature of these rights.

Chapter One will develop understanding of IHRL through a brief historical overview; a consideration of the developing content and applicability of human rights; and an introduction to the concept of dignity. Together these will demonstrate that contemporary IHRL is broader, more flexible, and more dynamic than earlier incarnations of human rights. It is this

breadth, flexibility and dynamism that renders the idea of using IHRL to protect the natural world plausible.

Two key points made in this chapter are relevant to the thesis as a whole. The chapter will demonstrate (i) that international law can create new legal subjects and (ii) that the content and the range of application of human rights is not fixed. The former result is relevant to the thesis as a whole as it opens up the technical possibility of international law creating new, nonhuman, right-holders. The latter result has both direct and indirect implications. Firstly, it directly demonstrates that IHRL can potentially expand further to include environmental matters within its remit. Secondly, it demonstrates a developing understanding of the subject of human rights, away from a political-legal persona and towards a real-life human being. Not only does this present a more receptive legal framework for environmental human rights, but it also crucially reveals the increasingly 'fleshy' (ie living, embodied and socially embedded) understanding of the human rights subject, opening up the normative possibility of other 'fleshy' beings having rights.

At a more general level, the ideas developed in this chapter will demonstrate the need for flexible approaches when understanding particular concepts such as 'rights' and 'dignity'. It will be seen that continuous (rather than discrete) interpretations, and ones which allow a number of potentially heterogeneous viewpoints to be held at once, allow for deeper analysis. This is because they match more closely to the world we live in, which is continuous (in the sense of not being containable in

clearly demarcated blocks); relational (in the sense of being axiomatically inter-connected); and open to explanation from a number of perspectives.¹

1.2 A VERY BRIEF HISTORY OF HUMAN RIGHTS

Human rights, as understood by this thesis, are protected by international law. It is therefore worth considering how human rights fit into international law as a whole.

1.2.1 THE EMERGENCE OF THE INDIVIDUAL IN INTERNATIONAL LAW

Through the nineteenth and into the early twentieth century, public international law was primarily one-dimensional: it was concerned almost exclusively with the law between nations, operating in a Westphalian arrangement. The turn of the century can be considered “the apogee of the state-centred phase of international law”.² Throughout this time, state sovereignty ruled supreme:

Perhaps the most important [implication of the conception of a law of nations] is the idea that, because the law of nations governs only the relations between States, rulers

¹ §9.

² Robert Kolb, ‘The Protection of the Individual in Times of War and Peace’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of The History of International Law* (OUP 2012) 318. Christian Tomuschat, *Human Rights* (3rd edn, OUP 2014) 1-2; Louis Sohn, ‘The New International Law: Protection of the Rights of Individuals Rather than States’ (1982) 32 *The American University Law Review* 1, 1-9.

must therefore be at liberty to govern as they please within their respective domains.³

This 'hands-off' approach to domestic affairs in other states meant that the international legal community was hardly able to intervene in the internal affairs of other states: "a state's own citizens were almost completely at its mercy, and international law had little to say about mistreatment of persons by their own government".⁴ Furthermore, problems of international (or regional) concern had only one possible route for resolution – state-centric approaches.⁵ Herein lies the one-dimensionality of international law qua International Law⁶ in its formative era: in "the insistence on the independent nation-State as the fundamental unit".⁷

This fundamental unit of international law was found to be insufficient during the twentieth century through two major wars. Under the state-centric view of international law, "war was seen as an inevitable and permanent feature of the inter-state system",⁸ yet this view was challenged by the atrocities of 1914-1918 and 1939-1945. War could no

³ Stephen Neff, 'A Short History of International Law' in Malcolm Evans (ed), *International Law* (2nd edn, OUP 2006) 35. See also Antonio Cassese, 'States' in Fassbender and Peters (n2) 50-52, 65.

⁴ Sohn (n2) 9. See also David Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 535.

⁵ Sohn (n2) 4, 9. Costas Douzinas, *The End of Human Rights* (Hart 2000) 118.

⁶ That is, modern International Law as opposed to earlier forerunners of legal provisions beyond the domestic. These were in fact less rigid: Fassbender and Peters (n2) 5ff; Neff (n3, 4th edn, 2014) 4-8.

⁷ Neff (n3) 39.

⁸ Neff (n3) 40; cf Dominique Gaurier, 'Cosmopolis and Utopia' & Mary O'Connell, 'Peace and War' both in Fassbender and Peters (n2) 250, 272.

longer be seen as a mere side-effect and sovereignty as ultimate after the horrors of claimed Aryan supremacy, *lebensraum* and holocausts.⁹ The attempts to rein in the excesses of states through the League of Nations¹⁰ eventually proved abortive, but the developments in international law post-WWII have prevailed.

Three key responses arose to Hitler and his allies: the creation of the UN in 1945; the Nuremberg Trials in 1945-46; and the adoption of the Universal Declaration of Human Rights (UDHR) by the UN in 1948.¹¹ The latter two responses both recognised individuals per se as actors within international law.¹² In so doing, they cemented the international community's realisation that regulating only the interactions between states was insufficient to respond adequately to certain matters of international concern. Although international law had not ignored the relevance of individuals previously,¹³ it was not until the 1940s that a genuine overhaul of the system took place.¹⁴ The following observation can be seen as the outstanding message from Nuremberg:

⁹ Harris (n4) 535.

¹⁰ In particular the Minorities Regime was an important development: Tomuschat (n2) 23-26; Janne Nijman, 'Minorities and Majorities' in Fassbender and Peters (n2) 111-18.

¹¹ UNGA Resolution A/RES/3/217/A(III). See Johannes Morsink, 'World War Two and the Universal Declaration' (1993) 15 *HRQ* 357; Sohn (n2) 9-12.

¹² Sohn (n2) 1; Thomas Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 *HRQ* 703, 703-707, 717-18.

¹³ Consider the treatment of aliens, and workers' rights through the ILO: Kolb (n2) 332-36; Sohn (n2) 4-7.

¹⁴ Harris (n4) 535.

Crimes against International Law are committed by men, not by abstract entities [ie states], and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.¹⁵

Individuals were not only held to account for international crimes through international criminal law, but they were also given 'rights' by international law. In particular, these rights are found in the so-called 'International Bill of Rights': the UDHR together with the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁶ and the International Covenant on Civil and Political Rights (ICCPR).¹⁷ Through these developments in international criminal law and IHRL, the status of individuals as actors within the international legal system has been confirmed.¹⁸

Through these developments, it is clear that individual human beings now have international legal personality. This contrasts with earlier International Law, which saw states as the only actors, even if individuals were sometimes of concern to the law. Simpson notes that pre-1945 one could think of the place of individual humans within the international legal system "in much the same way one might fit animals, or trees, or the

¹⁵ Judgment of the International Military Tribunal for the Trial of German War Criminals 1946 (1947) 41 AJIL 172, 221.

¹⁶ (1966) 993 UNTS 3.

¹⁷ (1966) 999 UNTS 171.

¹⁸ Buergenthal (n12). International humanitarian law (eg Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287) also contributed to this process.

environment, into thinking about the existence of domestic law aimed at protecting them".¹⁹ This analogy is highly pertinent for this thesis, which will go on to explore if a similar adaptation of international law can take place to include nonhuman right-holders.

The key point is that the creation of IHRL demonstrates the ability of international law to create new legal subjects. This shows that the idea of legal personality is flexible, and not fixed: "(legal) subjectivity, like humanity, is an elastic category that can be extended and contracted without great difficulty".²⁰

1.3 THE DESIGN OF CONTEMPORARY HUMAN RIGHTS

The emergence of IHRL can be characterised as a response to some of the inadequacies of a traditionally state-centric international law.²¹ However, the creation of individual right-holders within international law was neither sudden nor unexpected: the signals pointing towards the enshrinement of human rights within international law stretch back over centuries.²²

Furthermore, human rights have a long history of forerunners within national law (such as the Magna Carta (1215), the English Bill of Rights (1689), the US Declaration of Independence (1776), and the French Declaration on the Rights of Man and Citizen (1789)). The development of

¹⁹ AWB Simpson, *Human Rights and the End of Empire* (OUP 2001) 93.

²⁰ Douzinas (n5) 234.

²¹ In the spirit, if not the word, of Alan Dershowitz, *Rights from Wrongs* (Basic 2004).

²² Micheline Ishay, *The History of Human Rights* (University of California Press 2008); Scott Davidson, *Human Rights* (Open University Press 1993).

'human rights' was neither spontaneous nor linear.²³ Although currents of similarity run through this history, there are also important differences between IHRL and its antecedents. This section will consider two important distinctions that can be made: differences in the *content* of human rights and differences in the *applicability* of human rights pre- and post-1948.

In this regard, Baxi distinguishes between 'modern' and 'contemporary' human rights,²⁴ using the same point of division (ie 1948) as in this thesis.²⁵ Baxi argues that contemporary human rights differ from their modern predecessors in four key ways.²⁶ Firstly, whereas modern human rights were 'exclusionary' in their scope of right-holders, contemporary rights are 'inclusionary': they now belong to humans qua humans, rather than some ordained subset of humans. That is, "the modern paradigm of human rights ... excluded 'slaves', 'heathens', 'barbarians', colonized people, indigenous populations, women, children, the impoverished, and the 'insane' ... from those considered worthy of being bearers of human rights".²⁷ Contemporary human rights seek to include these 'others' within its domain:²⁸ they are vested in *all* humans, rather than in *some* humans.

²³ Ishay (n22); Micheline Ishay (ed), *The Human Rights Reader* (2nd edn, Routledge 2007); Ed Bates, 'History' in Daniel Moeckli et al (eds), *International Human Rights Law* (2nd edn, OUP 2014); Tomuschat (n2) ch2; Davidson (n22) ch1; Simpson (n19) chs1-5; Neff (n3).

²⁴ Upendra Baxi, *The Future of Human Rights* (3rd edn, OUP 2008) 48-50.

²⁵ *ibid* 49.

²⁶ *ibid* 49ff.

²⁷ *ibid* 51.

²⁸ *ibid* 49.

Secondly, their use of language differs: in particular, contemporary rights are no longer limited to protecting matters of civil or political concern through being “exclusively at the service of the ends of governance”.²⁹ In contrast, contemporary human rights are now “endlessly inclusive as far as norms and standards of human rights are concerned”.³⁰ This means that IHRL can engage with a greater variety of content than modern human rights. As such, contemporary human rights are no longer only civil and political, but also economic, social, cultural, and in solidarity.

Thirdly, the “*processes* of formulation of contemporary human rights are increasingly inclusive”.³¹ The development, authorship and ownership of human rights is no longer kept within a closed group, but is open to all. This results in a broader, livelier “carnivalistic”³² aspect to contemporary human rights whereby indigenous peoples and people with disabilities take part in defining their rights, as compared to their “ascetic”³³ predecessors, whose authorship was “both statecentric and Eurocentric”.³⁴

Fourthly, contemporary human rights now “[take] human suffering seriously”³⁵ (as with war, suffering was accepted as inevitable by modern human rights³⁶). As will be seen, taking suffering seriously results in a

²⁹ *ibid* 54, emphasis removed.

³⁰ *ibid* 53.

³¹ *ibid* 54, emphasis added.

³² *ibid*.

³³ *ibid*.

³⁴ *ibid*, emphasis removed.

³⁵ *ibid* 57.

³⁶ *ibid* 57-58.

markedly different, and indeed enriched, content of contemporary human rights when compared to the narrower focus of modern human rights.

Baxi's division is useful in this section's drawing out of some important features of the design of contemporary human rights (ie those found in IHRL). Assessment of the design of contemporary human rights is important as it will reveal how IHRL may be able to address environmental concerns, and how IHRL understands and constructs the 'human rights subject' (ie the subject in which human rights are vested). In particular, this section will consider what Baxi describes as the 'two perplexities' of human rights: "the nature of human nature [and] the question of who is to be counted as 'human'".³⁷ These will be considered through an examination of the content and the breadth of application of IHRL.

Before doing so however, it is important to make some preliminary remarks regarding the 'human rights subject'. Like human rights themselves,³⁸ the human rights subject bridges the two domains of law and morality, and how it is understood is ultimately dependent on the perspective taken.³⁹ From one perspective, it is clear that the human rights subject is a legal subject, since IHRL creates legal rights. This legal subject is not the same as an actual human being however: it is a legal construction, a persona (ie mask) that a human must wear when engaging

³⁷ *ibid* 51.

³⁸ §Introduction; §4.2.

³⁹ And the question asked: §9.5.

with the law.⁴⁰ A different, yet not mutually exclusive, perspective is that the human rights subject is not (only) a constructed legal persona, but the real-life human being. This is because human rights set out to protect the real-life human being: they are vested in humans qua humans and take actual human suffering and flourishing seriously.⁴¹

Human rights are legal rights, but they also reach outside technical legal rules and principles because they deal with matters that are vital to real-life human beings. The subject of IHRL thus faces both towards the abstract law and towards the fleshy organism: the interplay between these two will be seen throughout the following analysis.

1.3.1 THE DEVELOPING CONTENT OF HUMAN RIGHTS

Modern conceptions of human rights were typically justified by and focussed on the autonomy and freedom of the individual.⁴² Their genesis was in the liberation of the individual man from the tyrannical oppression of first the state of nature and subsequently the sovereign nation state.⁴³ Such rights, often referred to as 'rights of man', were attached to politicised beings and were concerned with the protection of a personal

⁴⁰ Anna Grear, 'Law's Entities: Complexity, Plasticity and Justice' (2013) 4 *Jurisprudence* 76, 82-83.

⁴¹ *infra*.

⁴² Thomas Hobbes, *Leviathan* (first published 1651, Infomotions 2001) 59; John Locke, *Two Treatises of Government* (first published 1689, Yale University Press 2003) 136; Immanuel Kant, *The Metaphysics of Morals* (first published 1797, Mary Gregor tr, CUP 1991) 24ff; Patrick Hayden (ed), *The Philosophy of Human Rights* (Paragon 2001) 57-147; Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1974); Jerome Shestack, 'The Philosophic Foundations of Human Rights' 20 *HRQ* 201, 206-208, 215-17.

⁴³ See Conor Gearty, *Can Human Rights Survive?* (CUP 2006) 23, 73-74.

sphere of influence away from state interference.⁴⁴ They issued a domain of 'small-scale sovereignty'⁴⁵ around the right-holder, in which he could govern as he saw fit.

The content of these modern human rights was thus predominantly concerned with the political relationship between a (nominally male: 'rights of man') right-holder and his government: these rights were dominated by civil and political liberties.⁴⁶ The consequent 'asceticism' of modern human rights, obsessed with the issue of governance, limited what they could protect. However, it has become clear that there is more to being a human than political demands,⁴⁷ and contemporary human rights consequently protect a broader array of interests.⁴⁸ The Second World War in particular functioned as a trigger for the international community to re-evaluate human suffering and how it must be prevented through human rights with "the post-Holocaust and post-Hiroshima/Nagasaki *angst* register[ing] a normative horror at human violation".⁴⁹

Humans' (potential for) suffering extends beyond the political and into other aspects of lived human lives: this became unavoidably evident during the Second World War.⁵⁰ There has since been an *enrichment* in the

⁴⁴ Bates (n23) 18-20.

⁴⁵ HLA Hart, 'Legal Rights' in *Essays on Bentham* (OUP 1982) 183.

⁴⁶ Ishay (n22) 3; Douzinas (n5) 89.

⁴⁷ Thanks in part to industrialism and socialism, see Ishay (n22) 135-45.

⁴⁸ *infra*.

⁴⁹ Baxi (n24) 56.

⁵⁰ Morsink (n11).

content of human rights, which has broadened their scope. Contemporary human rights now contain “an agenda of action to improve the lives of the peoples of the world, the kind of things we might come up with if we were designing Nirvana from scratch”.⁵¹ This enrichment of the content of contemporary human rights takes human suffering and human flourishing seriously. It is worth noting that human flourishing⁵² is as important to human rights as human suffering is. Human rights do not only prevent the bad, they also promote the good:

Human flourishing has been brought by linguistic usage and the actions of activist civil society well within the rubric of the term human rights. This part of our subject speaks to our right to thrive, not only as individuals but also through those associations and connections – with family, community, culture, national identity and so on – by which our humanity is further enriched.⁵³

1.3.1(A) ECONOMIC, SOCIAL AND CULTURAL RIGHTS

A clear example of the development in the content of human rights is the inclusion of economic, social and cultural rights (ESCR) in both the UDHR

⁵¹ Gearty (n43) 7, 26.

⁵² See Gearty (n43) 140; John Kleinig and Nicholas Evans, ‘Human Flourishing, Human Dignity, and Human Rights’ (2013) 32 *Law and Philosophy* 539. Note that the notion of ‘flourishing’ also crops up within environmental philosophy, see (eg) the first of eight basic principles of Deep Ecology: “The well-being and flourishing of human and nonhuman Life on Earth have value in themselves”, Bill Devall and George Sessions, *Deep Ecology*(Gibbs Smith 1985) 70.

⁵³ Gearty (n43) 6.

and the ICESCR.⁵⁴ Unlike modern human rights, which were primarily (though not exclusively) concerned with civil and political matters,⁵⁵ IHRL contains rights such as freedom from hunger⁵⁶ or the right to found a family.⁵⁷ This demonstrates a clear development in the content of human rights. Contemporary human rights do not understand and construct human rights in a narrow political or legal sense,⁵⁸ but rather seek to reflect the real lives that humans lead: ones where we eat (and so can suffer from hunger) and form lasting bonds with others (and so found families). They thus endorse the view that human flourishing is not a one-dimensional political affair.⁵⁹ This broader understanding of how humans flourish has not just developed, but *enriched*, both the content of IHRL and its understanding of the human rights subject.

ESCR are indeed essential for humans to flourish.⁶⁰ For example, “the right to education is crucial for a person’s self-fulfilment and the development of society as a whole”⁶¹ as “lack of access to educational opportunities typically limits (both absolutely and comparatively) people’s abilities to participate fully and effectively in the political and economic life of their

⁵⁴ Douzinas (n5) 115.

⁵⁵ Whereas “civil and political rights are usually traced to the pronouncements of the American and French Revolutions; the concept of economic and social rights, in comparison, is generally assumed to have originated in the Russian Revolution of 1917”: Sohn (n2) 32-33, see also the 1917 Constitution of Mexico.

⁵⁶ ICESCR Article 11(2).

⁵⁷ UDHR Article 16(1).

⁵⁸ Baxi (n24)152.

⁵⁹ Gearty (n43) 49, 67, 102, 140-57.

⁶⁰ See Sohn (n2) 32-37.

⁶¹ Fons Coomans, ‘Education and work’ in Moeckli (n23) 239.

country".⁶² Self-fulfilment and participation in society are part of what it means to flourish as a human.⁶³ Note also the inclusion of rights such as the human right to the highest attainable standard of physical and mental health.⁶⁴ This right is also of undeniable importance to human flourishing, and its recognition within IHRL is a clear indicator of the enriching content of human rights: IHRL does not see human suffering and human flourishing solely through the lens of governance, but also acknowledges the biological, physical and social needs of humans.

Through the full and proper inclusion of vulnerable communities and the challenges they face, IHRL can reach beyond technical legal arrangements regarding the legal person, and reach out to prevent the suffering and promote the flourishing of human beings.⁶⁵ The incorporation of ESCR demonstrates the developing content of human rights and the parallel enrichment in their understanding of the human rights subject as a real human being as well as a legal persona. That is, since "[i]t is clear on various accounts, including its own, that the UDHR attempts to respond to

⁶² James Nickel, 'Human Rights' in Edward Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Winter 2014 edn). See also Douglas Hodgson, *The Human Right to Education* (Ashgate 1998).

⁶³ Gerard Quinn with Anna Arstein-Kerslake, 'Restoring the 'human' in 'human rights'' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 50.

⁶⁴ Article 12(1) ICESCR.

⁶⁵ Note that this full and proper recognition requires interpretive recognition above and beyond what can be achieved in formal treaty text, see §1.3.2(c).

the need to protect the human being understood *qua* human being”,⁶⁶ the actual ways in which the UDHR (etc) seek to protect the human being are demonstrative of how IHRL understands the human rights subject.

This growing content of IHRL has been painted by some as human rights ‘inflation’ (and hence devaluation).⁶⁷ However, such a reaction cannot hold up for every ‘new’ human right.⁶⁸ This is because the growing content of human rights correctly acknowledges that the vital interests of human beings are not simply political: evidently humans do not only suffer and flourish in a political sense, as has become clear by evolving understanding of human suffering and flourishing. There is consequently a need for human rights to develop and enrich in order to better correlate with the real-life subject of human rights.

The value of ESCR is now widely enough understood such that the historical tension between ‘civil and political’ and ‘economic, social and cultural’ rights⁶⁹ is largely out-dated: “a comprehensive human rights approach has evolved, encompassing the broad and interlinked scale of civil, political, economic, social, and cultural rights”.⁷⁰ ESCR are now

⁶⁶ Anna Grear, ‘Framing the project’ of international human rights law’ in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 26.

⁶⁷ Philip Alston, ‘Conjuring up New Human Rights: A Proposal for Quality Control’ (1984) 78 *AJIL* 607; James Griffin, *On Human Rights* (OUP 2008) 173.

⁶⁸ Although Kundera and Baxi are right that every human desire cannot become a human right: Baxi (n24) 125.

⁶⁹ See Karel Vasak, ‘Human Rights: A Thirty-Year Struggle’ (1977) 30 *UNESCO Courier* 11.

⁷⁰ Theo van Boven, ‘Categories of Rights’ in Moeckli (n23) 145. See also Carl Wellman, ‘Solidarity, the Individual and Human Rights’ (2000) 22 *HRQ* 639;

properly considered a core part of the “indivisible, interdependent and interrelated”⁷¹ set of contemporary human rights.

The inclusion of ESCR within IHRL thus demonstrates not only that the content of human rights *can* develop, but also the direction in which such developments *are* heading. This direction is towards protecting a wider and more enriched set of human interests that acknowledge the real-life lived experience of human beings. Overemphasis of civil and political concerns results in a subject of human rights that “is not just ‘thin’ but ethereal, while real people are always ‘fat’, full of weaknesses, inadequacies and uncertainties”.⁷² The enriching of human rights has meant realising that these weaknesses, inadequacies and uncertainties are part of being human. In turn, the understanding of the human rights subject – though unavoidably a legal subject – has ‘fattened’ up.

Thus according to IHRL, ‘the nature of human nature’,⁷³ or ‘what it means to be human’,⁷⁴ does not simply amount to participatory political structures and equal treatment before the law (vital as these are). This is because human beings are not simply political entities or legal persons.⁷⁵ Rather,

Maarten den Heijer and Rick Lawson, ‘Extraterritorial Human Rights and the Concept of ‘Jurisdiction’’ in Malcom Langford et al (eds), *Global Justice, State Duties* (CUP 2013) 182; Ben Saul et al, *The International Covenant on Economic, Social and Cultural Rights* (OUP 2014) 1-11.

⁷¹ World Conference on Human Rights, ‘Vienna Declaration and Programme of Action’ A/CONF.157/23 (25 June 1993) Article 5; Saul (n70) 1.

⁷² Douzinas (n5) 238.

⁷³ *supra* n37. See also Gearty (n43) 19.

⁷⁴ Mary Ann Glendon, *World Made New* (Random House 2002) 39.

⁷⁵ Douzinas (n5) 187.

they live in the real, tangible, fleshy world. The existence of ESCR in IHRL thus demonstrates a move towards recognition of this living reality of the human rights subject. Contemporary human rights understand the human rights subject as an *embodied* subject whose (potential for) suffering can be eminently physical. This stands in contrast to the incorporeal 'small-scale sovereign' of the 'rights of man'. This is a key difference between the design of modern and contemporary human rights.

This is not to say that IHRL now fully and perfectly captures, protects and provides an ideal life for all humans. Rather it is simply to point out that the content of IHRL is different from that of modern human rights; and that this difference signposts an enriched understanding of the human rights subject – from a primarily political being to one that lives and breathes. This increasing embodiment of the human rights subject and parallel enrichment in the content of IHRL opens the door for environmental conditions to be protected through IHRL, given the axiomatic physical dependence that humans have on their environment.⁷⁶ Connected to this enrichment in the content of human rights is a developing understanding of *who* exactly it is that has human rights.

1.3.2 THE DEVELOPING APPLICABILITY OF HUMAN RIGHTS

The second key difference between modern and contemporary human rights is in their breadth of application: the range of persons bestowed with human rights. Contemporary human rights are inclusive. Indeed, Baxi writes "inclusivity is the hallmark of contemporary human rights, stamped

⁷⁶ See §2.3.2; §3.2.1.

with the exponential expansion of the very notion of 'human'".⁷⁷

Contemporary human rights seek to include 'others' (such as 'barbarians' and the 'insane'⁷⁸) within their remit, whereas modern human rights excluded these 'others'. A useful vantage point from which to view this developing applicability of human rights is provided by the concept of citizenship.

1.3.2(A) CITIZENSHIP WITHIN IHRL

A common thread running through both modern and contemporary human rights is that they dictate how states must and must not treat their citizens. This is done through giving individuals legal rights held against the state.⁷⁹ However, there is an important difference between modern and contemporary human rights in this regard. Whereas the forerunners to IHRL limited their scope to some subset of people (eg noblemen in the Magna Carta or "adult propertied male citizens"⁸⁰ in modern human rights), the UDHR seeks to bestow rights on *all* humans,⁸¹ not just some subset of them.⁸² This means that under contemporary human rights "every human

⁷⁷ Baxi (n24) 152.

⁷⁸ *supra* n27.

⁷⁹ Edward Rubin, 'Rethinking Human Rights' (2003) 9 *International Legal Theory* 5, 6-7; ICCPR Article 2(1).

⁸⁰ Aratio Rao, 'Right in the Home: Feminist Theoretical Perspectives on International Human Rights' in Hayden (n42) 505, 508.

⁸¹ See (eg) UDHR Article 1.

⁸² Douzinas (n5) 85.

being is now to be counted as human”,⁸³ and that “human rights are rights held by individuals simply because they are part of the human species”.⁸⁴

Despite IHRL’s ambition to bestow rights on all humans, it has been argued that IHRL still excludes certain people from its ambit. In particular, the continuing importance of states within international law is said to reveal an important limitation. This limitation is found in the plight of migrants, exiles and stateless persons,⁸⁵ whom Baxi argues “stand condemned to conditions of ‘absolute’, ‘fundamental’ rightlessness”⁸⁶ because human rights are “meaningful only within the zones of sovereignty”.⁸⁷ That is, without citizenship and the accompanying machinery of the state, human rights remain meaningless.⁸⁸ The role of the state and of citizenship within IHRL thus merits attention.

The effectiveness of IHRL is clearly reliant on states, since they are “the principal duty-bearers of human rights obligations”,⁸⁹ and it is through the machineries of states (their governance and administrative structures etc) that the rights of individuals are normally secured. Arguably then, the right to a nationality (UDHR Article 15) is of considerable importance since a

⁸³ Baxi (n24) 53. See also Gearty (n43) 22.

⁸⁴ Ishay (n22) 3.

⁸⁵ Hannah Arendt, *The Origins of Totalitarianism* (2004 edn, Schocken 1951) 355-56, 369-81; Baxi (n24) 152-56; Douzinas (n5) 142-43.

⁸⁶ Baxi (n24) 153.

⁸⁷ *ibid.*

⁸⁸ *ibid.* 155.

⁸⁹ Sarah Joseph and Adam Fletcher, ‘Scope of Application’ in Moeckli (n23) 120; §2.5.

citizen of a particular state will normally enjoy a greater range of rights with respect to that state than a non-citizen.⁹⁰

States clearly are important actors within IHRL. However, there is an important distinction between the role of the state in modern and contemporary human rights. Modern human rights bestowed rights *because of* citizenship of a particular state, whereas contemporary human rights are granted “to all persons irrespective of their citizenship and *qua* their being human”.⁹¹ Under IHRL one has rights simply by virtue of being a human, even if the state is often relied on to provide the mechanisms through which these rights can be secured. The role of the state in IHRL is to be the principle guarantor of human rights, not the progenitor of them.⁹²

As such, human rights are *not* only of benefit to citizens of a state:

“[n]umerous international human rights decisions and judgments have confirmed that non-nationals have human rights”.⁹³ For example, under the ICCPR a state must respect and ensure the rights of “all individuals within its territory and subject to its jurisdiction”.⁹⁴ Stateless individuals

⁹⁰ David Makinson, ‘Rights of Peoples: A Logician’s Point of View’ in James Crawford (ed), *The Rights of Peoples* (Clarendon 1988) 79-80; David Weissbrodt, ‘The Human Rights of Stateless Persons’ (2006) 28 *HRQ* 245, 248; Joseph and Fletcher (n89) 120-21.

⁹¹ Florian Hoffmann, ‘Foundations beyond law’ in Gearty and Douzinas (n63) 89.

⁹² Weissbrodt (n90) 248-49.

⁹³ Joseph and Fletcher (n89) 120. See also Weissbrodt (n90) 249-50; Tomuschat (n2) 70; Javid Rehman, *International Human Rights Law* (2nd edn, Longman 2010) 14.

⁹⁴ ICCPR Article 2(1); See Joseph and Fletcher (n89) 120, 129-137; HRC, General Comment 15 [2]; cf Article 25 ICCPR which is attached to citizens, “in contrast with other rights and freedoms recognized by the Covenant” HRC, General Comment 25 [3].

thus do have rights under IHRL, in contrast to the pre-1948 state of affairs whereby “a person’s protection depended on the conduct of his state, and stateless persons were entitled to no protection whatsoever”.⁹⁵

The central role of states as the primary guarantors of human rights arises in IHRL through reliance on pre-existing state structures to secure human rights rather than through a deep conceptual link between citizenship and human rights. States’ central role in IHRL is that of a proxy: one may rely on a state to secure one’s rights, but this is only because states provide a convenient platform through which human rights can be realised.⁹⁶ The overarching goal of IHRL is for all humans to enjoy all human rights: its reliance on states is simply a means to achieve this end. The right to a nationality is not a right to have rights. “[W]hile international law scholars might claim that the right to a nationality is the right to have rights, the principles of human rights would indicate otherwise”.⁹⁷ The right to a nationality is directed at preventing statelessness, it is not the gatekeeper of all human rights.

The proxy role of states in IHRL is further evidenced by the fact that it is not only states that have duties under IHRL: international organisations are also duty-bearers in IHRL,⁹⁸ and there is some degree of extraterritorial application of human rights.⁹⁹ Any rightlessness of the

⁹⁵ Sohn (n2) 9.

⁹⁶ See Douzinas (n5) 101-06, 116-17.

⁹⁷ Weissbrodt (n90) 248.

⁹⁸ Andrew Clapham, ‘Non-State Actors’ in Moeckli (n23) 538-40.

⁹⁹ §2.5.3.

stateless is therefore far from absolute, and any citizenship-based limitations of contemporary human rights are a downfall of the mechanisms of IHRL rather than its theoretical design,¹⁰⁰ as was the case for modern human rights.

That contemporary human rights belong to humans qua humans – rather than to humans qua citizens – is connected to the developing content of human rights outlined above.¹⁰¹ This is because the content of contemporary human rights is determined through consideration of the real-life fleshy human being, rather than the legal persona or the citizen (even if the persona and the citizen must be retained in order to give effect to the rights within law). The human rights subject cannot be parsed entirely through the legal subject or the citizen: ‘humans’ are necessarily more complex than ‘citizens’. The ‘citizen’ is one role amongst many that humans can play (eg we can also be parents, students, patients, activists and so on).¹⁰² Understanding human rights as belonging to fleshy multifaceted human beings rather than simply political citizens enriches their potential content and is a precursor to capturing the embodied nature of the human being within human rights.

While IHRL must retain some notion of legal personhood, its conception of its subjects (ie as the human being qua human being) is different from

¹⁰⁰ Weissbrodt (n90) 250-53, 264-76.

¹⁰¹ §1.3.1; Grear (n66) 26.

¹⁰² As noted by Karl Marx, ‘On the Jewish Question’ (1844), reprinted in Hayden (n42). See also Douzinas (n5) 105-106, 158-75, 220.

that of other forms of legal rights.¹⁰³ IHRL seeks to reach beyond legal formalism and a technically constructed legal persona, and towards the real-life human being:

Human rights, for example, (read as both 'moral' and 'legal' rights) are deemed *inherent* to this natural [human] subject and are understood to proceed directly... from the 'natural condition of being a human'. This 'natural' subject forms the site at which the conflation between legal personhood and humanity is most explicit and intractable.¹⁰⁴

It is important that at this conflation point within contemporary IHRL, the human rights subject is not entirely subsumed by the legal persona.¹⁰⁵ Instead, "the human rights movement can be seen as the ongoing but failing struggle to close the gap between the abstract man of the Declarations and the empirical human being".¹⁰⁶ The human rights subject is constructed by seeking to understand real human suffering and flourishing ("the nature of human nature"¹⁰⁷) rather than reverting to tired legal tropes.

¹⁰³ See §6.3.

¹⁰⁴ Grear (n40) 81, emphasis in original, footnote omitted.

¹⁰⁵ Douzinas (n5) 18-19, 183-227.

¹⁰⁶ Costas Douzinas, 'Human Rights for Martians' (Critical Legal Thinking blog, 3 May 2016).

¹⁰⁷ *supra* n37.

It is the real human that IHRL seeks to protect,¹⁰⁸ not the caricature of the citizen or the legal person. This has rendered it possible for IHRL to enrich its understanding of the human rights subject towards the real-life embodied human being, even if it must still use the artificial construct of legal personhood. Not only does IHRL seek to protect real-life humans rather than abstract citizens, but it also seeks to protect *all* humans rather than just some citizens.

1.3.2(B) UNIVERSAL APPLICATION OF IHRL

IHRL bestows rights simply as a consequence of being a human. As such, the rights contained within it are (purportedly) universal. However, the *de facto* universality of human rights has been challenged.¹⁰⁹ As well as potential issues over citizenship discussed above, concerns have also been raised over the reach of a law that claims to represent everyone. This is distinguishable from the supposed statelessness concern, since it is an issue with the theoretical construction of IHRL, rather than its implementing structures and mechanisms.

The issue arises because in the very act of constructing human rights to be universal (ie to apply to everyone), the human rights subject that IHRL implicitly constructs is a 'universal human subject'. Given that no such universal human actually exists in reality, a 'universal human subject'

¹⁰⁸ Even if it does not manage to do so perfectly. See Baxi (n24) 88-90 and *infra*.

¹⁰⁹ Baxi (n24) 51, 58-60, 152-56, 187-233; Douzinas (n5) 94-100, 141-60, 257-59; Anna Grear, 'The vulnerable living order: human rights and the environment in a critical and philosophical perspective' (2011) 2 *JHRE* 36-37; Ishay (n22) 293-311; Rao (n80); Gayle Binion, 'Human Rights: A Feminist Perspective' (1995) 17 *HRQ* 509, 514-15; Grear (n66) 26-34.

comes laden with an unavoidable abstractness. It is questionable whether such an abstract notion can portray an accurate picture of the particularities, intimacies (and even idiosyncrasies) of real human lives.¹¹⁰

More acutely, a problem arises if the universality of contemporary human rights results in ingraining colonialism, patriarchy or other existing power imbalances.¹¹¹ That is, if the 'universal human subject' is defined with the straight white able-bodied cis-gendered middle class European male in mind. This can happen if universalism allows one particular culture to conclusively decide what matters about being human. The risk of this exists if "the 'universal' is the form by which dominant ideology generalizes formations of particular interests".¹¹²

The 'exclusionary' nature of modern human rights can thus creep back into contemporary human rights, since their project of universality necessarily excludes the particularities, intimacies and idiosyncrasies of people's lives. Thus some people, notably those historically excluded and disenfranchised – women, children, people with disabilities, indigenous peoples, the LGBT+ community – may be excluded from contemporary human rights if their lived realities do not conform closely enough to IHRL's universal human subject. Consider MacKinnon's critique of contemporary human rights:

Rights that humans have by virtue of being human have not been rights to which women have had access, nor have

¹¹⁰ *ibid.*

¹¹¹ Upendra Baxi, 'Reinventing human rights in an era of hyper-globalisation' in Gearty and Douzinas (n63) 163.

¹¹² Baxi (n24) 190.

violations of women as such been part of the definition of the violation of the human as such.¹¹³

The universal human rights subject, MacKinnon argues, excludes the possibility of actually being a woman¹¹⁴ because the constructed universal human rights subject ('being a human') does not take the suffering of women seriously.¹¹⁵ The purported universality of contemporary human rights is thus under threat if IHRL is unable to respond to such critiques.

1.3.2(C) DIALOGICAL DEVELOPMENT OF THE MULTIFACETED HUMAN RIGHTS SUBJECT

There are two interlinked ways in which the universality of IHRL can be maintained. Firstly, the universal human rights subject must be understood as multiplex rather than singular. The human rights subject is not an arithmetical average of all human beings (who has approximately one ovary and 2.4 children). Nor is it one-dimensional: it is not simply a citizen or an employee, for example, although citizenship and work are dimensions of the human rights subject. Nor is the universal human rights subject a static Platonic form of a human, accompanied by a template human life. Instead, the human rights subject must be understood as diverse, pluralistic, and dynamic.

The creation of an abstract universal human rights subject cannot be avoided: "abstraction is necessary of course, if the great plan of rights is to

¹¹³ Catharine MacKinnon, 'Rape, Genocide, and Women's Human Rights' (1994) 17 *Harvard Women's Law Journal* 5, 5.

¹¹⁴ *ibid* 6. See also Douzinas (n5) 98.

¹¹⁵ *ibid* 6, 10-14.

cohere in the face of all the great differences of people and place and circumstance".¹¹⁶ But this universalism must not be done restrictively. Moreover, the point of the universality of contemporary human rights is to be able to capture all the diverse and important components of every lived human life. As such, IHRL must endeavour to construct its subject with the breadth of scope necessary to be meaningful to all lived realities: this requires pluralism, not monism; diversity, not homogeneity. Contemporary human rights celebrate the many different ways of being human, with the result that

[t]he bearer of universal human rights is ... no individual human being or community with a pre-positing 'essence' but a being born with a right to invent practices of identification, contest identities pre-formed by tradition, and the power to negotiate subversive subject-positions.¹¹⁷

However, suitably complex and multifaceted theoretical understandings of the universal human rights subject are themselves not enough. IHRL itself must also be flexible and dynamic, so that this complexity can be exercised in practice and the universal subject can be made meaningful to the many dimensions of being a human. This leads on to the second important approach through which the universality of IHRL can be maintained.

¹¹⁶ Douzinas (n5) 153.

¹¹⁷ Baxi (n24) 174; Douzinas (n5) 165, 200-201.

Although IHRL relies on categorisations of humans, their interests and their rights,¹¹⁸ these categories are not fixed. IHRL is in fact able to respond to new categorisations (and new understandings of old categorisations) that emerge alongside accompanying realisations of what lived human experiences are like. The creation and embellishment of the rights of women,¹¹⁹ of children,¹²⁰ of people with disabilities,¹²¹ and of indigenous peoples,¹²² in the decades following the adoption of the UDHR demonstrates precisely the ability of IHRL to rethink, remodel and improve its universality and its categorisations.¹²³ IHRL has not imposed a 'take-it-or-leave-it' construction of the subject of human rights, but rather is constantly open to modification. Although the very existence of treaties enunciating the rights of particular marginalised groups demonstrates IHRL's imperfect 'universal subject',¹²⁴ it simultaneously indicates willingness and capability to address this imperfection.¹²⁵

For example, Quinn and Arstein-Kerslake's analysis of the Convention on the Rights of Persons with Disabilities (CRPD)¹²⁶ demonstrates IHRL's

¹¹⁸ eg under numbered articles in catalogued human rights treaties.

¹¹⁹ Convention on the Elimination of All Forms of Discrimination Against Women (1979) 1249 UNTS 13.

¹²⁰ Convention on the Rights of the Child (1990) 1577 UNTS 3.

¹²¹ Convention on the Rights of Persons with Disabilities (2006) 2515 UNTS 3.

¹²² UN Declaration on the Rights of Indigenous Peoples, UNGA Resolution A/RES/61/295 (13 September 2007) (UNDRIP).

¹²³ See Gearty (n43) 35-37.

¹²⁴ Grear (n66) 29.

¹²⁵ *ibid* 34.

¹²⁶ *supra* n121.

developing understanding of what it means to be human.¹²⁷ In particular, they argue that the CRPD “really does pivot on a three-dimensional view of the reality of life as a person with a disability”¹²⁸ and that “this was made possible because of a much more nuanced understanding of what it means to be human and specifically a person with a disability”.¹²⁹ Significantly, the CRPD (and in particular Article 12, which provides for equal recognition before the law) re-imagines quite directly the conflation point between legal personality and being a human. It forces a ‘revolution’ that

does not work unless one abandons cognition as the essence of personhood. Nothing in the convention pivots on the ‘myth system’ of the rational and masterless man. In fact it depends rather on a frank acknowledgment of the reality and complexity of human existence. It chimes better with reality than the myth system, a reality that is increasingly being revealed in other walks of scholarship.¹³⁰

This re-imagination of the human rights subject is witnessed not only in the creation of new treaties, but also in the issuing of General Comments by the various human rights treaty bodies, which “set out ... understanding of the treaty language”¹³¹ and are “highly influential in setting out the

¹²⁷ Quinn (n63) 36, 46-51.

¹²⁸ *ibid* 38.

¹²⁹ *ibid* 39.

¹³⁰ *ibid* 49-50.

¹³¹ Christine Chinkin, ‘Sources’ in Moeckli (n23) 80.

scope of rights and standards".¹³² General Comments flesh out the details of necessarily succinct and prosaic treaty provisions to bring them into lived reality. They slide from the abstract persona to the real-life human being. For example, "through the device of the General Comments, the CEDAW Committee has unevenly sought to redress the lack [of reference to violence in CEDAW] by erasing the distinction between discrimination and violence".¹³³ General Comments¹³⁴ have allowed IHRL to take women seriously as subjects of human rights through responding to the reality of lived experiences whereby it is not just abstract discrimination but actual violence that matters.

In these ways, IHRL's construction of the human rights subject can be re-imagined and enriched through IHRL's very institutions, and real experience and suffering can be made relevant to international law.¹³⁵ This is not a straightforward linear process, but a spiralling, dialogical one that requires time, space and reflection between an array of different actors.¹³⁶

¹³² Saul (n70) 5.

¹³³ Baxi (n24) 124, emphasis removed; see also Rao (n80) 522, Chinkin (n133) 80-81.

¹³⁴ And other IHRL mechanisms such as the consideration of complaints and communications. For example, see the case law of the ECtHR regarding the Gypsy way of life as discussed in Doris Farget, 'Defining Roma Identity in the European Court of Human Rights' (2012) 19 *International Journal on Minority and Group Rights* 291.

¹³⁵ National law can show such dialogical process too: consider the participatory approaches detailed in Sandra Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication' (2014) 32 *Nordic Journal of Human Rights* 312 and César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socio-Economic Rights in Latin America' (2011) 89 *Texas Law Review* 1669.

¹³⁶ Baxi (n111) 162.

Contemporary human rights take human suffering and flourishing seriously and seek to reflect lived realities. Given the complexity and diversity of lived realities, this cannot be done in one motion. However, IHRL's continual recursive practices of re-defining and re-imagining the universal human rights subject through 'carnivalistic' dialogues allows it to reach towards the real-life human being. Conor Gearty talks of how human rights are "primarily about empowering the voiceless and the marginalised",¹³⁷ with the result that the language of human rights is "a language that speaks for people and that manages, by forcing people to be visible to everyone, first to make it possible for others to speak on their behalf, and then for them to speak for themselves".¹³⁸ As such, the development of contemporary human rights is directed towards an improved universality, even if 'complete universality' is an asymptotic limit IHRL will never quite reach.¹³⁹

1.3.3 SUMMARY

The subject of contemporary human rights is the real human being. This has direct implications for the design of human rights: IHRL aims to be applicable to all humans (earlier incarnations of human rights that made no such specific claim). But it is also important indirectly, since it forces a re-imagination of the human rights subject as a real-life, living, breathing,

¹³⁷ Gearty (n43) 12.

¹³⁸ *ibid* 48. See also 5-6, 42-44, 67.

¹³⁹ Douzinas (n5) 23-45.

loving, bleeding, embodied human¹⁴⁰ as opposed to a constructed¹⁴¹ political or legal person.¹⁴²

The re-imagination of the human rights subject as an embodied being results in an *enrichment* in the content of IHRL, as witnessed in the adoption of ESCR; in the creation and embellishment of the rights of disenfranchised groups; and in the issuing of General Comments. Neither the content of human rights, nor IHRL's construction of the human rights subject has remained static over time: both are open to renewal, demonstrating that IHRL may be able to enrich further to play a role within environmental protection measures in international law. Although IHRL may never fully reflect the 'true' human being, it is heading asymptotically in this direction. The following section considers another crucial aspect of this development.

1.4 GROUP RIGHTS

The majority of human rights in IHRL belong to individual humans. However, some are attached to groups.¹⁴³ Given the palpably communal aspect of environmental protection (favourable environmental conditions are a 'public good'), the notion of group rights is relevant to this thesis. This section will consider how group rights both inform the developing

¹⁴⁰ Note that this is one of the reasons why the label 'vital rights' has been chosen in this thesis to refer to the sort of rights found in IHRL: see §6.3.1.

¹⁴¹ Notwithstanding the fact that 'the human' is always, to some extent, constructed: Baxi (n24) 152.

¹⁴² Even if, as rights, they cannot (indeed must not) escape the law entirely. See Douzinas (n5) 18.

¹⁴³ *infra*.

understanding of the human rights subject and indicate the structural flexibility of international (human rights) law.

Common Article 1 of the two International Covenants states that “all peoples have the right of self-determination”,¹⁴⁴ and the African Charter on Human *and Peoples’* Rights¹⁴⁵ contains a number of rights attached to peoples,¹⁴⁶ including that “all peoples shall have the right to a general satisfactory environment favourable to their development”.¹⁴⁷ This latter right directly demonstrates the need to consider group rights in this thesis. The inclusion of peoples’ rights is a significant feature of IHRL as it demonstrates recognition of two important ideas. Firstly, that according to IHRL the ‘nature of human nature’ cannot be construed entirely in terms of individuals. The second important recognition is a structural one. Rights can be attached to groups without creating legal or logical absurdities.

The first recognition further demonstrates the dynamic nature of IHRL. The second recognition re-iterates the possibility of international law creating new legal subjects, even if these subjects do not have clearly defined boundaries. Before analysing the significance of group rights in these two ways, it is necessary to make some preliminary remarks concerning what group rights actually are.

¹⁴⁴ Also ICESCR Article 25, ICCPR Article 47; and potentially cultural rights: Saul (n70) 1182-84.

¹⁴⁵ (1982) 1520 UNTS 217.

¹⁴⁶ As does UNDRIP (n122).

¹⁴⁷ Article 24.

The term 'group rights' can refer to one of two different concepts: a right held by an individual because they fulfil certain criteria and so belong to a particular group (here termed a 'collective' right¹⁴⁸); or a right belonging properly to a group per se (here termed a 'corporate' right¹⁴⁹). For example, every Welsh person may have the right to receive official documentation in the Welsh language (a collective right); and the Welsh people may have the right to decide whether they wish to continue to form a part of the UK (a corporate right). The term 'minority right' usually refers to a collective right, and a 'peoples' right' to a corporate right,¹⁵⁰ and this is how the terms shall be used in this thesis. In a sense, all human rights are collective rights: they are rights which individuals have because of their membership of the group *Homo sapiens*. Other collective rights are also readily identifiable: the Convention on the Rights of the Child and the CRPD set out collective rights.

¹⁴⁸ Peter Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 *HRQ* 80, 83-88.

¹⁴⁹ Not to be confused with the phenomenon of corporations claiming to be the beneficiaries of individual human rights, see Marius Emberland, *The Human Rights of Companies* (OUP 2006). This development is at best tangential to the original intentions of the UDHR and potentially not only derails the foundations of human rights, but also misconstrues the subjects of human rights (ie humans as embodied beings): Anna Grear, *Redirecting Human Rights* (Palgrave Macmillan 2010).

¹⁵⁰ See Roland Rich, 'Right to Development: A Right of Peoples?' in Crawford (n90) 44.

1.4.1 FURTHER ENRICHMENT

Corporate rights contain an implicit acknowledgment that there is a social dimension to the nature of human nature, which cannot be captured through the lens of the individual alone. In other words:

As human rights should reflect lived realities, it is necessary to see them as more than about individuals. After all, most societies accord an importance to communities, collectives, and families.¹⁵¹

Group rights demonstrate and endorse that mapping human suffering and flourishing necessitates taking seriously humans' existence in social communities.¹⁵² To construct an entirely individualistic human rights subject would be to ignore the (potential for) suffering experienced through violence against and oppression of the group(s) to which one belongs,¹⁵³ and the (potential for) flourishing found through "associations and connections – with family, community, culture, national identity and so on".¹⁵⁴ Human flourishing happens in community.

It is worth noting that there is an inevitable overlap between individual rights and group rights.¹⁵⁵ Rights to join trade unions¹⁵⁶ or those attached

¹⁵¹ Robert McCorquodale, 'Group Rights' in Moeckli (n23) 333; Marx (n102) 126; Sohn (n2) 48.

¹⁵² Gearty (n43) 6, 141. Corsin Bisaz, *The Concept of Group Rights in International Law* (Martinus Nijhoff 2012) 132-49, 168.

¹⁵³ Consider the Genocide Convention, which "is considered by advocates of group rights as a 'classical group right in international law'" Bisaz (n152) 20.

¹⁵⁴ Gearty (n43) 6.

¹⁵⁵ HRC, General Comment 31 [9].

to the benefits of scientific progress and its applications¹⁵⁷ are individual rights with a notable group-oriented outlook. This demonstrates that it is often impossible to precisely determine whether something is of benefit to an individual or a group (or both).¹⁵⁸ In fact, the UN Human Rights Committee has stated that “the right to work is an individual right that belongs to each person and is at the same time a collective right”.¹⁵⁹ To further see this overlap between group and individual benefits, consider that societies with a more even distribution of wealth tend to improve everyone’s wellbeing.¹⁶⁰ More pertinently to the environmental context, protecting forests, wetlands and coral reefs is of benefit to society,¹⁶¹ but also more particularly for those who live nearby or make their living from such areas (eg land managers, ecologists or managers of visitor centres). As such, it should be expected that human rights in an environmental context will also operate in domains between the individual and the group perspective.

This is a consequence of the fact that what it means to be human is neither constrainedly individual nor hyperdispersibly communal. Instead it

¹⁵⁶ ICCPR Article 22(1).

¹⁵⁷ ICESCR Article 15(1).

¹⁵⁸ Bisaz (n152) 107-26.

¹⁵⁹ CESCR, General Comment 18 [6].

¹⁶⁰ Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone* (Allen Lane 2009).

¹⁶¹ TEEB, ‘The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB’ (2010) 14-17.

contains (at least) both these elements as equally vital,¹⁶² and there is a continuous spectrum between what is individual and personal and what is shared and communal.¹⁶³ Being human is potentially best thought of as a contextual condition.¹⁶⁴

Discernible within the adoption of group rights is therefore another re-imagining of the human rights subject: group rights give legal recognition to the contextual and social nature of the human rights subject. This is part of IHRL's enrichment and construction of a subject that mirrors what it actually means to be human. The existence of group rights thus further demonstrates that the nature of the human rights subject is dynamic, and that the direction of travel is towards the lived experiences of human beings. In particular, group rights demonstrate that the human rights subject is not only embodied, but also *socially embedded* too.¹⁶⁵

1.4.2 RIGHT-HOLDERS

Moving to the important structural lesson of group rights, the first preliminary issue is whether a group is the sort of entity that can hold a right. This is necessary to consider since the creation of group rights within

¹⁶² §9.4.

¹⁶³ §5.5.2; §9.2-9.5.

¹⁶⁴ This is neatly realised in the ideas of Watsuji Tetsurō, especially as developed by Kumon Shumpei. See §9.4.1; Steve Odin, *The Social Self in Zen and American Pragmatism* (SUNY 1996) 75-77.

¹⁶⁵ This thesis will go on to argue that humans (as living organisms) are also *ecologically* embedded: see §8.4; §9.2-9.4.

IHRL has not been without academic controversy.¹⁶⁶ However, corporate rights have received sufficient espousal to gain legitimacy within IHRL,¹⁶⁷ which is, after all, one important measure in gauging the acceptability of a construct. If the international community as a whole raises its voice loud enough to demand a certain legal arrangement, then legal theory ought to find a way to make sense of it. Political and philosophical arguments can still be made against the concept, but it cannot be dismissed on entirely technical grounds.

The main structural challenge with regards group rights (both collective¹⁶⁸ and corporate) is that of membership: this is crucial in order to be able to understand who the right-holder actually is. Although a 'group' can be formed of any combination of individuals,¹⁶⁹ it is usual in IHRL to talk of peoples' rights. However, who exactly constitutes a 'people' is not straightforward. Broadly speaking, there are two possible approaches: (i) allow any set of individuals who self-nominate as a people to count as one, or (ii) define some characteristics that define a people for the purposes of a peoples' right. The latter has been the preferred route, but an

¹⁶⁶ Maurice Cranston, 'Are There Any Human Rights?' (1983) 112 *Daedalus* 1; Alston (n67); Crawford (n90); JG Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon 1996) 31-32; Philip Alston (ed), *Peoples' Rights* (OUP 2001) 267; McCorquodale (n151).

¹⁶⁷ McCorquodale (n151); Alston (n166); Bisaz (n152) 77ff.

¹⁶⁸ Where the issue is slightly different: it takes the form of who counts as (eg) a child.

¹⁶⁹ See Ned Markosian, 'Restricted Composition' in Theodore Sider et al (eds), *Contemporary Debates in Metaphysics* (Blackwell 2008) 341-63.

unequivocal definition of what constitutes a people has yet to emerge (although it is clear that 'people' cannot mean the same as 'state'¹⁷⁰).

A reasonable starting point is a UNESCO experts definition which, *inter alia*, notes that to be a "people for the [purposes of the] rights of peoples in international law", the group "must be more than a mere association of individuals within a State".¹⁷¹ This definition appears to have indigenous peoples or ethnic minorities in mind. Although there can be no doubt that such groups can benefit hugely from both kinds of group right, it is plausible too that groups other than peoples in an ethno-cultural sense could be worthy of the protection of corporate rights. In any case, uncontested and predetermined membership of a group is evidently not a prerequisite for said group to receive rights within international law: this must be the case, since peoples' rights exist within international law without the law stipulating the exact constitution of all 'peoples'.

International law therefore can bestow rights on groups without those groups being clearly and precisely defined. This is relevant as this thesis will go on to investigate the possibility of the creation of further legal subjects whose boundaries are not precisely definable (ie ecosystems).¹⁷²

¹⁷⁰ James Crawford, 'The Rights of Peoples: 'Peoples' or 'Governments'?' in Crawford (n90).

¹⁷¹ 'Final Report and Recommendations of an International Meeting of Experts on further study of the concept of the rights of peoples', UNESCO SHS-89/CONF.602/7 (22 February 1990) [22(2)]. See also Robert McCorquodale (n151) 333, 337; Crawford (n172); Makinson (n90) 72-77; Jane Wright, 'Minority Groups, Autonomy, and Self-Determination' (1999) 19 *OJLS* 605, 625-28; Saul et al (n70) 25-27, 36-45; *Gunme and Others v Cameroon* (2009) ACommHPR Communication No 266/03 [171].

¹⁷² *infra* Part III.

The possibility of ecosystem rights can build on the notion of peoples' rights because an ecosystem, like a people, is a corporate entity composed of living organisms. It is therefore worthwhile introducing another key aspect of corporate rights that can function as an exemplar for ecosystem rights.

1.4.3 REPRESENTATION AND STANDING

It is necessary to determine who can legally represent a group that has a corporate right in international law.¹⁷³ This is distinct to the membership of a group as it concerns who has a voice that properly represents the group as opposed to who the potential victim of a violation is. When a right of an individual has been violated, the first choice for the legal person to make a complaint is obvious: the individual in question. Likewise, the violation of a collective right would normally be taken up by the relevant individual(s).¹⁷⁴ A group of individuals can make a joint complaint in the case when the same act has violated all of their rights.¹⁷⁵

Corporate rights do require a little more thought, but the challenges can be overcome. What is required is the identification of suitable legal representation in order to make a complaint on behalf of the group. The

¹⁷³ Legal complaints mechanisms will be used here to give useful insight into this, although there are other methods to complain *about* human rights violations (eg lobbying governments), and although complaints mechanisms are not necessary for human rights to exist (see the distinction in §4.3 between a claim and a power),

¹⁷⁴ eg *Länsman et al v Finland* (2005) HRC Communication No 1023/2001, CCPR/C/83/D/1023/2001; *Lovelace v Canada* (1981) HRC Communication No R.6/24A/36/40, A/36/40.

¹⁷⁵ eg *Guerra v Italy* (1998) 26 EHRR 357.

principle of legal representation is not a new one: it is often the case that individual or collective rights will be taken up on the behalf of other people. Notably this will happen when the individual in question is incapable of making the complaint themselves: they may be imprisoned¹⁷⁶ or a child,¹⁷⁷ and thus unable to initiate legal proceedings. But complaints within IHRL can also be made by NGOs¹⁷⁸ or other concerned individuals.¹⁷⁹ This form of representation is common and uncontroversial.

Legal representation of a group per se is therefore technically possible. Although finding the most suitable representation may not always be immediately obvious, it is normally reasonably straightforward to determine a solution. Groups are able to appoint spokespersons to act on their behalf,¹⁸⁰ and NGOs are also capable of bringing legal proceedings on

¹⁷⁶ eg *Fillastre, Bizouarn v Bolivia* (1991) HRC Communication No 336/1988, CCPR/C/43/D/336/1988.

¹⁷⁷ eg *A v United Kingdom* (1999) 27 EHRR 611.

¹⁷⁸ Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights (1998) OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III), Article 5(3); *SERAC and CESR v Nigeria* (2003) ACommHPR Communication No 155/96, 10 IHRR 282 ('Ogoniland'); *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* (App no 47848/08, Judgment of 17 July 2014) [64]-[73], [96]-[114].

¹⁷⁹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008) UNGA Resolution A/RES/63/117, Article 2; *Yanomami v Brazil* (1985) IACommHR Resolution 12/85, Case 7615.

¹⁸⁰ *Lubicon Lake Band v Canada* (1990) HRC Communication No 167/1984, A/45/40 [2.2]. Note that this decision demonstrates the existence of a lacuna within IHRL since the HRC held that an individual cannot be the victim of a violation of a peoples' right [13.3], but that currently complaints can only be made by or on behalf of individuals (Optional Protocol to the International Covenant on Civil and Political Rights (1966) 999 UNTS 171, Article 1).

See also *Antonie Bissangou v Congo* (2006) ACommHPR Communication No 253/02 [82]; cf *Gunme* (n171) where the complainants brought the

behalf of a group.¹⁸¹ There is therefore no technical barrier to either the establishment or the functioning of corporate human rights:

There is nothing to prevent international law from endowing 'with some element of personality entities other than states'. Although conceptually difficult, and existing in that penumbra between the individual and the state, it is possible to create rights in international law for minorities *qua* minorities [ie corporate rights].¹⁸²

1.4.4 SUMMARY

Group rights, both corporate and collective, are a part of IHRL. In fact, they form an essential part of it, given that human flourishing happens in community. Their existence further demonstrates the dynamic content of IHRL as well as the asymptotic conflation of the political-legal persona and the real human being in the human rights subject. The structural requirements for group rights mean that the structural models used for individual human rights may not always suffice (in particular with regards complaints), but there is no technical barrier to adapting these models:

communication "on their behalf and on behalf of the people of Southern Cameroon" [1]. A violation of Article 19 (a peoples' right) was found: [162].

Nor can a complaint be made *actio popularis*: *Brun v France* (2006) HRC Communication No 1453/2006, CCPR/C/88/D/1453/2006 [6.3]; *Metropolitan Nature Reserve v Panama* (2003) IACommHR Report No 88/03, Petition 11.533; cf *Ogoniland* [49].

¹⁸¹ *supra* 178.

¹⁸² Wright (n171) (citing Rodley). See also *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

international law can create new right-holders and new mechanisms to make their rights effective, should this be desired.

The possibility and indeed establishment of corporate rights is not only demonstrative of the ability of IHRL to adapt in both its structure and its content. It also re-confirms that it is possible for all manner of subjects to be bestowed with rights within international law as a whole. Imprecision over precise boundaries (ie membership of peoples) and concerns over suitable representation are surmountable. Within the context of this thesis, this is a valuable observation as it affirms that pathways exist for the creation of other right-holders (including ecosystems).¹⁸³

1.5 DIGNITY

This chapter has provided an overview of some key developments in human rights that differentiate IHRL from previous incarnations of human rights. Significantly, it has shown that the content of contemporary human rights is richer than that of modern human rights, and that this is tied to an enriched understanding of the subject of human rights. There is one final differentiation between human rights pre- and post-1948 that this chapter will now detail. This differentiation is found in the fact that, unlike its predecessors, IHRL provides a handle to understand what it protects: dignity.

¹⁸³ Part III.

1.5.1 DIGNITY AS THE FOUNDATION OF IHRL

Dignity's foundational role in contemporary human rights is apparent from its appearances within the International Bill of Rights. Firstly, according to the UDHR:

[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

[T]he peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person.

The reliance of human rights on dignity is even more explicit in the joint Preamble to the ICESCR and ICCPR, which not only repeats the first recital of the UDHR, but also sets out that:

[T]hese rights *derive* from the inherent dignity of the human person.¹⁸⁴

The foundation of human rights is explicitly stated to be dignity.¹⁸⁵ Before stepping any further, it is necessary to point out that the concept of 'dignity' is a highly contested one. There is a lack of consensus in the

¹⁸⁴ Emphasis added.

¹⁸⁵ See also UNGA Resolution A/RES/41/120 (4 December 1986) [4(b)]; Charles Foster, *Human Dignity in Bioethics and Law* (Hart 2011) 93; Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 1.

literature as to the definition, nature or function of dignity.¹⁸⁶ However, this imprecise, even vague, character of dignity actually proves indispensable for its utility.

Other proposed foundations for IHRL (such as equality¹⁸⁷ or autonomy¹⁸⁸) are less suitable because they are less vague than dignity: their precision narrows the scope of protection that they can offer. Nickel points out that relying on a narrow foundation¹⁸⁹ will make the justification for human rights too heavily skewed towards some particular subset of them, causing the justification of other rights to “appear shaky and derivative”.¹⁹⁰ Seeing as human rights are neither shaky nor derivative, a wide bed for their justification is necessary.

In contrast, dignity proved broad enough for the drafters of the UDHR to give it its justificatory role in IHRL: “the word dignity [was] considered

¹⁸⁶ Oscar Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77 *AJIL* 848; Deryck Beylveid and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2001); David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer 2002); Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *EJIL* 655; Griffin (n69)151-52, 192, 200-206; Roberto Adorno, ‘Human Dignity and Human Rights as a Common Ground for a Global Bioethics’ (2009) 34 *Journal of Medicine and Philosophy* 223; Jack Donnelly, *Human Dignity and Human Rights* (Geneva Academy of International Humanitarian Law and Human Rights 2009); Catherine Dupré, ‘Unlocking human dignity: toward a theory for the 21st century’ [2009] *EHRLR* 190; Foster (n185); Jeremy Waldron, ‘Dignity, Rights, and Responsibilities’ (2011) 43 *Arizona State Law Journal* 1107, 1117-21, 1129-34; Michael Rosen, *Dignity* (HUP 2012); Paolo Carozza, ‘Human Dignity’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013); McCrudden (ed) (n185).

¹⁸⁷ eg Samantha Besson, ‘Justifications’ in Moeckli (n23) 44-46.

¹⁸⁸ eg Griffin (n69).

¹⁸⁹ As in Griffin (n69).

¹⁹⁰ James Nickel, *Making Sense of Human Rights* (Blackwell 2007) 54.

carefully by the Human Rights Commission, which [included] it to emphasize that every human being is worthy of respect ... to explain why human beings have rights to begin with".¹⁹¹ The Commission's consideration had involved discussion of the concepts of unity, reason, and 'two-man mindedness',¹⁹² with the main difficulty being finding "a formula that did not require the Commission to take sides on the nature of man and society, or to become immured in metaphysical controversies, notably the conflict among spiritual, rationalist, and materialist doctrines on the origins of human rights".¹⁹³ The result was to deploy dignity in a foundational role.

Dignity thus has this role because of, rather than despite, its vagueness. Dignity can encompass a pluralistic set of justifications, and allows diverse beliefs about why humans matter to be united under one banner. It can serve as a shorthand – or a placeholder¹⁹⁴ – for the complex, diffuse and entangled nexus of reasons and beliefs as to why humans should have human rights. A polycentric approach to human rights is necessary, and this requires a polycentric conception of dignity. Thanks to its vagueness, dignity can in fact include many potential justifications for human rights:

¹⁹¹ Glendon (n74) 146.

¹⁹² *ibid* 67. 'Two-man mindedness' is a somewhat clumsy translation of the Chinese word *ren*.

¹⁹³ *ibid* 68, quoting René Cassin.

¹⁹⁴ McCrudden (n186) 675-80; Foster (n185) 57.

dignity can contain interlocking and interacting components,¹⁹⁵ such as conscience,¹⁹⁶ equality,¹⁹⁷ liberty,¹⁹⁸ or well-being.¹⁹⁹

This widespread relevance and amenability of the notion of dignity (its roots are not confined to Europe²⁰⁰) is necessary since “the philosophical foundations of human rights law cannot be confined exclusively to some conveniently Western natural rights theory, but are to be found in a more diverse, pluralistic set of justifications”.²⁰¹ Given the ambitious ambit of IHRL (ie the entire human race), its stated foundation must be meaningful to every single culture and lived experience. Dignity’s vagueness renders it malleable enough to fulfil this requirement.

The malleability of dignity also helps IHRL remain relevant over time. The conception of dignity can adopt and develop as the human rights project adopts and develops its content (as IHRL has done through the continued

¹⁹⁵ See §8.2; Carl Wellman, *The Moral Dimensions of Human Rights* (OUP 2010) 22; Martha Nussbaum, *Frontiers of Justice* (HUP 2006) esp 76-78; Carozza (n186) 345, 349.

¹⁹⁶ UDHR Article 1. Or ‘two-man-mindedness’: Glendon (n74) 67-68.

¹⁹⁷ Costas Douzinas, ‘The poverty of (rights) jurisprudence’ in Gearty and Douzinas (n63) 56, 67; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University 2013) 68-69; Besson (n187) 44-47.

¹⁹⁸ Dalai Lama, ‘Human Rights and Universal Responsibility’ reprinted in Hayden (n42) 291, 294; Griffin, (n69) 81, 159-74; Wellman (n197) 44.

¹⁹⁹ Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, (Princeton University Press 1996); Griffin (n69) 81, 178-86; Nickel (n190) 181.

²⁰⁰ Paul Lauren, *The Evolution of International Human Rights* (3rd edn, University of Pennsylvania Press 2013)11-13; Marcus Düwell et al (eds), *The Cambridge Handbook of Human Dignity* (CUP 2014) Part II.

²⁰¹ Philip Alston, ‘Making Space for New Human Rights’ (1988) 1 *Harv Hum Rts YB* 3, 32.

adoption of treaties and development by General Comments and general jurisprudence).

Although using the term 'dignity' specifically as the foundation for human rights is new in IHRL, the concept itself was not invented by the UDHR.²⁰² Dignity has routes back to (at least) the time of Cicero,²⁰³ and 'human rights' had long been about protecting something akin to 'dignity', even if no such word had been used to this effect; indeed, "it needs to be more fully recognised than is the case now that contemporary human rights values, norms, and standards emerged much earlier than the UDHR".²⁰⁴ However, neither of these points prevents dignity from serving a useful purpose as a placeholder for understanding what human rights set out to protect. No major IHRL treaty has sought to distance itself from the concept of dignity.²⁰⁵

Dignity being vague and malleable does not mean that it is entirely meaningless. Dignity does hold some content and its meaning cannot be stretched indefinitely: as Schachter says, "I know it when I see it even if I cannot tell you what it is".²⁰⁶ The remainder of this section will detail some key features of the concept of dignity. Given that this thesis is concerned specifically with the role that dignity plays within IHRL (rather than the

²⁰² Klaus Dicke, 'The Founding Function of Human Dignity' in Kretzmer and Klein (n186) 112-13; Jochen Abr Frowein, 'Human Dignity in International Law' in Kretzmer and Klein (n186) 121-22. Douzinas (n5) 31.

²⁰³ Rosen (n186) 11.

²⁰⁴ Baxi (n111) 163.

²⁰⁵ Frowein (n202) 122.

²⁰⁶ Schachter (n186) 849.

notion of dignity more broadly), it is possible to sculpt away some of dignity's vagueness by analysing this particular role. Key features of dignity will be drawn out in two ways. Firstly, by enquiring how IHRL's construction of the human rights subject informs its understanding of human dignity. Secondly, by analysing the role of dignity in key legal documents.

1.5.2 THE DIGNITY OF THE HUMAN RIGHTS SUBJECT

Contemporary human rights (i) derive from the inherent dignity of the human person and (ii) are vested in and protect the human rights subject. The notion of 'human dignity' as found in IHRL is therefore connected to IHRL's understanding of the human rights subject. This chapter has already demonstrated some ways in which IHRL constructs the human rights subject. These are indicative of how IHRL understands dignity. Here these will be outlined and their connections with dignity noted.

The first connection lies in the inherentness of dignity and the universality of human rights. As demonstrated above, human rights are designed to belong to all and every human. Under IHRL, humans have human rights simply because they are human (not because of citizenship of a particular state, or membership of a certain club; nor because of some particular trait or achievement etc). The universality of human rights must be dependent on there being something shared amongst *all* humans that justifies the very existence of human rights. Dignity embraces this by the fact that it is 'inherent' (ie permanent and pre-existing), as referred to in

both the preambles above. The universality of human rights is thus captured by, and a consequence of, the inherentness of dignity.²⁰⁷

Furthermore, since dignity inheres in the human rights subject, it is clear that dignity need not be awarded, and nor can it be taken away. Dignity is something that humans have simply by virtue of being human.²⁰⁸

Dignity's inherentness allows elimination of some interpretations of it: human dignity (as understood with respect to human rights and this thesis) is neither an aspirational status to be earned nor idealised human comportment. It is not concerned with gold standards or the dignified behaviour of 'dignitaries'. If possession of dignity is a matter of status, then the only status that matters is the status of being human.²⁰⁹ Its presence in every human is therefore indubitable. Dignity exists because of what a human is, not what because of what a human has.²¹⁰ Although dignity cannot be taken away, it is possible to ignore or to violate dignity. As such, dignity must be recognised; and this is the purpose of IHRL.²¹¹

Rosen describes dignity as an 'inner transcendental kernel': "something intangible that all human beings carry inalienably inside them that

²⁰⁷ Dicke (n202) 112.

²⁰⁸ Note that this does not preclude the possibility of other entities having dignity simply by virtue of being whatever they are: a possibility that this thesis will go on to consider in more detail in §6-9.

²⁰⁹ Michael Rosen, 'Dignity: The Case Against' in McCrudden (n185) 145.

²¹⁰ Linda Leib, *Human Rights and the Environment: Philosophical, Legal and Theoretical Perspectives* (Martinus Nijhoff 2011) 44.

²¹¹ See UDHR Preamble and Dicke (n202) 114.

underlies the moral claims that they have just by being human".²¹² This 'kernel' both inheres in all humans and justifies the existence of human rights: for this reason contemporary human rights are universal.

It is in fact possible to dig a little deeper about the concept of dignity beyond noting that it is something that all humans have by virtue of being human. The analysis of the contemporary human rights subject in this chapter has revealed that IHRL understands the nature of human nature in a physically embodied and socially embedded sense. This is evidenced by the progressive inclusion of rights that seek to shield against suffering that emanates from this embodied and embedded status. This demonstrates a commitment to real, lived realities that must also be reflected in IHRL's understanding of the concept of dignity. If dignity were not related to the human rights subject's embodied and embedded nature, then such concerns could not be ultimately justified within IHRL by appeals to human dignity.

'Human dignity' is therefore concerned with the lived, visceral reality of human existence and the urgent need to protect it (the need must be urgent else the potency of (vital²¹³) rights would not be deployed). Dignity is undeniably an abstract concept; but its abstraction should not be a distraction from its very real reckonings.²¹⁴ To talk of ignoring or violating dignity often evokes concrete physical scenarios – whether found in the act

²¹² Rosen (n186) 9. See also 55, 69-77. cf Rosen (n209) 143, 146-47, 152.

²¹³ §6.3.

²¹⁴ Paola Carozza, 'Human Dignity and Judicial Interpretations of Human Right: A Reply' (2008) 19 *EJIL* 931, 931.

of violation itself (eg regarding medical treatment²¹⁵); our immediate response to such an act (eg regarding injustices suffered under apartheid or other discrimination²¹⁶); or both, with the result that

many dignity claims [are] powerful and moving: the Peruvian mother of the disappeared; the Jamaican men kept indefinitely in overcrowded, small, dark, and unventilated police holding cells amid garbage and urine; the leader of the Paraguayan indigenous community whose children were dying from diarrhoea because they had no access to clean water.²¹⁷

Human dignity, like the human rights subject, cannot be locked in a noumenal realm; it “needs to be forged in the crucible of human experience”.²¹⁸ Dignity is concerned with real matters of human life, as revealed by IHRL’s enriching commitment to the embodied and embedded human rights subject.

Furthermore, it is important to note the significant implications that the existence of group rights have for IHRL’s understanding of dignity. That human rights have been assigned to groups per se (ie through corporate rights) necessitates a compatible outlook on dignity. The implication is that

²¹⁵ See eg Conor Gearty, ‘Socio-Economic Rights, Basic Needs, and Human Dignity’ in McCrudden (n185) 155, 156-58.

²¹⁶ eg Edwin Cameron, ‘Dignity and Disgrace: Moral Citizenship and Constitutional Protection’ in McCrudden (n185) 467, 477.

²¹⁷ eg Carozza in McCrudden (n185) 615, 615-16.

²¹⁸ *ibid* 615.

dignity must have some group-oriented dimension; perhaps dignity may even be directly applicable to groups.²¹⁹ Indeed, dignity has been attributed to the entire human species within the law,²²⁰ demonstrating that dignity is not necessarily confined solely to individuals.

Another way to conceptualise group dignity is through considering each individual's dignity (which must be congruent with the lived reality of human existence) to be deeply entwined with communal identity.²²¹ Such a notion of dignity, as residing beyond the atomistic individual, reflects common lived experiences:

The individual whose human rights and fundamental freedoms the United Nations seeks to proclaim and defend is [humankind] in [its] national, cultural, and spiritual environment. Stripped of [its] environmental, national, and cultural characteristics, spiritually adrift from [its] past and loosed from [its] traditional moorings, [humankind] loses [its] essential humanity.²²²

²¹⁹ Adorno (n186) 233.

²²⁰ UNDRIP Article 43; Universal Declaration on the Human Genome and Human Rights (1997) UNESCO, Records of the General Conference, Twenty-ninth Session, vol I, Resolution 16, Article 10; BGH (Federal Court of Justice) 2 StR 310/04 - Urteil vom 22 April 2005 (LG Kassel) [35].

²²¹ Rhoda Howard, 'Dignity, Community, and Human Rights' in Abdullahi An-Nai'm (ed), *Human Rights in Cross-Cultural Perspectives* (University of Pennsylvania 1991) 81, 83-85; Erin Daly and James May, 'Bridging constitutional dignity and environmental rights jurisprudence' (2016) 7 *JHRE* 218, 231-32.

²²² Moses Moskowitz, *The Politics and Dynamics of Human Rights* (Oceana 1968) 169-70 cited in Gillian Triggs, 'The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?' in Crawford (n90) 141.

It is clear that IHRL does not wish to strip away something that can be considered essential to humanity (nor would this be desirable). There must therefore be something beyond the individual, something relational, to the concept of human dignity understood by IHRL. This relationality of dignity will be explored in greater detail in Part III of this thesis.

Dignity attempts to capture in a single word the real-life complexity of the human rights subject and the urgent need to protect it from suffering. As such, dignity is multifaceted, organic and potent. It exists alongside and is bound up with the human in such a way that the two cannot be divorced, and any attempts to sever one from the other necessarily de-humanise and in-dignify the human. In order to explore further the precise role of dignity in IHRL, it is worth considering more closely its appearances within the legal texts.

1.5.3 DIGNITY AS JUSTIFICATION AND METRIC

Despite the reliance of human rights on dignity, IHRL does not define or clarify what dignity actually is. This lack of a definition of dignity is not too surprising given the lack of consensus in the literature as to the definition of dignity, and that the drafters of the UDHR found agreeing on its philosophical basis highly challenging.²²³

However, the term 'dignity' appears in a number of places in the International Bill of Rights, and this assists in understanding its role. For example, "the right to just and favourable remuneration ensuring ... an

²²³ Glendon (n74) 38-41, 67-68, 146; Lauren (n200) 220-21.

existence worthy of human dignity";²²⁴ the right to education, which "shall be directed to the full development of the human personality and the sense of its dignity";²²⁵ and the right that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".²²⁶ However, it is not clear why these rights in particular require reference to dignity while others do not, given that all rights derive from dignity.²²⁷

However, the references to dignity in the texts of treaties and declarations (as well as those in General Comments²²⁸) are in fact instances of dignity being used to detail the *content* of a right rather than to *justify* it.²²⁹ In each case, the right refers back to dignity in order to demonstrate the content and the scope of the right: existence must be *worthy of* dignity, treatment must be *with respect for* dignity. In this sense, dignity provides a way to somehow measure particular actions or situations. Dignity thus cannot be devoid of meaning, since it can be used as a measure of sorts;

²²⁴ UDHR Article 23(3).

²²⁵ ICESCR Art 13(1).

²²⁶ ICCPR Article 10(1).

²²⁷ Just as human rights are "interdependent, indivisible and interrelated", (World Conference on Human Rights, 'Vienna Declaration and Programme of Action' A/CONF.157/23 (25 June 1993) Article 5) they are all intertwined with dignity too. There is thus no *de jure* hierarchy between human rights.

²²⁸ CESCR, General Comment 4 (para 7), General Comment 12 (para 4), General Comment 13 (para 4), General Comment 14 (para 1), General Comment 15 (para 1), General Comment 17 (para 1), General Comment 18 (para 1), General Comment 19 (para 1); HRC, General Comment 20 (para 2).

²²⁹ Dicke (n202) 118; Gerald Neuman, 'Discourses of Dignity' in McCrudden (n185) 637, 643-44; Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' (2013) *NYU School of Law, Public Research Paper No 12-73* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196074> (accessed 14/12/2014) 3.

although understanding dignity's content is necessarily context-dependent and open to debate.²³⁰

Dignity helps shape the contours of IHRL; it pushes and pulls at how human rights are to be defined and interpreted, thus serving a purpose within human rights interpretation and adjudication.²³¹ In particular, Townsend identifies three ways that courts have utilised dignity when adjudicating human rights issues: "as decider, as a rule of interpretation, and by interpreting dignity to extend and create new rights".²³² The criticism of the legalism of human rights identified in the Introduction re-emerges here if a court treats dignity "as a truth to be discovered and then imposed rather than a point of view to be argued for and deliberated on".²³³ The value and importance of the dialogical development of IHRL is key to avoiding this: a plurality of relevant voices must be heard in defining the contours of dignity and human rights.

Because undignified treatment (eg the overcrowded prison cells and diarrhoea from lack of clean water) is something to be avoided, dignity functions as a metric that indicates the boundaries and the intentions of

²³⁰ For a good example of how dignity provides a debatable measure, consider the discussion around *Wackenheim v France* HRC Communication No 854/1999 CCPR/C/75/D/854/1999 (2002): Susan Millns, 'Dwarf-throwing and human dignity: A French perspective' (1996) 18 *Journal of Social Welfare and Family Law* 375; Rosen (n186) 63ff; McCrudden (n186) 705-706.

²³¹ McCrudden (n186); McCrudden (n185) 361-402.

²³² Dina Townsend, 'Taking dignity seriously? A dignity approach to environmental disputes before human rights courts' (2015) 6 *JHRE* 204, 213.

²³³ Conor Gearty, 'A Perspective from Law's Front Line' in McCrudden (n185) 162.

human rights (including environmental human rights²³⁴). Dignity captures what constitutes human suffering and flourishing, *and* why these should be respectively prevented and promoted.

Dignity therefore has two roles in IHRL: as a metric and as an overarching justification.²³⁵ That is, humans have human rights because they have dignity (justification), and human rights seek to ensure that humans are not treated in an undignified way (metric). As a justification, dignity refers to the inherent worth or intrinsic value that humans have.²³⁶ Dignity points to an ineffable quality about being a human that means that they matter, that their suffering matters, and that their lives matter. It signposts that humans have a certain moral status simply through virtue of being human. As a metric, dignity describes the boundaries within which humans must be treated: it captures what constitutes human suffering and flourishing and informs the content and interpretation of human rights. This is why Schachter knows dignity when he sees it: because its absence (ie treatment in an undignified manner) evokes a distinctive response, a response that shapes human rights by sounding an alarm when a human has been wronged.²³⁷ As such, dignity is not entirely vacuous (as some

²³⁴ See §3.2.1; Townsend (n232) 213-22; Daly and May (n221) 230-34

²³⁵ Carozza (n186) 346-47.

²³⁶ See §8.4.1; McCrudden (n186) 679-80; Carozza (n214) 934; Rosen (n186) 10ff; Foster (n185) 100; John Tasioulas, 'Human Dignity and the Foundation of Human Rights' in McCrudden (n185) 304-307.

²³⁷ Dershowitz (n21); Johannes Morsink, *Inherent Human Rights* (University of Pennsylvania Press 2009) 58ff.

suggest²³⁸): if it were, then it would not be able to both underpin and shape the prodigious body of law that is IHRL.

As a justification, dignity explains why being a human matters. As a metric, it describes what matters. These two roles are clearly intertwined: humans matter because there are things that matter to and about them. There is a loop between using dignity as a justification and a metric: one must be treated with dignity because one has dignity.²³⁹ This two-threaded role of dignity helps understand the dynamic, 'carnivalistic',²⁴⁰ nature of contemporary human rights, with their constant spiralling reflection and reinterpretation of lived human realities. IHRL (founded on dignity) must continually refer back to the lived reality of human existence in order to ensure that it is achieving the aim it has set itself (providing for a life in dignity).

Because dignity is both a metric and a justification, it serves as a shorthand for both what matters and why it matters. This still leaves open a broad scope for dignity: it is not clear whether dignity is spiritual, rationalist, or materialist (as questioned by the Human Rights Commission²⁴¹); nor is it clear why (only) humans have dignity. These ideas will be revisited later in the thesis.²⁴²

²³⁸ Ruth Macklin, 'Dignity is a useless concept' (2003) 327 *BMJ* 1419; Steven Pinker, 'The stupidity of dignity', *The New Republic* (28 May 2008) 28; Beyleveld and Brownsword (n186).

²³⁹ See Tasioulas (n236) 306.

²⁴⁰ In a slightly broadened sense of both the processes of formulation *and* the content – see Gear (n66) 21.

²⁴¹ *supra* n193.

1.6 CONCLUSION

Human rights have transformed international law. They have transformed it through their incorporation of individuals (and groups of individuals) as right-holders within the international legal order, and they represent a movement of international law from technical legal rules between states to a law that recognises the inherent dignity of the human being. The fact that international law has shown its ability to develop its structure by incorporating new right-holders and new justifications is of particular significance for this thesis.²⁴³

A second important result of this chapter is that the content of human rights is not static. In particular, the developments in the content of IHRL post-1948 have shown a transition from human rights being predominantly concerned with protecting the civil or political liberties of the citizen, to them protecting against a wide range of forms of human suffering, and indeed promoting human flourishing. It is therefore plausible that IHRL will provide suitable terrain for using the tool of 'rights' to protect the natural world within international law, given that it has increasingly been recognised that human flourishing (and indeed survival) is at risk from the progressive deterioration of the state of the natural world on this planet. The following chapter will investigate how IHRL has responded to this possibility, and determine the most fruitful paths available for IHRL in this regard.

²⁴² §6.4.3; §III.

²⁴³ See Part III.

Implicit with the developing content of human rights is a parallel enrichment in IHRL's construction of the human rights subject. Given that a key role of rights is to indicate to whom duties are owed (viz to the right-holder in which the right is vested),²⁴⁴ the understanding of the subject of rights is crucial. By moving towards understanding human rights as belonging to humans qua humans (rather than citizens or legal persons), IHRL has understood its subject to be the real living, 'fleshy' human. Recognition of the embodied and embedded nature of human beings has thus broken through into IHRL. This ability to understand the legal subject as an approximation of a real-life subject is relevant for considering the possibility of nonhuman legal subjecthood, as noted by Douzinas:

The creative potential... allows the original rights of 'man' to break up and proliferate into the rights of various types of subject, eg the rights of workers, women, children, refugees or the rights of a people to self-determination, or animal and environmental rights.²⁴⁵

This thesis will go on to consider the expansion of the sort of rights found in the original rights of 'man' to animals and other living, 'fleshy' beings.

Another notable difference between human rights pre- and post-1948 is IHRL's specific identification of 'human dignity' as its foundation. Because of its role as the justification for the existence of contemporary human rights, dignity has a proximity to the human rights subject: dignity

²⁴⁴ §Introduction.

²⁴⁵ Douzinas (n5) 256.

attempts to capture in a single word the real-life complexity of the human rights subject *and* the urgent need to protect it from suffering and promote flourishing. Dignity is admittedly a vague concept – but the obverse of this imprecision is its malleability: a true asset for a concept underpinning something as broad and diverse as IHRL. Dignity strikes a balance. It displays just the right amount of malleability to make it widely acceptable as the foundation of human rights without it being easily sloughed off as a meaningless jingle.

This balance is in part due to the fact that dignity plays two roles within IHRL: as a metric and as a justification. These two roles are closely entwined. It is because humans have dignity that they must be treated in line with their dignity. Although an ultimate and unanimous definition of dignity is unlikely to be forthcoming (if it even exists), some statements can be made regarding its definition for the purposes of this thesis.

Firstly as just noted, dignity operates as both a metric and a justification within IHRL. Secondly, human dignity is tightly enmeshed with and indeed an inherent property of the human: one has dignity simply through being human. Thirdly, because of its dual-role, and because of the complexity that dignity seeks to capture, dignity is best thought of as a shorthand for a vast number of potential beliefs both as to why humans matter and what matters about being a human.²⁴⁶ It is worth pointing out too that none of these features of dignity necessarily prevent nonhumans from having their own brand of dignity. Elephants of course cannot have human dignity

²⁴⁶ As long as these beliefs are ultimately compatible with human rights.

(which humans have by virtue of being human), but they could have elephant dignity by virtue of being elephantine.

Leaving aside this final remark to be revisited in Part III of the thesis, it is now necessary to investigate how IHRL may be able to function to protect the environment. Although some philosophical aspects of human rights suffer from imprecision, the presence of human rights is ubiquitous, their reach is considerable and their power indubitable. The next two Chapters look at methods of deploying human rights for environmental protection in order to see if this is a viable and valuable extension of their reach.

CHAPTER TWO

THE FORM OF A HUMAN RIGHT TO ENVIRONMENT

2.1 INTRODUCTION

Having analysed some key aspects of human rights in Chapter One, this Chapter focuses on responding to the question of how such rights can be used to protect the natural world through international law. It will do this by considering environmental applications of international human rights law (IHRL). The question underlying this analysis is whether IHRL can imagine the human rights subject and its flourishing in such a way to include protection of the natural world. Chapter One has shown that it is technically feasible for IHRL to enrich its content, and this enrichment could allow environmental protection to be included within IHRL's scope. Furthermore, this may be desirable given that "[w]ere the Universal Declaration to be drafted today, it is easy to imagine that it would include a right recognized in so many national constitutions and regional agreements [ie a right to a healthy (or satisfactory, safe or sustainable) environment]".¹

There are in fact a number of strategies by which human rights can be used to protect the environment and so some definitions are required. In this thesis, 'human right to environment' is used as shorthand for a

¹ UNHRC, 'Preliminary report' A/HRC/22/43 (24 December 2012) [14].

substantive human right to an environment of a certain quality, ie for any of the following: a human right to a *healthy* environment, a human right to a *satisfactory* environment, a human right to an *adequate* environment, and so on. 'Environmental human right' means any human right (individual, collective or corporate) with an environmental hue. This includes a human right to environment, human rights that are affected by environmental conditions (such as the right to life), a human right to conservation, and so on.

In this chapter, both the theory and the practice of environmental human rights will be examined. After looking at the deployment of existing human rights in environmental contexts ('greening'), it will consider how a specific human right to environment can take shape. The main difficulties here are in defining precisely what such a right is protecting; locating its actors; and establishing the legal duties it creates.

Although some groundwork for a human right to environment has been laid, its establishment is not ubiquitous.² The embryonic nature of a human right to environment is captured by the UK's declaration when signing the Aarhus Convention³ that "the 'right' of every person 'to live in an environment adequate to his or her health and well-being' ... express[es] an aspiration which motivated the negotiation of this Convention".⁴ The

² David Boyd, *The Environmental Rights Revolution* (UBC Press 2012) 47, 59.

³ (1998) 2161 UNTS 447.

⁴ Available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en (accessed 26/7/2013).

declaration points out that a substantive human right to environment has not yet fully matured, but that it represents something towards which the international community is heading.⁵ This aspirational status of a human right to environment directs the following analysis.

2.2 THE 'GREENING' OF EXISTING HUMAN RIGHTS

'Greening' refers to the deployment of existing IHRL in environmental situations.⁶ The idea behind greening is that regulation of environmental quality is already implicit in extant IHRL, and this characterisation needs simply to be drawn out.⁷ Existing human rights may be able to deal with environmental problems adequately once they have been appropriately interpreted, in particular in line with the embodied and embedded nature of the human rights subject.

2.2.1 EUROPE

Greening of human rights has predominantly taken place within the European Convention on Human Rights and Fundamental Freedoms (ECHR) regime.⁸ The ECHR does not contain a human right to environment.

⁵ See 'Preliminary report' (n1) [12]-[17].

⁶ Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2006-2007) 18 *Fordham Environmental Law Review* 471, 472.

⁷ *ibid.*

⁸ (1950) 213 UNTS 222. Dinah Shelton, 'Environmental Rights in the European Community' (1992-1993) 16 *Hastings Int'l & Comp L Rev* 557; Richard Desgagné, 'Integrating Environmental Values into the European Convention on Human Rights' (1995) 89 *AJIL* 263; Robin Churchill, 'Environmental Rights in Existing Human Rights Treaties' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon 1996) 93; Mariana Acevedo, 'The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights' (1999-2000) 8 *NYU Env'tl LJ* 437; Margaret DeMerieux,

However, this has not deterred the European Court of Human Rights (ECtHR) from engaging with cases of an indubitably environmental flavour. The ECtHR has interpreted environmental issues to be relevant to a number of rights within the ECHR, in particular the rights to respect for private and family life, home and correspondence (Article 8)⁹ and to life (Article 2).¹⁰ The right to property in Article 1 of the First Optional Protocol to the ECHR protects the right to peaceful enjoyment of possessions¹¹ also contains potential for greening.¹² However, the European Commission on Human Rights noted that this provision does not “guarantee a right to the peaceful enjoyment of possessions *in a pleasant environment*”.¹³

The earliest European environmental cases concerned Article 8, and this has continued to be the most common basis for environmental claims

‘Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (2001) 21 *OJLS* 521; Ole Pedersen, ‘European Environmental Human Rights and Environmental Rights: A Long Time Coming?’ (2008) 21 *GIELR* 73.

⁹ *Arrondelle v UK* (1983) 5 EHRR 118; *S v France* (1990) 65 DR 250; *Powell and Rayner v UK* (1990) 12 EHRR 355; *Zander v Sweden* (1994) 18 EHRR 175; *López Ostra v Spain* (1995) 20 EHRR 277; *Guerra v Italy* (1998) 26 EHRR 357; *Hatton v UK* (2002) 34 EHRR 1 & (2003) 37 EHRR 28 [GC]; *Kyrtatos v Greece* (2005) 40 EHRR 16; *Taşkin v Turkey* (2006) 42 EHRR 50; *Fadeyeva v Russia* (2007) 45 EHRR 10; *Giacomelli v Italy* (2007) 45 EHRR 38; *Leon and Kania v Poland* App no 12605/03, Judgment of 21 October 2009; *Tătar v Romania* App no 67021/01, Judgment of 6 July 2009, Judgment of 21 October 2009; *Hardy and Maile v UK* (2012) 55 EHRR 28.

¹⁰ *Öneryıldız v Turkey* (2005) 41 EHRR 20; *Kolyadenko v Russia* (2013) 56 EHRR 2; *Budayeva v Russia* (2014) 59 EHRR 2.

¹¹ First Optional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952) 213 UNTS 262.

¹² CoE, ‘Manual on Human Rights and the Environment’ (2nd edn, 2012) 61-74.

¹³ *Powell and Rayner v United Kingdom* (1986) 47 DR 5 [6], emphasis added. See also *Fredin v Sweden* (1991) 13 EHRR 784.

within the ECHR regime.¹⁴ Article 8 has been shown to be applicable when polluting activities, such as noxious fumes in *López Ostra v Spain*¹⁵ and noise pollution from an airport in *Hatton v UK*,¹⁶ have a negative impact on the lives of individuals. The Court has established a relatively low threshold for environmental damage to interfere with the enjoyment of Article 8 rights: pollution can have negative impacts on an individual's right to enjoy their private and family life or home *without* necessarily seriously endangering their health.¹⁷ The ECtHR has also noted that the level of adverse effects caused by environmental pollution necessary to demonstrate an interference with Article 8 is a contextual issue: suitable environmental conditions vary depending on the situation.¹⁸

Article 8 does not protect against all environmental problems because the enjoyment of rights protected by Article 8 ECHR can be limited: an interference will be legitimate if it is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".¹⁹ The possibility of legitimate interference accommodates the important economic role that

¹⁴ *supra* n9.

¹⁵ *López Ostra* (n9).

¹⁶ *Hatton* (n9).

¹⁷ *López Ostra*(n9) [51]; *S v France* (n9) [2]. Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002) 16 *Tul Env'tl LJ* 65, 102-103.

¹⁸ *Fadeyeva* (n9) [69].

¹⁹ Article 8(2) ECHR.

activities causing environmental hazards often perform. In assessing whether an interference with Article 8 is legitimate (ie whether a fair balance has been struck between individual interests and the societal interests being pursued), consideration must be given to both the *substantive* merits of the decision resulting in the interference and the *procedure* through which the decision was reached.²⁰

With regards to the substantive merits of a decision, the ECtHR has “held on a number of occasions that in cases involving environmental issues the State must be allowed a wide margin of appreciation”.²¹ This ‘margin of appreciation’²² is afforded to states in their compliance with the requirements of Article 8 because national authorities are often better placed to assess local needs than an international court.²³ Furthermore, the margin of appreciation is wide in the present context because environmental issues are normally concerned with general policy decisions – such as aviation policy in *Hatton*²⁴ – rather than with a highly intimate or

²⁰ *Giacomelli* (n9) [79].

²¹ *Giacomelli* (n9) [80].

²² Pedersen (n8) 85; Alastair Mowbray, *European Convention on Human Rights* (3rd edn, OUP 2012) 551; Malgosia Fitzmaurice, ‘Environmental Degradation’ in Daniel Moeckli et al (eds), *International Human Rights Law* (2nd edn, OUP 2014) 597.

The ‘margin of appreciation’ actually refers to a number of related but distinct situations: Robin White and Clare Ovey, *The European Convention on Human Rights* (5th edn, OUP 2010) 79.

²³ *ibid.*

²⁴ *Hatton* (n8 [GC]) [97]. A Grand Chamber overturned an earlier ruling from a Chamber in this case based primarily on consideration of the margin of appreciation. Mowbray (n22) 550-53.

private aspect of home or family life.²⁵ There is thus an “understandable reluctance to allow the [ECtHR] to become a forum for appeals against the policy judgments of governments, provided they do not disproportionately affect individual rights”.²⁶

Because of the wide margin of appreciation, and the normally public nature of environmental damage and protection, a violation of Article 8 is more likely to be found when its procedural requirements have not been met.²⁷ Relevant procedural duties include giving regard to prior consultation,²⁸ compliance with national law,²⁹ and taking compensatory measures.³⁰ However, even if the procedural requirements of Article 8 have been met, the ECtHR will still consider whether there has been a substantive breach.³¹ This will include consideration of pollutant levels and resulting rates of illnesses.³² For example, in *Öçkan and Others v Turkey*,³³ the

²⁵ *Hatton* (n8 [GC]) [102].

²⁶ *Boyle* (n6) 508.

²⁷ *ibid.*

²⁸ *Giacomelli* (n9) [82]-[98].

²⁹ *López Ostra* [55]-[56]; *Guerra* [27], [59]; *Taskin* [117], [123]; *Fadeyeva* [132] (n9). Dinah Shelton, ‘Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?’ in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law* (OUP 2012) 206, 225.

³⁰ *S v France* (n9).

³¹ Consider *Hatton* (n9 [GC]) [122]-[129].

³² CoE (n12) [43]-[45].

³³ (2006) 42 EHRR 50.

ECtHR found “a violation of Article 8 because of the threat posed to the applicants’ health by the operations of gold mine using cyanidation”.³⁴

Violations of Article 2 ECHR, the right to life, have also been found as a result of poor environmental conditions.³⁵ In *Öneryıldız v Turkey* the Court ruled that a violation of Article 2 had occurred on account of the poor conditions of a waste-collection site resulting in the deaths of nine people. The ECtHR noted that the positive obligation on states to safeguard the lives of those within their jurisdiction is relevant when there is a real and immediate risk to life as a result of poor environmental conditions.³⁶ It is therefore necessary to ensure appropriate environmental conditions in order to protect the right to life.

Violations of human rights have therefore been found based on environmental conditions. The extent and content of ECtHR case law demonstrates that its greening of the ECHR has not been a superficial watercolouring. Indeed, the Council of Europe’s *Manual on Human Rights and the Environment* indicates that it can be valid for states to interfere with certain other rights contained in the ECHR in order to pursue environmental protection measures.³⁷

³⁴ CoE (n12) [43].

³⁵ *supra* n10.

³⁶ *Öneryıldız* (n10) [71], [101].

³⁷ CoE (n12) 8. See also Boyle (n6) 486, 492-500; Francesco Francioni, ‘International Human Rights in an Environmental Horizon’ (2010) 21 *EJIL* 41, 45-46; ECOSOC, ‘Human Rights and the Environment’ E/CN.4/Sub.2/1994/9 (‘Ksentini Report’) [242]; *Fredin* (n7).

However, because of its use of the 'margin of appreciation', the ECtHR has in general been unwilling to challenge states' own definitions of suitable environmental conditions unless there has been a loss of life.³⁸ The greening of existing human rights is therefore a limited means of protecting the environment in the European context. The ECtHR has acknowledged this, stating that "there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8".³⁹

The ECHR is therefore only relevant in cases where damage to the environment has *also* resulted in an interference with the enjoyment of a human right already recognised. Damage to the environment alone is not enough for a breach of duty to be found. *Kyrtatos v Greece*⁴⁰ provides a concrete example of this. Assessing whether the destruction of a wetland⁴¹ violated Article 8, the ECtHR ruled that "neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such".⁴² Thus the ECHR approach

³⁸ Boyle (n6) 495-96, 508; Dinah Shelton, 'Developing substantive environmental rights' (2010) 1 *JHRE* 89, 111-12.

³⁹ *Leon and Kania* (n9) [98]. See also *X v Iceland* (1976) 5 DR 86; DeMerieux (n8)524.

⁴⁰ *Kyrtatos* (n9). See also *Herrmann v Germany* (2013) 56 EHRR 7, Separate Opinion of Pinto de Albuquerque 36.

⁴¹ Referred to as a 'swamp' by the ECtHR. Karen Hulme, 'International environmental law and human rights' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 285, 298.

⁴² *Kyrtatos* (n9) [52].

provides a point of access for environmental protection into IHRL, but does not protect the environment per se.

2.2.2 ELSEWHERE

Although no other regional human rights regime has engaged with greening on a par with the ECHR, the principles can be found elsewhere. The Inter-American Commission on Human Rights (IACCommHR) has stated that “several fundamental rights require, as a necessary precondition for their exercise, a minimum environmental quality”.⁴³ Indeed, the IACCommHR and the Inter-American Court of Human Rights (IACtHR) have acknowledged that environmental damage has an impact on the right to life;⁴⁴ communal rights to property;⁴⁵ the right to residence and movement;⁴⁶ the right to religious freedom and worship;⁴⁷ the right to family;⁴⁸ the right to preservation of health;⁴⁹ and the ‘right to consultation’

⁴³ IACCommHR, ‘Thematic Report on Indigenous Peoples, Communities of African Descent and Extractive Industries’ (2015) [58]. Note that the OAS regime does contain a human right to environment. See *infra* and Dinah Shelton, ‘Remedies and Reparations’ in Malcolm Langford et al (eds), *Global Justice, State Duties* (CUP 2013) 381-84; *Yakye Axa Indigenous Community v Paraguay* (2005) IACtHR Series C No 125 [163].

⁴⁴ *Yanomami v Brazil* (1985) IACCommHR Resolution 12/85, Case 7615 p10; *Maya Indigenous Community of the Toledo District v Belize* (2004) IACCommHR Report No 40/04, Case 12.053 [154]; *Kichwa Indigenous People of Sarayaku v Ecuador* (2012) IACtHR Series C No 245 [341(3)].

⁴⁵ *Maya* [147]; *Sarayaku* [341(2)].

⁴⁶ *Yanomami* p10, *Sarayaku* [134]-[136].

⁴⁷ *Maya* [154].

⁴⁸ *Maya* [154].

⁴⁹ *Maya* [154], *Yanomami* p10.

implicit in the right to self-determination.⁵⁰ Although the IACtHR and IACCommHR have primarily considered how environmental damage affects the rights of indigenous peoples, their 'greening' principles may have wider reach.⁵¹

At the global level, UN bodies have likewise noted that the state of the environment is relevant to existing human rights. The Committee on Economic Social and Cultural Rights' (CESCR) General Comments on the right to health⁵² and the right to food⁵³ contain references to the environment and environmental policy. John Knox, in his role as Special Rapporteur on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,⁵⁴ has emphasised the connection between existing human rights and environmental conditions, in particular the rights to life, health, food, water, housing, and self-determination.⁵⁵ Knox has noted that "all human rights are vulnerable to environmental degradation",⁵⁶ and that "states have obligations to protect

⁵⁰ *Maya* [154], *Sarayaku* [145]-[232].

⁵¹ §2.4.1(a).

⁵² CESCR, General Comment 14, HR1/GEN/1/ (Vol I) [4].

⁵³ CESCR, General Comment 12 [4].

⁵⁴ See <<http://srenvironment.org/>> (last accessed 14/6/2016).

⁵⁵ UNHRC, 'Mapping report' A/HRC/25/53 (30 December 2013) [17]-[25]; 'Preliminary report' (n1) [16]-[24]. See also 'Analytical Study' A/HRC/19/34 (16 December 2011) [56]-[63]; 'Climate Change Report' A/HRC/10/61 (15 January 2009) [18]-[41].

⁵⁶ 'Preliminary report' (n1) [19]. See also Ksentini Report (n37) [188]-[248].

against environmental harm that interferes with the enjoyment of human rights".⁵⁷

Although greening is a legitimate pathway for bringing environmental concerns into IHRL, its scope is limited. Greening is only relevant when an existing human right has been violated. Damage to the environment is not itself enough to demonstrate a breach of a greened human right. Greening acknowledges that enjoyment of human rights is affected by the state of the environment, but falls short of protecting the environment per se. As such, the greening of existing human rights is limited in its ability to protect the natural world through international law. An alternative strategy which may prove more effective at this is to establish a specific human right to environment. The remainder of this Chapter will focus on this strategy, assessing current law and potential developments.

2.3 DEFINING A HUMAN RIGHT TO ENVIRONMENT

The first hurdle that a human right to environment must overcome is determining its formulation. This will affect its content, its interpretation, and its resultant duties. The usual strategy to deal with this question is to insert an adjective to describe the environment⁵⁸ that humans have a right to, such as 'adequate', 'satisfactory' or 'healthy'.⁵⁹ Existing treaty texts will

⁵⁷ 'Mapping report' (n55) [44]. See §2.5.

⁵⁸ There is also the question of determining what constitutes someone's 'environment'. It is not certain that this must be in any way physically delimited or clearly defined.

⁵⁹ Others include: clean, healthful, ecologically balanced, decent, pure, safe and sustainable. See Stephen Turner, *A Substantive Environmental Right* (Kluwer 2009) 46-48.

be surveyed to form a starting point to see how a human right to environment has been defined to date.

2.3.1 A SURVEY OF CURRENT LAW

Although there is no human right to environment within global IHRL, four regional treaties contain provisions directly concerned with the state of the environment, all of which couch it in terms of health either directly or indirectly. Firstly, Article 24 of the African Charter on Human and Peoples' Rights (ACHPR)⁶⁰ provides:

All peoples shall have the right to a general satisfactory environment favourable to their development.

Although the drafters of Article 24 opted to use the qualifier 'general satisfactory', this has been interpreted to mean healthy. In the *Ogoniland*⁶¹ case, the African Commission on Human and Peoples' Rights (ACommHPR) referred to "the right to a general satisfactory environment ... or the right to a healthy environment, as it is widely known".⁶² *Ogoniland* concerned the conditions of the Ogoni people of Nigeria and the violation of a number of their human rights as a consequence of oil extraction activities in their lands. The operations caused extensive environmental degradation and

⁶⁰ (1981) 1520 UNTS 217.

⁶¹ *SERAC and the CESR v Nigeria* (2003) ACommHPR Communication No 155/96, 10 IHRR 282 ('*Ogoniland*')

⁶² *ibid* [52]. See also Fons Coomans, 'The *Ogoni* Case Before the African Commission on Human and Peoples' Rights' 52 *ICLQ* 749, 754; Dinah Shelton, 'Decision Regarding Case 155/96' (2002) 96 *AJIL* 937, 939.

health problems resulting from pollution and contamination.⁶³ In assessing the merits of *Ogoniland*, the ACommHPR considered the violations of Article 16 (right to best attainable standard of health) together with Article 24.⁶⁴ A 'general satisfactory environment' should therefore be considered in this context to be closely related to a 'healthy environment'.

Secondly, Article 11(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol)⁶⁵ provides:

Everyone shall have the right to live in a healthy environment and to have access to basic public services.

Article 11(1) provides a slightly different formulation of a human right to environment than the ACHPR. It refers directly to a healthy environment and is attached to individuals rather than peoples as in the ACHPR.⁶⁶ However, it does not define what is meant by a 'healthy environment'.

Article 38 of the Arab Charter on Human Rights⁶⁷ also contains a human right to a healthy environment. The right is framed under the umbrella of ensuring 'well-being and a decent life' alongside food, clothing, housing and services.

⁶³ *Ogoniland* [1].

⁶⁴ *Ogoniland* [50]-[54].

⁶⁵ (1988) OAS Treaty Series No 69.

⁶⁶ §2.4.1(a).

⁶⁷ 12 IHRR 893.

The final relevant regional treaty is from Europe and is not normally considered a part of IHRL but rather of international environmental law (IEL). The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus) sets out a number of procedural rights. It can therefore be thought of as a bridge between IEL and IHRL, especially as it is the first environmental treaty to create legal relations between states and their citizens.⁶⁸ Although Aarhus does not codify a substantive human right to environment, it does mention one in Article 1, which begins as follows:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall ...

Article 1 endorses the idea of a human right to environment. It also specifically provides that the state of the environment is to be measured in terms of human health and well-being. The Aarhus Convention's embellishment of the meaning of a healthy environment (as adequate to human well-being) is unique in the realm of international treaties, and its reference to future generations⁶⁹ is also innovative in this field.

All existing instances of a human right to environment within IHRL refer to health in their formulation. However, simply defining the right as a human right to a *healthy* (as opposed to sustainable, adequate, etc) environment

⁶⁸ §1.2.1; Boyd (n2) 87.

⁶⁹ §2.4.1(b).

provides only the first step in defining a human right to environment. The next step is to define what is meant by a 'healthy environment'.

2.3.2 DEFINING A 'HEALTHY ENVIRONMENT'

There are two important components to unpacking the meaning of a 'healthy environment': (i) whether it should be understood as one which is conducive to human health or interpreted to mean that the environment itself is healthy; and (ii) setting the actual standards for human and/or ecosystem health.

As to the latter component, precise standards cannot be set out in a treaty text since this would be far too unwieldy, and suitable environmental conditions are inevitably variable.⁷⁰ The supposed consequent vagueness of a human right to environment is often grounds for criticism.⁷¹ Although vagueness is a meaningful concern, it is not one unique to a human right to environment. For example, Article 7 ICCPR provides that "no one shall be subjected to torture", but does not provide a definition of what constitutes torture.⁷² Nickel points out that "international human rights typically set broad normative standards that can be interpreted and applied by appropriate legislative, judicial, or administrative bodies at the

⁷⁰ *Fadeyeva* (n9) [69].

⁷¹ Philip Alston, 'Conjuring up New Human Rights' (1984) 78 *AJIL* 607, 613; Paula Pevato, 'A Right to Environment in International Law: Current Status and Future Outlook' (1999) 8 *RECIEL* 309, 312-13; Boyd (n2) 33-34; Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 1, 32-33.

⁷² And the definition of torture has indeed been further defined through the more specific Convention Against Torture: see §8.2.1.2.

appropriate level":⁷³ a key element of the design of contemporary IHRL seen in Chapter One is that they are not static but dynamic ('carnivalistic' even),⁷⁴ they are open to re-interpretation and renewal.

Defining exactly what is meant by a healthy environment can therefore be done elsewhere through an interpretive process.⁷⁵ The articulation of a human right in a treaty is distinct from the interpretive process, and the latter can solve problems that the former cannot. Such a process is well-suited to fleshing out the meaning of a human right to a healthy environment, which will necessarily vary across time and space.

Defining appropriate environmental standards is a complicated problem. There is no precise rate at which chopping down trees for firewood becomes unsustainable deforestation and no level that defines when the concentration of pollutants in a river becomes dangerous. Of course, standards can and have been set in this regard,⁷⁶ even if they are ultimately arbitrary to some extent.⁷⁷ Allocating an interpretive role to human rights institutions would entrust considerable responsibility to judges and other professionals who may not be well-versed in

⁷³ James Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' (1993) 18 *YJIL* 281, 285.

⁷⁴ §1.5.3n240.

⁷⁵ Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford Journal of International Law* 103, 135-37; François du Bois, 'Social Justice and the Judicial Enforcement of Environmental Rights and Duties' in Boyle and Anderson (n8); Boyle (n6) 508.

⁷⁶ Relying for instance on WHO guidelines: Shelton (n38) 97, 117-18.

⁷⁷ Decreasing the concentration of a pollutant by a tiny amount may alter its status from illegal to legal without necessarily providing any health benefits.

environmental science and ecology (and the expansive time and space scales required to respond to environmental problems).⁷⁸ However, this risk can be overcome by ensuring that a range of suitable experts are involved in the process.⁷⁹

Vagueness can in fact be an asset of human rights – it allows them to be developed and deployed appropriately in differing situations. This flexibility of human rights is especially pertinent in the environmental context: “the variability of implementation demands imposed by the right to environment in response to different threats over time and place does not undermine the concept of the right, but merely takes into consideration its dynamic character”.⁸⁰ All human rights require flexibility in how they can be deployed (given that no ‘universal human rights subject’ exists⁸¹), and a human right to a healthy environment is no different in this regard. In summary, “indeterminacy is thus a problem, but not necessarily an insurmountable one”.⁸²

⁷⁸ Hulme (n41) 298.

⁷⁹ Consider the role of experts in *Whaling in the Antarctic (Australia v Japan)* ICJ (Judgment of 31st March 2014) and the composition of the CEDAW and CRPD Committees
<<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Membership.aspx>>;
<<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx>> (both accessed 22/12/2014).

⁸⁰ Dinah Shelton, ‘Human Rights and the Environment: What Specific Environmental Rights have been Recognized?’ (2006-2007) 35 *Denver Journal of International Law and Policy* 129, 164.

⁸¹ §1.3.2(b).

⁸² Alan Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’ in Boyle and Anderson (n8) 51.

It is also necessary to determine whether a 'healthy environment' is defined in terms of human health, ecosystem health, or both (the first component raised earlier). The anthropocentric route to defining a 'healthy environment' may appear more obvious. Popović claims that a right to a healthful environment "refers to an environment conducive to human health"⁸³ and Nickel refers to a safe environment "meaning an environment that is not destructive of human health".⁸⁴ Furthermore, the non-binding reference to a human right to environment in the Aarhus Convention is clearly formulated in anthropocentric language. However, as will be seen, human rights institutions have not always interpreted a healthy environment so narrowly.

2.3.2(A) INTERPRETING A 'HEALTHY ENVIRONMENT'

As previously identified, judicial and other supervisory institutions frequently draw out the definition of human rights in an interpretive process. This subsection looks at how this has been done in practice with regards to the right to a healthy environment.

The ACommHPR has interpreted the meaning of Article 24 ACHPR to be concerned with human health, as demonstrated by the combined reading of Articles 16 and 24 ACHPR in *Ogoniland*.⁸⁵ But the meaning of a 'healthy environment' was also developed further by the Commission's endorsement of the words of Alexandre Kiss:

⁸³ Neil Popović, 'In Pursuit of Environmental Human Rights' (1996) 27 *Columbia Human Rights Law Review* 487, 524.

⁸⁴ Nickel (n73) 284. cf Atapattu (n17) 111-12.

⁸⁵ *Ogoniland* [2], [50].

An environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development [of personality] as the breakdown of the fundamental ecological equilibria is harmful to physical and moral health.⁸⁶

In other words, for an environment to be healthy – according to the ACommHPR – it must be clean (ie not degraded by pollution), beautiful, varied and functioning (ie in terms of fundamental ecological equilibria). The endorsement of the words of Kiss incorporates an important recognition: that the meaning of a healthy environment is pluralistic, and so determining whether or not an environment is healthy requires consideration of a number of ‘reference points’.⁸⁷ The reference points referred to (clean, beautiful, varied, functioning) concern both the health of the environment itself, and the health of its human inhabitants. Indeed, the two approaches are shown to be closely linked: functioning ecosystems are necessary for good human health.

These reference points lend themselves to quantification and qualification to varying degrees. A healthy environment must be clean: limits can be set for various pollutants. It must be varied: there are a number of different ways in which biodiversity can be measured,⁸⁸ and the existence of

⁸⁶ *Ogoniland* [51].

⁸⁷ See Melissa Thorne, ‘Establishing Environment as a Human Right’ (1991) 19 *Denver Journal of International Law and Policy* 301, 310.

⁸⁸ Such as species richness or the Shannon index.

particular species or habitats can be safeguarded.⁸⁹ It must be functioning: ecological equilibria, cycles and processes must not be hampered. It must be beautiful: people must feel connected to their environment and enjoy spending time in it.⁹⁰

No specific scientific measurements were used to indicate what demonstrated a violation of Article 24 ACHPR in *Ogoniland*. This is at least partly due to the lack of independent scientific monitoring (a fact that contributed to the Commission finding a violation of Article 24).⁹¹ However, the reference points identified by the ACommHPR may help with identifying breaches in the future. Given the heterogeneity of the natural world and the need to be context specific, universal standards can hardly be set for these reference points.⁹² Rather, their value is in giving greater definition to the right and assisting in its justiciability.

Within the Inter-American regime, Article 11(1) San Salvador Protocol has not to date been the subject of a decision from the IACommHR or the IACTHR.⁹³ This is because Article 19 San Salvador Protocol limits the

⁸⁹ eg The 1979 Convention on the Conservation of European Wildlife and Natural Habitats 1284 UNTS 209.

⁹⁰ Since beauty is, by definition, a subjective characteristic.

⁹¹ *Ogoniland* [53]-[54]. A breach of Article 24 can thus be established through either procedural or substantive means.

⁹² IHR is capable of responding to such heterogeneity, consider for example its interpretation of the right to freedom of religion: Kevin Boyle and Sangeeta Shah, 'Thought, expression, association, and assembly' in Moeckli (n22) 220-25.

⁹³ Although there have been a number of petitions and cases before them which have a palpably environmental undercurrent: *Yakye Axa* (n43); *Yanomami*; *Maya*; *Sarayaku* (n44); *Saramaka People v Suriname* (2007) IACTHR Series C No 172; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) IACTHR Series C No 79.

competence of these institutions to only receiving petitions concerning trade union rights and the right to education. However, in its *Thematic Report on Indigenous Peoples, Communities of African Descent and Extractive Industries*,⁹⁴ the IACommHR has “asserted that extraction and development projects generate a series of consequences to the personal integrity, health, and right to a healthy environment of indigenous peoples and Afro-descendent communities”.⁹⁵ In particular, the IACommHR details a number of environmental impacts that may affect these rights.⁹⁶ These include impacts relating both to human health – such as toxic substances harmful to human health,⁹⁷ exposure to oil and oil-related chemicals,⁹⁸ and interruptions to river flows that affect water use⁹⁹ - and to ecosystem health – such as destruction of ecosystems,¹⁰⁰ adverse consequences to the hydrological system,¹⁰¹ loss of biodiversity,¹⁰² and habitat degradation.¹⁰³

Again, a ‘healthy environment’ has been interpreted to include numerous ‘reference points’ concerned with both human and ecosystem health (including being clean, varied and functioning). The impacts identified by

⁹⁴ IACommHR (n43).

⁹⁵ *ibid* [273].

⁹⁶ *ibid* [250], [273]-[286], [294].

⁹⁷ *ibid* [274], [277].

⁹⁸ *ibid* [280].

⁹⁹ *ibid* [281].

¹⁰⁰ *ibid* [274].

¹⁰¹ *ibid*.

¹⁰² *ibid* [250], [281].

¹⁰³ *ibid* [294].

IACommHR (eg exposure to oil/functioning of hydrological systems) provide specific measures that can be used to determine whether or not an environment is healthy.

Within other regional bodies, Article 38 of the Arab Charter has received no further interpretation, and the Aarhus Convention is not relevant to the interpretive process for a 'healthy environment' since it does not enlist a substantive right to an environment of a particular quality.

At the global level, reports from UN human rights institutions are useful sources, even though no human right to environment is articulated within global human rights instruments. Most significantly, the Ksentini Report and its Draft Principles¹⁰⁴ both go beyond a purely anthropocentric definition of a healthy environment. When discussing the health aspect of environmental protection, the Ksentini Report notes that healthy "has been generally interpreted [in international and domestic instruments] to mean that the environment must be healthy in itself – free from 'diseases' that hinder its ecological balance and sustainability – and that it must be healthful, that is conducive to healthy living",¹⁰⁵ thus defining a healthy environment in both an ecocentric and an anthropocentric manner.

This twinned interpretation of a 'healthy environment' is reflected in the Ksentini Draft Principles, which contains a human right to a "secure, healthy and ecologically sound environment".¹⁰⁶ In particular, in order for

¹⁰⁴ *supra* n37.

¹⁰⁵ *ibid* [180].

¹⁰⁶ Article 2.

an environment to be 'ecologically sound', consideration must be had of the health of ecosystems themselves. Finally, although John Knox's mandate is focussed on greening rather than a human right to environment, he has noted that the human right to environment enshrined in national constitutions often refer to both human health and/or "an ecologically balanced environment".¹⁰⁷

2.3.2(B) MULTIPLE REFERENCE POINTS

A broad and pluralistic interpretation of a 'healthy environment', defined according to multiple reference points, has been endorsed by a number of legal regimes.¹⁰⁸ Defining a 'healthy environment' according to multiple reference points is not only legitimate, but also increases the scope of protection afforded by a human right to environment¹⁰⁹ because of the limitations of a purely anthropocentric definition.¹¹⁰ In particular, Alan Boyle notes that the ECHR already "fully guarantees everything a right to a healthy environment would normally be thought to cover"¹¹¹ if (and only if) it is conceived of solely in terms of human health. This is because

¹⁰⁷ UNHRC, 'Compilation of good practices' A/HRC/28/61 (3 February 2015) [73].

¹⁰⁸ Boyd (n2) 246.

¹⁰⁹ See Rodriguez-Rivera's 'expansive right to environment': Rodriguez-Rivera (n71) 16; Richard Hiskes, 'The Right to a Green Future' (2005) 27 *HRQ* 1346, 1351-54. cf Nickel's accommodationist stance (n73) 283

¹¹⁰ Joshua Bruckerhoff, 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2007-2008) 86 *Texas Law Review* 615, 624-25, 631-46.

¹¹¹ Boyle (n6) 504.

environmental problems which have an impact on human health are already (potentially) relevant to Article 8 ECHR.¹¹²

Defined only in terms of human health, a human right to a healthy environment is better thought of as a 'newly focussed human right' rather than a 'new human right'.¹¹³ In fact, an entirely anthropocentric definition of a 'healthy environment' actually provides *less* protection than the greening approach, which does not require any impacts on health specifically: according to the ECtHR "severe environmental pollution may affect individuals' ... private and family life adversely, without, however, seriously endangering their health".¹¹⁴

Defining a healthy environment according to both anthropocentric and ecocentric reference points thus adds substantive content to the right. Whilst human health should remain as a reference point for defining a healthy environment, it should not stand alone. The definition of a healthy environment should, and can, incorporate both anthropocentric and ecocentric reference points, such as pollution levels, nutrient cycles, biodiversity, and people's ability to access nature. Whether such an interpretation of a 'healthy environment' is compatible with IHRL and its project to protect human dignity will be examined in Chapter Three, where

¹¹² *ibid* 473, 489, 504-505.

¹¹³ Theo van Boven, 'Categories of Rights' in Moeckli (n22) 143, 152-53.

¹¹⁴ *López Ostra* (n9) [51].

it will be argued that the flourishing of the 'fleshy' human rights subject does require healthy ecosystems.¹¹⁵

A broad definition of a 'healthy environment' is able to provide better protection both to humans and to the natural world. However, limitations still remain. For example, a right to a healthy environment is not a right to a *particular* environment. Ecosystems could be destroyed and rebuilt as long as they meet certain criteria.¹¹⁶ It is therefore worth considering how reference points beyond the notion of 'health' could be included in a human right to environment.

2.3.3 DEVELOPMENTS BEYOND HEALTH

Environmental human rights are certainly connected to health, both human and nonhuman. However, it is plausible that ensuring appropriate environmental conditions for humans is not solely an issue of health. That environmental human rights are not restricted to issues of health is witnessed via alternative formulations for a human right to environment. In particular, proposals for a human right to an 'ecologically balanced' or a 'sustainable' environment, or a 'right to co-existence with nature'¹¹⁷ may potentially include matters that a human right to a *healthy* environment cannot.

¹¹⁵ §3.2; §3.4.

¹¹⁶ Consider biodiversity offsetting, the practice of creating new habitats to replace ones lost through construction.

¹¹⁷ Galtung and Wirak's proposal, cited in Alston (n71) 610.

Additionally, the interpretive process for *other* human rights has seen acknowledgment from the European, Inter-American and UN regimes that the state of the environment is relevant to the enjoyment of many other human rights (via the greening process).¹¹⁸ This suggests the existence of dimensions to a human right to environment other than health, since the state of the environment is also relevant to, for example, cultural life,¹¹⁹ and food.¹²⁰

Further reference points may also emerge through use of dignity's role as a metric¹²¹ within IHRL: "dignity can alleviate the nebulous nature of environmental rights by providing a benchmark against which a violation or a remedy should be judged".¹²² Using dignity as a metric to interpret environmental human rights "may allow courts to consider a broader range of impacts, such as impacts on personality, identity and well-being".¹²³ Chapter Three will identify a number of ways in which human dignity is tied to a healthy environment;¹²⁴ and deeper analysis of dignity later in this thesis will demonstrate that fuller understanding of the 'fleshy' nature of

¹¹⁸ Shelton (n38) 90ff.

¹¹⁹ See *Sarayaku* [145]-[158]; Ksentini Report (n37) [226]-[234].

¹²⁰ CESCR, General Comment 12 [4]; Ksentini Report (n37) [188]-[191]; 'Analytical Study' (n55) [48]-[50].

¹²¹ §1.5.3.

¹²² Erin Daly and James May, 'Bridging constitutional dignity and environmental rights jurisprudence' (2016) 7 *JHRE* 218, 234.

¹²³ Dina Townsend, 'Taking dignity seriously? A dignity approach to environmental disputes before human rights courts' (2015) 6 *JHRE* 204, 215; §3.2.

¹²⁴ §3.2.1.

the (human) rights subject reveals that (human) dignity is in fact fundamentally caught up in the natural world.¹²⁵

However, it has already been seen that a 'healthy environment' can be defined very broadly. For example, the 'beauty' dimension referred to be the ACommHPR perhaps extends beyond ecosystem health since ecosystems that are functioning are not necessarily aesthetically pleasing or conducive to meaningful human interaction.¹²⁶ It is thus possible for additional reference points to be used as methods for determining whether an environment is indeed 'healthy'. For example, the Special Rapporteur on the right to food has found that right to be threatened by pollution and habitat loss.¹²⁷ As such, a 'healthy environment' could be interpreted to mean one that is capable of producing adequate food. This additional reference point will inevitably be linked to others: an environment that can produce adequate food must also be clean and diverse.

Furthermore, even reference points relating to the cultural and identity aspects of environmental conditions could be incorporated under the 'healthy environment' umbrella. As recognised by the UNESCO Director-General in 1976: "The deterioration of the natural environment and, even more, the alienation from this environment of an increasingly large number of people in the industrialized countries are direct and potentially very

¹²⁵ §6.4; §8.4; §9.

¹²⁶ See Hulme (n41) 289-90; and an IUCN Resolution that endorses a right to environment that includes "the child's inherent right to connect with nature in a meaningful way" IUCN, WCC-2012-Res-101-EN [1a].

¹²⁷ 'Mapping report' (n55) [21].

serious blows to culture itself".¹²⁸ The interpretive process could determine that for an environment to be considered 'healthy', it must be capable of supporting positive human cultural relationships.¹²⁹ The adjective 'healthy' has proved popular because it is flexible. This flexibility can be used to ensure that a 'healthy environment' is not interpreted too literally given the litany of other formulations of a right to environment.

Another way in which environmental human rights extend beyond health can be found in the Ksentini Draft Principles. Article 6 provides: "all persons have the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems".¹³⁰ The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)¹³¹ also envisions environmental human rights as including a "right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources".¹³² Rights to protection, preservation or conservation are distinct from a right to an environment of a particular standard. They are not concerned with the quality of environment humans have a right to but rather with specific components of the existing environment. They come

¹²⁸ Cited in Ksentini Report (n37) [227].

¹²⁹ For the value of healthy relations with nature, see Kai Chan et al, 'Opinion: Why protect nature? Rethinking values and the environment' (2016) 113 *PNAS* 1462.

¹³⁰ See also Ksentini Report (n37) [255]-[256].

¹³¹ UNGA Resolution A/RES/61/295 (13 September 2007).

¹³² Article 29(1).

closer to protecting the environment itself, as opposed to a human interest in the environment – although the two may be ultimately inseparable.

Although such rights are distinguishable from a human right to environment, the two matters are closely entwined. This issue will be returned to when the duties that flow from a human right to environment are considered, where it will be seen that IHRL already recognises that environmental protection measures are necessary in order to secure environmental human rights.¹³³ A broadly defined human right to environment will necessarily expand the scope of state duties in this regard to protect and conserve the environment. A broadly defined human right to a healthy environment is thus a highly promising means by which to both codify and extend how IHRL can be used to protect the natural world through international law. The remainder of this chapter will explore other important aspects of such a right.

2.4 ACTORS

2.4.1 SUBJECTS

The subjects of a human right to a healthy environment need establishing. The potential candidates here are individuals and groups. The relative advantages and disadvantages of the two approaches merit attention, as does gauging the possibility of following a hybrid pathway whereby both individuals and groups are the subjects of the right.

¹³³ §2.5.

2.4.1(A) INDIVIDUALS AND GROUPS

Whether an individual, collective or corporate right is more suitable for a human right to environment is not immediately clear. This is attested to by the fact that the ACHPR enlists a peoples' right, whereas the San Salvador Protocol contains an individual right to a healthy environment.

As noted in Chapter One, there are two different types of group rights: collective and corporate.¹³⁴ All three types of right (individual, collective, corporate) are potentially meaningful within environmental human rights.¹³⁵ For example, biodiversity loss and the ensuing deterioration of the health of the environment is a corporate issue at both a local and global level. Members of an indigenous community affected by pollution from mining activity may have had their collective cultural rights violated. Or a concerned individual may wish to exert a right to environmental information concerning a new development on a greenfield site. The difference is subtle, and also somewhat artificial. It is plausible that individuals who request information on the environmental aspects of a new development do so for reasons other than individual benefit. A community suffering from pollution is likely to consider this an issue to be addressed as a group, especially if there are suggestions of discrimination in the locating of the polluting activity in the first place.¹³⁶ Likewise, biodiversity

¹³⁴ §1.4.

¹³⁵ Boyd (n2) 25.

¹³⁶ Consider the Environmental Justice Movement from the USA: Robert Bullard, *Dumping in Dixie* (Westview 1990); Tom West, 'Environmental Justice and International Climate Change Legislation: A Cosmopolitan Perspective' (2012) 25 *GIELR* 129, 129-131; and the response of Japanese communities to the 'Big Four'

loss can affect individuals in a direct way (for example farmers or fishers). It is therefore not immediately obvious which strategy (individual, collective or corporate) is the most suitable for a human right to environment.

However, a purely individualistic account will not suffice for a human right to environment because the environment is a public good:¹³⁷ nobody's environment is exclusively their own. Environmental conditions supply a tangible way in which human flourishing happens in community¹³⁸ and environmental damage will normally affect more than one person. For example, the aspects of environmental protection concerned with species loss or deforestation are not solely owed to a single individual since the justification for such protection is not solely based on individual interest. Rather, it is in the wider interest of society and humanity at large that an inhabitable biosphere is present: ecological collapse affects more than just individuals.¹³⁹

Even if a healthy environment is construed narrowly to be concerned only with human health, environmental issues will often arise that affect entire groups – the air people breathe and the water they drink are shared

pollution cases of the 1960s: Shiro Kawashima, 'A Survey of Environmental Law and Policy in Japan' (1994-1995) 20 *NCJ Intl L & Com Reg* 231.

¹³⁷ JG Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects' in Boyle and Anderson (n8) 25, 28; Christopher Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' (1972) 45 *S Cal L Rev* 450, 475.

¹³⁸ §1.4.1.

¹³⁹ For discussion of how whole societies are affected see Jared Diamond, *Collapse* (Penguin 2005).

resources. Flexibility would allow the law in this area to develop along the lines of common property,¹⁴⁰ which may prove essential to defining a human right to environment since “to be meaningful, a right to a decent environment has to address the environment as a public good”.¹⁴¹ A right to environment should therefore be vested in groups. A corporate perspective is in part needed in order to avoid situations whereby “the more widespread the violations – which can occur in many contexts where environmental harm is the origin of the complaint – the less likely it is that [a] complaint will be admissible”.¹⁴²

Indeed, when emerging group rights are discussed, a right to environment often features.¹⁴³ However, the majority of analyses of human rights in environmental contexts have paid relatively little attention to the concept of group rights,¹⁴⁴ even though the only justiciable human right to environment is a corporate one (Article 24 ACHPR). This may be due to the controversy over, and consequent reluctance for, corporate rights

¹⁴⁰ Convention on Biological Diversity (1992) 1760 UNTS 79, Preamble, third recital; UNFCCC, Preamble, first recital. See Jutta Brunnée, ‘Common Areas, Common Heritage, and Common Concern’ in Daniel Bodansky et al (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007).

¹⁴¹ Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23 *EJIL* 613, 628; Francioni (n37) 50-55.

¹⁴² Dinah Shelton, ‘Legitimate and necessary: adjudicating human rights violations related to activities causing environmental harm or risk’ (2015) 6 *JHRE* 139, 150.

¹⁴³ See James Crawford, ‘The Rights of Peoples: ‘Peoples’ or ‘Governments?’ in Crawford, *The Rights of Peoples* (Clarendon 1998) 56-57; Dinah Shelton, ‘Environmental Rights’ in Philip Alston (ed), *Peoples’ Rights* (OUP 2001) 185-258.

¹⁴⁴ See Boyle (n141) 626-33.

generally.¹⁴⁵ Part of this reluctance is due to difficulties over establishing who the holder of a group right is.

The risk noted in Chapter One of associating corporate rights in general with peoples' rights in particular, and 'peoples' with indigenous communities, can be seen here. Undeniably, there is a tight connection between indigenous communities and environmental human rights due to the particular relationship such communities often have with their land.¹⁴⁶ This has been witnessed in cases such as *Ogoniland*;¹⁴⁷ *Yanomami*;¹⁴⁸ *Lubicon Lake Band*;¹⁴⁹ and *Länsman*.¹⁵⁰ Together these bear witness to the ease with which whole communities can be affected by environmental damage. It may seem promising to use these cases as examples of how a corporate environmental human right can function. However, this risks a potential narrowing of environmental human rights by restricting them to indigenous rights. All people(s) share a dependence on natural systems. This dependence is unaffected by (lack of) awareness of it. The groups affected by environmental damage are not only indigenous ones.

Although environmental human rights may require clear enunciation and specific interpretation for indigenous peoples, this is the case for all human

¹⁴⁵ §1.4.

¹⁴⁶ *Yakye Axa* (n43) [120(c)].

¹⁴⁷ n61.

¹⁴⁸ n44.

¹⁴⁹ *Lubicon Lake Band v Canada* (1990) HRC Communication No 167/1984, A/45/40.

¹⁵⁰ *Länsman et al v Finland* (2005) HRC Communication No 1023/2001, CCPR/C/83/D/1023/2001.

rights (hence the very existence of UNDRIP¹⁵¹). There are important lessons for IHRL to learn from indigenous communities, and those concerning the nonhuman environment may be particularly visible.¹⁵² These lessons should be listened to and reflected on not only for indigenous communities, but for all humankind. However, since it is possible that legal decisions regarding indigenous communities are not relevant outside such a context,¹⁵³ developments for environmental rights should not be aligned too closely with indigenous rights. All peoples (however defined) stand to benefit from a right to environment.

There is also room for a human right to environment to also have an individual dimension. The important human health aspects of a human right to environment can be considered from the vantage point of the individual¹⁵⁴ and it should be possible for an individual alone to have standing in this regard. As noted in Chapter One, it is unlikely that individuals would have standing under a specifically group right to environment.¹⁵⁵ However, it is conceivable that the majority of a people experiencing a deteriorating environment may not be interested in bringing

¹⁵¹ And other collective rights bestowed on groups which have historically suffered from, or are liable to, discrimination, persecution or poor treatment.

¹⁵² Leena Heinämäki, 'The Right to Be a Part of Nature' (PhD thesis, University of Lapland 2010); UN Conference on Environment and Development, 'Rio Declaration' A/CONF.151/26/Rev.1 (12 August 1992) Principle 22.

¹⁵³ Boyle (n6) 476. See also Benedict Kingsbury, 'Competing Structures of Indigenous Peoples' Claims' in Alston (n143) 80; Robert McCorquodale 'Group Rights' in Moeckli (n22) 351-54. Consider *Mossville Environmental Action Now v United States* (2010) IACommHR Report No 43/10, Petition 242-05.

¹⁵⁴ Consider the case law of the ECtHR, §2.2.1.

¹⁵⁵ §1.4.3.

a complaint due to some political or economic compromise that has been struck. In such a case, the legal position of an individual who wants to uphold their right to environment is unclear. Perhaps as an individual, they never had such a right in the first place, or it may be considered waived on their behalf by the position of their people. Neither result seems particularly satisfactory.

There therefore needs to be a synthesis between individual and group rights in order to best reflect environmental needs. This can be done by simply stating that a human right to environment applies to both individuals and to groups.¹⁵⁶ It is possible that a human right to environment will help develop understanding of the coexistence of individual and group rights within IHRL.

2.4.1(B) OTHER SUBJECTS

There are two further categories of potential right-holders worth mentioning here. Firstly, future generations since legal regimes within IEL are often concerned with the plight of future generations.¹⁵⁷ Notice too that the Aarhus Convention refers to “the right of every person of present and future generations”.¹⁵⁸ This could be read as simply stating that humans will be born in the future and they too will have human rights. However,

¹⁵⁶ See Alston (n71) 611; John Lee, ‘The Underlying Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law’ (2000) 25 *Columbia Journal of Environmental Law* 283, 293-96.

¹⁵⁷ International Convention for the Regulation of Whaling (1946) 161 UNTS 72, Preamble; UNFCCC Article 3(1); Rio Declaration Principle 3; Edith Brown-Weiss, *In Fairness to Future Generations* (Transnational Publishers 1989); Turner (n59) 63.

¹⁵⁸ Article 1. See also Stockholm Declaration Principle 1.

the language does raise the issue of how a legitimate environmental objective (ie the protection of future generations) can fit into IHRL. In this regard, the OHCHR has stated that:

The human rights principles of equality and non-discrimination generally focus on situations in the present, even if it is understood that the value of these core human rights principles would not diminish over time and be equally applicable to future generations.¹⁵⁹

On the other hand, *Minors Oposa*¹⁶⁰ demonstrates the possibility of future generations having legal standing. The case was brought on behalf of children and future generations to stop deforestation in The Philippines. The Filipino Supreme Court ruled that future generations do have a right to a balanced and healthful ecology. However, *Minors Oposa* does not draw out the implications of granting future generations human rights under IHRL. As a starting point, it is nontrivial to ascertain exactly which rights future generations can hold. It seems unlikely that the entire catalogue of human rights can be bestowed on the unborn.¹⁶¹ It is worth noting that the issue of future persons has received most debate within IHRL through the

¹⁵⁹ 'Climate Change Report' (n55) [90]; See also *EHP v Canada* (1984) HRC Communication No 67/1980, CCPR/C/OP/1 [8(a)].

¹⁶⁰ *Minors Oposa v Secretary of the Department of Environment and Natural Resources*, 33 ILM 173 (1994).

¹⁶¹ Hiskes (n109) 1347-49, 1355; Lee (n156) 325-27.

discussion on the human rights of fetuses.¹⁶² There may be parallel developments regarding the notion of legal standing.

Secondly, it is not only humans that benefit from living in a healthy environment, but every single living organism.¹⁶³ As Part I is focussed on IHRL and the subjects of human rights are necessarily humans, this observation will be considered in Part III of this thesis.

*

Embracing the many dimensions of environmental human rights can encourage human rights in general to celebrate their multi-functionality.¹⁶⁴ The subjects of a human right to environment are humans in their many manifestations as individuals, members of collectives, and constituent parts of various groups. It would be challenging for IHRL to bestow human rights on future generations, and this is a drawback of using human rights to achieve environmental protection objectives given the clear endorsement of inter-generational justice within IEL. An equivalent observation is also valid for nonhumans.

¹⁶² Sarah Joseph and Adam Fletcher, 'Scope of Application' in Moeckli et al (n22) 119,121; *Baby Boy v United States* (1981) IACommHR Resolution 23/81, Case 2141; *Vo v France* (2005) 40 EHRR 12.

¹⁶³ Hiskes (n109) 1350n17; Noralee Gibson, 'The Right to a Clean Environment' (1990) 54 *Sask L Rev* 5, 11-12; 'Preliminary report' (n1) [53].

¹⁶⁴ Francioni (n37) 41.

2.4.2 DUTY BEARERS

The primary duty bearers in IHRL are states.¹⁶⁵ As detailed in Chapter One, the creation of IHRL was based on consensus among states that they owe responsibilities to individuals within their jurisdiction. However, IHRL is now somewhat more nuanced: not only do state bodies and agents have human rights duties,¹⁶⁶ but IHRL also places duties on other actors (such as the UN¹⁶⁷) and state duties can be dispersed to non-state actors within their jurisdiction.¹⁶⁸

The dispersed nature of duties emanating from human rights was seen in *Ogoniland* where the polluting activities were performed by the Nigerian National Petroleum Company, a state-owned company, in conjunction with the Shell Petroleum Development Corporation, a private actor. It was the state, Nigeria, who held the legal duty, but part of this duty was to regulate the activities of Shell.¹⁶⁹ It is thus possible for the existing model for duties under IHRL to be transferred seamlessly to a human right to environment:

The right to a safe environment can be sculpted to fit the general idea of human rights by conceiving it as primarily

¹⁶⁵ Although states only hold this legal duty as a proxy. See §1.3.2(a).

¹⁶⁶ Frédéric Mégret, 'Nature of Obligations' in Moeckli et al (n22) 102. See also Jeremy Waldron, 'Duty-bearers for Positive Rights' (2014) 14-58 *Public Law & Legal Theory Research Paper Series* 9-17 <<http://dx.doi.org/10.2139/ssrn.2510506>> (accessed 20/5/2015).

¹⁶⁷ Guglielmo Verdirame, *The UN and Human Rights* (CUP 2011) 72-90.

¹⁶⁸ 'Compilation of good practices' (n107) [79]; HRC, General Comment 31 [8].

¹⁶⁹ *Ogoniland* [55]. See also López Ostra (n9); Stephen Turner, *A Global Environmental Right* (Routledge 2014) 70-100.

imposing duties on governments and international organisations. It calls on them to regulate the activities of both governmental and nongovernmental agents to ensure that environmental safety is maintained.¹⁷⁰

However, the nature of these duties is often rather complex.¹⁷¹ The following section will examine what environmental duties already exist in IHRL and what might arise from a human right to environment.

2.5 NATURE OF DUTIES

All human rights involve a wide array of interlocking duties. Insight into these can be gained through the 'respect, protect, fulfil' typology, which provides a useful depiction of the range of state duties which arise through IHRL.¹⁷² The (prospective) duties arising from environmental human rights can therefore be thought of in terms of this tripartite scheme. Although there are meaningful differences between the three types of duty, there is inevitably some continuity between them.¹⁷³

The most basic element of state duties regarding human rights is to *respect* them. This entails a predominantly negative obligation on states

¹⁷⁰ James Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 97. See also Alexandre Kiss, 'Concept and Possible Implications of the Right to Environment' in Kathleen Mahoney and Paul Mahoney, *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff 1992) 551, 554-56.

¹⁷¹ See Turner (n59) 81-148.

¹⁷² HRC, General Comment 12 [15]. For more detail see Ida Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 *HRLR* 81; Bertrand Ramcharan, *The Fundamentals of International Human Rights Treaty Law* (Brill 2011) ch6.

¹⁷³ Koch (n172).

not to violate human rights, including both direct and indirect interference with their enjoyment.¹⁷⁴ For environmental human rights, this means that states must not wantonly destroy the environment, subject their citizens to unacceptable levels of pollution, or pursue policies that necessitate severe environmental degradation.

The duty to *protect* human rights requires states to “create an environment in which rights are enjoyed”.¹⁷⁵ This means that states must ensure that private actors operating within their jurisdiction are not able to readily interfere with rights.¹⁷⁶ The need to *protect* human rights does not make a state responsible for every act that infringes an individual’s rights, but it does place an obligation on them to safeguard their citizens against such acts, at least to some extent. In the present context, states must exercise due diligence¹⁷⁷ in ensuring that activities of private individuals and companies under their jurisdiction do not illegitimately prevent their citizens from enjoying their environmental human rights.

To *fulfil* a human right is the more complex, and perhaps more onerous, aspect of the state obligation. It includes “obligations to provide, facilitate and promote”¹⁷⁸ and requires states to proactively engage in activities intended to strengthen people’s ability to realise their rights.¹⁷⁹ Fulfilling

¹⁷⁴ CESCR, General Comment 18 [22].

¹⁷⁵ Mégret (n166) 102.

¹⁷⁶ CESCR, General Comment 18 [22].

¹⁷⁷ HRC, General Comment 31 [8]; Joseph and Fletcher (n162) 124.

¹⁷⁸ CESCR, General Comment 18 [22].

¹⁷⁹ CESCR, General Comment 12 [15].

human rights includes adopting national measures¹⁸⁰ that mirror international commitments, and ensuring that rights cannot be violated with impunity.¹⁸¹ Ramcharan includes some aspects of this under the duty to respect,¹⁸² demonstrating the continuity between the three types of state duties. As will be seen below, there are a number of largely procedural duties that arise within the context of fulfilling environmental human rights.

This section will present the environmentally relevant duties that already exist in IHRL and consider how these duties would be altered and/or extended by the creation of a specific human right to environment. Environmental duties already exist because of the need to respect, protect and fulfil greened human rights. For example, within the ECHR regime,

[c]ases such as *Guerra*, *Lopez Ostra*, *Öneryildiz*, *Taskin* and *Fadeyeva* show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose information.¹⁸³

John Knox's rapporteurship is concentrated on analysing the environmental obligations that arise from existing human rights. Knox has noted that

¹⁸⁰ Legal, judicial, administrative, educative and other appropriate measures. HRC, General Comment 31 [7]; Koch (n172).

¹⁸¹ Mégret (n166) 103.

¹⁸² Ramcharan (n172)124. See also Koch (n172) 89ff.

¹⁸³ Boyle (n6) 487. Note that "the State's responsibility in environmental cases may arise from a failure to regulate private industry" (*Fadeyeva* (n9) [89]).

there are numerous obligations in this regard,¹⁸⁴ which will be outlined below.

2.5.1 ADOPTING A LEGAL FRAMEWORK

As seen above, poor environmental conditions can result in violations of human rights. As such, in order to respect, protect and fulfil many human rights, states must take steps to ensure that the environment is of a certain quality. For example, the IACommHR has “reiterated the widely held conclusion that the right to life ... requires that governments take affirmative steps to protect life by ensuring environmental integrity”.¹⁸⁵

In order to ensure appropriate levels of environmental integrity, states must firstly ensure that their own activities do not damage the environment. In *Ogoniland* the ACommHPR considered that the particular duties required to *respect* Article 24 are “largely non-interventionist”¹⁸⁶ – states must “desist from directly threatening the health and environment of their citizens”.¹⁸⁷ Secondly, states must also ensure that activities of private actors within their jurisdiction do not damage the environment in ways that interfere with the enjoyment of human rights. They must not only *respect* but also *protect* environmental human rights.

¹⁸⁴ ‘Preliminary report’ (n1) [17], [40]-[43]; ‘Mapping report’ (n55) [29]-[78]; UNHRC, ‘Human rights and the environment’ A/HRC/RES/25/21 (15 April 2014) [4]. Shelton (n38) 112-14.

¹⁸⁵ Fergus MacKay, ‘The Rights of Indigenous Peoples in International Law’ in Lyuba Zarsky (ed), *Human Rights & the Environment* (Earthscan 2002) 18; Shelton (n43) 382.

¹⁸⁶ *Ogoniland* [52].

¹⁸⁷ *ibid.*

As such, states have obligations to adopt and implement legal frameworks that prevent environmental harm by regulating both state activity (*respecting*) and business and industry (*protecting*). This has been witnessed in ECtHR case law,¹⁸⁸ noted by the IACommHR,¹⁸⁹ put forward in *Ogoniland*, implied by Article 11(2) San Salvador Protocol,¹⁹⁰ and endorsed by John Knox.¹⁹¹

The content of these laws will mirror the content and formulation of environmental human rights. For this reason, the definition and interpretation of environmental human rights is significant: the kind of environment that the state must respect, protect, and fulfil influences the laws it must adopt.¹⁹² For example, greening has placed an obligation on states to ensure that environmental quality does not endanger the enjoyment of other human rights. States must therefore put in place legislative frameworks that protect the environment only in so far as the state of the environment may affect these rights. This will likely include regulation of “air quality, water quality [and] toxic releases”.¹⁹³ As demonstrated above, an anthropocentrically defined human right to a healthy environment will have much the same content as greened human

¹⁸⁸ *supra* n9; Shelton (n38) 97.

¹⁸⁹ IACommHR (n43) [91]; Shelton (n43) 382-83.

¹⁹⁰ “The States Parties shall promote the protection, preservation and improvement of the environment”.

¹⁹¹ ‘Mapping report’ (n55) [47], [56], [64], [80].

¹⁹² Shelton (n38) 97-98.

¹⁹³ ‘Compilation of good practices’ (n107) [72]. See also ‘Mapping report’ (n55) [47]-[57]; CoE (n12) 46.

rights, and so also places an obligation on states to regulate environmental quality where it may affect human health.

However, under existing IHRL, states have no obligations to protect the environment per se. Neither John Knox nor the ECtHR have identified an obligation to protect biodiversity or sites of cultural importance in order to respect, protect and fulfil greened human rights. Indeed, the ECtHR has “consistently held to the view that nature protection as such is not part of the ECHR’s guarantees”.¹⁹⁴

The increased scope of a human right to a healthy environment when defined according to multiple reference points can be seen in the ACommHPR’s development of the obligations arising from that right:

Article 24 ... imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.¹⁹⁵

A broader definition of a healthy environment – including ecocentric reference points – would generate obligations regarding ecological degradation and biodiversity conservation. This is because states would have obligations to protect and provide an environment that is varied, functioning, and beautiful. The additional rights contained in the Ksentini

¹⁹⁴ Shelton (n142) 149.

¹⁹⁵ *ibid* [52].

Report and UNDRIP regarding the protection and conservation of biodiversity do not flow from greened human rights, but would be integral components of a broadly defined human right to environment.¹⁹⁶ This demonstrates the additional protection offered to both humans and the natural world by defining a healthy environment according to both anthropocentric and ecocentric reference points.

2.5.2 PROCEDURAL DUTIES

There are also a number of procedural environmental duties within IHRL. As recognised by Knox, these procedural duties – to facilitate participation, to provide information and access to justice, and to assess environmental impacts¹⁹⁷ – have a key role to play in *protecting* and *fulfilling* all environmental human rights. These procedural duties are also standalone components of IEL: they can be found in Principles 10 and 17 of the Rio Declaration¹⁹⁸ and in the Aarhus Convention, which has codified access to information,¹⁹⁹ access to justice²⁰⁰ and public participation²⁰¹ in environmental matters into binding international law. The procedural rights

¹⁹⁶ Other potential duties flowing from a human right to environment such as compensation for damage, environmental accounting and environmental insurance can be found in Turner (n169) 70-100.

¹⁹⁷ 'Mapping report' (n55) [29]-[43]. See also Part III of the Ksentini Report Draft Principles (n37).

¹⁹⁸ *supra* n152.

¹⁹⁹ Articles 4-5.

²⁰⁰ Article 9.

²⁰¹ Articles 6-8.

correlative to these procedural duties are often considered the most widespread form of environmental human right.²⁰²

The key principles contained in Aarhus have been adopted by the ECtHR, which has found violations of Article 8 ECHR based on procedural issues such as a failure to provide environmental information.²⁰³ It is also notable that the ECtHR applies the Aarhus principles to all state parties, notably in *Taşkın*²⁰⁴ “despite the fact that Turkey is not a party to the Aarhus Convention”.²⁰⁵ Given the desire of international human rights regimes to standardise their practice, the principles of Aarhus may even have global reach.²⁰⁶ The need for community involvement in decision-making processes concerning their immediate environments has also been emphasised by the IACtHR in *Maya, Sarayaku* and *Saramaka*,²⁰⁷ with the IACtHR noting that consultation is not just a treaty-based provision, but “is also a general principle of international law”.²⁰⁸

The ECtHR has also recognised that states have a procedural duty to conduct environmental impact assessments (EIAs).²⁰⁹ As with other

²⁰² Fitzmaurice (n22); Shelton (n143) 205; Boyle (n141) 621-26; Atapattu (n17) 96.

²⁰³ *supra* n9.

²⁰⁴ *Taşkın* (n9). See also *Guerra* concerning availability of environmental information.

²⁰⁵ Boyle (n6) 499. See also *Öneryıldız* (n21) [59] where the ECtHR made reference to other multilateral environmental agreements.

²⁰⁶ Boyle (n6) 504-505. See ACHPR Articles 60-61.

²⁰⁷ *Maya* [142], *Sarayaku* [177]-[211], [341(3-4)]; *Saramaka* (n79) [133]-[137].

²⁰⁸ *Sarayaku* [164]. Shelton (n38) 108-109.

²⁰⁹ *Giacomelli* (n9) [94]-[95]; *Tătar* (n9) [112].

procedural duties, EIAs are a key component of (international) environmental law. The *Case Concerning Pulp Mills on the River Uruguay*²¹⁰ centred on the obligation to conduct EIAs, with the ICJ concluding that “an environmental impact assessment must be conducted prior to the implementation of a project”.²¹¹

These same procedural duties will also be necessary in order to *protect* and *fulfil* a specific human right to environment. Indeed, the ACommHPR recognised the importance of procedural duties in *Ogoniland*, where it noted that appropriate and independent scientific monitoring, active dissemination of information, impact assessments, and providing meaningful opportunities for local communities to participate in decision-making are all necessary in order to comply with Article 24.²¹²

However, a specific human right to environment would also connect these procedural duties to more detailed substantive requirements regarding the state of the environment (according to its multiple reference points). This is important since compliance with procedural requirements does not itself guarantee protection and restoration of the natural world.²¹³ Substantive standards are also necessary, and appropriate scientific, philosophical, sociological and historical expertise should also be involved in decision-making processes. The multiple reference points of a human right to

²¹⁰ (*Argentina v Uruguay*) (Merits) [2010] ICJ Rep 14.

²¹¹ *ibid* [205]; Rio Declaration (n152) Principle 17.

²¹² *ibid* [53]-[55].

²¹³ *Zander* (n9); *Boyle* (n141) 630; *Shelton* (n75) 120; Tim Hayward, *Constitutional Environmental Rights* (OUP 2005); *Shelton* (n38) 91.

environment would facilitate this, generating indicators for when the substantive requirements of the right have been breached.

A broad human right to environment would also extend the scope of procedural obligations. That is, human rights duties regarding environmental information and public participation would also include matters relating to biodiversity conservation and ecological degradation per se, rather than just matters concerning pollutants and nuisances. This would again be incorporating principles that already exist within IEL²¹⁴ into IHRL.

Procedural obligations in the Aarhus Convention are in fact broader than those within IHRL in a number of ways. In addition, procedural duties are currently limited within IHRL because they are only owed to those whose rights have been (potentially) violated.²¹⁵ This is in contrast to the Aarhus Convention, which provides access to environmental information and justice to the public in general, including NGOs.²¹⁶ A similar structure could be constructed in IHRL if a human right to environment is recognised as a peoples' right, moving towards the understanding of the environment as a public good.

The provisions of the Aarhus Convention also apply "without discrimination as to citizenship, nationality or domicile".²¹⁷ Aarhus thus creates 'diagonal'

²¹⁴ See eg Aarhus Convention Article 2(3)(a).

²¹⁵ Boyle (n141) 625-26.

²¹⁶ Aarhus Convention Article 2(5); Boyle (n6) 491, 497.

²¹⁷ Article 3(9).

rights that are “held by individuals or groups against the governments of states other than their own”.²¹⁸ There is clear value in procedural rights/duties²¹⁹ functioning across borders given that environmental problems often need addressing supranationally.²²⁰ This is especially pertinent given the lack of guaranteed environmental protection from procedural rights. A potentially toxic mix may arise “if a fully informed society decides to sacrifice environmental quality in order to advance economic or cultural considerations [then] such decisions can have harmful consequences for other states or international commons”.²²¹ The extraterritorial application of norms and duties within IHRL is an issue that requires tackling if IHRL is to provide effective protection to the natural world.

2.5.3 SCOPE OF DUTIES

IHRL treaties ordinarily impose duties on states to secure rights only within their jurisdiction.²²² However, environmental damage often traverses political borders, and large proportions of environmental protection require multilateral action by a number of states. The Maldives alone cannot prevent climate change, nor can Ecuador solely halt deforestation of the Amazon. The transboundary/extraterritorial nature of much environmental

²¹⁸ John Knox, ‘Diagonal Environmental Rights’ in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 82, 101-102.

²¹⁹ These are two sides of the same coin, see §4.3.

²²⁰ Shelton (n75) 120. Note recognition of this in Article 3(9) Aarhus Convention.

²²¹ Shelton (n75) 120; Francioni (n37) 46-47.

²²² §1.3.2(a).

damage thus creates challenges for environmental human rights.²²³

Fulfilling these rights cannot be done by states in isolation: assistance, co-operation and even provision of aid may be required.²²⁴

The issue of extraterritoriality is not new to IHRL.²²⁵ Some solutions have been attempted, but none have yet proved to be entirely sufficient. For example, the ECtHR decided in *Banković v Belgium*²²⁶ that obligations under the ECHR only arise where a state exercises jurisdiction, and that such jurisdiction is normally limited by national borders *even if* cause and effect can be identified.²²⁷ On the other hand, the HRC has stated that a “State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party”;²²⁸ and the ECtHR decided in *Al-Skeini v UK*²²⁹ that recognition of extraterritorial jurisdiction can occur in “exceptional circumstances”,²³⁰ in this case that the UK was exercising “some of the public powers normally to be exercised by a

²²³ See ‘Mapping report’ (n55) [62]-[68]; Lee (n156) 336-38; Boyle (n141) 633-41.

²²⁴ Marteen den Heijer & Rick Lawson, ‘Extraterritorial Human Rights and the Concept of ‘Jurisdiction’’ in Langford et al (n43) 183.

²²⁵ See eg Joseph and Fletcher (n162); Langford et al (n43).

²²⁶ (2007) 44 EHRR SE5.

²²⁷ *ibid* [74]-[82].

²²⁸ HRC, General Comment 31 [10]. See ‘Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (ETO Consortium 2011); Marko Milanović, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8 *HRLR* 411, 422ff; Joseph and Fletcher (n162) 129-38; Langford (n43) 61, 213.

²²⁹ (2011) 53 EHRR 18.

²³⁰ [149].

sovereign government".²³¹ However, transboundary environmental impacts do not necessarily result from one state having 'effective control' over another's territory in a political or military sense.²³²

John Knox has discussed the lack of precision over obligations relating to transboundary environmental harm,²³³ concluding that "although it is clear that States have an obligation of international cooperation... clarification of the content of extraterritorial human rights obligations pertaining to the environment is still needed".²³⁴ Clarity could potentially be gained in this area through combining principles from IEL and IHRL. For example, the horizontal application (ie state to state) of IEL, combined with the vertical application (ie state to citizen) of IHRL can potentially aid progress towards the 'diagonalisation' (ie between one state and another's citizens) of international law, as witnessed in the Aarhus Convention.²³⁵ A specific human right to environment could potentially assist in this process since it is a legal rule that is definitively reliant on principles from both bodies of law.

²³¹ *ibid.*

²³² Boyle (n141) 638.

²³³ 'Preliminary report' (n1) [47]-[48]; 'Mapping report' (n55) [62]-[68]; 'Compilation of good practices' (n107) [84]-[92]; 'Analytical study' (n55) [64]-[73].

²³⁴ 'Mapping report' (n55) [82]. 'Compilation of good practices' (n107) [106].

²³⁵ Article 3(9). See Knox (n218).

2.5.4 REMEDIATION

Finally, further duties will also arise as a consequence of a breach. There is a duty under IHRL to provide a remedy for a violation of human rights,²³⁶ and this likewise applies for all existing and potential environmental human rights.²³⁷ In *Ogoniland*, the ACommHPR appealed to Nigeria to “undertake a comprehensive cleanup of lands and rivers damaged by oil operations”.²³⁸ Similarly, in *Yanomami, Maya*, and *Sarayaku*, the relevant states were all recommended (or ordered) to perform some element of environmental remediation.²³⁹

*

A wide range of duties arises from environmental human rights. This is both expected and desirable since the state of the natural environment affects humans in a number of different (and at times unpredictable) ways, and since IHRL must actually safeguard human dignity rather than merely appear to do so (the ECHR (eg) protects “effective rights and not illusory ones”²⁴⁰). States are the primary duty-bearers under IHRL, but their duties extend to regulating, and thus placing duties, on other actors within their jurisdiction. There are both procedural and substantive duties resulting

²³⁶ See eg ICCPR Article 2(3).

²³⁷ See ‘Mapping report’ (n55) [41].

²³⁸ *Ogoniland* [69].

²³⁹ *Yanomami* p10; *Maya* [197(3)]; *Sarayaku* [341(2)]. See also Draft Principles Article 20 which provides for remedies in the case of “threat of [environmental] harm.”

²⁴⁰ CoE (n12) [45].

from environmental human rights, although the procedural ones are more fully established.

Compliance with a specific human right to environment would require compliance with the vast majority of existing environmental duties under IHRL. However, such a right would also place firmer substantive duties on states regarding environmental quality. Development of the multiple reference points could lead to certain particular environmental standards being required to comply with IHRL (eg air pollution levels in cities or total national extent of protected areas).

A broadly defined human right to a healthy environment would generate additional duties to those already existing in IHRL. In particular, it would extend the scope of environmental legislation that states are obligated to create and implement. This is a result of the additional reference points that states must take into account in respecting, protecting and fulfilling a healthy environment. Codifying the right as a peoples' right would also potentially extend the scope of duties under IHRL. This is because it would openly endorse the 'public good' nature of environmental protection, and hence the need for the public as a whole to have access to environmental information and judicial proceedings.

2.6 DETERMINATION OF A BREACH

In order for a human right to environment to function, it must be possible to determine when it has been violated. Determining a breach of the procedural obligations of a human right to environment is likely to be

easier than doing so for the substantive obligations.²⁴¹ Procedural breaches were relied on in *Ogoniland*²⁴² and have been the favoured approach in the ECtHR's greening process.²⁴³ Even if a human right to environment were to set particular standards regarding environmental quality, then determining a breach of such obligations would still be tricky for a number of reasons. Alongside the problem of definition (ie the standard of environment demanded by the right), there are interconnected difficulties regarding causation and balancing the right against other legitimate aims.

2.6.1 CAUSATION

Causation is a constant problem in environment law as it is often difficult to pinpoint the exact cause of environmental harm.²⁴⁴ The issue of causation actually has multiple strands to it. The first strand is to determine which action caused which environmental damage (a largely scientific problem); the second is to determine whether such environmental damage falls outside the definition of a 'healthy environment' (setting the boundaries for which is a predominantly political issue); the third is to demonstrate that said environmental damage was a

²⁴¹ Daly and May (n122) 233.

²⁴² *Ogoniland* [55].

²⁴³ As well as a failure to comply with domestic legislation. See 'Compilation of good practices' (n107).

²⁴⁴ For examples of the difficulty of demonstrating causation in environmental law, see *Pulp Mills* (n210) [179]-[180], [191]-[194], [198]-[200], [211]-[214], [227]-[265] and the UN Compensation Commission's Category 'F4' claims, <<http://www.uncc.ch/decisions-governing-council-category-f>> (accessed 27/5/2015).

result of a breach of duty (an essentially legal question).²⁴⁵ These are all difficult issues to resolve.²⁴⁶ However, identifying these as separate concerns provides a framework for dealing with them: the three issues should not be confused with one another.

A corporate human right to environment could overcome some of the causation-related difficulties vis-à-vis human health. This is because one need only demonstrate that general demographic trends (such as higher mortality rates or lower fertility rates) can be linked to polluting activity in order to demonstrate a (potential) breach. The individual equivalent of explicitly arguing that an instance of (eg) lung cancer was specifically caused by activity at a particular industrial plant has obvious deficiencies.²⁴⁷

The often cumulative nature of environmental damage (eg greenhouse gas emissions) creates additional difficulties in determining what action caused what environmental damage. Again, there is a need for increased and improved international co-operation and approaches to transboundary/extraterritorial issues in order to properly secure environmental human rights.

²⁴⁵ Sigrun Skogly, 'Causality and Extraterritorial Human Rights Obligations' in Langford (n43) 233, 235-36.

²⁴⁶ Shelton (n38) 115-18; Shelton (n142) 150-54.

²⁴⁷ But is not impossible, see *Fairchild v Glenhaven* [2002] 3 WLR 89.

2.7.2 BALANCING

It has already been seen that the ECHR recognises a need to balance individual rights with legitimate social aims.²⁴⁸ In addition, Article 24 ACHPR is unavoidably dependent on development, stating that “all peoples shall have the right to a general satisfactory environment *favourable to their development*” (enshrined in Article 22 ACHPR). A human right to environment, and indeed any human right,²⁴⁹ is susceptible to a balancing process with other human rights and legitimate objectives. To achieve this, fruitful interdisciplinary dialogue is needed in responding to environmental (and human rights) concerns. A human right to environment can potentially be a useful tool in promoting such dialogue and enhancing the consideration given to environmental matters within IHRL:

Lacking the status of a right means that the environment can be trumped by those values which have that status, including economic development and natural resource exploitation. This is an omission which needs to be addressed if the environment as a public good is to receive the weight it deserves in the balance of economic, social, and cultural rights.²⁵⁰

Balancing of various social and individual concerns is best done on a case-by-case basis: there is an avoidance of strict liability when it comes to

²⁴⁸ §2.2.1.

²⁴⁹ Boyle and Shah (n92) 217, 218-19; James Griffin, *On Human Rights* (OUP 2008) ch3.

²⁵⁰ Boyle (n141) 629.

environmental damage, both within IEL²⁵¹ and IHRL.²⁵² Gradually, general principles for how to balance environmental protection with other legitimate aims may emerge, but this will take time.²⁵³ Determining a breach of duty cannot be done by blanket rules, but requires understanding and sensitivity regarding the particular circumstances. That both IEL and IHRL require balancing acts renders them familiar with the process.²⁵⁴ Although both may have “imperial ambitions”,²⁵⁵ neither expects to reign supreme.

The determination of a breach is not a trivial affair. However, it can be done provided that relevant expertise is relied on; that suitable standards are developed; and that the geographical scope of state duties is clarified.²⁵⁶ However, there are situations in which IHRL will likely be unable to identify a breach. Environmental damage often occurs over time and space scales that are longer and more complex than many human rights violations.²⁵⁷ The time-lag effect of some environmental harm, and the potentially global nature of much of it, present serious issues to the

²⁵¹ Except in the nuclear regime: Patricia Birnie et al, *International Law & the Environment* (3rd edn, OUP 2009) 516-20.

²⁵² *Hatton* (n9).

²⁵³ And will require dialogic and participatory models for dealing with structural human rights violations. See Sandra Liebenberg, ‘Participatory Approach to Socio-Economic Rights Adjudication’ (2014) 32 *Nordic Journal of Human Rights* 312, 314-20, 327-30.

²⁵⁴ Birnie (n251) 109-10.

²⁵⁵ Michael Anderson, ‘Human Rights Approaches to Environmental Protection: An Overview’ in Boyle and Anderson (n8) 1.

²⁵⁶ Shelton (n142) 150-54.

²⁵⁷ Shelton (n75) 133-34.

use of human rights to effect environmental protection, no matter what strategy is adopted.

2.7 CONCLUSION

A number of ways to address environmental harm through IHRL have been developed. In Africa, a peoples' right exists; in America, a non-justiciable right has been pronounced; and in Europe, a process of greening human rights has been undertaken. Despite the lack of a specific human right to environment at the global level, UN institutions have shown interest in environmental human rights, in particular through John Knox's compilation of environmental obligations in IHRL.²⁵⁸ Although all environmental human rights can contribute towards improvement of environmental conditions, a broadly defined human right to environment can go furthest. In particular, it opens the possibility of environmental degradation itself being a violation of IHRL; broadens the scope of environmental laws that a state has obligations to create and implement; provides a clearer pathway for the setting of environmental quality standards in IHRL; and enhances the status of environmental issues in IHRL balancing processes.

A human right to environment is normally defined as a right to a healthy environment. However, there is room for manoeuvre in defining what a 'healthy environment' actually means. When interpreted purely in terms of human health, much of the right's scope can be covered through a robust greening process. However, a healthy environment can also refer to the environment itself being healthy. A broad interpretation of 'healthy

²⁵⁸ 'Mapping report' (n55); 'Compilation of good practices' (n107).

environment' according to multiple reference points both anthropocentric and ecocentric (such as clean, varied, beautiful and functioning) has been endorsed in the Ksentini Report, by the ACommHPR in *Ogoniland*, by the IACommHR, and within national jurisdictions. The term 'healthy environment' should thus be interpreted in a broad and dynamic sense, potentially including additional reference points (such as cultural ones) as understanding of human-nature interactions develops.

The plurality of a human right to environment can also be found in the most appropriate subjects of such a right. Both individuals and groups can suffer from environmental degradation through its effects on inter alia their health, culture or private life. In order to ensure that a human right to environment is effective in protecting against this (potential for) suffering, it should be vested in both individuals and peoples. This recognises the 'public good' nature of environmental protection, and also helps ensure that restrictive rules over standing do not thwart attempts to use IHRL processes to ensure adequate environmental conditions.²⁵⁹

A binding global right with multiple reference points regarding what constitutes a 'healthy environment' could be established via a protocol to an existing international human rights treaty, or a separate treaty regime, or even CESCR General Comments.²⁶⁰ Such an instrument could also set out those rights that can also be infringed with through environmental degradation, and clarify state duties in order to respect, protect and fulfil

²⁵⁹ cf *Lubicon Lake Band* (n149).

²⁶⁰ See §6.2.2.

environmental human rights. This would further enrich IHRL's understanding of the human rights subject, providing a clear route towards recognising that human flourishing requires appropriate environmental conditions. A broadly defined human right to a healthy environment would contribute towards protection of both humans and the natural world and potentially improve understanding of how the two relate: it is the strongest form that environmental human rights can take.

Because of its plurality, a human right to a healthy environment will inevitably be somewhat ambiguous in its initial formulation. But so it should be: the overlap between IHRL and IEL in which the right can be located spans anthropocentrism and ecocentrism; individual and group interests; and requires awareness of contexts and balancing acts. In addition, environmental problems operate on scales of time and space unusual to IHRL, and environmentally damaging activities will often be performing necessary social or economic roles. Flexibility is therefore essential to allow the law to engage with the many ways in which humans interact with and depend on the natural world. The wording 'a human right to a healthy environment' in a treaty may be vague, but its full meaning can be developed by courts, commissions and committees through interpretive, collaborative and participatory processes relying on multiple reference points (such as beauty, diversity and harmony).

The substantive difficulties surrounding a human right to environment – issues regarding definition, appropriate rights-holders and consequent duties – can be overcome using norms relevant to the entire human rights canon and ideas more specific to the environmental context. There are

however a number of problems that are more difficult to overcome in using IHRL to protect the natural world. In particular are problems in responding to the time and space scales required for environmental protection. These rear their heads under the guises of the plight of future generations and extraterritorial/transboundary challenges. However, the further development of a human right to environment could actually benefit IHRL more broadly through providing context for engagement with these issues. In particular, difficulties associated with extraterritorial obligations and peoples' rights can potentially be tackled through an environmental framework.

CHAPTER THREE

JUSTIFYING HUMAN RIGHTS FOR ENVIRONMENTAL PROTECTION

3.1 INTRODUCTION

The final chapter of Part I turns to more theoretical concerns about a human right to environment. Chapter Two demonstrated that there is value in establishing a human right to environment, even if its precise contours are currently unknown. Chapter Three is concerned with whether such a right is justifiable in terms of both international human rights law (IHRL) and the goal of protecting the natural world.

There are three major topics to be looked at: compatibility, redundancy, and focus. The first of these is concerned with whether a human right to environment can successfully be accommodated within IHRL. That is, whether it is consistent with certain foundational requirements (both moral and legal) that all human rights must meet. The latter two topics question whether a human right to a healthy environment actually serves a purpose that cannot be achieved through alternative channels (redundancy); and whether this purpose can actually meet the demands of environmental protection (focus). Both of these hinge on how 'a healthy environment' is defined.

This chapter will show that the potential redundancy of a human right to environment can be assuaged by ensuring that a healthy environment is defined using ecocentric as well as anthropocentric reference points.¹ However, even in this case, its focus is still confined since its protection exists for the sake of humans.²

3.2 COMPATIBILITY

Justification for a human right to environment does not arise simply because it could improve international law's ability to protect the natural world. Nor can the valid observation that a legal right is emerging at national, regional, and international levels³ serve such a purpose. One cannot simply assume that 'a human right to X' is a valid legal construction for all possible X. It must also be compatible with the basis and nature of other human rights. There are a number of criteria that are essential to human rights norms, in particular: paramount importance, universality, justiciability, enforceability and inalienability.⁴ There are thus two elements to the compatibility of the right: its moral legitimacy (ie paramount

¹ §3.3.

² §3.4.

³ James May, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 *Pace Environmental Law Review* 113; UNHRC, 'Preliminary report' A/HRC/22/43 (24 December 2012) [12]-[14].

⁴ Maurice Cranston, *What are Human Rights?* (Bodley 1973) 23, 66-68; Maurice Cranston, 'Are There Any Human Rights?' (1983) 112 *Daedalus* 1, 13-14; Philip Alston, 'Conjuring up New Human Rights' (1984) 78 *AJIL* 607, 615; Philip Alston, 'Making Space for New Human Rights' (1988) 1 *Harv Hum Rts YB* 3, 24ff; James Nickel, 'The Human Right to a Safe Environment' (1993) 18 *YJIL* 281, 288-93; Tim Hayward, *Constitutional Environmental Rights* (OUP 2005) 47-52; James Nickel, *Making Sense of Human Rights* (Blackwell 2007) 75; Liz McKinnell, 'Environmental Rights' (Doctoral thesis, Durham University 2010) 92ff.

importance and universality) and its legal viability (justiciability, enforceability and inalienability).

These two elements serve different purposes: the moral legitimacy concerns whether there *should* be a human right to environment, the legal viability whether there *could* be. Neither of these necessarily implies anything about the other and so they must be considered separately. The reason why the compatibility of a human right to environment is bifurcated like this is because human rights as a whole are dual-natured: they are 'Janus-faced', with roots in both natural law and positive law.⁵ Consequently, for a human right to environment to be compatible, it must be able to mirror both faces of human rights.

3.2.1 MORAL LEGITIMACY

A case to justify the use of human rights language is a prerequisite for the establishment of a human right to environment. As Joseph Sax contends, there is a situation which needs to be avoided:

When assertions of environmental [human] rights are made, the assumption often seems to be that the principled basis for them is self-evident and need not be identified or explained. The result is to leave an aura of ambiguity around most such declarations.⁶

⁵ See §Introduction; §4.2.

⁶ Joseph Sax, 'The Search for Environmental Rights' (1991) 6 *Journal of Land Use and Environmental Law* 93, 96.

Rights language must be justified. Human rights are concerned with real human suffering and flourishing; and they have an urgency and a potency that arises from their paramount importance to the human rights subject (ie the human being). This is captured within contemporary IHRL by the concept of human dignity. As such, for a human right to environment to be morally legitimate, it must be connected to the notion of dignity. Chapter One has shown that human dignity is a shorthand for both why humans matter and what matters about being a human (it is a justification and a metric). Therefore, in order to pass the test of moral legitimacy, a human right to environment must protect human dignity: it must prevent suffering that would undermine human existence and/or promote human flourishing.

A preliminary remark in this regard is that although there may be other human rights whose connection to dignity seems more apparent than that of a human right to environment, this does not prevent dignity being relevant here too. For example, one might consider freedom from torture to be intimately bound with respect for human dignity in a way that environmental conditions are not.⁷ However, human rights are non-hierarchical:⁸ none has a monopoly on dignity. Therefore, even if the explicative route from dignity to a human right to environment is more nuanced than it is for some other rights, this does not discount the

⁷ Consider that “when the [ECtHR] uses human dignity ‘positively’, in order to find a violation, it is clear that it applies it much more to serious violations, with Article 3 being especially privileged ... The very notion of ... torture is, in the Court’s view manifestly contrary to human dignity”. Jean-Paul Costa, ‘Human Dignity in the Jurisprudence of the European Court of Human Rights’ in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 393, 400.

⁸ §1.3.1(a).

existence of the connection.⁹ Furthermore, it is important to ensure that the meaning of dignity is not prematurely restricted through uncritical adherence to certain theoretical preconceptions. One must avoid the situation whereby “one’s presumptions about what is ethically acceptable determines the nature of one’s freedom and therefore the meaning of one’s ‘dignity’... a dizzying circularity”.¹⁰ Instead, one must be open and flexible in response to lessons of lived suffering and real experience, engaging with the potential enrichment of the human rights subject, as indeed contemporary IHRL is.

The previous chapter noted that a human right to a healthy environment can have a number of formulations, but that the most effective one is when ‘healthy environment’ is understood broadly through multiple reference points. It is worth considering whether both the anthropocentric and the ecocentric definitions of ‘healthy environment’ are legitimate interests that are comprised by human dignity and so to be protected by IHRL. In Alan Boyle’s words, the question is: “Is the environment – or the global environment – a sufficiently important public good to merit economic and social rights status?”¹¹

⁹ It is even possible to derive the right from other human rights. See Antonio Trindade, ‘Environmental Protection and the Absence of Restrictions’ in Kathleen Mahoney and Paul Mahoney, *Human Rights in the Twenty-First Century* (Martinus Nijhoff 1992) 561, 572-82; §6.2.2.

¹⁰ Charles Foster, *Human Dignity in Bioethics and Law* (Hart 2011) 38.

¹¹ Alan Boyle, ‘Human Rights and the Environment: Where Next? (2012) 23 *EJIL* 613, 629.

Given the overlap in content between a human health oriented right to environment and existing greened human rights,¹² it is clear that such a right falls within the scope of IHRL. The central importance of environmental conditions to humans is well-established: it is already part of what IHRL protects, and so part of human dignity. Heavily polluted environments that threaten human health, well-being and life are not conducive to a life lived in dignity: “[t]oxic rivers and polluted air diminish dignity not just because of the threat to life or to health, but also because they challenge the ability of people fully to develop their personalities in relation to their surroundings”.¹³ It is therefore indubitably within the remit of IHRL to establish a human right to a healthy environment, when defined according to anthropocentric reference points. Alan Boyle responds to his own question that “[t]he answer endorsed repeatedly by the UN over the past 40 years is obviously yes”.¹⁴

As acknowledged in Chapter Two, defining a healthy environment in terms of ecosystem health may seem to stretch IHRL beyond its remit of protecting human dignity. However, given that such an interpretation already exists in both international and national laws, and since a right defined in this way would provide greater scope in protecting the natural world, it merits consideration. As will be seen, there are in fact a number of reasons as to why the health of ecosystems is related to human dignity:

¹² §2.2-2.3; Boyle (n11) 613-21; Nickel (n4 1993) 288-92.

¹³ Erin Daly and James May, ‘Bridging constitutional dignity and environmental rights jurisprudence’ (2016) 7 *JHRE* 218, 232.

¹⁴ Boyle (n11) 629.

this is essentially because humans – as living organisms – are dependent on the state of the natural world.¹⁵ As reasoned by the ACommHPR in *Ogoniland*, a degraded and defaced environment is contrary to satisfactory living conditions for humans.¹⁶

That human flourishing is dependent on healthy ecosystems is in some senses obvious, for example in terms of food production, pollination and clean air. But healthy and functioning ecosystems improve the quality of human lives in myriad direct and indirect ways.¹⁷ The value to humans of defining a 'healthy environment' in a broad sense is demonstrated by the mental health benefits of contact with nature;¹⁸ the sense of connectedness and solace that people feel within their local environments ('biophilia');¹⁹ the cultural significance of certain landscapes;²⁰ the concept

¹⁵ See §9.2-9.4.

¹⁶ *Ogoniland* [51].

¹⁷ The at-times controversial concept of 'ecosystem services', and in particular cultural ecosystem services, can help to understand the ways in which healthy ecosystems are in human interest. See eg TEEB, 'The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB' (2010).

¹⁸ Joe Sempik et al (eds), 'Green Care: A Conceptual Framework' (Loughborough University 2010).

¹⁹ Edward Wilson, *Biophilia* (HUP 1984). Consider also the Norwegian concept of *friluftsliv*, Arne Naess, *Ecology, community and lifestyle* (David Rothenberg tr, CUP 1989) 177-81; and the Japanese one of *shinrin-yoku* E Morita et al, 'Psychological effects of forest environments on healthy adults' (2007) 121 *Public Health* 54. See also an IUCN Resolution that endorses a right to environment that includes "the child's inherent right to connect with nature in a meaningful way" IUCN, WCC-2012-Res-101-EN [1a].

²⁰ Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) 1037 UNTS 151.

of 'ecohealth';²¹ and the disorientation and displacement caused by environmental destruction ('solastalgia').²² Humans are happier and healthier (they can flourish) when they live within clean, diverse and beautiful ecosystems. It is to the benefit of both humans and nonhumans for ecosystems to be healthy.

There is thus convergence between human dignity and ecosystem health: a "healthy environment is not separate from, but is an integral part of, human dignity. Human dignity, likewise, resides within nature".²³ This is ultimately because humans are 'fleshy' living beings, and to cut humans off from their ecological home ignores a fundamental aspect of what it is to be human. As will be seen in Chapter Nine, humans are not only socially, but also *ecologically* embedded.²⁴

Since human existence cannot be dislocated from the natural world, it is impossible to divorce the condition of both local and global environments from the conditions in which people live. Just as other humans and human-constructed institutions affect humans, it is inevitable that environmental conditions affect human lives in diverse ways. Whether this connection is

²¹ Ecohealth is concerned with "identify[ing] ecosystem management strategies that contribute to improving the health and living conditions of human populations and the sustainability of the ecosystem in which they live": Renaud de Plaen and Catherine Kilelu, 'From Multiple Voices to a Common Language: Ecosystem Approaches to Human Health as an Emerging Paradigm' (2004) 1 *EcoHealth* (Suppl 2) 8, 9.

²² See Dina Townsend, 'Taking dignity seriously? A dignity approach to environmental disputes before human rights courts' (2015) 6 *JHRE* 204, 218.

²³ Daly and May (n13) 240, 232, 236.

²⁴ §9.2-9.4.

enough to consider poor ecosystem health an affront to dignity is ultimately dependent on one's understanding of dignity. However, such a claim is certainly plausible and has been recognised by the Indian Supreme Court which "has found that ... a dignified life necessitates not only adequate environmental conditions, but also ecological balance".²⁵ As such, vesting in humans a right to healthy ecosystems is legitimate within IHRL.

A fuller analysis of dignity (and its relevance to ecosystem health) will take place later in this thesis where "the aim will be to link the intrinsic values of humans with the intrinsic values of other species and the environment [since] human rights... need to respond to the fact that the individual not only operates in a social environment, but also in a natural environment".²⁶ This analysis will construct an argument that human flourishing happens in ecological as well as social communities, demonstrating that human dignity does include living in and access to healthy ecosystems.²⁷

The second test for moral legitimacy concerns whether a human right to environment is a universal issue or not. Human rights must not be protecting the parochial interests of some subset of humanity. The universality criterion for a human right to environment is rather straightforward to establish. It is not required that a human right to

²⁵ Townsend (n22) 217. Townsend goes on to argue that such an interpretation would allow human rights counts to include the issues raised in *Kyrtatos* within their remit.

²⁶ Prudence Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1997-1998) 10 *GIELR* 309, 396. §8.4; §9.2-9.4.

²⁷ Because humans have a 'vital interest' in forming ecological communities: §9.2-9.4.

environment must have the exact same content for everyone: people's needs vary based on geography, culture and individual differences. Rather, every human being must require a healthy environment in which to live. Since there is not one human who is not reliant on the state of their local and global environment, the criterion of universality, and so the moral legitimacy as a whole, can be met.

3.2.2 LEGAL VIABILITY

The key criteria for a human right to environment to fulfil in order to be legally viable are justiciability, enforceability and inalienability. This subsection will consider them in turn.

Ogoniland demonstrates the justiciability of a human right to environment.²⁸ The contextual nature of appropriate environmental conditions means that the right cannot set out precise and unchanging standards, but this is not a criterion for human rights: all human rights require interpretation.²⁹ The fact that there are number of clear procedural obligations flowing from the right assists in its justiciability, and developing precise substantive standards and duties which arise from a human right to environment will enhance it further.³⁰

²⁸ See also John Lee, 'The Underlying Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Colum J Envtl L* 283, 298-301; Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights* (International Commission of Jurists 2008); Malcolm Langford (ed), *Social Rights Jurisprudence* (CUP 2009).

²⁹ §2.3.

³⁰ §2.5.

The enforceability of a human right to environment is perhaps best thought of in terms of implementation and supervision.³¹ Implementing and supervising a human right to environment may not be straightforward, but it certainly is possible, especially with regards to its procedural aspects.³² As standards evolve, the enforceability of a human right to environment will become more straightforward and more powerful.

The required inalienability of a human right to environment may initially seem more problematic. As evidenced by the corpus of international (environmental) law, protection of the environment must be balanced against other objectives.³³ The concept of sustainable development encapsulates this balancing act.³⁴ However, human rights' inalienability does not mean that every right always has the widest scope imaginable: all human rights must be balanced against one another and other legitimate aims. Although the scope of each human right may vary, their inalienability means that the right itself can never be waived, surrendered, foregone, or alienated by the right-holder.³⁵ A human right to environment can fit this requirement.

³¹ Alston (n4 1988) 35; Trindade (n9) 582-85.

³² Alexandre Kiss, 'Concept and Possible Implications of the Right to Environment' in Mahoney and Mahoney (n9) 551, 554-56; 'Compilation of good practices' A/HRC/28/61 (3 February 2015).

³³ Patricia Birnie et al, *International Law & the Environment* (3rd edn, OUP 2009) 109-10.

³⁴ 'The Future We Want' UNGA Resolution A/RES/66/288 (11 September 2012) IV.

³⁵ Nickel (n4 2007) 44-45. This reveals the moral portion of inalienability: the right must have such a character because of its high level of moral importance.

The potential scope of a human right to environment also presents potential problems of legal viability. The transboundary nature of natural processes means that a human right to environment would best operate on an international (or at least transnational) plane.³⁶ Handl points out that this “might turn into an extremely effective legal platform for internationalising national decision-making in areas that represent the core of traditional state sovereignty”.³⁷ It is doubtful that there is much appetite for this, given the frequent reassurance given to states of the importance of sovereignty in international environmental law. Dinah Shelton believes that “the required broad extension of state liability may prove to be the biggest single hurdle to establishing a right to environment”.³⁸ However, whether this is a genuine issue of legal viability or a reminder of the difficulty of using a state-centric international legal order to deal with global environmental problems is debateable.³⁹ The latter may not solve any problems, but it identifies them as practical, rather than theoretical ones.

³⁶ §2.5.3.

³⁷ Günther Handl, ‘Human Rights and Protection of the Environment: A Mildly “Revisionist” View’ in Antonio Trindade (ed), *Human Rights, Sustainable Development and the Environment* (Instituto Interamericano de Derechos 1992) 130.

³⁸ Dinah Shelton, ‘Human Rights, Environmental Rights, and the Right to Environment’ (1991) 28 *Stanford Journal of International Law* 103, 134.

³⁹ All human rights entail intrusions on state sovereignty: ‘Preliminary report’ (n3) [48].

3.2.3 SUMMARY

The multiple challenges to a human right to environment's compatibility with IHRL can be summed up as genuine, but surmountable. A human right to environment is therefore both morally legitimate and legally viable. However, the fact that it can coalesce with existing human rights norms and structures does not mean that it ought to be created. It must also be demonstrated that it serves a purpose.

3.3 REDUNDANCY

Establishing a human right to environment may be a pointless exercise if its goals can be achieved more easily by existing means. That there is an overlap between human rights and environmental protection does not mean that bridging the two in the most lexically obvious way will produce ideal outcomes: the relationship between the two is more complex than that.⁴⁰ It is thus possible that a human right to environment is a redundant tool.

The redundancy argument states that the potential lies within international law to appropriately protect both humans and nonhumans without a human right to environment. Günther Handl is a keen proponent of this:

⁴⁰ See (eg) Michael Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon 1996) 3-4; Mahoney and Mahoney (n9) 517-614; Dinah Shelton (ed), *Human Rights And The Environment* (Edward Elgar 2011); Linda Hajjar Leib, *Human Rights and Environment: Philosophical, Legal and Theoretical Perspectives* (Martinus Nijhoff 2011) ch3. 'Analytical Study' A/HRC/19/34 (16 December 2011) [6]-[10].

Indeed, the emphasis on such a perspective on the interrelationship of human rights and environmental protection carries significant costs; it reflects a maximalist position that offers little prospect of becoming reality in the near term while its propagation diverts attention and efforts from other more pressing and promising environmental and human rights objectives.⁴¹

Given that there a number of legal regimes and theoretical approaches already existing within international law (including IHRL) concerned with environmental issues, it is possible that a human right to environment is redundant. It may achieve nothing that cannot be done through consolidating and developing more firmly established pathways. The most obvious place to look for this is international law concerning the environment.

International environmental law (IEL) has expanded over recent decades and now represents a considerable body of law comprising a large number of treaty regimes. These cover a diverse range of subject matter (incorporating themes of transboundary pollution,⁴² protection of endangered species,⁴³ and natural heritage⁴⁴). IEL has also adopted and elaborated a number of key principles that accompany the formal treaty

⁴¹ Handl (n37) 119-20.

⁴² Convention on Long-range Transboundary Air Pollution (1979) 1302 UNTS 217.

⁴³ Convention on International Trade In Endangered Species of Wild Fauna and Flora (1976) 993 UNTS 243 (CITES).

⁴⁴ Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) 1037 UNTS 151 ('Heritage Convention').

regimes, such as the principles of precaution⁴⁵ and common but differentiated responsibilities.⁴⁶ These increase IEL's flexibility and hence ability to deal with specific problems arising within the environmental realm.⁴⁷

Through diverse treaty regimes and general principles, IEL is already equipping itself to deal with the intricacies of regulating natural processes and may therefore be better suited to continue with this project than IHRL. The corollary is that focus should turn to improving implementation, compliance and enforcement of IEL, as well as further elaboration of the legal implications of more complex principles (such as intergenerational justice⁴⁸) and concepts (such as the intrinsic value of living entities⁴⁹), and improving coordination between IEL and IHRL.⁵⁰

In addition to what can be achieved by IEL is the potential for deeper 'greening' of existing human rights.⁵¹ It may be the case that existing

⁴⁵ Jonathan Wiener, 'Precaution' in Daniel Bodansky et al (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 597.

⁴⁶ Tom West, 'Environmental Justice and International Climate Change Legislation: A Cosmopolitan Perspective' (2012) 25 *GIELR* 129, 149-52.

⁴⁷ For discussion of the relevance of these principles to IHRL, see Karen Hulme, 'International environmental law and human rights' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 285, 297-300.

⁴⁸ Edith Brown-Weiss, *In Fairness to Future Generations* (Transnational 1989).

⁴⁹ Mattia Foschi and Tom West, 'In Whose Interest? Instrumental and Intrinsic Value in Biodiversity Law' in Michael Bowman et al (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar 2016).

⁵⁰ Handl (n37); Günther Handl, 'Human Rights and Protection of the Environment' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Brill 2001).

⁵¹ §2.2.

IHRL, once more fully interpreted, is able to ensure a suitable environment for humans. However, limitations of the greening approach have already been seen: in particular, it seems unlikely that environmental human rights will be able to accommodate the intrinsic (or even inherent⁵²) value of nonhumans,⁵³ which is a core goal of IEL.⁵⁴ Not only is a human right to environment potentially redundant, but it may also be attempting to unite two incompatible value systems.

It is therefore worthwhile enquiring what a human right to environment contributes beyond existing law. The need to do this is compounded by the fact that greened human rights can potentially provide more extensive environmental protection than a human right to a healthy environment when a 'healthy environment' is conceived of purely in human health terms, since "severe environmental pollution may affect individuals'... private and family life adversely, without, however, seriously endangering their health".⁵⁵

When a 'healthy environment' is defined as an environment that is healthy per se, then additional protection certainly is offered by a human right to environment.⁵⁶ As seen in Chapter Two, a right with multiple reference

⁵² The difference being that inherent value is still anthropocentric: it is the value humans place on the pure existence of something (which could be a mountain or the Mona Lisa). See Michael Bowman et al, *Lyster's International Wildlife Law* (2nd edn, CUP 2010) 68-69.

⁵³ §2.2.1.

⁵⁴ §3.4.

⁵⁵ *López Ostra v Spain* (1995) 20 EHRR 277 [51]; §2.2-2.3.

⁵⁶ Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2006-2007) 18 *Fordham Environmental Law Review* 471, 507-11.

points opens the possibility of environmental degradation itself being a violation of IHRL; broadens the scope of environmental laws that a state has obligations to create and implement; provides a clearer pathway for the setting of environmental quality standards in IHRL; and enhances the status of environmental issues in IHRL balancing processes. Thus, when a human right to environment is interpreted broadly, as argued for in this thesis, the redundancy argument shrinks away.

Furthermore, even when defined anthropocentrically, there are a number of reasons as to why a human right to environment is not redundant. A specific human right to environment has the potential to improve the balancing processes both between and within IEL and IHRL. While considered two distinct bodies of law, balances in the overlaps between them may be skewed or incomplete because of their segregation. Without dedicated environmental expertise, the long-term insight required for suitable environmental protection may be lacking within IHRL institutions which are accustomed to operating on shorter time-scales.⁵⁷ This can be overcome to some extent by greened human rights and improved coordination between the two bodies of law. But a specific human right to environment would go further in terms of ensuring that environmental expertise features adequately within IHRL.⁵⁸

In addition, a human right to environment can help develop legal principles in cases when human rights and environmental protection are *not* mutually

⁵⁷ 'Climate Change Report' A/HRC/10/61 [90]; See also *EHP v Canada* (1984) HRC Communication No 67/1980, CCPR/C/OP/1 [8(a)].

⁵⁸ Boyle (n11) 629-33.

supportive.⁵⁹ By specifically including the state of the environment within IHRL, important environmental issues can be engaged with directly by IHRL rather than through circuitous routes. Using human rights can also assist in ensuring that vulnerable groups are not marginalised,⁶⁰ and holding states to account for serious environmental damage due to the more advanced enforcement and complaint mechanisms within IHRL.

Another additional benefit of a human right to environment that deflects the charge of redundancy is the rhetorical potency⁶¹ carried by IHRL, which is not currently found within IEL. Creating a specific human right to environment would direct this urgency towards environmental protection measures. There is thus something to be gained simply by using the language (and consequent machinery) of IHRL to bring about environmental protection. Furthermore, human dignity may well contain an essential ecological component,⁶² making it proper for IHRL to secure healthy environmental conditions. That is, a human right to environment

⁵⁹ Such as with rights to property or to found a family. See Dinah Shelton, 'Human Rights and the Environment: What Specific Environmental Rights have been Recognized?' (2006-2007) 35 *Denv J International L & Poly* 129, 170; *Fredin v Sweden* (1991) 13 EHRR 784.

⁶⁰ ECOSOC, 'Human Rights and the Environment' E/CN.4/Sub.2/1994/9 ('Ksentini Report') [117]-[160]; UNHRC, 'Mapping report' A/HRC/25/53 (30 December 2013) [69]-[78]. See also Elisa Morgera, 'No need to reinvent the wheel for a human rights-based approach to tackling climate change' in Erkki Hollo et al (eds), *Climate Change and the Law: A Global Perspective* (Springer 2012); Tom Kerns, 'Ten practical advantages of a human rights approach to environmental advocacy' (2013) 3 *J Environ Stud Sci* 416.

⁶¹ See §Introduction; §4; §6.3.

⁶² §8.4; §9.2-9.4.

makes clear that a deeper environmentalism is also in the interests of humans.

There are thus a number of reasons why a human right to environment is not redundant. Handl is right that it should not take away from “more pressing and promising environmental and human rights objectives”,⁶³ but it need not do so. A human right to environment may in fact be able to help achieve such objectives. For example, demonstrating that climate change violates human rights may aid climate change negotiations;⁶⁴ and fuller understanding of environmental issues such as desertification and soil salination within human rights institutions may help to fulfil a human right to food.

To conclude, a human right to environment is certainly not redundant if it is conceived of as protecting an interest in the environment itself being healthy. This provides new content to IHRL and new urgency to environmental protection. When interpreted strictly along the lines of human health, its potential redundancy is more visible since much of what it protects can be achieved through the greening of existing human rights. However, endorsing a specific human right to environment would still achieve other objectives and confirm the importance of the state of the environment to human dignity. Matching the value systems of anthropocentrism and ecocentrism may not be straightforward, but a

⁶³ *supra* n41.

⁶⁴ Boyle (n11) 633.

human right to environment can help “make it possible to go beyond reductionist concepts of ‘mankind first’ or ‘ecology first’.”⁶⁵

3.4 FOCUS

The apparent tension between anthropocentric and ecocentric focuses to environmental protection presents the third theoretical problem to a human right to environment. The focus of protection offered by a human right to environment is inevitably restricted due to its status as a *human* right and consequent vesting in humans.⁶⁶ This section will demonstrate that although IEL certainly meets anthropocentric aims,⁶⁷ it also goes beyond protecting what is in the direct interests of humans.⁶⁸ As such, a human right to a healthy environment is not able to cover the same ground as existing IEL.

Existing IEL protects ecosystems,⁶⁹ species,⁷⁰ biodiversity,⁷¹ and even “every form of life”.⁷² There are also a number of legal regimes that

⁶⁵ Ksentini Report (n60) [5].

⁶⁶ ‘Mapping report’ (n60) [53]; Catherine Redgwell, ‘Life, the Universe and Everything: A Critique of Anthropocentric Rights’ in Boyle and Anderson (n40).

⁶⁷ eg UNFCCC; Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (1997) 2241 UNTS 302.

⁶⁸ In instruments such as: CBD (1992) 1760 UNTS 79; Heritage Convention (n25); Convention on the Conservation of European Wildlife and Natural Habitats (1979) 1284 UNTS 209; Protocol on Environmental Protection to the Antarctic Treaty (1991) 30 ILM 1461 (‘Antarctic Protocol’).

⁶⁹ Antarctic Protocol (n68) Article 3.

⁷⁰ CITES (n43).

⁷¹ CBD, Preamble.

⁷² ‘World Charter for Nature’ (1982), UNGA Resolution A/RES/37/7, Preamble.

protect the welfare of individual animals.⁷³ Not only does existing IEL directly protect nonhumans, but significantly the justifications given for this protection are frequently non-anthropocentric. For example, the Convention on Biological Diversity (CBD) – one of the most important legally binding treaties within IEL – opens by noting that the contracting parties are “conscious of the intrinsic value of biodiversity”.⁷⁴ This opening recital demonstrates a key justification for the existence of the CBD: that biodiversity has value in, of, and for itself.⁷⁵ The CBD thus openly affirms and endorses the existence of a broadly ecocentric dimension within IEL.

The CBD is by no means the only instrument in IEL to have a focus that expands beyond human interest. The 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention),⁷⁶ the 1991 Protocol on Environmental Protection to the Antarctic Treaty,⁷⁷ and the 2004 African Convention on the Conservation of Nature and Natural Resources⁷⁸ all refer to the intrinsic value of

⁷³ CITES Articles III(2)(c), IV(5)(b), IV(6)(b), V(2)(b), VII(7)(c), VIII(3); 1976 Convention for the Protection of Animals Kept for Farming Purposes ETS 87; 1979 European Convention for the Protection of Animals for Slaughter ETS 102; 1987 European Convention for the Protection of Pet Animals, ETS 125.

⁷⁴ (1992) 1760 UNTS 79, Preamble.

⁷⁵ For discussion of intrinsic value, see §8.4.1.

⁷⁶ 1284 UNTS 209, Preamble. See Bowman (n52) 298-300.

⁷⁷ 20 ILM 1461, Article 3(1).

⁷⁸ The text can be found in IUCN, *An Introduction to the African Convention on the Conservation of Nature and Natural Resources* (IUCN, 2004); for the original, see the 1968 African Convention on the Conservation of Nature and Natural Resources, 1001 UNTS 3.

nonhumans.⁷⁹ Furthermore, the (nonbinding) World Charter for Nature (WCN) is unambiguously ecocentric; it is “aware that [m]ankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients”,⁸⁰ and is “convinced that [e]very form of life is unique, warranting respect regardless of its worth to man”.⁸¹ All of these instruments demonstrate that the conservation of nature does not only exist as a legal obligation because of human interests.

Thus, although multilateral environmental agreements are often designed to benefit humans, they frequently have a more comprehensive outlook. “[E]ven if their focus remains human benefit this concept is drawn so broadly as to be indistinguishably ecocentric”.⁸² Whilst it may be the case that “anthropocentric motivations have plainly predominated”⁸³ within IEL, “the need for a more expansive and pluralistic approach seems also to have gained clear recognition”,⁸⁴ and the intrinsic value of all species “is now clearly recognised in multiple regimes”.⁸⁵

⁷⁹ Bowman (n52) 65-67; Fosci and West (n49) 59-61.

⁸⁰ *supra* n72, Preamble. See also Ian Mason, ‘One In All: Principles and Characteristics of Earth Jurisprudence’ in Peter Burdon (ed), *Exploring Wild Law* (Wakefield 2011) 41.

⁸¹ Preamble.

⁸² Alan Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’ in Boyle and Anderson (n40) 52. See also Birnie (n33) 280.

⁸³ Bowman (n52) 66.

⁸⁴ *ibid* 68.

⁸⁵ Alexander Gillespie, *International Environmental Law, Politics and Ethics* (2nd edn, OUP 2014) 129.

IEL's ecocentric tilt has not displaced anthropocentric rationales for protecting the environment, but rather exists alongside them.⁸⁶ As such, IEL embraces a plurality of values,⁸⁷ and although arguments concerned by the utilitarian component of environmental law, which contend that "in order to secure a 'proper' relationship between humans and nature, environmental law should evolve, to follow ecocentric ethics"⁸⁸ may be valid, it should equally be recognised that this evolution is already under way.⁸⁹

The stated objectives of the CBD neatly bear out the simultaneous existence of both ecocentric and anthropocentric motivations within IEL. Its objectives are the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of its benefits.⁹⁰ The first of these reflects an ecocentric rationale, whereas the latter two are

⁸⁶ See eg Alexandre Kiss and Dinah Shelton, *International Environmental Law* (Transnational 1991) 10-11; Birnie (n33) 7-8, 597-600, 618; Christopher Stone, 'Ethics and International Environmental Law' in Bodansky (n45) 296-99; Philippe Sands et al, *Principles of International Environmental Law* (3rd edn, CUP 2012) 450; Gillespie (n85) 127-28, 133-36, 148-49; Fosci and West (n49) 57-61.

⁸⁷ For discussion of the benefits of ecological value pluralism, see Bryan Norton and Douglas Noonan, 'Ecology and valuation: Big changes needed' (2007) 63 *Ecological Economics* 664.

⁸⁸ Jane Holder, 'New Age: Rediscovering Natural Law' (2000) 53 *Current Legal Problems* 151, 167. See also Sally Bullen, 'Lessons from feminist epistemology: toward an environmental jurisprudence' (1993) 23 *Victoria U Wellington L Rev* 155, 159-164.

⁸⁹ For example, Holder claims that "in the light of the [intrinsic] value accorded by deep ecology to human and non-human life alike, the instrumentalism of law on genetically modified organisms becomes less tenable" (ibid 170). There is some truth in here, which is why IEL has abandoned pure instrumentalism.

⁹⁰ CBD, Article 1.

concerned with human interests.⁹¹ In fact, the CBD's distinction between biological *diversity*, and biological *resources* (in that not only resources, but also diversity itself must be conserved⁹²) provides a useful vantage point from which to view the value pluralism endorsed by IEL.⁹³ Thus, although it is true that IEL is concerned with human wellbeing, it would be false to claim that this was its only focus.

There is thus a complex interplay between anthropocentrism and ecocentrism found in IEL. This interplay is captured by the recognition in the CBD that "humans, with their cultural diversity, are an integral component of many ecosystems".⁹⁴ IEL cannot avoid the fact that humans are part of nature, but it also cannot deny an escape route for human exceptionalism. Human cultural diversity is used to maintain a division between the human and the nonhuman.

This pluralistic approach of the CBD can also be seen in the *Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity*.⁹⁵ Given that the ambit of these is sustainable use, one could reasonably expect them to have an exclusively anthropocentric focus. However, Principle 10 states that international and national policies should take into account

⁹¹ Alan Boyle, 'The Convention on Biological Diversity' in L Campiglio et al (eds), *The Environment after Rio* (Kluwer 1994) 38; Bowman (n52) 596-98

⁹² CBD Articles 5-7, 8(a), 8(b), 8(g), 8(i), 8(j), 11-14.

⁹³ Bowman (n52) 67, 598; Rosemary Rayfuse, 'Biological Resources' in Bodansky (n45) 369.

⁹⁴ Annex A [2].

⁹⁵ Available at <<https://www.cbd.int/sustainable/addis.shtml>> (accessed 13/8/2016).

intrinsic and other non-economic values of biological diversity. The CBD operates from a platform of value pluralism, whereby “the strength of the CBD approach lies ... in the potentially all-encompassing concept of ‘value’ reflected in its recognition of the intrinsic value of biodiversity, which allows a broad and flexible approach to the definition of biological resources beyond mere economic value”.⁹⁶

This pluralistic approach of IEL can also be found in one of the tools it has at its disposal: the ‘ecosystem approach’. The ecosystem approach has been defined by the CBD as a “strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way”⁹⁷ and has become the “primary framework of action”⁹⁸ under the CBD.

The core idea underpinning the ecosystem approach is to use the ecosystem (defined by the CBD as “a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit”⁹⁹) as the primary unit and guiding principle for regulating human interaction with the natural world. As such, the approach encompasses a commitment to moving away from species-based or other single issue approaches and towards responding to the natural world in accordance with the complex and interconnected ways in which it

⁹⁶ Rayfuse (n93) 362, 369 (367-370).

⁹⁷ Decision V/6, Annex A [1].

⁹⁸ CBD COP 5 Decision V/6, Annex C [12].

⁹⁹ Article 2.

functions.¹⁰⁰ This demonstrates a realisation within environmental law that in order to protect the natural world, ecological principles need to be understood and followed.¹⁰¹

The ecosystem approach therefore demonstrates a willingness within international law to adopt techniques and perspectives learnt from ecology and the natural world, rather than insisting on imposing an anthropogenic order on it. These techniques can of course be appropriated for anthropocentric as much as ecocentric ends, but their ecogenic nature provides a means to work with, rather than against, natural processes.

The objectives of the ecosystem approach in fact exactly mirror the objectives of the CBD: the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of its benefits.¹⁰² The focus of the ecosystem approach, like IEL as a whole, thus revolves between the anthropocentric and the ecocentric.¹⁰³ There are “two broad narratives within which the ecosystem approach is finding expression, responding to two broadly competing logics roughly aligned with what is usually referred to as ecocentrism and anthropocentrism”.¹⁰⁴ And while

¹⁰⁰ R Edward Grumbine, ‘What Is Ecosystem Management?’ (1994) 8 *Conservation Biology* 27, 29-31; Arie Trouwburst, ‘The Precautionary Principle and the Ecosystem Approach in International Law: Differences, Similarities and Linkages’ (2009) 18 *RECEIL* 26, 28-29; Bowman (n52) 603-604; Gillespie, (n85) 139-40; Vito De Lucia, ‘Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law’ (2015) 27 *JEL* 91, 92.

¹⁰¹ See §7.1.2.

¹⁰² CBD, Article 1.

¹⁰³ See De Lucia (n100)

¹⁰⁴ *ibid* 94, 105-108, 111-14.

“the prevailing deployment of the ecosystem approach in international law... remains aligned with the anthropocentric construction of nature as a service provider, ecocentric perspectives find at least *some* space in the language of the law”.¹⁰⁵ In comparison, a human right to environment obscures this space by throwing the purpose of environmental protection into a staunchly anthropocentric domain.

The reason for this staunch anthropocentrism is because human rights are necessarily vested in humans. As demonstrated in the Introduction, a key legal advantage of ‘rights’ is that they identify a holder to whom duties are owed. In the case of human rights, this holder must necessarily be a human.¹⁰⁶ Thus the focus of a human right must be directed towards its human holder. Human rights are therefore *unavoidably* anthropocentric. As such, human rights cannot fully encompass the ecocentric rationales of IEL. Indeed, the existence of an ecocentric rationale for protecting the natural world within IEL may even make the idea of endorsing a *human* right seem cumbersome. Why use humans as a proxy for protecting nature if, according to the WCN, “Nature shall be respected and its essential processes shall not be impaired”?¹⁰⁷ Sumudu Atapattu goes so far as to claim that “recognising a fundamental right to a healthy environment

¹⁰⁵ *ibid* 96.

¹⁰⁶ §6.3-6.4.

¹⁰⁷ WCN (n72), Principle 1.

would go against the very nature of the Charter"¹⁰⁸ because of this clash in focus.

Because the focus of IHRL is more restricted than that of IEL

"environmental protection cannot be wholly incorporated into the human rights agenda without deforming the concept of human rights and distorting its program".¹⁰⁹ Furthermore, a human right to environment cannot encompass all the motivations for and approaches of IEL, in particular its recognition that "every form of life is unique, warranting respect regardless of its worth to man".¹¹⁰

However, this does not mean that IHRL and IEL must be locked at an impasse. Rather than a conflict, there is a poignant juxtaposition between meeting the needs of humans and the needs of nonhumans, as recognised in the ecosystem approach and other principles of IEL. As Christopher Stone put it in 1972: "these goals will often be so mutually supportive that one can avoid deciding whether our rationale is to advance 'us' or a new 'us' that includes the environment".¹¹¹ One route towards reconciliation has already been seen in this thesis: through defining 'a healthy environment' according to the health of the ecosystem rather than of humans. This would temper the inherent anthropocentrism (and the potential

¹⁰⁸ Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?' (2003) 16 *Tul Env'tl LJ* 65, 75.

¹⁰⁹ Shelton (n38) 138. Stephen Turner, *A Substantive Environmental Right* (Kluwer 2009) 49-51.

¹¹⁰ WCN, Preamble.

¹¹¹ Christopher Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' (1972) 45 *S Cal L Rev* 450, 489; Shelton (n38) 109-10.

redundancy) of the right and increase the level of protection it can offer to aspects of the nonhuman environment.

However, as a *human* right, a human right to a healthy environment would still be vested in humans, and so would still amount to protecting the environment *for the sake of humans*. The anthropocentrism of human rights is immovable: because they are directed towards humans, human rights have humans at the centre of their consideration.¹¹²

How the subject of human rights is understood will affect how this anthropocentrism is manifested: as seen in Chapter One, the anthropocentrism of human rights does not mean human rights must be egotistical and individualistic.¹¹³ In fact, they are not. The contemporary human rights subject is understood as embodied and embedded. But even an embodied and embedded human rights subject cannot shift the spotlight of human rights away from the human and towards the nonhuman, for it is still a human that is found at the centre, as the holder of the right.

Human rights' ability to reach beyond anthropocentrism is therefore limited by their unavoidably restrictive focus. Daly and May claim that once an ecologically embedded sense of the human and its dignity has been established "the question of whether nature itself has (competing) rights, including dignity rights, becomes less pressing because nature's rights can

¹¹² See 'anthropocentric', *Shorter OED* (6th edn, OUP 2007).

¹¹³ cf Holmes Rolston III, 'Rights and Responsibilities on the Home Planet' (1993) 18 *YJIL* 251, 253-62.

be enveloped within human rights".¹¹⁴ But this is not entirely convincing because the human still remains at the centre. Whilst it is undeniable that there is value in understanding that human dignity "resides within nature",¹¹⁵ this does not shift IHRL away from its anthropocentrism.

The anthropocentricity of human rights (when unbalanced) has the potential for reinforcing a one-dimensional view of environmental protection that fails to bring out the value pluralism of IEL. The conceptualisation of nature as the dominion of man¹¹⁶ is confirmed. This conceptualisation sees nature's value as being found in its exploitation – or perhaps more generously, management – by humanity.¹¹⁷ Thinking of the natural world exclusively as 'resources' that exist for the sake of humans constructs a false (and potentially counter-productive) discontinuity between humanity and nature. This discontinuity leads to a limited understanding of humans and nonhumans alike, resulting in limitations in the legal constructs designed to protect them.¹¹⁸

The anthropocentricity of a human right to environment can in fact be found throughout its lexical phrasing. Not only does the fact that it is a *human* right render it anthropocentric, but also the term 'environment' is

¹¹⁴ Daly and May (n13) 240

¹¹⁵ *ibid.*

¹¹⁶ Genesis 1: 26-28.

¹¹⁷ Robert Costanza et al, 'Changes in the global value of ecosystem services' (2014) 26 *Global Environmental Change* 152.

¹¹⁸ See Gary Francione, *Animals Property and the Law* (Temple University Press 1995); Klaus Bosselmann, 'A vulnerable environment: contextualising law with sustainability' (2011) 2 *JHRE* 45.

employed in an anthropocentric sense. This is because the 'environ-ment' is literally that which environs, that which encircles. To talk of an 'environment' is therefore to implicitly register that there is something at the centre. Although it is not necessary that the word 'environment' must refer to the human's environment (all organisms have an 'environment' or '*Umwelt*'¹¹⁹) – and it is in fact arguable that 'environment' is not interpreted as such within IEL¹²⁰ – its meaning within the phrase 'a human right to a healthy environment' is naturally interpreted this way. This is obviously the case when a healthy environment is defined as one conducive to human health; but even when the health of the ecosystem itself is under consideration, 'environment' can be so interpreted. This is because it is still the human's environment that must be healthy, and the human thus remains at the centre.

Implicit (as well as explicit) anthropocentrism can result in negative repercussions for humans as much as nonhumans. Given humans' dependence on the natural world, relegating nonhumans to merely instrumental, or even incidental, legal protection through the lens of human interest is a gamble. The gamble is that human self-interest will be enlightened enough to protect the natural systems on which humans depend, despite the temporal and spatial complexities in their composition

¹¹⁹ See §9.4.2.

¹²⁰ Consider the definition of 'ecosystem' in the CBD which refers to "plant, animal and micro-organism communities and their non-living environment" (Article 2). Note also that an ECI Rights of Nature Draft Directive defines 'natural world' as "the total ecological environment of which human beings and our societies form part" (Article 3) <<http://www.rightsofnature.eu/ECI-DraftDirective-Draft.pdf>> (accessed 4/1/2017).

and our dependence on them.¹²¹ This is a gamble that we currently appear to be losing.¹²² In this sense, we see that speciesism¹²³ or species chauvinism¹²⁴ is in reality short-sighted. With the interests of humanity so closely tied to the interests of other living beings, the selection of some direct human interests to be protected by the superior potency of vital rights is a challenge to international law's effectiveness and consistency. This is especially the case given the difficulties of IHRL in suitably dealing with the temporal and spatial scales required for environmental protection.¹²⁵

The critique of anthropocentrism is not that humans do not matter, but that it is *not only* humans that matter. Recognition of issues such as the mutual causation between environmental degradation and human rights abuse¹²⁶ can improve protection of humans and nonhumans alike, but is not itself sufficient. Conceptualisations of the natural world must go beyond that of humanity's dominion. Just as humanity is a 'strand in the thread of life',¹²⁷ so too should human interest in a healthy environment constitute a strand in the thread of protection of the natural world.

¹²¹ See Gillespie (n85) 14-24.

¹²² Will Steffen et al, 'Planetary boundaries: Guiding human development on a changing planet' (2015) 347 *Science* 6223.

¹²³ Coined by Richard Ryder, but made most popular by Peter Singer in *Animal Liberation* (1975).

¹²⁴ Anthony D'Amato & Sudhir Chopra, 'Whales: Their Emerging Right to Life' (1991) 85 *AJIL* 21.

¹²⁵ Shelton (n38) 133-34.

¹²⁶ 'Analytical study' (n40) [15]-[28].

¹²⁷ See Ksentini Report (n60) [74].

Chapter One demonstrated the ongoing enrichment of the human rights subject from an abstract legal persona to an embodied and (socially) embedded human being. It is crucial that this process continues in such a way that humans are understood as being embedded in the natural world too. Recognition of this would help to ensure that both humans and the nonhuman natural world are better understood, and better protected, by the law. However, the anthropocentrism of IHRL will still remain. Even if IHRL were to conceptualise the human rights subject as an ecologically embedded living organism, human rights would still exist for the sake of humans. There is thus a need to contemplate the possibility of vital rights being vested in nonhuman beings. This will be the task of Part III of this thesis.

3.5 CONCLUSION

There are a number of criteria that any human right must meet in order to become part of IHRL. The right to environment is no different in this regard and many of the problems for a human right to environment are not specific to its subject-matter. For example, the issue of justiciability is a common one for many human rights; the problem of moral legitimacy is one which all rights must be able to meet; there is no purpose in any redundant human right; and the transboundary issues of environmental harm are similar to the extraterritorial issues that arise in securing numerous human rights.

This chapter has demonstrated that a human right to a healthy environment can overcome the majority of these issues. Firstly, it is relevant to human dignity and it can function as a legal tool. Both of these

are at least in part dependent on a 'contemporary' rather than a 'modern' conception of human rights. But since IHRL is definitive of this contemporary conception, there is no formal barrier to a human right to environment forming part of the corpus of IHRL.

Secondly, a human right to environment is not redundant. It can play a valuable role in balancing human and nonhuman, and short- and long-term interests appropriately.¹²⁸ This is especially the case when 'a healthy environment' is defined in terms of ecosystem health. The redundancy argument suggests that the creation of a human right to environment may be a gamble with limited resources, but if limited resources are an issue, then this is surely a wider issue about the commitment given to human rights and environmental protection in general. It would thus be valuable to establish a human right to environment within IHRL.

However, there is one problem that cannot be overcome within IHRL. That is the problem of their anthropocentric focus. Given the inherent anthropocentrism of *human* rights, it is impossible for a human right to environment to meet a great number of the concerns of environmentalism and existing IEL. Restricted focus is thus a problem of a different ilk to the rest. It cannot be solved through alterations within IHRL. This does not render such a right worthless, but it does mean that it cannot alone be the solution to the question of how rights can be used to protect the natural world within international law.

¹²⁸ Boyle (n56) 483, 507.

A human right to environment can make a considerable contribution towards improving both human wellbeing and the state of nature, but it also perpetuates a dubious belief that separates humanity from the rest of the natural world. Even though a human right to environment will benefit nonhumans, the primary focus of a human right is the individual or group who holds it. The aim of protecting nonhumans *for their own sake* cannot be done through human rights machinery.

An alternative approach is to see (environmental) human rights as functioning within a wider body of legislation designed to protect the interlocking needs of humans and nonhumans.¹²⁹ A key question for this thesis is how (or whether) nonhuman rights could also be used within such a framework. IHRL defends human dignity but does not explain what is so specifically human about dignity itself. Dignity, more deeply considered, may be something held in common by more than just humans, and so may make demands to protect other forms of life.

Nonhuman rights may be able to respond to these demands. At the start of Chapter One, it was noted how individual human beings were incorporated into the international legal system through, inter alia, the establishment of IHRL.¹³⁰ It may therefore be possible for international law to adapt again to include other living beings as legal subjects. This idea recalls AWB Simpson's characterisation of the position of humans of international law before the adoption of human rights as being similar to the "way one might

¹²⁹ See Nickel's 'accommodationist stance' in Nickel (n4 1993) 283; Atapattu (n108) 67.

¹³⁰ §1.2.1.

fit animals, or trees, or the environment, into thinking about the existence of domestic law aimed at protecting them".¹³¹ Perhaps a parallel adjustment can be made.

The prospect of nonhuman rights will dominate the rest of this thesis. The conceptual shift required for such rights (in Stone's words: "thinking the unthinkable"¹³²) is creaking into gear. The development of nonhuman rights is currently diffuse, reflecting the diverse values and focus found in IEL. This thesis will provide a little more rigour to the concept of nonhuman rights, in particular regarding how rights of this ilk can be justified through the concept of dignity.

The most visible solution to the question 'how can rights be used to protect the natural world through international law?' has proved valuable but inadequate, and so examination of other possibilities is required. However, before travelling any further down this pathway, this thesis will first analyse further what 'rights' actually are.

¹³¹ AWB Simpson, *Human Rights and the End of Empire* (OUP 2001) 93.

¹³² Stone (n111) 453-56. See Steven Bartlett, 'Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks' (2002) 8 *Animal Law* 143.

PART II

Part I's investigation of human rights approaches to environmental protection ended with a proposition: that the potency associated with human rights could be harnessed for environmental protection through vesting comparable rights in nonhumans. It is worth re-iterating that in answering the question 'how can rights be used to protect the natural world through international law?', the meaning of the word 'rights' is understood as the sort of rights found in international human rights law (IHRL). These 'vital rights' have both moral and legal characters and they form a subset of rights as a whole.

The Introduction demonstrated that rights are powerful normative tools that are central to the functioning of modern law and morality. This is exhibited in two main ways. Firstly, rights are a valuable legal tool because they are vested in a right-holder (cf the Roman concept of *ius* – the 'what's fair'¹). As such, rights are owed to a specific right-holder rather than existing for the sake of an overarching 'fairness'. Secondly, rights identify important moral² issues. They conduct this identification because of the rhetorical and normative force attached to the language of the term 'rights': that is, stating that one has a right to something will often evoke a strong moral demand because "the expression 'a right' has a specific force

¹ John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 205-10

² Morality in this thesis is understood in a broad sense that does not limit the subjects of moral behaviour to humans.

and cannot be replaced by ... other moral expressions".³ The normative force of rights is particularly elevated within the category of 'vital rights', since these have "law-exceeding energies and institutionally elevated juridical status",⁴ which is why they are the primary tool for enquiry in this thesis.

Because of their normative potency, vital rights may offer a particularly effective way to protect the natural world, and their current entrenchment within IHRL makes their continued and expanded usage tempting. In order to assess whether vital rights can be vested in nonhumans there is a need to be clear over the nature of both rights in general and vital rights in particular. These matters will be scrutinised in Part II, the aim of which is to demonstrate that rights can be vested in nonhumans, and to construct a theoretical framework for the function of vital rights that allows Part III to analyse whether they should be.

Part II develops understanding of both the moral and the legal characters of vital rights through a rigorous technical analysis. It will provide clarity and precision as to what rights are and what rights do, for both rights in general and specifically with regards vital rights. Chapter Four conducts a Hohfeldian analysis of rights in order to gain clarity over what rights are; Chapter Five gauges the various merits of Will Theory and Interest Theory

³ HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175, 181.

⁴ Anna Grear and Louis Kotzé, 'An invitation to fellow epistemic travellers' in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Elgar 2015) 2.

in order to describe what rights do. Chapter Six then focuses more specifically on the concept of vital rights, explaining why this terminology has been chosen, and constructs a framework that permits Part III's enquiry into whether vital rights should be vested in nonhumans.

There is a need to be clear and precise about what exactly it is that rights are and what they do because the word 'right' can be used in many different senses. For example, there are 'human rights', 'rights of way', 'women's rights', 'constitutional rights' etc. LW Sumner compares the many varieties of rights to many species of the same genus, arguing that despite their differences, "all species of rights must share some common concept of a right".⁵ This comparison with taxonomical classification's ability to provide meaningful distinctions within a continuum⁶ is a highly pertinent one for this thesis. Although there must be some shared characteristics of rights regardless of the context in which they are found (they are of the same genus), their differences may be so marked as to make distinct species of rights neither comparable nor interchangeable. However, just as there is often no clear dividing line between species, rights also exist along continuous gradients, the different species flowing into one another. A task of Part II is to discover both the shared

⁵ LW Sumner, *The Moral Foundation of Rights* (Clarendon 1987) 17-18, 92-93.

⁶ Species are not fixed watertight categories, but overlap with one another: a clear example of this is found in the concept of 'ring species' (see Darren Irwin et al, 'Speciation by Distance in a Ring Species' (2005) 307 *Science* 414). There are in fact a number of different definitions of 'species' (see Ernst Mayr, *Systematics and the Origin of Species* (Columbia University Press 1942); Kevin de Queiroz, 'Ernst Mayr and the modern concept of species' (2005) 102 *PNAS* 6600).

characteristics of rights as a whole, and the defining features that distinguish vital rights from other rights.

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CHAPTER FOUR

WHAT RIGHTS ARE

4.1 INTRODUCTION

The word 'right' can be deployed in numerous and diverse ways and in numerous and diverse settings. As a consequence, 'rights' suffer from problems of varied meaning and nebulous usage.¹ Because of this, it can be unclear precisely what someone means when they declare that they have a right to something. This is not a new observation: it is one that has attracted attention for decades with the result that many adjectives can now be prefaced to the word 'right' to give it a more precise meaning.² Yet in both everyday and academic usage rights are often left unqualified. This ambiguity can create confusion, imprecision and inaccuracy.

The goal of Chapter Four is to prevent confusion, imprecision and inaccuracy by establishing clearly what is meant by 'rights' within this thesis. In order to do this, 'rights' will be analysed through the Hohfeldian

¹ Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *The Yale Law Journal* 16, 28-29.

² eg positive, negative, natural, legal, moral, active, passive, *in personam*, *in rem*, human, animal, natural, inalienable, inviolable, subjective, objective. Joseph Raz, *Morality of Freedom* (OUP 1986) 167; LW Sumner, *The Moral Foundation of Rights* (Clarendon 1987) 1-14; Hillel Steiner, 'Working Rights' in Mathew Kramer, N Simmonds and Hillel Steiner, *Debate Over Rights* (OUP 1998) 248.

framework, thereby constructing a model that describes the sort of rights under consideration.

This thesis is concerned with the sort of rights found in international human rights law (IHRL). This is because this category of rights exhibits rights' normative force in a particularly potent way,³ and so they are worth investigating as potential tools for protecting the natural world within international law. This category of rights will be referred to as 'vital rights', a choice of terminology that will be explained in Chapter Six. Chapter Four will first describe some overarching features of vital rights in order to situate them within the continuum of rights as a whole. It will then set out some properties of rights in general, and show how these manifest themselves within the subset of vital rights.

4.2 WHAT KIND OF RIGHTS?

A key feature of human rights is that they are both moral rights and legal rights.⁴ They are reliant on an overt moral justification, but are also firmly grounded in law.⁵ Human rights are "Janus-faced, looking simultaneously toward morality and the law".⁶ This 'Janus-faced' nature of human rights

³ §Introduction.

⁴ Samantha Besson, 'Justifications' in Daniel Moeckli et al (eds), *International Human Rights Law* (2nd edn, OUP 2014) 34-41; Conor Gearty, *Can Human Rights Survive?* (CUP 2006) 40; Upendra Baxi, 'Reinventing human rights in an era of hyper-globalisation: a few wayside remarks' 150 and Florian Hoffmann, 'Foundations beyond law' 89, both in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012).

⁵ §Introduction; §3.2.

⁶ Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights (2010) 41 *Metaphilosophy* 464, 470.

must be carried over to the more general category of vital rights in order to ensure that the potency of human rights resides in all vital rights. Although there are numerous other perspectives from which to view 'human rights'⁷ (and also 'vital rights'), it is their particularly strong dual manifestation of both moral and legal characters that renders them of interest to this thesis.

A second important feature of vital rights is that they are a subset of all rights, yet potentially broader than IHRL.⁸ Importantly, there is no a priori reason why only humans can have vital rights. This is represented in the figure below. In the figure, the rectangle represents the entire domain of 'rights'. There is both a blur between law and morality and a dividing line between them since both these interpretations of their relationship are defensible: it is possible to consider law as an attempt to codify morality,⁹

⁷ Human rights are also historical, political, institutional and so on. There are a great number of ways to interpret and analyse them, none of which are 'right' or 'wrong'. Human rights are like the elephant being touched by a group of blind people. Depending on which bit you touch, you will see a different picture. Consider a Wittgensteinian analysis of the word 'right'; Marie-Bénédicte Dembour, *Who Believes in Human Rights?* (CUP 2006) 233ff; James Griffin, *On Human Rights* (OUP 2008) 210. See also Scott Davidson, *Human Rights* (Open University Press 1993); Alan Gewirth, *The Community of Rights* (University of Chicago Press 1996); Jerome Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20 *HRQ* 201, 225-26; James Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007); Horacio Spector, 'Value Pluralism and the Two Concepts of Rights' (2009) 46 *San Diego L Rev* 819, 829-38; Allen Buchanan, *The Heart of Human Rights* (OUP 2014) chs1-2; Moeckli (n2) Part I; Christian Tomuschat, *Human Rights* (3rd edn, OUP 2014) 1-7.

⁸ Although international human rights are here used as the paradigmatic example of vital rights, there may be others in existence. Constitutional rights are a good candidate, although these are not international and so less relevant to this thesis.

⁹ eg Lon Fuller, *The Morality of Law* (YUP 1964); Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

but it is also possible to set them apart by identifying particular criteria which tools must have to count as law (or morality).¹⁰ Whichever interpretation is preferred, it is clear that 'Janus-faced' human rights sit with a foot planted firmly in each camp. This important feature of human rights also applies to the broader domain of vital rights.



Vital rights have a clear, direct and indispensable link to important moral issues. Human rights achieve this through being justified by the concept of dignity.¹¹ Although it is not necessarily the case that all vital rights must be based on dignity, this thesis will rely on the fact that dignity clearly can serve as a foundation for vital rights when it comes to investigate nonhuman vital rights in Part III. This will necessarily require an investigation of the concept of (nonhuman) dignity. In any case, vital

¹⁰ eg via Hart's 'rule of recognition' in HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 100ff.

¹¹ §1.5.

rights must certainly be protecting issues of *fundamental* moral importance rather than relatively inconsequential issues.¹²

Vital rights must also have legal effect, since they are legal rights. Human rights are not simply exhortative statements of what should be done; rather they indicate what *must* be done and so create legal duties directly binding states and with secondary consequences for non-state actors.¹³ All vital rights must have legal force, and potentially must operate in the same way as human rights: binding states directly and other non-state actors indirectly.

Not only are vital rights 'Janus-faced', but it is also possible to think of them as 'Colossal'. Like the Colossus of Rhodes, they stand astride two separated, but connected domains (law and morality), and they play a commanding role in both. As seen in the Introduction, vital rights indicate urgent and essential moral issues, and provide a necessary engine for the functioning of law. Like the Colossus, vital rights dominate the moral-legal landscape.

Focussing on vital rights (rather than on rights in general) delimits the scope of this thesis and focuses its intent. Doing so moves the thesis away from a discussion over whether the fact that nonhuman entities do receive a measure of legal protection amounts to furnishing them with rights more generally. Vital rights require 'rights-language' to be deployed – they must

¹² §3.2.1; §6.3.

¹³ §2.4-2.5.

be specifically and intentionally designated as 'rights' in order to receive the normative potency associated with 'rights'. This thesis is concerned with the rhetorical force that arises through the very language of rights, and the legal effect that comes from the clear status of rights vested in particular right-holders.

4.3 UNDERSTANDING RIGHTS

Before building a model for vital rights, it is necessary to understand the structure of rights more broadly. Since most analytical expositions of rights have focussed on legal rights, the approach here will be indebted to, and reliant on, a primarily legal understanding of rights.

Wesley Hohfeld's investigation into rights is the road most travelled in analyses of rights.¹⁴ Hohfeld's insight was to notice that the word 'right' is used to denote a number of related but separate legal relations.¹⁵ From there he constructed the Hohfeldian schema of 'fundamental legal conceptions'.¹⁶ Hohfeld's aim in defining his 'fundamental conceptions' was to shore up legal thinking by categorising and characterising legal relationships, removing "chameleon-hued words [which] are a peril both to

¹⁴ Hohfeld (n1). See Kramer et al (n2); HLA Hart, 'Legal Rights' in *Essays on Bentham* (Clarendon 1982) 162; Sumner (n2); Joseph Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' (1982) *Wis L Rev* 975; Carl Wellman, *An Approach to Rights* (Kluwer 1997); Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 *OJLS* 257; Leif Wenar, 'Rights' in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Fall 2011 edn) <<http://plato.stanford.edu/archives/fall2011/entries/rights/>> (accessed 14/1/2015).

¹⁵ Hohfeld (n1) 28-30.

¹⁶ *ibid* 30.

clear thought and to lucid expression".¹⁷ In so doing, he distinguished a number of distinct situations that are often referred to as 'rights'.

Although there are alternatives,¹⁸ Hohfeld's schema remains singular in its ability to provide an understanding of numerous meanings of legal right and to act as a springboard for consideration of rights in further domains. As Matthew Kramer has pointed out, it can be used to understand the structure of rights at the broadest level, since "virtually every aspect of Hohfeld's analytical scheme applies as well, *mutatis mutandis*, to the structure of moral relationships".¹⁹

Hohfeld's analysis identifies a number of relations that can exist between actors. Hohfeld describes these relations, their relationships with one another and their crucial differences. These will here be referred to as Hohfeldian 'positions' and categorised into two groups of four. The first group is 'static' and describes a state of affairs between actors, whereas the second group is 'dynamic' and allows for alterations to relations to take place. The two groups are as follows:²⁰

¹⁷ *ibid* 29.

¹⁸ Immanuel Kant, *The Metaphysics of Morals* (first published 1797, Mary Gregor tr, CUP1991); Jeremy Bentham, *Anarchical Fallacies* (1843); Robert Nozick, *Anarchy, State and Utopia* (Blackwell 1974); Dworkin (n9); Neil MacCormick, 'Rights in Legislation' in PMS Hacker and Joseph Raz (eds), *Law, Morality and Society* (OUP 1977); Raz (n2).

¹⁹ Matthew Kramer, 'Rights Without Trimmings' in Kramer et al (n2) 8. See also Jeremy Waldron (ed), *Theories of Rights* (OUP 1984) 8.

²⁰ See Hohfeld (n1) 30. Two changes have been made to Hohfeld's terminology: claim for right and liberty for privilege.

Static Group

Duty Claim

Liberty No-claim

Dynamic Group

Power Liability

Immunity Disability

It is imperative to realise that although the Hohfeldian schema uses terminology that overlaps to a large extent with everyday usage, the words are used here with precise, technical meanings. Hohfeld defines rather than describes. The words used to label the Hohfeldian positions (duty, claim, etc) come encumbered with associated meaning from their variegated usage in day-to-day life since they are fairly common English words. However, within the Hohfeldian schema, they have a clearly delimited sense: they are technical labels.²¹ For example, a Hohfeldian liberty does not carry every feature that one can think of that a liberty might be thought to have. Instead, the analytical schema defines *exactly* what features the Hohfeldian liberty has and does not have. The fact that they tend to converge broadly with everyday meaning has both advantages and disadvantages: it encourages intuitive understanding of

²¹ That is, they function as symbols, and symbols are ultimately arbitrary: the solutions to $x^2 = x + 1$ are the same as $\Delta^2 = \Delta + 1$. Kramer points out that Hohfeld could have used 'spaghetti' and 'rice' to denote the positions: Kramer (n19) 23.

complicated arguments, but it also risks inaccuracy when slippage from the precise to the colloquial occurs.

4.3.1 THE STATIC GROUP

It is sensible to begin by looking at the static group and, in particular, at the Hohfeldian 'duty'. In everyday language, to have a duty means that you are compelled, required, obligated, or forced to act in a certain way.²² This parallels what the Hohfeldian 'duty' represents: that a particular action (or omission) is required of a particular entity.²³ We can express this as 'Y has a duty-to- ϕ ', where ϕ represents a verb.

Note that although we can create sensible sentences such as 'you have a duty to your family' where ϕ appears to have been replaced by a noun, this is not actually the case as the verb is implicit. What is really meant by the second sentence is 'you have a duty-to- ϕ and this duty is owed to your family'. Two facts of significance are uncovered here: (i) the word 'to' can function as the dative indicator or as part of the infinitive of a verb; and (ii) that Hohfeldian duties are *owed to another entity*.

The first fact is a reminder that language will at times occlude understanding within this analysis; it is a double-edged sword where the consideration of meaning is concerned. The latter fact reveals that Hohfeldian duties are *directional*.²⁴ This provides for a key feature of the

²² cf Raz (n2) 195.

²³ Hohfeld (n1) 32.

²⁴ cf Siegfried van Duffel, 'The Nature of Rights Debate Rests on a Mistake' (2012) 93 *Pacific Philosophical Quarterly* 104, 107-14.

Hohfeldian schema: each and every Hohfeldian position can be expressed from the perspective of a second entity. This second entity can vary – it could be your neighbour, your family, a country, humankind, yourself, the Earth, or God.²⁵ But in any case, there is always another side to the coin, and this other point of view to the duty is represented by the Hohfeldian 'claim'.

In Hohfeldian terminology claims and duties are 'correlatives'.²⁶ They represent the same situation, viewed from different sides. That is, 'Y has a duty-to- ϕ -held-to-X' is *identical* to 'X has a claim-on-Y-that-Y- ϕ '. This can be written in shorthand:

$$Y \text{ d}_\phi X \equiv X \text{ c}_\phi Y \quad \text{A correlative relationship}$$

Although not technically necessary, the fit with our ordinary conception of what claims and duties are is a good, though not perfect, one: if you promise to lend your brother your bike, then he has a claim on you that you loan him the bike and you a duty to provide it. A claim is something that a claim-holder has (and likewise for duties): claims and duties do not exist untethered, but are attached to actors. The Hohfeldian schema provides clarity over to whom duties (and claims) are directed by clearly identifying two parties and a legal (or moral) relation that connects them.

²⁵ Note that it is logically *coherent* for all sorts of entities to hold Hohfeldian positions. Whether this is desirable is a value judgement: Matthew Kramer, 'Getting Rights Right' in Matthew Kramer (ed), *Rights, Wrongs and Responsibilities* (Palgrave 2001) 28.

²⁶ Hohfeld (n1) 30.

However, it is important to notice that in everyday language 'claim' has an alternative, but similar, meaning. A claim can also be a statement asserting that a certain proposition is true, no matter how spurious it might be. I can claim to be Spartacus, or that Marvin Gaye's 'What's Going On' is the greatest album of all time. Neither of these needs to be true to be a valid claim.²⁷ The Hohfeldian claim, on the other hand, is a statement about what one entity is owed by another.²⁸ Importantly, having a Hohfeldian claim has nothing to do with the act of 'claim-making'. By definition, one cannot have a Hohfeldian claim to do something, but only that *another* do something.²⁹ A Hohfeldian claim is not an appeal that another should do something, but simply the state of affairs that they must. The room for confusion expands if the looser sorts of claims are made about other Hohfeldian positions (ie if X claims that they have a right). These potential pitfalls must be avoided by clear thinking about the meaning and usage of words with regards to the Hohfeldian positions.

The two other static positions arise where duties and claims end. This is represented by another relationship between Hohfeldian positions: the antithesis.³⁰ The antithesis is used to describe the situations when duties

²⁷ cf the difference between 'sound' and 'valid' in formal logic.

²⁸ Which could be critiqued from outside the system, but within the system it is simply a fact.

²⁹ Glanville Williams, 'The Concept of Legal Liberty' in Robert Summers (ed), *Essays in Legal Philosophy* (2nd edn, Blackwell 1972) 139.

³⁰ Hohfeld used the term 'opposite' to describe this relationship. However, as Halpin points out, this term is open to misinterpretation. AKW Halpin, 'Hohfeld's Conceptions: From Eight to Two' (1985) 44 *CLJ* 435, 440ff.

and claims are *not* found and gives rise to the final two static Hohfeldian positions: the 'liberty' and the 'no-claim'.

Firstly, the antithesis of duty is liberty.³¹ Hohfeld made the subtle definition that the antithesis of Y having a duty-to- ϕ is not Y having a liberty-to- ϕ . Rather, it is Y having a liberty-to-*not*- ϕ .³² If one has a duty-to- ϕ , then not- ϕ -ing is impermissible, whereas the antithetical case is when not- ϕ -ing *is* permissible: ie Y having a liberty-to-not- ϕ . In other words, one has a liberty to do anything (and everything) which one has **no** duty **not** to do. In shorthand:

$$Y I_{\phi} X \equiv Y \neg d_{\neg\phi} X \quad \text{An antithetical relationship}^{33}$$

Again, the match with everyday meaning is close though not perfect. Having a Hohfeldian liberty to perform some action says nothing about the practical feasibility of said action. I have a Hohfeldian liberty to run the hundred metres in 9.58 seconds (since I have no duty not to), but this is a rather useless liberty to possess given its unfeasibility.

Two key observations must be made, both of which demonstrate the Hohfeldian liberty to be weaker than the everyday conception of liberty. Firstly, Hohfeldian liberties are specifically directed to a particular person:³⁴

³¹ Hohfeld (n1) 30.

³² *ibid* 32.

³³ \neg represents negation. Alternatively: $Z d_{\phi} W \equiv Z \neg I_{\neg\phi} W$.

³⁴ We could say they have an indirect object. *cf in rem* and *in personam* rights; Liz McKinnell, 'Environmental Rights' (Doctoral thesis, Durham University 2010) 17, 70-71.

Y has a liberty-to- ϕ *with respect to X*. A consequence of liberties being specifically directed at a particular person is that conflicting positions may be held with respect to different people. For example, if Laura has signed a contract with her employer that she will be in the office on Mondays, then Laura has a duty-to-go-to-the-office owed to her employer and, as such, does not have a liberty-to-not-go-to-the-office with respect to her employer. That is:

$$\text{Laura } d_{\text{go to office}} \text{ Employer} \equiv \text{Laura } \neg l_{\text{not-go to office}} \text{ Employer}$$

However, Laura has signed no such contract with her sister. She therefore has no duty-to-go-to-the-office owed to her sister, and therefore does have a liberty-to-not-go-to-the-office with respect to her sister:

$$\text{Laura } \neg d_{\text{go to office}} \text{ Sister} \equiv \text{Laura } l_{\text{not-go to office}} \text{ Sister}$$

Laura's situation is such that she both has a liberty-to-not-go-to-the-office and does not have a liberty-to-not-go-to-the-office simultaneously. It is therefore possible for someone to both have and not have a Hohfeldian liberty to do something at the same time as these opposing liberties can be held with respect to different entities. Speaking universally then, one is only really *at*³⁵ liberty-to- ϕ if one *has* a Hohfeldian liberty-to- ϕ with respect to everyone since otherwise one is under at least one duty-to-not- ϕ .

³⁵ For clarity 'being at' liberty is used to refer to the intuitive conception, whereas the Hohfeldian position is referred to as 'having' a liberty.

Just as with claims and duties, Hohfeldian liberties do not exist untethered but rather are a specific relation between two specified actors. This is a property of the Hohfeldian schema as a whole, since all Hohfeldian positions have specified holders, and all can be viewed from two different perspectives. The Hohfeldian schema provides clarity over who exactly it is that has a liberty (eg), and who that liberty is held against. The directed nature of Hohfeldian positions explains what it means to say that rights are *vested* in a right-holder, as detailed in the Introduction. Hohfeldian positions (of which rights are composed³⁶) are something that someone in particular has. Duties are not owed to God, or to 'the Law' in general as in Roman Law³⁷ or *Nowheresville*,³⁸ but are specifically directed and owed to a right-holder.³⁹

The vestedness of Hohfeldian positions further emphasises why human rights are unavoidably anthropocentric. Human rights are (by definition) vested in humans. Their duties are owed to humans, and so have humans at the centre of their concern, which is what it means to be anthropocentric. Additionally, it is crucial to realise that the Hohfeldian schema removes ambiguity over who (or what) has a Hohfeldian position, but not over who (or what) actually constitutes that position-holder. For

³⁶ *infra*.

³⁷ John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 205-210.

³⁸ Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 *The Journal of Value Inquiry* 243.

³⁹ Unless of course God or 'the Law' is the claim-holder.

example, a 'people' can hold a Hohfeldian position even if it is not entirely clear who (or what) constitutes a people.⁴⁰

The second key observation over the Hohfeldian liberty concerns another important divergence between Hohfeldian and everyday language, reinforcing the need to be precise in the use of language when analysing what rights are. To have a Hohfeldian liberty-to- ϕ does not logically entail having a Hohfeldian liberty-to-*not*- ϕ . It is therefore possible within the Hohfeldian schema for Y to have a liberty-to- ϕ but not have a liberty-to-*not*- ϕ , ie:

$$Y \text{ } l_{\phi} \text{ } X \text{ AND } Y \text{ } \neg l_{\neg\phi} \text{ } X$$

But the second of these is equivalent to $Y \text{ } d_{\phi} \text{ } X$. This implies that it is possible for an entity to have both a Hohfeldian duty and a Hohfeldian liberty to do something.⁴¹ As such, in order for the Hohfeldian liberty-to- ϕ to connote actual freedom, it must be combined with the Hohfeldian liberty-to-*not*- ϕ to ensure that there is no duty-to- ϕ . Although there is considerable discussion on the existence and the nature of the so-called 'half-liberty',⁴² the key observation here is that Hohfeldian positions do not exist in isolation but often require combination to be meaningful.⁴³

⁴⁰ See Kramer (n19) 56-57.

⁴¹ Hohfeld (n1) 32-33. Hart (n14) 173.

⁴² Hart (n14) 166-67, 173-74; Feinberg (n38) postscript; Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' (1978) 7 *Philosophy & Public Affairs* 93, 109n16; Kramer (n19) 17-20; Judith Jarvis Thomson, *Realm of Rights* (HUP 1990) 46; Sumner (n2) 26-27; Daniel O'Reilly, 'Using the Square of Opposition to Illustrate the Deontic and Alethic Relations Constituting Rights' (1995) 45

The final static Hohfeldian position is the antithesis of claim and the correlative of liberty. The best label for this position is the neo-Hohfeldian term 'no-claim'.⁴⁴ The lack of a more imaginative or intuitive name for this position is perhaps due to (or results in) the fact that it is much more naturally and smoothly expressed via its antithesis or correlative. If Paul has a liberty to water his garden (with respect to all other entities), then no other entity has a claim against Paul that he does not water his garden. To put it another way: every entity has a 'no-claim' on Paul that he water his garden. In shorthand:

$Y I_{\varphi} X \equiv X n_{\varphi} Y$ Correlative

$X n_{\varphi} Y \equiv X \neg C_{\neg\varphi} Y$ Antithesis

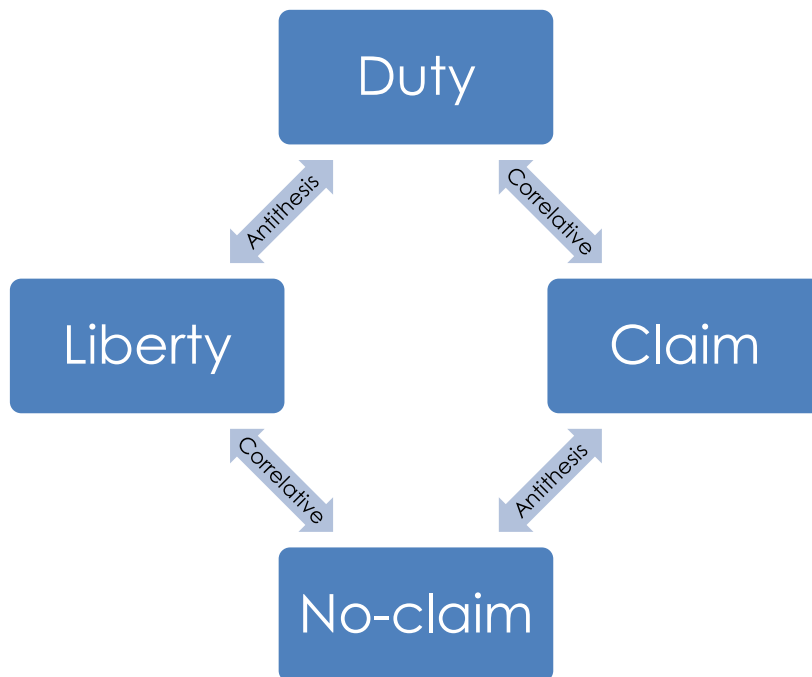
An important implication is that the Hohfeldian liberty is not a particularly forceful position. The entity on the other side of the coin to a liberty (ie X) is not compelled to act in a certain manner because of the existence of the liberty. It may seem that X cannot prevent Y from φ -ing, but this is only true in a rather weak sense. For example, Paul being at liberty to water his garden (with respect to Jane) does not of *itself* mean that Jane cannot prevent Paul from doing so by, for example, stealing his watering can or inviting him round for lunch. Jane is simply lacking a specific claim that Paul not water his garden.

University of Toronto Law Journal 279, 290ff; Leif Wenar, 'The Nature of Rights' (2005) 33 *Philosophy and Public Affairs* 223, 228, 231n9.

⁴³ §4.4.

⁴⁴ Hohfeld preferred 'no-right'.

The four static Hohfeldian positions can now be grouped as follows:



Correlative:

Two Hohfeldian positions which describe the same situation from alternative perspectives.

Antithesis:

Two Hohfeldian positions which are in contrast to each other

It is apparent that, generally speaking, claims and liberties are advantageous for the holder (ie the entity on the left hand side of the shorthand expression), whereas duties and no-claims are generally disadvantageous. Although creative thinking can create exceptions to this state of affairs,⁴⁵ it both makes sense and is useful to group liberties and claims as Hohfeldian 'entitlements', and duties and no-claims as 'disadvantages'. This is a crucial step for the encapsulation of the structure of rights.

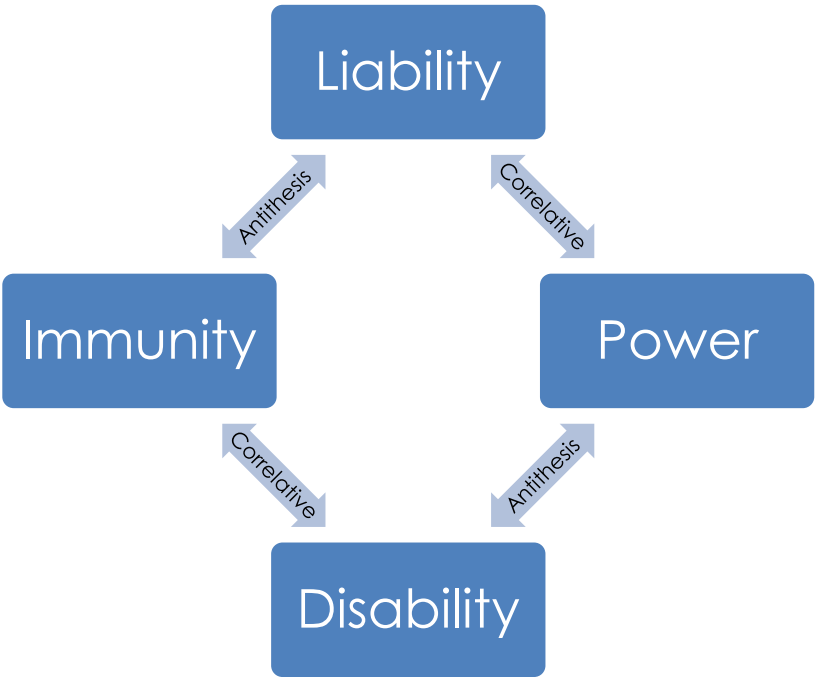
4.3.2 THE DYNAMIC GROUP

Hohfeldian positions must arise from somewhere: they are not discovered, but constructed. Furthermore, legal (and moral) systems are susceptible to

⁴⁵ Sumner (n2) 32.

modifications on both the macro and micro scales. This ability for legal relations to be created, manipulated and terminated is central to many rule-systems (eg contract law). As will be seen, the dynamic group of Hohfeldian positions allows such processes to take place through the modification of static positions (and indeed of dynamic positions themselves).⁴⁶

There are parallels in structure between the two groups. Recalling the four-way arrangement of the static group, a comparable structure can be used to model the dynamic group.



The intuitive place to begin is the Hohfeldian 'power'. To have a Hohfeldian power is to have the ability to create, alter or destroy a Hohfeldian

⁴⁶ The function of some elements within the dynamic group is akin to Hart's secondary rules for a rule-system, see Hart (n10) 79-99.

position.⁴⁷ In any given rule-system, there may be one unique power-holder (eg God for The Ten Commandments) or huge numbers of them (eg any potential contracting party in contract law). Where there are multiple power-holders, there is no reason why each must hold identical powers.⁴⁸ Such a situation is in fact highly unlikely: it is probable that a power-holder will have the ability to modify some of their own positions in a way that nobody else can.

The directionality of the power is slightly more complex than with the static group, since if A has a power to create the position $Y d_{\phi} X$, then A has a power over both Y and X. In practice, this difficulty will seldom be significant since the imposition (or removal) of a Hohfeldian position will usually be to the benefit of at least one entity and, although technically a power exists over them both, it will be more meaningful to talk of the power over the disadvantaged entity.⁴⁹ Note that it remains entirely unambiguous who the power is vested in (ie who the power-holder is).

As before, the remaining positions can be conceived through considering correlatives and antitheses. Firstly, the correlative: if A has a power to impose a duty upon B, then from B's viewpoint, B has a 'liability' with respect to A.⁵⁰ Care must be taken not to slip into confusing the Hohfeldian

⁴⁷ Hohfeld (n1) 44-45.

⁴⁸ The same is true for other Hohfeldian positions.

⁴⁹ See Nigel Simmonds, 'Rights at the Cutting Edge' in Kramer et al (n2) 152n53. There is also a nuanced difference between the cases when the power-holder is a party to the claim-duty position (eg a contractor) or independent to it (eg a legislator).

⁵⁰ Hohfeld (n1) 30.

liability with any other (legal or non-legal) meaning of the word. Here, it simply means that another actor has the potential to alter one of your existing legal relations or to create a new one.

$A \text{ pow}_\varphi B \equiv B \text{ liab}_\varphi A$ Correlative

The antithesis of power is where the power runs out: the Hohfeldian 'disability'. If you lack the power to alter some arrangement, then you are disabled from doing so.

$A \neg \text{pow}_\varphi B \equiv A \text{ dis}_\varphi B$ Antithesis

The antithesis of liability, (and hence the correlative of disability), is the Hohfeldian 'immunity'. If you are not liable to an alteration of your position by a certain entity, then you have an immunity with respect to them.⁵¹

$A \text{ dis}_\varphi B \equiv B \text{ imm}_\varphi A$ Correlative

$B \text{ liab}_\varphi A \equiv B \neg \text{imm}_\varphi A$ Antithesis

Note that the antithesis within the dynamic group does not function in the same way as within the static group. Moving between duties and liberties (antitheses) within the static group required a double negation. A duty is **not** having the liberty to **not** do something. But, within the dynamic group, a disability is simply **not** having the power.⁵²

⁵¹ *ibid* 55.

⁵² Kramer (n19) 21; Sumner (n2) 31.

As before, it is reasonable to categorise two of these positions as generally advantageous: the power and the immunity. Again, situations may exist where it is in fact disadvantageous to be a power or immunity-holder,⁵³ but these need not cloud thinking on the matter since these fringe cases can be accounted for through consideration of the function of rights, as will be done in Chapter Five.⁵⁴ Therefore, these can be added to the list of entitlements.

	Entitlement	Disadvantage
Static	Liberty Claim	No-claim Duty
Dynamic	Power Immunity	Liability Disability

It is worth noting at this stage that the Hohfeldian positions are not all alike in terms of any prerequisites for their possession. For example, not everything that is capable of possessing claims will necessarily also be capable of bearing duties, since a duty demands particular behaviour of the bearer, whereas a claim makes no demands of the holder.⁵⁵ At the very least, it must be possible for these demands to be communicated to

⁵³ David Lyons, *Rights, Welfare and Mill's Moral Theory* (OUP 1994) 11; Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 *L and Phil* 347, 355, 358.

⁵⁴ §5.5.1.

⁵⁵ See Sumner (n2) 29; cf Visa Kurki, 'Why things can hold rights: reconceptualising the legal person' (2015) 7 *University of Cambridge Legal Studies Research Paper Series* 18-19.

the duty-bearer. This does not produce logical absurdities within the Hohfeldian framework: $Y d_{\phi} X$ does not imply $X d_{\phi} Y$.

4.4 BUNDLED HOHFELDIAN POSITIONS

It has already been demonstrated that there are situations that cannot be modelled by a singular Hohfeldian position. In particular, the previous section showed that matching a real-world liberty to the Hohfeldian liberty requires two Hohfeldian positions. To model the situation whereby Ted is *at*⁵⁶ liberty with respect to Bill to walk on Bill's land, Ted must *have* both a Hohfeldian liberty-to-walk-on-Bill's-land and a liberty-to-not-walk-on-Bill's-land. If the second one is missing, then Ted does not have a liberty-to-not-walk-on-Bill's-land and has, by definition, a duty-to-walk-on-Bill's-land. The important point is that two Hohfeldian positions are required to accurately describe what is meant by the everyday (but legal) proposition that 'Ted is at liberty (with respect to Bill) to walk on Bill's land.'

Hohfeldian positions do not exist in isolation but rather come combined with one another. That is, Hohfeldian positions do not exist 'atomically' (ie isolated) but are 'molecular':⁵⁷ they come as 'bundles',⁵⁸ or 'clusters'⁵⁹ of positions. These bundles can often be rather complex. For example, Wellman suggests that 'the right to life' consists of at least the following:⁶⁰

⁵⁶ *supra* n35.

⁵⁷ Wenar (n42) 229.

⁵⁸ Sumner (n2) 32.

⁵⁹ Wellman (n14) 7, 51.

⁶⁰ *ibid* 245-47. See also Wenar (n42) 233.

- 1) A claim not to be killed by another.
- 2) A claim that others not endanger one's life.
- 3) A liberty to defend one's life with all necessary force.
- 4) A liberty to preserve one's life by any necessary means.
- 5) A claim to be rescued from the dangers of death.
- 6) A liberty to risk one's life.

One may disagree with the particular details of Wellman's breakdown,⁶¹ but the crucial point is that things called 'rights' are often bundles of Hohfeldian positions. Another example of this is that claims will normally be bundled with an immunity against the claim being extinguished: that is, if X has a duty-to- ϕ owed to Y, then X cannot normally simply extinguish this duty.⁶² Correlatively, Y has both a claim and an immunity over X.

Furthermore, although the 'entitlement-holder' (ie who the entitlements are vested in) must be the same for every position in the bundle, there is no requirement that the 'disadvantage-holder' must likewise remain constant. For example, in item 1 in Wellman's bundle above, the claim not to be killed by another is in fact shorthand for a (very large) set of claims held against other people.⁶³

Understanding the structure of these bundles, and the interactions within them, is important for any model of the structure of rights but will prove particularly pertinent for analysing vital rights.

⁶¹ Consider HRC, General Comment 6, HR1/GEN/1/ (Vol I).

⁶² Matthew Kramer, 'Some Doubts about Alternatives to the Interest Theory of Rights' (2013) 123 *Ethics* 245, 247.

⁶³ See Kramer (n19) 41-42.

4.5 WHICH ENTITLEMENTS ARE RIGHTS?

Although Hohfeld's schema directly engages with the concept of rights, it does not itself determine which Hohfeldian positions should be described as 'rights'. Hohfeld's insight was to realise that the language of rights is commonly used indiscriminately to refer to any of the four Hohfeldian entitlements (liberty, claim, power and immunity) and that this imprecision in usage is the source of much analytical confusion over rights.⁶⁴

Hohfeld sought to overcome this confusion by synonymising rights ("in the strictest sense"⁶⁵) with claims. However, it is equally possible to avoid misunderstanding by acknowledging that there are four types of right, which all operate differently. Hohfeld's identification of 'rights' as claims has received both support⁶⁶ and criticism⁶⁷ in the literature. As would be expected, Hohfeld's definition of a 'right' is narrower than how the term is often used: "the statement that rights are claims is prescriptive for, not descriptive of, usage".⁶⁸ Therefore good reason needs to be found for limiting the notion of a 'right' exclusively to Hohfeldian claims, especially as

⁶⁴ Hohfeld (n1) 30.

⁶⁵ *ibid* 36, 31-32.

⁶⁶ HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175, 179; Hart (n14) 166-68, 185n88; Feinberg (n38) 257; Kramer (n19) 9-14; Matthew Kramer and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 *OJLS* 281, 294ff.

⁶⁷ Wellman (n14) 2-4, 7, 52-53, 66-67; MacCormick (n18) 189, 193-94, 205-206 (see Simmonds (n49) 149); Neil MacCormick 'Children's Rights' in *Legal Right and Social Democracy* (OUP 1984) 154, 161-62; Thomson (n42) 40-60; Raz (n2) 166-75; Dworkin (n9) 171; Cruft (n53) 355-59; Wenar (n42) 236-37; Spector (n7).

⁶⁸ Wenar (n14).

it has already been seen that Hohfeldian positions often come bundled together.

The following section will analyse some potential defining features of rights. It will do this by considering the merit of synonymising rights with claims, and the reasons why other Hohfeldian positions are referred to as rights. This requires two simultaneous balancing acts: between claims and liberties⁶⁹ on one hand, and between legal and moral usage of the term 'right' on the other.

4.5.1 RIGHTS AND DUTIES

Synonymising rights with claims is based on a connection between duties and rights. It endorses and emphasises that an important feature of 'rights' is that they must give rise to duties if they are to count as 'rights'. This necessity of the existence of duties for rights has been designated by Kramer as the "Correlativity Axiom".⁷⁰ The axiom is understandable: if a right is to exist, then someone somewhere surely has to do something (or specifically not do something) about it. That is, someone must have a duty.

Rights give rise to duties because rights exert authorised coercion – they necessarily restrict the behaviour of others.⁷¹ The necessity of coercion arises because rights exist in domains apart from virtue, grace and kindness. Rights do not indicate what would be honourable or benevolent

⁶⁹ See *infra* n74.

⁷⁰ Kramer (n19) 24-49.

⁷¹ Kant (n18) 55-57; Hart (n66) 177, 183; Tom Regan, *The Case for Animal Rights* (Routledge 1988) 271; Simmonds (n49) 135, 176, 180, 203; Nickel (n7) 24-26.

to do, but what must be done.⁷² This means that it must be factually *possible* (though not legally/morally *permissible*) to violate a right, otherwise no coercion has been created. Rights must identify what behaviour they demand, and from whom, in order to count as rights.

Compare the Hohfeldian duty and the Hohfeldian no-claim in this regard. It is clear that X can violate a duty-to- ϕ by simply not ϕ -ing. But the Hohfeldian no-claim cannot be violated in this way: it does not require any action (or indeed any inaction) by the no-claim-holder.⁷³ Only duties can demand particular behaviour from particular actors. Since the correlative of a duty is a claim (and no other Hohfeldian position is logically entailed by a duty), the Correlativity Axiom thus seems to be valid.

However, although it is uncontroversial that (at least legal) Hohfeldian claims are rights, the word 'right' is often used to refer to situations which cannot be parsed as Hohfeldian claims. This happens in (at least) two different ways: through other Hohfeldian entitlements being referred to as 'rights' and through 'right' being used in a looser (often moral) fashion. These will be considered in turn to see if they are valid alternative meanings of a 'right', and what this implies for the Correlativity Axiom.

⁷² *ibid.*

⁷³ §4.5.2.

4.5.2 RIGHTS AND LIBERTIES

It is sometimes the case that liberties are referred to as rights.⁷⁴ For example, people may say that they have a right to walk down a street or a right to bear arms, both of which are in fact liberties. However, because of their very structure, Hohfeldian liberties (even when twinned) cannot themselves be violated. This is because liberties do not make any specific demands of the no-claim-holder. Liberties are discretionary – they allow the liberty-holder to exercise or not exercise their liberty as they wish. But liberties do not themselves restrict the actions of any other entity: “a mere liberty, in and of itself, is too weak to constitute a right ... It is essential to the concept of a right that any right can be violated or infringed”.⁷⁵

For example, Paul’s liberty-to-walk-down-the-street cannot be violated. It does not *itself* prevent Jane from breaking his leg and preventing him doing so. Of course, it is not permissible for Jane to break Paul’s leg, but this is because Paul has a distinguishable claim-right against such injury – ie Jane has a duty not to assault Paul. Importantly, the liberty *itself* does not (and cannot) prohibit assault: Paul’s claim-right exists irrespective of his liberty.

One may think that a no-claim holder must not prevent a liberty-holder from exercising their liberty, but this is not the case. For example,

⁷⁴ As are immunities and powers. However, both of these are less problematic: immunities do create coercion and can be violated since the disability-holder cannot exercise the power they are disabled from exercising. And powers can *create* duties, so they can be understood as a source of coercion.

⁷⁵ Wellman (n14) 3.

someone who is at liberty to register a charity called 'Spark' can be prevented from doing so by someone already having done so. As such, there is no general prohibition against no-claim-holders preventing liberty-holders from exercise their liberty.

An important realisation is that although liberties themselves do not entail duties, liberties are often protected by being bundled with accompanying claims. Hart referred to this as a 'protective perimeter', and noted that liberties are seldom left entirely unprotected:

This is so because at least the cruder forms of interference, such as those involving physical assault or trespass, will be criminal or civil offences or both, and the duties or obligations not to engage in such modes of interference constitute a protective perimeter behind which liberties exist and may be exercised.⁷⁶

However, although these claims (ie the ones correlative to the duties) indubitably protect the liberty, they are merely incidental to the liberty itself. That is, they are rights-in-themselves; they do not exist in order to protect the liberty but do so as a side-effect. If Jane does assault Paul while he happens to be exercising his liberty-to-walk-down-the-street, Jane has violated a right regardless of Paul's liberty. Since the right being violated is distinguishable from the liberty-to-walk-down-the-street, it is both unnecessary and misleading to refer to Paul's liberty as a 'right'. The

⁷⁶ Hart (n14) 171.

same is true of any liberty that is protected merely incidentally by distinguishable claim-rights.

On the other hand, it is possible a protective perimeter to be specifically designed and constructed for the purpose of protecting a particular liberty (or bundle of Hohfeldian positions). Hart noticed that this will be the case regarding particularly important or fundamental rights.⁷⁷ In this case, claims⁷⁸ will be created that ensure that the liberty cannot be interfered with in certain ways. Because of their origins, these claims exist are not incidental, but exist *because of* the liberty in question.⁷⁹ And as claims, they have correlative duties that can be violated, and so adhere to the Correlativity Axiom. In this way, claim-rights can be created in order to secure a liberty, giving meaning to the notion of a liberty-right. For example, in the US the liberty-right to bear arms has received specific constitutional protection, but in the UK no such legal structure exists.

In such cases, it is better to think of these claim-rights as specifically *securing* the liberty, rather than merely existing in a protective perimeter. A specifically secured Hohfeldian liberty (or indeed bundle of liberties), rather than one incidentally benefiting from a protective perimeter, can thus meaningfully be thought of as a right. This latter conception, of specifically securing a bundle of positions with Hohfeldian claims, will be useful in explaining the structure of vital rights.

⁷⁷ *ibid* 172.

⁷⁸ And immunities etc, *supra* n62.

⁷⁹ Hart (n14) 172.

4.5.3 RIGHTS AND IMPORTANCE

The second way in which 'right' is used in a sense looser than meaning a Hohfeldian claim appears most often in moral discourse. Here, the word 'right' is often used to denote that an issue is of a high level of importance,⁸⁰ rather than to refer to a specific Hohfeldian claim.⁸¹ For example, the 'right to education', or the 'right to healthcare' can be used as appeals for the provision of education or healthcare. Deploying the notion of 'rights' in this way is commonly done to stake a belief or to push for reform, rather than to identify specific duties that are owed. In the latter case it may even be precisely the *absence* of a suitable legal duty that motivates the appeal.⁸² Consider for example the debate over prisoners' voting rights in the UK⁸³ or the supposed 'right to die' regarding assisted dying.⁸⁴

The purpose of 'rights-language' here is not to describe a precise moral (or legal) relationship, but to indicate that an issue is morally important. The language of rights captures this importance in a succinct and powerful way.⁸⁵ The power of the language of rights is noted by MacCormick when he points out that there is "a significant difference between asserting that

⁸⁰ §Introduction.

⁸¹ Although moral rights can still invoke normative force through being correlative to moral duties: that is, there is more than one meaning of a moral right.

⁸² §Introduction.

⁸³ See Alexander Horne and Isobel White, 'Prisoners' voting rights (2005 to May 2015)' (2015) House of Commons Briefing Paper SN01764.

⁸⁴ AC Grayling, 'Right to die' (2005) 330 *BMJ* 799.

⁸⁵ §Introduction.

every child ought to be cared for, nurtured, and, if possible, loved, and asserting that every child has a right to care, nurture, and love".⁸⁶ When used in this sense, 'rights' are less concerned with identifying precise duties, and more concerned with demonstrating the urgency of a particular issue.

Furthermore, when used in this sense, a 'right' will often not refer to a singular Hohfeldian position. Instead, it will normally be used as shorthand for a bundle of connected Hohfeldian positions, and potentially also demands (ie 'claims' in a non-Hohfeldian sense) regarding these positions. Of the positions in this bundle, some may be Hohfeldian claims, but some may not. Consider for example Wellman's composition of the 'right to life' above. Kramer likewise identifies this looser shorthand use of the word 'right' regarding the 'right to education':

To say that every child holds an unspecified 'right' to an education, for example, is to say merely that every child's interest in receiving an education ought to enjoy moral or legal protection [and] ... might eventuate in some of the following components, among others: a right not to be excluded or greatly hindered from obtaining an education, a right to be furnished with adequate pedagogical services and materials, a liberty to attend school and engage in lessons regularly, an immunity from being divested of these

⁸⁶ MacCormick (n67) 154, 158-59.

educational rights and liberties, and a power to seek enforcement of these educational rights.⁸⁷

When the word 'right' is used as a shorthand for a bundle of Hohfeldian positions, the positions within the bundle are frequently held *in rem* rather than *in personam*, as seen in both Wellman's and Kramer's examples above.⁸⁸ This is because they detail general entitlements which everyone ought to abide by, rather than specific arrangements between two parties.⁸⁹

One could argue that this looser, sloganistic, sense of 'right' is simply a misuse of precise legal terminology. However, given the clear association between the word 'right' and issues of high moral importance, this would be overly prescriptive, and insufficiently descriptive,⁹⁰ of what rights are. The normative force that comes associated with the use of 'rights-language' is in fact a key feature of rights as a whole, and especially vital rights (which exhibit this normative rhetorical force in a particularly potent way). This feature of rights must therefore not be overlooked.

The Correlativity Axiom thus holds valuable information about strictly legal rights, but it should not supersede the important rhetorical force of the word 'right'. A legal right must entail legal duties, but the word 'right' also

⁸⁷ Kramer (n19) 46-47.

⁸⁸ An *in rem* right can itself be seen as a bundle of rights of identical content but held against numerous entities.

⁸⁹ Consider Hart's differentiation between 'special rights' and 'general rights': Hart (n66)183-88.

⁹⁰ *supra* n68.

has a distinguishable moral function via its rhetorical force. Both these meanings of 'right' are of importance with regards the subject of inquiry of this thesis: the Janus-faced vital rights. A model for their structure can now be detailed.

4.6 A MODEL FOR VITAL RIGHTS

Human rights are specifically both moral and legal rights. They exist as both bundled moral demands (such as the 'right to education') and as legal claim-rights within international law (with states as the correlative duty-bearers). This 'Janus-faced' structure is an important characteristic of human rights which is symbolic of the broader category of vital rights as a whole: that they are both moral and legal rights.⁹¹

The structure of vital rights is therefore somewhat complex: they both adhere to the Correlativity Axiom (as legal rights) and bypass its rigidity (as moral rights). This can be seen through considering the paradigmatic example of vital rights: those rights found in IHRL. On the one hand, human rights function as indicators of matters of moral importance, they "traditionally have been thought of as moral rights of the highest order".⁹² They are bundles of Hohfeldian positions which can be encapsulated by a

⁹¹ Note that the shorthand/claim distinction is distinct from the moral/legal distinction.

⁹² Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell 2013) 11.

shorthand expression taking the form of a moral right (eg the 'right to education'),⁹³ rather than a precise Hohfeldian claim.

These bundles represent the core of the right, enlisting its key content. They can contain a mixture of Hohfeldian claims, liberties, immunities and powers, directed at various entities (although the entitlement holder must remain constant so as to preserve the coherence of the right: rights are vested in right-holders). As already noted, these positions will usually be held *in rem* due to their status as general moral principles rather than specific legal arrangements. These positions being held *in rem* further complicates the bundle since a single Hohfeldian position held *in rem* can itself be seen as a bundle of positions, each with identical content and holder, but held against different entities.⁹⁴

On the other hand, vital rights are legal rights. The necessary legal status of vital rights is ensured through the creation of legal claim-rights *specifically in order to secure* the content of the core bundle. Unlike a purely incidental protective perimeter, the creation of these legal claim-rights is predicated on the existence and the importance of the bundled moral right. The existence of these claim-rights is not secondary or optional for vital rights, but rather axiomatic to their nature. In this way, vital rights adhere to the Correlativity Axiom.

⁹³ Within IHRL, the purpose of general comments is to pick apart these bundles: they "set out ... understanding of the treaty language" (Christine Chinkin, 'Sources' in Moeckli et al (n4) 80).

⁹⁴ *supra* n88.

For human rights, these legal claim-rights primarily⁹⁵ take the form of state duties under international law. These duties effectively secure the bundle in a number of ways as can be seen through the lens of the 'respect, protect, fulfil'⁹⁶ typology. Firstly, the state must *respect* human rights by not itself violating any claims in the bundle. These duties arise because the state itself will normally be one of the duty-bearers regarding claims⁹⁷ in the bundle. For example, states must not conduct torture or any of the other acts prohibited by Article 7 ICCPR.

But the state also has a further supervisory role as the guardian of these important moral entitlements, hence "the traditional role of the State as the guarantor [as well as] the prime violator of human rights".⁹⁸ The role of the state in *securing* human rights is thus twofold: as a matter of conduct, the state can be perpetrator or protectorate; but as a matter of law, it must be the latter and never the former. In order to effectively *secure* human rights, a state must also *protect* its citizens' rights, and provide the conditions in which human rights can be *fulfilled*. As seen in Chapter Two, duties to *protect* and *fulfil* human rights require states to exercise control over other actors within their jurisdiction through the adoption of "legislative, judicial, administrative, educative and other

⁹⁵ But not exclusively: non-state actors do hold duties that secure human rights. See §2.5.

⁹⁶ §2.5.

⁹⁷ Or disability-holder regarding immunities etc.

⁹⁸ Heli Askola, 'Globalization and Human Rights' in Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan (eds), *An Introduction to Human Rights Law* (Brill 2010) 111. See also Frédéric Mégret, 'Nature of Obligations' in Moeckli (n4) 102-104.

appropriate measures”.⁹⁹ This will result in the creation of further legal duties on non-state actors,¹⁰⁰ which are normally correlative with claims held by the right-holder.¹⁰¹ The protective perimeter *securing* human rights is diverse and multifaceted in terms of both actors and content.

For example, regarding the right to life, the state “should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces”,¹⁰² and regarding freedom from torture, the state must “afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”.¹⁰³

Many state duties will also contribute towards securing more than one human right.¹⁰⁴ For example, ensuring compliance with toxic waste legislation is necessary to protect human rights to health, to life, and to a healthy environment. Rather than challenging the requirement that these state duties specifically exist in order to protect a particular core moral

⁹⁹ HRC, General Comment 31 [7]; §2.5

¹⁰⁰ *ibid.*

¹⁰¹ Note that the value of vesting a human right to a healthy environment in peoples can be seen here: the claim-holder of environmental legislation is often the public in general.

¹⁰² HRC, General Comment 6 [3].

¹⁰³ HRC, General Comment 20 [2].

¹⁰⁴ See HRC, General Comment 12 [2].

right, this overlapping nature of state duties recalls and reflects the “indivisible, interdependent and interrelated”¹⁰⁵ nature of human rights.

Returning to an issue from Part I, the difference between defining a ‘healthy environment’, and determining the state duties resulting from a human right to a healthy environment can now be seen. The definition of a ‘healthy environment’ belongs in the core bundle: what is the moral entitlement to, and what ‘primary reference points’ does it contain? The claim-rights securing this entitlement will then reflect this. As seen in *Kyrtatos*, whether or not a right is “specifically designed to provide general protection of the environment as such”¹⁰⁶ necessarily affects the content of state duties. For example, the creation of a specific and broadly defined human right to a healthy environment would create additional state duties regarding the protection of biodiversity and general protection of the environment as such.

4.7 CONCLUSION

An analytical model for both rights and vital rights has been detailed. In doing this, the forms of a number of different types of right have been seen. In a strict legal sense, the word ‘right’ can be understood to refer only to Hohfeldian claims, since only claims necessarily carry a coercive element (through being correlative to duties). However, the word ‘right’ has other valid meanings, such as a liberty that has been specifically

¹⁰⁵ World Conference on Human Rights, ‘Vienna Declaration and Programme of Action’ A/CONF.157/23 (25 June 1993) Article 5.

¹⁰⁶ *Kyrtatos v Greece* (2005) 40 EHRR 16 [52].

secured by the creation of additional claim-rights; or as an indicator of an issue of high moral importance. The Correlativity Axiom (that rights entail duties) contains important information about rights, but does not always hold true. This is because there is more than one meaning of the word 'right', although this does not mean that the word 'right' is without meaning. A right either establishes a legal duty in another, or acts as an indicator of high moral importance (or both as in vital rights). If it does neither, then it cannot be a right.

The Hohfeldian schema also facilitates understanding of what it means for a right to be vested in a right-holder. All Hohfeldian relations stipulate the existence of two specific position-holders: Hohfeldian relations do not simply exist in an abstract or untethered fashion. It is the entitlement-holder who is the right-holder. More particularly, for rights that adhere to the Correlativity Axiom (which includes vital rights), it is the claim-holder that is the right-holder. Because claims are correlative with duties, duties are directed at a claim-holder. The Hohfeldian schema thus clarifies an observation first made in the Introduction: that, in modern legal systems, duties are owed to a right-holder, rather than to God or to 'the Law'. It is for this reason that it is important to consider the nature of the subject of vital rights.

It was also first seen in the Introduction that the tool of a 'right' is of great importance to both morality and law. That is, 'moral rights' signpost issues of high moral importance, and 'legal rights' are correlative to an essential engine for law: the duty. This Chapter has teased out the moral and legal dimensions of vital rights through exploring their structure. This has been

necessary since not only does the word 'right' have many meanings, but even the vital rights carved out for investigation in this thesis have more than one character. This Chapter has shown that vital rights are *both* general moral demands *and* correlative to legal duties. As moral demands, they are a bundle of many Hohfeldian entitlements, and as legal tools they are claim-rights that secure these entitlements. These claim-rights are not merely incidentally protective, but have been established specifically in order to secure the entitlements.

As an example of the structure of vital rights, human rights recognised by international law are moral demands (justified by appeals to human dignity), which have been secured by claim-rights of people(s) held against states.¹⁰⁷ As discussed in Part I, these claim-rights create duties for states, but also have secondary effects, creating duties held by non-state actors, including other individuals.¹⁰⁸ This is because the state is the guarantor of human rights,¹⁰⁹ and in order to fulfil this role effectively, the state must both restrict its own activities and those of others under its control.

Although the structure of (vital) rights is complicated, Hohfeld's schema provides clarity. There is no single precise and exact way to definitively state what is meant by (vital) rights because there is more than one perspective from which to view them. They are both strict legal claim-

¹⁰⁷ This can be seen in the process that established human rights at the international level. First, the moral demands were enunciated in the UDHR. These were then specifically *secured* through the two Covenants.

¹⁰⁸ §2.5.

¹⁰⁹ §1.3.2(a).

rights, and they are not. Sumner's analogy of different kinds of rights as different species demonstrates how the many different kinds of right are related, but separate.¹¹⁰ Species do merge into each other, but it is also possible to draw meaningful (although perhaps ultimately arbitrary) boundaries around them.

¹¹⁰ Sumner (n2) 17-18, 93.

CHAPTER FIVE

WHAT RIGHTS DO

5.1 INTRODUCTION

This chapter will introduce the two main schools of thought that aim to describe what rights *do* rather than what they *are* – these are Interest Theory (IT) and Will Theory (WT). This is necessary in order to see whether rights can be vested in nonhumans, and if so, what function they can serve. Analysing IT and WT will allow for a better understanding of rights' function to be gained.

In Chapter Four it was demonstrated that there are a number of different varieties (or 'species') of rights. Rights often come in bundled packages and can be viewed from a number of perspectives. Chapter Five will look at what binds together this assortment of rights through considering what shared function rights serve. Both IT and WT offer plausible perspectives on what the function of a right is. IT states that rights protect interests, whereas WT analyses rights as protecting choices.¹ Here, it will be shown that WT is less suitable a theory to describe rights than IT since it is only

¹ For a history of the roots of the theories, see Nigel Simmonds, 'Rights at the Cutting Edge' in Mathew Kramer, N Simmonds and Hillel Steiner, *Debate Over Rights* (OUP 1998).

applicable for a certain subset of rights (which is distinct from the subset of vital rights) whereas IT can explain the entire body of rights.

As Leif Wenar points out, the disagreement between IT and WT is actually twofold “as it will be controversial not only which moral or jurisprudential theory is correct but also which rights are entailed by any such theory within a given set of circumstances”.² Neither IT nor WT is able to provide an exhaustive catalogue (or a rule for generating such a catalogue) of what is and what is not a right since they simply describe what it is that rights do. It is the first concern – regarding which jurisprudential theory is correct – that is to be considered now. This will be done through a foray into the relative advantages and disadvantages of the two theories.

There are two ways to determine how successful each theory is at describing what rights do.³ Firstly, through comparing what are (and are not) generally accepted to be rights with the function proposed by each theory. This is here labelled the *accommodationist* approach. Secondly, through a defence of why the label ‘right’ ought to be attached to a particular legal arrangement or function. This is labelled the *revisionary* approach. This chapter is mainly concerned with assessing the analytical merits of both IT and WT: this is primarily (but not exclusively) linked to the accommodationist approach since it tests how well the theories

² Leif Wenar, ‘The Nature of the Claim’ in Matthew Kramer (ed), *The Legacy of HLA Hart* (OUP 2008) 252.

³ Although the two cannot be completely separated: LW Sumner, *The Moral Foundation of Rights* (Clarendon 1987) 50; Hillel Steiner, ‘Working Rights’ in Kramer et al (n1) 298; Neil MacCormick, ‘Rights in Legislation’ in P Hacker and Joseph Raz (eds), *Law, Morality and Society* (Clarendon 1977) 196-97.

describe existing rights. However, at the end of the chapter, the revisionary approach will be engaged with more directly in assessing the relationship between autonomy, dignity and rights. The chapter will reject any revisionary argument for WT since rights should not only protect autonomy.

5.2 WILL THEORY

The prominent characteristic of Will Theory (WT) is revealed by its alternative name: Choice Theory. WT focuses on the notion of choice and preserves it as intrinsic to both the meaning and the working of any right. That is, a right is construed as concerned with protecting a choice of the right-holder. WT is conceptually tied both to Hart's idea of the "small-scale sovereign"⁴ and Nozick's "area in moral space around an individual".⁵ WT has thus been summarised by proponent-in-chief HLA Hart as finding that for all rights "one who has a right has a choice respected by the law";⁶ and by one of its major detractors, Matthew Kramer, as entailing that "every right is a vehicle for some aspect of an individual's self-determination or initiative".⁷

The motivation for WT is in preserving the prestige first afforded to autonomy and rationality by Kantian notions of justice.⁸ Early antecedents

⁴ HLA Hart 'Legal Rights' in *Essays on Bentham* (Clarendon 1982) 183.

⁵ Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1974) 57.

⁶ Hart (n4) 188-89.

⁷ Matthew Kramer, 'Rights Without Trimmings' in Kramer et al (n1) 62.

⁸ Horacio Spector, 'Value Pluralism and the Two Concepts of Rights' (2009) 46 *San Diego L Rev* 819, 829-31; §1.2-1.3.

of WT saw rights as things that could be exercised by the right-holder and having three inexorable and mutually entailing characteristics: (i) they indicated what behaviour was permissible; (ii) they authorised coercion in others; and (iii) they were inviolable.⁹ However, Hohfeld's schema broke this apart as it demonstrated that these features are not connected by logical necessity: permissible behaviour is governed by liberties; authorisation by powers; coercion by duties; and inviolability by immunities. Thus the permissibility of rights does not invoke coercion or inviolability, since it is liberties that govern permissibility and these are not correlative with (Hohfeldian) duties or disabilities.¹⁰ Significantly too, the idea of 'exercising' a right is challenged by Hohfeld's schema since one cannot 'exercise' a claim-right: a claim-right is something that simply exists.¹¹ Hohfeld's schema therefore questions the notion of rights as inviolable domains of freedom surrounding and to be exercised by the right-holder.

HLA Hart overcame this dilemma by analysing a WT-right (ie a right as defined by WT) to be made up of a Hohfeldian claim-and-power bundle¹² both of which have the same position-holders. The merit to Hart's analytical description is that it provides for both coercion (through the claim) and permissibility (through the discretionary exercise of the power):

⁹ Simmonds (n1) 134-37, 178-80.

¹⁰ Nigel Simmonds, 'The Analytical Foundations of Justice' (1995) 54 *CLJ* 306, 321.

¹¹ §4.3.

¹² Hart (n4). See also Jeremy Waldron (ed), *Theories of Rights* (OUP 1984) 9.

“to possess a right, on this view, is to have control over a duty incumbent on someone else”.¹³

The content of the right (as found in the claim-right) and the ability to enforce this claim (the power) are held together by vesting both in the same entity. By providing the right-holder with both a claim and the power to control it, choice over the right’s deployment has been vested in the right-holder, who retains discretion over claims owed to them. The right-holder in effect becomes a ‘small-scale sovereign’ in some domain concerning behaviour owed to them.¹⁴

Hart’s other key insight was to realise that the power of a WT-right itself comes as a bundle.¹⁵ Control over a right is not a simple on/off switch – rather there are a number of switches that can waive or ensure enforcement at various stages. Hart distinguished three elements to the power:

- (i) the right-holder may waive ... the duty or leave it in existence
- (ii) after breach or threatened breach of a duty he may leave it ‘unenforced’ or may ‘enforce’ it ...
- (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise.¹⁶

¹³ Simmonds (n1) 215, 200.

¹⁴ Hart (n4) 183, 188-89.

¹⁵ *ibid* 183-84.

¹⁶ *ibid*.

Power over a claim can therefore be split into three phases. Control over these three phases can, at least in theory, be held by three different power-holders.¹⁷ Dividing the power neither necessarily strengthens nor weakens a right in itself.¹⁸ Power being split (or delegated¹⁹) between more than one person does in fact happen in reality. This is particularly the case within criminal law, where the latter two stages of power are often controlled by state officials rather than the claim-holder (ie the victim).²⁰

To summarise, a WT-right vests both a Hohfeldian claim and some power to ensure that this claim is effective in the right-holder. However, there are two problems with WT that will be examined here: firstly by looking at inalienable (or powerless) rights and then by considering the potential pool of WT right-holders.

5.3 PROBLEMS WITH WILL THEORY

5.3.1 POWERLESS RIGHTS

WT insists that the right-holder must have some control over their right. Contrariwise, an important characteristic often cited of some rights (eg

¹⁷ See Steiner (n3) 240ff; Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 *OJLS* 257, 259. For a critique of the separation of WT powers, see Matthew Kramer, 'Some Doubts about Alternatives to the Interest Theory of Rights' (2013) 123 *Ethics* 245, 248-58.

¹⁸ Simmonds (n1) 230; Sreenivasan (n17) 260-61.

¹⁹ Steiner (n3) 246-47.

²⁰ *ibid* 248-55.

human rights) is their inalienability.²¹ Whether these two aspects can be synchronous warrants investigation. Their interplay can be analysed in the light of Hart's identification of the three stages of power over a claim. The purpose behind this analysis is to examine how much power right-holders actually have over some rights.

As already noted, the latter two Hartian stages of power for criminal law rights are often invested in the state. The power to press charges based on a criminal offence is not usually resident in the hands of the victim (ie the right-holder). There are a number of options to deal with this situation for WT. The first is to state, as Steiner does, that it is the power-holder who is the true right-holder, and that they need not be the same person as the claim-holder.²² Steiner is thus content with the following solution:

The inference to be drawn is *not* that WT rights are absent from criminal and constitutional law. On the contrary, they are very much present in it and are to be found fairly high up in the hierarchy of state officials.²³

The separation breaks with Hart, who believed that:

The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that

²¹ §3.2.2; Spector (n8) 825-26. cf Michael Bayles, *Hart's Legal Philosophy* (Kluwer 1992) 149.

²² Steiner (n3) 251-55.

²³ *ibid* 255.

duty the individual who has the right is a small-scale sovereign *to whom the duty is owed*.²⁴

Steiner's modification to Hart's WT is notable and creates a peculiar state of affairs whereby you are not the 'right-holder' of some duties that are owed to you. It also erases a significant asset of WT: the clarity it provides in understanding the *directionality* of a right (that it is vested in a specific entity).²⁵ This modification will therefore not be followed. The WT deployed here is one that insists on the right-holder being owed the duty as well as holding some measure of control over it.

A second possible solution to the problem of criminal law rights is to relinquish how much control the right-holder must have. Rather than insisting that all three Hartian levels of power must be held by the right-holder, perhaps it is only the first that is needed.

However, this also fails as a general model for rights because there are rights that do not come with this power: in the case of inalienable rights, it is not possible for the right-holder to waive the associated duties. For example, one cannot unilaterally 'opt out' of the protection offered by international human rights law (IHRL) – it is inalienable. In the case of human rights however, some control does exist since individuals often have the power to bring complaints concerning the violation of their human rights.

²⁴ Hart (n4) 183, emphasis added. cf Steiner (n3) 250ff.

²⁵ §4.3; Sreenivasan (n17) 259.

The solution may therefore be that some (but not necessarily all) of Hart's three levels of power must be present for a right to exist. However, the spectre of a right without *any* control invested in the right-holder still looms over WT: if such rights do exist (or if they merely *could* exist), then WT cannot claim to describe all rights. As will be illustrated below, such rights can be found. These are rights that are both inalienable (thus lacking in the first stage of Hartian power) and without any means of enforcement lying in the hands of the right-holder.

Neil MacCormick's criticism of Hart's WT draws attention to this shortcoming.²⁶ A number of rights do not bestow any amount of small-scale sovereignty (ie any of Hart's three powers) on the right-holder. One example of this is the right not to be deprived of bodily liberty. This right is inalienable: nobody can be enslaved by another, even with consent²⁷ (in fact the duties correlative to many criminal law claim-rights cannot be waived by the right-holder²⁸). In addition to this, the latter two Hartian powers are missing since control over the enforcement of such rights is vested in the state.²⁹

²⁶ MacCormick (n3) 195-99.

²⁷ Consider Armin Meiwes, who was convicted of murder despite his victim's willingness to be murdered and eaten: BGH 2 StR 310/04 – Urteil vom 22 April 2005 (LG Kassel). Consider also *R v Brown* [1994] 1 AC 212; and *Wackenheim v France* (2002) HRC Communication No 854/1999, CCPR/C/75/D/854/1999.

²⁸ The merit of this arrangement may be contentious, but the point is that currently some rights *are* inalienable: MacCormick (n3); AV Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (first published 1914, Liberty Fund Inc 2008) 217-20.

²⁹ The applicability of the first power for private rights has also been questioned. See Kramer (n17) 254-58.

There are also examples within IHRL of rights where the right-holder has no power, since complaint mechanisms are not a necessary component of IHRL treaties.³⁰ There are therefore a considerable number of rights that do not fit within the WT model.

The final option available to WT is to conclude in a *revisionary* fashion that “legal rights are not conferred by criminal law”.³¹ And a parallel observation would have to be made for other varieties of powerless rights. That is, WT can only abide through arguing that certain existing ‘rights’ should not be described as rights after all. MacCormick sums up his contentions to such an approach by asking:

[Are we] really to conclude that the language of the practical lawyer does such violence to common understanding as to extrude such protections of human interests, when arguably at their most efficacious, from the category which it is interesting or useful to describe as ‘rights’?³²

The concept of rights should not be revised to exclude criminal law rights to (eg) bodily liberty and human rights that do not (yet) have complaints mechanisms. These are *bona fide* examples of rights that any theory of rights must be able to explain. Perhaps even more damaging to WT is that

³⁰ eg the ICESCR has no individual complaints mechanism – this was not established until the 2008 Optional Protocol UNGA A/RES/63/117 (10 December 2008).

³¹ Simmonds (n1) 230.

³² MacCormick (n3) 196. See also Kramer (n17) 262.

it does not just fail to tally with currently existing rights, but it also prevents inalienability ever forming an aspect of any right: “it is worth emphasizing that the crucial question here concerns the *possibility*, rather than the fact, of inalienable claim-rights. WT makes inalienable claim-rights incoherent in principle”.³³

The impossibility of inalienable WT-rights also has the knock-on effect of placing a surreptitious limitation on WT right-holders. This restriction is WT’s most serious shortcoming of both an accommodationist and revisionary nature from the perspective of this thesis.

5.3.2 RIGHT-HOLDER RESTRICTION

The second challenge to WT explored in this thesis is its underpopulated pool of right-holders. The issue arises since WT indicates that it is only possible for X to have a right if X can be a power-holder. However, there is an ‘entry policy’ to possessing a power: executing alterations to a system of norms requires certain capacities such as the abilities to design and subsequently communicate the change.³⁴ WT therefore imposes analytical constraints on who can be a right-holder in the first place.

It is reasonable for any rule-system to require certain capabilities of entities before permitting them to possess powers (and so qualify as a potential WT right-holder). A wielder of power must be able to understand the nature, purpose and procedural aspects of said power, and must be

³³ Sreenivasan (n17) 260.

³⁴ See Hohfeld’s requirement of ‘volitional control’ (Wesley Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *The Yale Law Journal* 16, 51); Steiner (n3) 259, 274ff.

able to factually deploy the power. Without these two aspects the existence of a power is rendered meaningless, or arbitrary at best.³⁵

Potential power-holders must be informed decision-makers.³⁶

Examples of entities that are probably not informed decision-makers include infants, animals, comatose adult humans and ships. But these entities are frequently said to have rights.³⁷ There are, therefore, rights where the right-holder has no powers whatsoever, and so the right-holder has none of the Hartian powers related to the enforcement of a claim-right.

One could disagree that these are correct invocations of rights. For example, giving rights to children could be dismissed as a mere normative preference.³⁸ This would be a *revisionary* argument. To an extent it is true that vesting rights in children is simply a preference: there is no *analytical* reason why WT's inability to bestow rights on children is a defect of WT, and an argument could be made that rights should only be vested in informed decision-makers. However, this argument cannot be made through analytical analysis: revising what the current definition of a 'right' is requires an argument that is both *normative* and *revisionary*.

³⁵ cf Visa Kurki, 'Why things can hold rights: reconceptualising the legal person' (2015) 7 *University of Cambridge Legal Studies Research Paper Series* 18-19.

³⁶ Being 'informable' alone is not enough; power-holders must also be informed. See Matthew Kramer, 'Getting Rights Right' in Matthew Kramer (ed), *Rights, Wrongs and Responsibilities* (Palgrave 2001) 28.

³⁷ Consider CRC 1577 UNTS 3; CRPD (2006) 2515 UNTS 3; United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3 Article 23; *Bumper Development Corp v Commissioner of Police* [1991] 1 WLR 74.

³⁸ See Simmonds (n1) 226n138.

To deny rights to a considerable convocation of entities through an adherence to WT runs a treacherous path that disguises normative preferences as analytical observations. As interesting as rights are from a purely analytical standpoint, they cannot be divorced in entirety and in perpetuity from their peremptory, or trumping,³⁹ nature:

It is morally important that we should recognize the moral importance and the significance of moral rights... There is a significant difference between asserting that every child ought to be cared for, nurtured, and, if possible, loved, and asserting that every child has a right to care, nurture, and love.⁴⁰

WT itself cannot explain why only informed decision-makers can have rights. There is nothing in the meaning of rights per se that attaches them to informed decision-makers, and there is a considerable accommodationist problem with asserting so.

WT's insistence that "every right is a vehicle for some aspect of an individual's self-determination or initiative"⁴¹ deflates its universal applicability. It restricts rights to too narrow a domain by default rather than via an openly honest policy choice. Important normative arguments are disguised as mere terminological whims. It may turn out that this price of WT is worth paying, accepting that some inalienable rights are actually

³⁹ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) xi.

⁴⁰ Neil MacCormick 'Children's Rights' in *Legal Right and Social Democracy* (OUP 1984) 154, 158, 159.

⁴¹ Kramer (n7) 62, emphasis added.

rights held by state officials and that children (and other such creatures) cannot have rights. However, this would require a revisionary normative argument, the merits of which will be considered more closely in the final section of this chapter.

5.3.3 SUMMARY

The two challenges to WT demonstrate how it presents a conception of rights that is limited to a certain subset of rights. That is, WT provides an excellent way to understand and analyse some rights (particularly in private law⁴²), but it is unable to fully explain the whole range of rights. WT thus struggles to meet the *accommodationist test*. This restrictiveness is particularly damaging since it results in a situation whereby

[a]ccording to WT, the firmest protections of our truly *vital* interests do not amount to rights, whereas the less formidable protections of relatively inconsequential interests do amount to rights.⁴³

5.4 INTEREST THEORY

At the other end of the often polarised⁴⁴ debate surrounding the nature of rights lies IT. Originating from Bentham's account of duties,⁴⁵ IT has since

⁴² Although it has problems here too. Kramer (n17) 248-58.

⁴³ Kramer (n7) 73, emphasis added.

⁴⁴ For reconciliatory attempts, see Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 *L And Phil* 347; Sreenivasan (n17); Siegfried van Duffel, 'The Nature of Rights Debate Rests on a Mistake' (2012) 93 *Pacific Philosophical Quarterly* 104.

⁴⁵ Jeremy Bentham, *The Works of Jeremy Bentham* (11 vols, John Bowring (ed), William Tait 1843) iii, 159; Sumner (n3) 40n31.

been modified and/or annexed by David Lyons,⁴⁶ Neil MacCormick,⁴⁷ Matthew Kramer⁴⁸ and Joseph Raz.⁴⁹ The key tenet of IT is that a right protects an interest of the right-holder. For example, according to IT, the discussion in Part I over the definition of a 'healthy environment' was ultimately concerned with what interest is protected by a human right to environment.⁵⁰ IT is markedly different from WT as it neither postulates a particular Hohfeldian structure for a right nor is it as clear-cut as to what is and is not a right. The unifying factor of all rights according to IT is simply that every right must correspond to some interest of the right-holder.

It is worth noting at the outset what is meant by an 'interest'. Being interested in something is emphatically not the same as having an interest in something.⁵¹ This is an important distinction and it is the latter (having an interest) which is meant here. Regular exercise and a nutritious diet are interests of mine even if they consistently bore me. An interest is something that is, all things considered, beneficial for the interested party.

⁴⁶ David Lyons, 'Rights, Claimants, and Beneficiaries' (1969) 6 *American Philosophy Quarterly* 173.

⁴⁷ MacCormick (n3); MacCormick (n40).

⁴⁸ Kramer (n7).

⁴⁹ Joseph Raz, 'Legal Rights' (1984) 4 *OJLS* 1 (LR); Joseph Raz, *The Morality of Freedom* (OUP 1986) 165-92 (MoF). Not all these authors perceive Hohfeld's analysis as a useful backbone for rights, but their thoughts on IT retain at least some relevance despite the fact that Hohfeld's schema will be retained here.

⁵⁰ §2.3.

⁵¹ Tom Regan, *The Case for Animal Rights* (Routledge 1988) 87-88; Mariachiara Tallacchini, 'Human Right to the Environment or Rights of Nature?' (1997) 67 *Archiv fur Recht und Sozial Philosophie* 125; Matthew Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14 *Canadian Journal of Law and Jurisprudence* 29, 33. cf Timothy Macklem and John Gardner, 'Value, Interest, and Well-Being' (2006) 18 *Utilitas* 352.

Interest Theory is less decisive than WT since the latter states that 'when an arrangement has property W, then it is a right' whereas IT operates in the opposite direction: 'when an arrangement is a right, then it must have property I'.

One justifies a statement that a person has a right by pointing to an interest of his and to reasons why it is to be taken seriously... One cannot specify in the abstract what importance those reasons must assign to the interest except circularly by saying 'sufficient to justify the conclusion that that person has a right'.⁵²

An essential caveat must be made for those wishing to dismiss IT at an early stage: it is not the case that IT must ascribe a right to *every* interest. IT states that rights protect interests, not that all interests are protected by rights. Differentiating between those interests that merit protection by rights and those that do not requires value judgment.⁵³ However, this is not the present concern, which is determining the analytical interplay between rights and interests.

Generally speaking, IT is more positivistic⁵⁴ than WT in its outlook. WT seeks to provide informed decision-makers with control over some domain close to them, but is not concerned with how this control is exercised. On

⁵² Raz (LR n48) 5n10.

⁵³ §6.5; §8.2.

⁵⁴ That is, it seeks to create a more determinate state of affairs than WT can hope to do. Simmonds (n1) 196-98. WT on the other hand emphasises the systematic character of law. Simmonds (n1) 134-35.

the other hand, IT implies that there are some particularly important interests that warrant the protection (or perhaps imposition) of rights. These differences in the thrust of the two theories demonstrate how an entirely analytical approach to rights is difficult. Those more politically aligned to libertarianism will be tempted by WT; whereas IT may be more enticing for egalitarians.⁵⁵

Interest Theory has been criticised as being paternalistic for removing the autonomy of informed decision-makers to decide how best to manage their own existence.⁵⁶ This apparent demotion of the importance of autonomy is not actually a necessary feature of IT. It is possible for IT to accept that autonomy is an important interest of informed decision-makers and to protect it via rights that take the form of WT-rights. These can comfortably sit alongside other formulations of IT-rights.

5.5 PROBLEMS WITH INTEREST THEORY

The main arguments against IT are of an opposite fashion to those against WT. Where WT explains too few rights, it can be claimed that IT ascribes the label 'right' too indiscriminately. The first line of examination concerns whether all rights do actually protect an interest.

⁵⁵ See Spector (n8).

⁵⁶ Simmonds (n1) 164; Dicey (n28) 217-20.

5.5.1 UNINTERESTING RIGHTS

The first challenge to IT is the possibility of a right for which no interest can be identified.⁵⁷ The most straightforward way to see this possibility is through inheritance rights. For example, my mother is the owner of an angel ornament, which my sisters and I all agree is hideous. None of my generation has any interest in the ornament, yet one of us may one day gain a right to it were it to be left to us in a will. This appears to jar with IT: none of us have any interest in possession of the angel, we do not stand to benefit anything from ownership of it (it is not worth any money and would be a nuisance to dispose of), and it does nothing for our overall welfare. It may appear that a right without an interest has been identified.

However, this is not as problematic for IT as it first seems. There are two possible routes to take to demonstrate that such a right does not defeat IT. Firstly, through the identification of an interest of the right-holder that is being protected. Secondly, through a minor adjustment to IT. Within the first route, at least two such interests can be found: my interest in having my mother's wishes respected and my interest in administering my own property.⁵⁸

The former interest is straightforward to see,⁵⁹ and provides a glimpse of the fact that interests often exist between and amongst people.⁶⁰ The

⁵⁷ Kramer (n7) 93-97; MacCormick (n3) 202; Cruft (n44) 372ff.

⁵⁸ Another possibility is the interest in being able to determine how my mother's property is disposed of.

⁵⁹ Raz (MoF n49) 175-76; Sreenivasan (n17) 264; Kramer (n7) 79.

⁶⁰ §5.5.2; §9.2-9.4.

latter interest is a demonstration of how IT can also protect choices. In the present example, I may not be enamoured to own my mother's angel but I would be more perturbed if the state ruled on my behalf and extinguished my right to it. There may be plenty of things we own which we have no interest in owning, but this is a small price to pay compared to relinquishing control over how to administer our own property. There is a clear interest in retaining autonomy over such matters. The law may sometimes confer burdens on us where it usually protects us, but better this compromise than losing the right to decide: 'too much' autonomy is at times preferential.

If unsatisfied by this argument, then uninteresting rights can still be accounted for via a minor adjustment to IT. This is to say that rights protect an *assumed* interest of the right-holder, meaning that "from the fact that a right is *normally* beneficial ... we should not conclude that it is *invariably* so."⁶¹ The need for this adjustment arises because of failures which occur when generalisations or categorisations are made.⁶² In the inheritance example my right is protecting an interest in owning the ornament, which is assumed to exist because I have a general interest in owning property. The reasoning is as follows:

X has a general interest in T

t is an instance of T

∴ X has an interest in t

⁶¹ Kramer (n7) 93. See also Paola Cavalieri, *The Animal Question* (OUP 2001) 74.

⁶² Although such categorisations are necessary for legal systems: §9.5.

But X may have a general interest in T without having an interest in every possible t which is an instance of T. Uninteresting rights can also arise through a slightly different failure in categorisation: when decision-making over individuals' lives has been transferred to the state. For example, a person suffering from a terminal illness who wishes to end their own life and a masochist who delights in being tortured are examples of right-holders who have no interest in their right to life and freedom from torture respectively. These are arguably a consequence of too *little* autonomy being given to rights-holders, rather than too much. There is also a subtle interplay between having an interest and taking an interest here: arguably it is in the masochist's best interest to not be tortured despite their denial of the existence of said interest.

The difference here is that rather than one individual's general right generating an uninteresting derivative right for them;⁶³ a right bestowed upon an entire class of entities (because such entities usually have a particular interest in living/not being tortured) has come up against a niche case. That is, the existence of such rights is based on an argument along the following lines:

X belongs to class C

All things in class C have an interest in T

∴ X has an interest in T

⁶³ Raz (MoF n48)168-70; HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175, 187.

But, as demonstrated by masochism and euthanasia, this is not always true. The reasoning in both cases is robust and a decent approximation for a functioning rule-system to adhere to. But both can produce errors. The root of these errors lies in the middle line of reasoning: assuming that a general interest in T must carry over to every instance of t, or that everything of a certain class has the same interests. Neither of these are necessarily true. In both cases the purported interest the right protects can be identified but it just so happens that the interest does not exist. The right is therefore protecting an assumed interest.

WT's structure may allow for these uninteresting rights to be waived, but there are certain rights that should not be susceptible to waiver (some rights are inalienable). No suggestion that a child or animal seems to enjoy being subjected to physical pain can warrant torturing them and so exceptions should not be made. IT implies that entities who cannot engage in legal discourse must have their interests best-guessed according to the sort of reasoning outlined above. Categorisation may occasionally result in failure (and uninteresting rights), but this is potentially a price worth paying.

In any case, the two versions of categorisation-failure for uninteresting rights can arise through opposite approaches to the protection of autonomy. The balancing act between liberty and order is a complex one⁶⁴

⁶⁴ "Liberty is not the daughter, but the mother of order" Pierre-Joseph Proudhon, *Solution of the Social Problem* (1849).

and as long as the universe continues to produce uniqueness, categorisations will always experience failure. To summarise:

Interest Theorists do not submit that every entitlement classifiable as a right is invariably promotive of the interests of someone who holds it. Those theorists' basic test for right-holding inquires about entitlements that are generally rather than always beneficial for their holders.⁶⁵

Thus IT may have to be adjusted slightly to allow for these fringe cases. Rather than boldly proclaiming that every right protects an interest of the right-holder, it may be wiser to declare that a right attempts to protect an interest, or that collections of rights protect categories of interests. That an IT-right attempts to protect an interest (which may or may not exist) suggests that an IT-right may also protect interests that it does not intend to, and this is the next problem to be examined.

5.5.2 CASCADING INTERESTS

Interest Theory may supply too many rights since it is less strict than WT about their function. Since numerous entities can benefit from any one action in an indirect, cascading fashion, it may appear that IT must ascribe numerous rights too. This is emphatically not the case. IT states that every right protects an interest, not that every interest is protected by a right. The possibility of cascading rights does however mean that IT needs to find

⁶⁵ Matthew Kramer and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 *OJLS* 281, 292.

a way to determine precisely whose interests are relevant to the performance of a given duty.

For example, suppose that Sofia is owed a large sum of money by a bank, a significant portion of which she intends to donate to various charitable organisations. Clearly it is in Sofia's interest that the bank pay her the money; but it is also in the interest of the various organisations Sofia donates to, as well as the staff and service users of these organisations, that the bank honour its debt. With so many interests in play, a way of determining which of these interests actually merit rights is needed. If IT were to ascribe a right to anyone who might benefit from the carrying out of a contract, then it "would merit no further consideration as a serious theory of rights".⁶⁶ However, this is not the case because interest is a *necessary* rather than *sufficient* condition for a right.⁶⁷

Kramer deals with this challenge eloquently by ironing out a solution first proposed by Bentham. The test put forward is that "any person Z holds a right under a contract or norm if and only if a violation of a duty under the contract or norm can be established by simply showing that the duty-bearer has withheld a benefit from Z or has imposed some harm upon him".⁶⁸ This test efficiently draws the boundaries between those with rights and those without. For example, Sofia may in fact choose not to donate any of the money the bank owes her. This is clearly of detriment to those

⁶⁶ Kramer (n7) 81.

⁶⁷ *ibid* 81-82.

⁶⁸ *ibid* 81.

who were expecting additional funding, but is not sufficient to demonstrate a breach of the bank's duty. Thus, the charities and their affiliates hold no rights against the bank. They may hold a right against Sofia (if Sofia had already promised to donate money to them) but this is a separate issue. In the words of Kramer:

No version of IT postulates a one-to-one correspondence between being a right-holder and being a beneficiary of a correlative duty. Proponents of IT maintain that every right-holder is a beneficiary of a duty, but they do not maintain that every beneficiary of a duty is a right-holder.⁶⁹

At this point it is worth noting that the reality of cascading interests suggests that it may be challenging to identify exactly which interests ought to be protected by rights (or vital rights) and to whom these interests belong. This is because interests are often not as compartmentalised as analytical jurisprudence might like: one right can have many beneficiaries. This has already been seen in the idea of having an interest in seeing someone else's wishes fulfilled, and is also demonstrated by the concept of the 'chilling effect',⁷⁰ which notes that violating the right of one individual may affect the behaviour of others. It is in my interest that people are not imprisoned unjustly, although I clearly have no right that other people are not so treated. This issue does not

⁶⁹ *ibid* 67.

⁷⁰ HRC, General Comment 34 [47], HRI/GEN/1/ (Vol I); Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford Journal of International Law* 103, 124-25.

undermine IT, but simply points out that it is rare for a particular interest to be neatly and exclusively attached to just one individual. I have a genuine interest in the wellbeing of my friends and family that is not exclusively derivative or secondary. The reality of interests being spread in this way is particularly pertinent in the environmental context. For example, it is in the interests of humans and nonhumans that natural systems are clean, beautiful, diverse and functioning.⁷¹

Interests do cascade and a theory of rights must be able to identify to which entity an interest worthy of rights is attached. The concept of group rights (and in particular corporate rights⁷²), with the associated realisation that groups, as groups per se, can have interests,⁷³ may provide a method to better understand these continuous (as opposed to discrete) interests.⁷⁴

5.5.3 THIRD PARTY BENEFICIARIES

The other problem with IT to be considered in this thesis is the problem of third party beneficiaries. This is usually formulated by an example of A agreeing with B that A will do something to benefit C. Although IT can be critiqued by the third party beneficiary problem, this is often a result of mixing up the substance of a number of threads. Dismantling the third

⁷¹ §2.3; §3.3; §8.3.

⁷² §1.4.

⁷³ Kramer (n7) 9, 31, 49-60, 78.

⁷⁴ §9.

party beneficiary problem into its constituent pieces helps clarify the situation. The following have all been raised under its banner:⁷⁵

- i. A fourth party, D, who will benefit from the completion of the promised act, has an interest in it, but no right.
- ii. The promisee, B, has a right, but no interest.
- iii. The third party, C, has an interest, but no right.
- iv. If B waives A's duty, then C's interest remains, but her right does not.

Problem (i) is a version of the cascading interests problem and so can be dealt with in the same way.

Problem (ii) is a version of an 'uninteresting right' and does not appear to pose too great a challenge. Surely there is an interest of B's here: the interest in having her wishes fulfilled and promises to her kept. The interest may not be relevant to the content of the promise itself, but there certainly is an interest to be discovered. Thus, IT has no problem explaining B's right, who is by most accounts "the one uncontroversial right-holder".⁷⁶

Problem (iii) is slightly more tricky and is the real third party beneficiary problem. Consider Hart's argument in this regard:

In many jurisdictions contracts expressly made for the benefit of third parties e.g. a contract between two people

⁷⁵ Steiner (n3) 284; Hart (n4) 185-88.

⁷⁶ Sreenivasan (n17) 264.

to pay a third party a sum of money, is not enforceable by the third party and he cannot waive or release the obligation. In such a case although the third party is a direct beneficiary since breach of the contract constitutes a direct detriment to him, he has no legal control over the duty and so no legal right.⁷⁷

However, Hart's reasoning is circuitous: it only matters that the third party cannot waive or release the obligation if one is already committed to a WT definition of rights. Without WT, there is no reason why it is irreconcilably incoherent to say that there is a right belonging to the third party, C, to be enforced by another entity, B.⁷⁸ Neil MacCormick has astutely pointed out that the third party challenge can be applied to WT as well as IT simply by drawing up a contract that gives C some power over an action that also benefits her.⁷⁹

In any case the ability of law to bestow rights onto third parties should not be in doubt. It is demonstrated aptly by examples such as Article 36 of the Vienna Convention on the Law of Treaties⁸⁰ and IHRL treaties. Both of these demonstrate the possibility of awarding rights to non-contracting parties, and so any theory of rights must be able to either incorporate them or give a revisionary reason why they ought not to be considered rights.

⁷⁷ Hart (n4) 187.

⁷⁸ Kramer (n7) 66-68, 82-83; Kramer (n36) 60.

⁷⁹ MacCormick (n3) 208-209.

⁸⁰ (1969) 1155 UNTS 331.

Problem (iv) demonstrates a consequence of a claim and the associated power over it being located in separate entities.⁸¹ In this case, it is possible for the interest behind the claim to remain but the right not to (if B, the power-holder, waives the duty). If a state were to withdraw from all IHRL treaty regimes, its citizens would no longer hold human rights (in the international legal sense),⁸² although their interest in them would surely remain (dignity cannot be taken away). Rights are created to protect interests. They are logically secondary to them and not every interest must generate a right.

The third party beneficiary problem(s) does prompt consideration over how IT operates and how it negotiates between interests and rights. However, these problems are not insurmountable. They simply require care and precision to be taken over joining the dots between interests and rights. Not every interest creates a right, and the lack of waiver power does not mean that someone cannot have an IT-right.

5.5.4 SUMMARY

Although either WT or IT can be adopted by a legal theorist for explaining rights, here a choice must be made between the two. In this regard, the decision is over whether WT's incompatibility with inalienable rights and restriction on right-holders weigh more heavily than IT's slight fuzziness as to where rights begin and end.

⁸¹ Sreenivasan (n17) 264.

⁸² Except those protected by customary international law.

Clearly, IT is to be preferred from an accommodationist perspective since it is able to provide the more general model for what rights do. It can accommodate the full range of rights, whereas WT cannot model some of them. Interest Theory's slight imprecision can be overcome by careful reasoning and acceptance of the inevitability of unpredictability, whereas WT's restrictiveness significantly curtails its usefulness.

An important explanation as to why IT performs better than WT at modelling the function of rights is that WT is in fact a subset of IT. This is because WT is itself a theory based on an interest – the interest in having choices respected (ie in autonomy). That is, since “autonomy can be treated as a particular component of individual welfare, anything which counts as a right under the choice conception will also count as such under the interest conception”.⁸³ This also explains why the potential pool of IT-right-holders is wider than that of WT-right-holders: because “the set of creatures who are capable of exercising powers can never amount to more than a very small subset of the creatures who have interests, however interests are construed”.⁸⁴ Exercising a power can be modelled as an interest of a power-holder.

Because IT includes all WT-rights, it can absorb some of the pertinent insights of WT. For example, IT can provide right-holders with suitable powers over their rights when necessary. We should therefore

⁸³ Sumner (n3) 96. cf Spector (n8) 829.

⁸⁴ Steiner (n3) 259, 274ff.

(provisionally) opt for IT as the better theory for explaining what rights in general do.

The possibility remains that a valid revisionary argument can be made for WT. That is, it could be argued that those rights that do not fit with the WT model ought not be considered as rights. This is a necessarily normative argument: WT – as an analytical tool – does not have the license to explain why rights ought to be redefined as exclusively concerned with choice preservation and autonomy. In order to see whether this is the case, an exploration of autonomy and its relationship to rights will conclude this chapter.

5.6 A REVISIONARY ARGUMENT FOR WT?

WT fails as an accommodationist theory for rights because it cannot explain all rights. This is because WT is based on “a desire to preserve an association between rights and the values of autonomy”,⁸⁵ but not all rights are concerned with autonomy. Autonomy, as understood here, is the capacity to self-govern through making active and independent choices concerning one’s own life.⁸⁶ Making choices is therefore exercising one’s autonomy⁸⁷ – and because it is choices that WT-rights seek to protect, it is

⁸⁵ Simmonds (n1) 137. WT has evolved beyond Kantian thought, but remains wedded to a link between rights and autonomy.

⁸⁶ This is a notion of ‘personal/individual autonomy’, as distinct from ‘moral/principled autonomy’. See Gerald Dworkin, *The Theory and Practice of Autonomy* (CUP 1988) 17; Onora O’Neill, *Autonomy and Trust in Bioethics* (CUP 2002) 21ff; John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism* (CUP 2005) 3.

⁸⁷ The relationship between autonomy and choices is complex, but it is clear that choices are considered important because of the value of autonomy. See Mary

with the right-holder's autonomy that they are predominantly concerned. As identified by Kramer, restricting rights in this way is a normative rather than analytical choice:

When will theorists reserve the term 'rights' for claims that are combined with enforcement/waiver powers and liberties in the hands of the claim-holders, they do so primarily because they want to stress the importance of individual discretion and self-determination. They are less concerned to highlight logical differences and logical relations than they are to pay homage to the value of individual choice, a value which they present as integrally connected with rights. Because the term rights is a highly respectful and respected label in the modern West, the will theorists wish to confine it to situations that are characterised by the ideal (namely, the ideal of individual self-determination) which they themselves respect most.⁸⁸

A *revisionary* argument is therefore required if WT is to be accepted as a theory to explain what rights do. This revisionary argument must make a case that only autonomy is worthy of the potent protection of rights. This section will examine whether autonomy can play such a role, in particular for the sort of rights under consideration in this thesis (vital rights). That

Donnelly, *Healthcare Decision-Making and the Law* (CUP 2010) 10-48; Michael Rosen, 'Dignity: The Case Against' (2013) 192 *Proceedings of the British Academy* 143, 150.

⁸⁸ Kramer (n7) 75. See also Hans Reinders, *The Future of the Disabled in Liberal Society* (University of Notre Dame Press 2000) ch2; Sumner (n3) 98.

is, whether autonomy can play the role of dignity in justifying the very existence of vital rights.

Reliance on autonomy is understandable for some (predominantly legal) rights. However, this has less to do with the charms of autonomy than with basic practicalities: a functioning legal system requires considered interaction and such interaction is likely performable only by those who can exercise choices in some meaningful way (informed decision-makers). Thus, where possible, a legal system can deflect control and choice over certain issues onto those most affected by them.⁸⁹ This mirrors the WT structure of rights. But making the *revisionary* argument that *all* rights should be modelled in such a way runs aground.

In the first instance, there are certain *infans*⁹⁰ that cannot exercise choices in the manner demanded by WT (they lack this form of autonomy), but which ought to be protected by the legal and rhetorical force of rights. Any theory of rights must take seriously the presence of (eg) children's rights, given their considerable entrenchment and almost universal support.⁹¹ This is "the problem faced by all children's rights theorists: children may be too young to say anything. Even if they are not, their opinions may be coloured by ignorance or parental influence. Yet they surely have rights".⁹²

⁸⁹ §5.5.1.

⁹⁰ Literally 'unable to speak'.

⁹¹ Hart was aware of this difficulty with WT: Hart (n4) 184n86, 185n88, which softens an earlier view of Harts found in Hart (n63) 181. See also Kramer (n7) 69-70; Carl Wellman, *An Approach to Rights* (Kluwer 1997) 127-39.

⁹² John Eekelaar, 'The Importance of Thinking That Children Have Rights' (1992) 6 *International Journal of Law and the Family* 221, 228-29.

This is not to say that (eg) children lack *any* sense of autonomy, but rather that they do not have the relevant autonomy capabilities required to have WT-rights (they are not informed decision-makers). *Infans* are not themselves be able to speak to legal institutions, but this does not mean that they are incapable or undeserving of possessing rights.

WT's emphasis on autonomy restricts not only who can have rights, but also what rights can protect. As seen in Chapter One, the suffering and the flourishing of humans is dependent on more than choice preservation, hence the enriching content of IHRL.⁹³ People do not spend their entire lives acting as informed decision-makers: we bleed and breathe, we get ill and we love. This limitation of WT is especially pertinent for vital rights given their particular potency and the 'fleshy' nature of their subjects.⁹⁴ The human rights subject is an embodied and embedded being, not a rationalistic machine.⁹⁵ However, WT constructs a legal person whose interests amount to concern for their independent choice making. This legal person is "the archetypal rational, choosing, will-exercising 'discrete possessor of rights', distinctly bounded and separative".⁹⁶ But this is a mask - a persona - that does not fit 'fleshy' human beings.⁹⁷ WT thus

⁹³ §1.3.1.

⁹⁴ §1.3-1.4; §6.3.1.

⁹⁵ Anna Grear, 'The vulnerable living order: human rights and the environment in a critical and philosophical perspective' (2011) 2 *JHRE* 23.

⁹⁶ Anna Grear, 'Law's Entities: Complexity, Plasticity and Justice' (2013) 4 *Jurisprudence* 76, 90-91 (footnotes omitted).

⁹⁷ *ibid* 82-83, 90-100.

presupposes and constructs a legal person which does not in fact exist in the real world.

The sterility of the WT idea of a perfectly rational self-governing being is fertile ground for private law, but shackles progress outside this domain. Hart's legally respected choices⁹⁸ are suitable for those who can (in the eyes of the legal system) make choices, yet nonsensical and pernicious for those who cannot. Through its focus on autonomy, WT prevents rights from serving a number of valuable purposes. Following WT at best represents a significant oversight regarding who has rights and what rights protect. At worst, it raises suspicion of gerrymandering to ensure only a desired 'in-crowd' (of supposedly autonomous rational beings) are capable of enjoying the protection of rights. Both of these should be avoided, in particular within the realm of vital rights.⁹⁹

This does not deny the importance of autonomy. Although IT is the better theory to explain what rights do, many rights are in fact built in a WT-manner as claims with accompanying powers. Autonomy is worthy of the protection of rights. In looking at 'uninteresting rights' earlier, the importance of individual self-determination (ie autonomy) was mentioned. The key point is that there is also a need to protect matters other than autonomy itself, as implied in Gerald Dworkin's very description of autonomy:

⁹⁸ And Nozick's "area in moral space around an individual" Nozick (n5) 57.

⁹⁹ cf the 'inclusionary' nature of IHRL: §1.3.

Autonomy is conceived of as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values.¹⁰⁰

Autonomy is illustrious. It is worthy of esteem and respect, but not to the exclusion of the first- and higher-order preferences it marshals.¹⁰¹

Autonomy ought not be instrumentalised – it is worthy of protection itself – but neither should it instrumentalise all other values but itself. Autonomy is evidently important, including for those that lack the form of autonomy that WT focusses on. Consider for example John Eekelaar’s definition of the “best interests” that shall be a “primary consideration” under Article 3(1) of the UN Convention on the Rights of the Child.¹⁰² These include

‘basic’ interests, (to physical, emotional and intellectual care); their ‘developmental’ interests (that their potential should be developed so that they enter adulthood as far as possible without disadvantage); and their ‘autonomy’ interests, (the freedom to choose a lifestyle of their own).¹⁰³

¹⁰⁰ Dworkin (n86) 20.

¹⁰¹ Consider ‘too much’ and ‘too little’ autonomy in §5.5.1.

¹⁰² CRC (n36). See also Michael Freeman, *Commentary on the United Nations Convention on the Rights of the Child, Article 3* (Brill 2007) 25-64.

¹⁰³ Eekelaar (n92) 231.

Rights thus should protect autonomy, but not only autonomy. There are other interests and values that merit the protection of rights and exalting autonomy alone is blinkered: "autonomy, unqualified by other principles, is the philosophy of the snivelling, selfish, atomistic brat".¹⁰⁴ Besides, too much focus on autonomy is flawed. Too strong a concentration of it is counterintuitive and counterproductive. What use is free will¹⁰⁵ if we are trapped between a rock and a hard place? Exercising choice cannot always solve problems and improve situations in order to prevent suffering and promote flourishing.

Insisting that autonomy is the underlying fundamental justification for vital rights would result in a narrow view of what vital rights can protect and consequently a one-dimensional view of the subject of vital rights.

Douzinas criticises Griffin's autonomy-based¹⁰⁶ account of human rights because

[t]hey protect that 'somewhat austere state, a characteristically human life'. This is indeed an austere definition of self, almost Scrooge-like for anyone who does not belong to the ranks of the well-off middle classes.¹⁰⁷

¹⁰⁴ Charles Foster, *Human Dignity in Bioethics and Law* (Hart 2011) 62.

¹⁰⁵ The debate over the actual existence of 'free will' is potentially explosive to all the discussion here.

¹⁰⁶ Specifically, 'normative agency', which Griffin defines as "the agency involved in living a worthwhile life" (James Griffin, *On Human Rights* (OUP 2008) 45) and includes autonomy, minimum provision and liberty (ibid 149).

¹⁰⁷ Costas Douzinas, 'The poverty of (rights) jurisprudence' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 67.

Overreliance on autonomy fails to account for the embodied nature of the subject of vital rights as physical (and vulnerable¹⁰⁸) beings. It ignores arational (not irrational) bodies due to a fixation on supposedly rational minds (which are of course a part of bodies). Not everything that matters is about choice and autonomy; there is more to human existence than this. It is for this reason that it is dignity, not autonomy, that is the foundation for IHRL.¹⁰⁹ Autonomy is not able to play this role because it is too narrow in its focus and does not properly reflect the embodied and embedded nature of the human rights subject.

Furthermore, the concept of autonomy has moved beyond how WT understands it. Feminist critiques of autonomy and literature on rights of disabled persons have developed the understanding of autonomy to one of 'relational autonomy'.¹¹⁰ This appreciates that the decisions people make and the lives they lead do not take place in isolation, but rather are heavily dependent on the people and the world around them. It is for reasons such as these that highly atomistic notions of rights, which see them as "areas

¹⁰⁸ Anna Grear, 'Towards a New Horizon: in Search of a Renewing Socio-Judicial Imaginary' (2013) 3 *Oñati Socio-Legal Series* 966, 973.

¹⁰⁹ Foster (n104) 110. cf Ruth Macklin, 'Dignity is a useless concept: It means no more than respect for persons or their autonomy' 327 *BMJ* 1419; Deryck Beylveid and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2001); Carl Wellman, *The Moral Dimension of Human Rights* (OUP 2010) 21-22.

¹¹⁰ Catriona MacKenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (OUP 2000); Jennifer Nedelsky, *Law's Relations* (OUP 2011) ch3; Piers Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law' (2013) 20 *Psychiatry, Psychology and Law* 431, 435.

in moral space around an individual”,¹¹¹ falter when fuller versions of reality and human personhood are painted.

For example, Quinn and Arstein-Kerslake argue that the Convention on the Rights of Persons with Disabilities¹¹² – and Article 12 in particular – “forces an understanding that human personhood is not atomised but in fact shared”.¹¹³ This shared, relational, mode of being reaches beyond the narrower confines of personal autonomy expressed through exercising independent choice by noting that decision-making processes are not purely individual, but shared. However, even if this expansive notion of relational autonomy were argued to be the sole justification for rights, this would not sit comfortably with a WT interpretation of rights where an individual right-holder holds exclusive autonomy over certain matters.

It is therefore inappropriate to revise the function of rights in line with WT. This can be seen quite clearly within IHRL, where reconceptualising human rights as WT-rights would mean significantly altering its structure by removing human rights’ inalienability, denying that a great number of rights not concerned with autonomy should exist, abandoning the presence of the rights of children, and adjusting IHRL’s understanding of the human rights subject. It is therefore an unsuitable revision to suppose that WT can model human rights, and so WT cannot explain the function of vital

¹¹¹ Nozick (n5) 57.

¹¹² The CRPD (n37) is the only major human rights treaty to refer to autonomy, but where it does so, it also mentions dignity (Articles 3, 16(4), 25(d)).

¹¹³ Gerard Quinn with Anna Arstein-Kerslake, ‘Restoring the ‘human’ in ‘human rights’: personhood and doctrinal innovation in the UN disability convention’ in Gearty and Douzinas (n107) 40.

rights in general. Since WT is exclusively concerned with matters of individual choice, it is unable to provide a satisfying account for what vital rights do.

Vital rights protect interests, and require a broader justification than autonomy can provide. Dignity can serve this purpose because of its diversity and plurality.¹¹⁴ The next chapter will examine more closely the concept of dignity to see how it can be better understood through the lens of IT.

5.7 CONCLUSION

Chapter Five has considered the two major theories which seek to explain what rights do. Interest Theory, although imperfect, is superior to WT because WT is too restrictive regarding rights' function, structure and subjects. The fact that many rights take the form detailed by WT is unproblematic since these rights can be accommodated by the more comprehensive IT. This is because choice, as an interest, can be protected by IT. That is, WT is a subset of IT.

In this chapter, WT was first rejected analytically through predominantly *accommodationist* reasoning. WT cannot explain a great number of existing rights (many of which are vital rights). WT was then normatively rejected (in particular for vital rights) through examining a *revisionary* argument: autonomy neither is nor should be the sole justification for vital rights. Dignity is not just autonomy.

¹¹⁴ §1.5.

Not only do rights in general protect interests, but this is also true – perhaps even especially true – of vital rights.¹¹⁵ Human rights are inalienable, whereas WT insists on rights retaining an element of discretion – they are distinctively alienable. Human rights have real living beings as their subjects, whereas WT constructs an abstract legal person as its right-holder. Significantly for this thesis, the superiority of IT over WT means that nonhuman rights remain technically possible, since the only formal requirement to qualify as a right-holder is to have interests (rather than the ability to exercise powers).

The rejection of WT at an analytical level runs parallel to the rejection of the standalone virtue of autonomy at a normative level. Rights are not inherently connected to choices: it just so happens that humans have value their ability to choose (their autonomy) and have deployed rights for this purpose. However, choice is not the only valuable interest worthy of the protection of rights, as seen by the content of IHRL. Autonomy is the helmsman of WT and the essential structural ties between the two mean there is a danger of mixing analytical and normative argumentation when considering the merits of WT.

Distinguishing between the structure and the function of rights runs treacherous ground. As a legal tool, rights can be defined howsoever one wishes. However, rights come encumbered with a history that influences

¹¹⁵ *supra* n43; cf Siegfried van Duffel, 'Moral Philosophy' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 32.

ideas about their structure.¹¹⁶ Their roots lie in Enlightenment notions of autonomy and rationality, and this is reflected in their historical structure, which is closer to the WT model. But today the function of rights is broader and their structure correspondingly altered. The potential function of rights should not be restricted by arguing that they must conform to a historical WT-structure, especially as there is a viable (and in fact better) alternative available through IT.

There is a danger in issues of fundamental moral importance becoming conflated with Enlightenment notions of autonomy and rationality through analytical rather than normative arguments. That is, when the WT-style structure of rights that emerged to protect land-owning men is held up as 'objective' evidence to restrict what it is that rights today can protect (and consequently, what is of fundamental moral value¹¹⁷). But analytical theories of rights can define neither what dignity is nor what ought to be protected by vital rights. After all, "human rights present only one path to the realization of human dignity".¹¹⁸ Rights are simply the tool that happens to have been used to protect dignity: vital rights serve dignity, not vice-versa.

This chapter has argued that autonomy is not able to provide the grounds of vital rights because it is not broad enough. A more diverse and pluralistic concept, such as dignity, is needed. This does not reject the

¹¹⁶ §1.2-1.3.

¹¹⁷ The 'dizzying circularity': §3.2.1n10.

¹¹⁸ Jack Donnelly, 'Human Rights and Human Dignity' (1982) 76 *The American Political Science Review* 303, 303.

value of autonomy, but rather locates it within a wider context. Just as WT is contained within IT, so too is autonomy contained within dignity. The next chapter begins to question what else dignity is composed of through analysing what is so vital about vital rights and the interests they protect.

CHAPTER SIX

VITAL RIGHTS, VITAL INTERESTS, AND DIGNITY

6.1 INTRODUCTION

So far this thesis has shown that human rights protect both dignity (rhetorically)¹ and interests (functionally).² Furthermore, the more general category of vital rights also protect interests (since they are rights) and the potent moral character of human rights can be ensured within vital rights by understanding them too to be protecting dignity.³ It is therefore possible to make progress in understanding the nature and function of vital rights by overlapping these two observations. This is the task of Chapter Six, which will provide a framework for analysing the meaning of nonhuman dignity through the lens of 'vital interests'.

Chapter Six begins by using an expanded version of Joseph Raz's 'grounding' process⁴ to develop the Interest Theory (IT) of rights adopted in the previous chapter. This process states that rights are *grounded in* interests, and that rights and interests both operate at varying levels of generality. The analysis here will define 'vital interests' (ie the interests

¹ §1.5.

² §5.

³ §1.5; §4.2; §5.6. Notwithstanding the possibility that some other foundation may be possible for vital rights.

⁴ Joseph Raz, *The Morality of Freedom* (OUP 1986) 165-70.

that ground vital rights) as operating at a high level of generality, and will note that these vital interests are often overlapping and mutually supportive.

The remainder of the chapter will be committed to exploring the relationship between dignity and vital interests. It will do this by first explaining why the term 'vital rights' has been chosen to label the sort of rights under consideration in this thesis. Simply put, vital rights are vital in two senses of the word: they are vested in *living* beings, and they protect interests that are *essential*. That is, vital rights protect the essential interests of living beings.

Since dignity serves as a justification for vital rights, the two meanings of the word 'vital' can be deployed to illuminate the concept of dignity.

Linking dignity to vitality will build directly on the analysis of dignity found in Chapter One, where it was shown that (a) human dignity is inherent in (living) human beings; and (b) human dignity functions as a metric for determining what is essential to human flourishing and as a justification for protecting these matters through international human rights law (IHRL).⁵

Together, these show that dignity captures what is *essential to living* beings. This chapter will then argue that dignity is not necessarily exclusively human, opening the door to the possibility of nonhuman vital rights to be examined in Part III.

The final section of this chapter works the proximity of dignity and vital interests into a clear framework. Given that "human rights... can be

⁵ §1.5.3.

conceived as specifications of human dignity”,⁶ and that “it follows from the structure of human rights... that human rights protect fundamental [ie vital] human interests”,⁷ vital interests can themselves be conceived of as specifications of dignity. This arises from both a structural overlap between vital interests and dignity (ie vital rights protect both dignity and vital interests) and a conceptual overlap between the concepts of dignity and vitality (ie both are concerned with matters that are essential to living beings).

6.2 GROUNDING

Having adopted IT as the preferred model for rights in the previous chapter, the nature of the relationship between interests and rights can be more fully elucidated through Joseph Raz’s ‘grounding’ process. Although born in a non-Hohfeldian framework,⁸ Raz’s concept of grounding can still serve a purpose here. It will provide a useful way to understand how rights and interests are related, and, in particular, will allow identification of the structural role of ‘vital interests’.

⁶ Jürgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights (2010) 41 *Metaphilosophy* 464, 464.

⁷ Samantha Besson, ‘Justifications’ in Daniel Moeckli et al (eds), *International Human Rights Law* (2nd edn, OUP 2014) 41.

⁸ Raz holds that rights are the grounds of duties in others since otherwise rights *in rem* are impossible. However, this can be bypassed by considering an *in rem* right as an equivalence class of rights. See Raz (n4) 186; Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 180; Matthew Kramer, ‘Rights Without Trimmings’ in Mathew Kramer, N Simmonds and Hillel Steiner, *Debate Over Rights* (OUP 1998) 10n2, 45-46.

6.2.1 RIGHTS ARE GROUNDED IN INTERESTS

According to IT every right is protecting some interest. Raz draws out this relationship in outlining his process of 'grounding', which states that:

'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.⁹

The basic idea of grounding is that each and every right must be guarding some particular interest that is sufficiently significant to bring about the coercion entailed by a 'right'.¹⁰ In this way, an interest contributes towards the justification for the existence of a right: X has a right because X has a (corresponding) interest. The possession of interests is therefore a necessary, though not sufficient, condition for the possessing of rights. It is not sufficient because it is also necessary for X to be capable of having rights in the first place. Raz states that it is those whose "well-being is of ultimate value"¹¹ that are capable of having rights in the first place. In this thesis, however, the possession of dignity is used as the determinant of

⁹ Raz (n4) 166. See also Matthew Kramer, 'Getting Rights Right' in Matthew Kramer (ed), *Rights, Wrongs and Responsibilities* (Palgrave 2001) and Joel Feinberg 'The Rights of Animals and Future Generations' in *Rights, Justice and the Bounds of Liberty* (Princeton University Press 1980) 159 for discussion of what kinds of entities can have interests.

¹⁰ Through the existence of the duty, see §4.5.1.

¹¹ Raz (n4) 166.

being capable of possessing vital rights, since dignity is a known justification for the bestowing of vital rights.¹²

In order to determine whether nonhumans can have rights, it is necessary therefore to determine whether or not they have interests and dignity. This Chapter will explore the relationship between dignity and interests. The first step towards this is to be more precise over the relationship between interests and (vital) rights.

On one level, it is trivial to discern the interest that grounds a right. By definition, a right-to- ϕ is protecting an interest-in- ϕ ; a right to form and join associations is grounded in an interest in forming and joining such associations. However, this does not allow any analysis of interests or rights, but simply notes the existence of two parallel lists, one of 'rights-to- ϕ ', and another of 'interests-in- ϕ '. In order to develop understanding of rights and interests, further analysis is required as to why such an interest exists.

Enquiring why an interest-in- ϕ exists demands a more considered and informative response. It requires the identification of a more general interest that explains the existence of a specific interest-in- ϕ . Recall the discussion of 'uninteresting rights' in the previous chapter.¹³ There, establishing the general interest being protected was nontrivial: it required careful thinking over the interest being protected by a property right created through inheritance. It was shown that inheritance rights can be

¹² See §8.4 for a comparison of ultimate/intrinsic value and dignity.

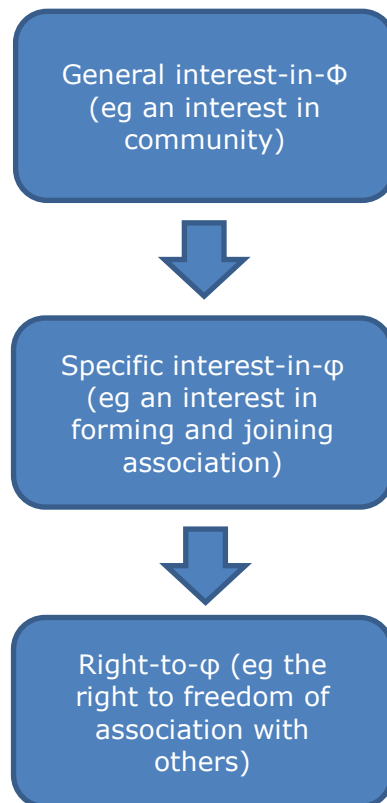
¹³ §5.5.1.

grounded in a general interest in administering one's own affairs or in a general interest in having promises fulfilled. It is this sort of reasoning that allows the identification of a general interest that does not simply parrot the language of rights (as with a right-to- ϕ /interest-in- ϕ).

As an example of a general interest of a vital right, consider again the right to freedom of association. Article 16 of the American Convention on Human Rights notes that the right to association may be exercised for "ideological, religious, political, economic, labor, social, cultural, sports, or other purposes".¹⁴ The protection of such a broad range of associations indicates that the very process of *associating* is itself of genuine importance. As such, a general interest in belonging to communities can be considered to give rise to the specific interest in forming and joining particular associations.

In short, a general interest gives rise to a specific interest, which grounds a specific right. Advancing Raz's model allows us to say that a right is grounded in a general interest. This can be represented as follows:

¹⁴ (1969) 1144 UNTS 123. See Kevin Boyle and Sangeeta Shah, 'Thought, Expression, Association, and Assembly' in Moeckli (n7) 231-32.



However, the relationship between rights and interests is often not quite as straightforward and linear as this suggests. This is because interests overlap with one another, as already demonstrated in the inheritance example above, and the discussion of cascading interests in the previous chapter.¹⁵ This overlapping nature of general interests is worthy of closer consideration.

6.2.2 COMPLICATIONS IN THE PROCESS

Although each and every right-to- ϕ is grounded in a general interest, the pathway from general interests to specific rights can at times be more convoluted. As a starting point, consider what Raz refers to as 'derivative

¹⁵ §5.5.2.

rights'.¹⁶ Derivative rights are justified by other rights rather than interests.¹⁷ One of Raz's examples of this is that someone who inherits a whole residential street has a derivative right to each house on that street, derived from their right to the street.¹⁸ Such an example is a case of simple logical entailment – it would not be coherent to have a right to the street without a right to each house too.

However, it is also possible for derivative rights to be established through normative argument.¹⁹ The idea underlying this is that rights can be justified by appeals to the existence of other rights rather than by direct appeal to interests. This process can be seen within IHRL where the creation of derivative human rights from other human rights is possible. For example, the right to water has been derived by the CESCR from the right to an adequate standard of living,²⁰ and the human right to environment can be conceived of as deriving from other human rights established by treaties.²¹

¹⁶ Raz (n4) 168-70.

¹⁷ *ibid* 168.

¹⁸ *ibid* 169.

¹⁹ See Raz's discussion of freedom of expression and freedom of political/artistic/scientific/academic communication, *ibid* 169-70.

²⁰ General Comment 15 (1999), HRI/GEN/1/ (Vol I).

²¹ Joint Dissenting Opinion of Judges Costa et al *Hatton v UK* (2003) 37 EHRR 28 [GC] [4]; Antonio Trindade, 'Environmental Protection and the Absence of Restrictions' in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff 1992) 561, 572-82; Margaret DeMerieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2001) 21 *OJLS* 521. In general see James Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 87-90.

The derivative establishment of rights can also be seen in the creation of state duties that specifically *secure* human rights.²² That is, the state duty not to torture X exists because X has a right (in the sense of a broad entitlement) to be free from torture. This aligns with the state duty to *respect* human rights. But the state also has duties to *protect* and *fulfil* human rights, and these duties also derive from the broad entitlements that humans have to be treated in certain ways. The state is not only bound to not violate human rights, but also to be their guarantor.²³

The existence of derivative rights does not undermine the relationship between interests and rights. This is because although derivative rights can be justified by other rights, they are also simultaneously grounded in an interest that is sufficient to hold someone under a duty.²⁴ Raz's right to each house is also grounded in an interest in owning each house; the human right to water is also grounded in an interest in water; and X also has an interest in not being tortured by the state. There can thus be more than one pathway from general interest to specific right.

The pathway from general interest to specific right can also be complicated by the fact that a right can be grounded in more than one general interest. This overlapping has already been seen in the example of a right to an inherited item: this is grounded in interests in having promises kept, in

²² §4.6.

²³ §4.6.

²⁴ This is not necessarily true of all of Raz's examples because he allows unsecured liberties (eg "the right to walk on my hands" [Raz (n4) 169]) to creep in to his analysis as instantiations of particular liberty-rights.

administering one's own affairs, and (potentially) in owning the item itself. Within human rights any such overlapping should not be surprising given that they are "indivisible, interdependent and interrelated".²⁵ For example, the right to freedom of association can be grounded in an interest in community, but could also be grounded in freedom of thought (through joining groups of like-minded individuals).

Consider too the example of state duties within international law to provide access to environmental information. These duties can be seen to be grounded in either a human right to a healthy environment²⁶ or other 'greened' human rights,²⁷ all of which are themselves grounded in (potentially similar) general interests. But rights to environmental information could also be grounded in an interest in having access to information in general.²⁸ It is therefore quite possible that particular rights can be justified by more than one interest. Indeed, "any given human right will typically be grounded in a cluster of affected interests".²⁹

²⁵ World Conference on Human Rights, 'Vienna Declaration and Programme of Action' A/CONF.157/23 (25 June 1993) Article 5.

²⁶ Article 1 of the Aarhus Convention begins: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters".

²⁷ Consider the case law of the ECtHR on this matter, §2.2.1.

²⁸ Consider Article 10(1) ECHR, which includes the freedom "to receive and impart information and ideas without interference by public authority and regardless of frontiers".

²⁹ John Tasioulas, 'Human Dignity and the Foundation of Human Rights' (2013) in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 296.

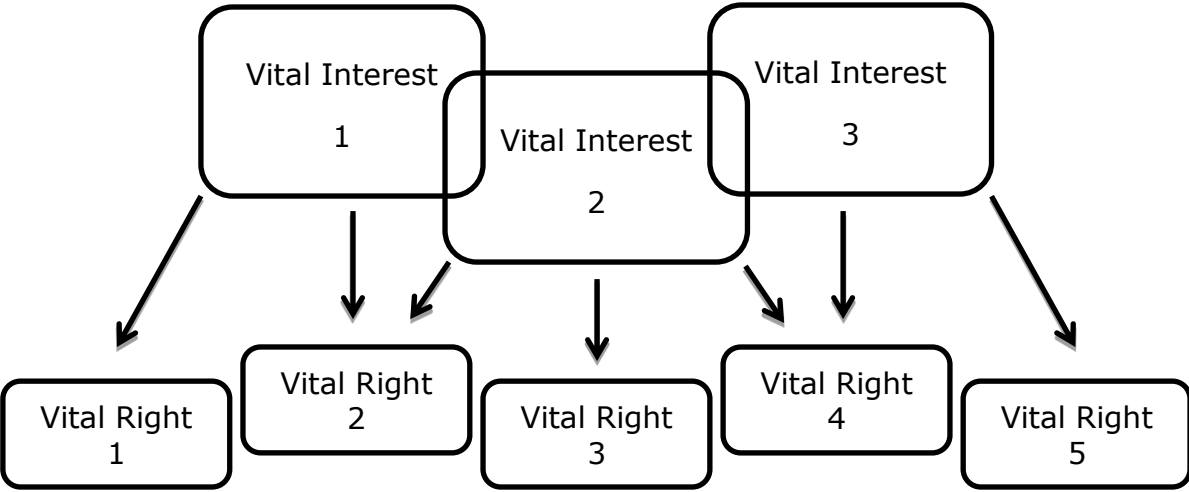
The overarching point is that there can be more than one route from general interest to specific right. Although the reality of the grounding process may be complex and contain a number of different pathways, the fundamental theory behind it is more straightforward: all rights are grounded in at least one general interest. The potential multiplicity of pathways does not undermine the process at all. Rather, it acknowledges that there is sometimes more than one way to construct a valid argument, and adds strength to a system of rights as a whole.

6.2.3 VITAL RIGHTS ARE GROUNDED IN VITAL INTERESTS

The preceding analysis is valid for any type of right. However, this thesis is concerned with a particular subset of rights: the sort found within IHRL. Since these have been labelled as 'vital rights', it stands to reason to label the interests protected by vital rights as 'vital interests' in parallel. That is, vital rights are grounded in vital interests. Furthermore, for the sake of clarity, the term 'vital interests' will be used in this thesis to refer to the general interests that ground vital rights, rather than the specific interests in between. Focussing on general vital interests is appropriate because these allow deeper analysis of what vital rights are protecting. There is limited value to a consideration of specific interests that ground vital rights since these simply parrot the rights themselves.

Considering vital interests at the more general level also allows a set of vital rights (IHRL for example) to be categorised under a set of vital interests in which they are grounded. The usefulness of such a categorisation will be seen later in this chapter. In any such categorisation, each vital right may be grounded in more than one vital interest and each

vital interest is likely to be grounding more than one vital right. A set of vital interests is therefore likely to be overlapping – but this does not mean that the interests contained within it are substitutable or superfluous, since there may be rights that are only grounded in that interest (see figure below).



This section has set out a framework for vital rights. According to this framework, vital rights are grounded in (and so exist because of) general vital interests. This chapter will go on to demonstrate how the notion of vital interests can be profitably compared with the notion of dignity, since vital rights protect both vital interests (functionally) and dignity (rhetorically). As a first step in this process, it is now necessary to explain why the label 'vital rights' has been chosen to describe the sort of rights under consideration in this thesis.

6.3 WHY VITAL RIGHTS ARE 'VITAL'

It has already been seen that vital rights have both moral and legal characters (they are 'Janus-faced'), and that they are particularly potent rights (they are 'Colossal').³⁰ Yet more can be learnt about vital rights by synthesising what has been seen about rights in general and human rights – the paradigmatic example of vital rights – in particular.

Part II has so far identified two key features of human rights that result from their status as 'rights'. Firstly, they are vested in a right-holder to whom the correlative duties are owed; and secondly, they are grounded in (and so exist because of) an interest of the right-holder.

But the first word of 'human rights' also contains important information about their nature,³¹ and consequently the nature of 'vital rights'. In particular, the 'human' part of 'human rights' deepens understanding of the two features identified in the previous paragraph. The word 'human' indicates that human rights are vested *in humans*, and exist because of *human* interests. However, the phrase 'human rights' is a stronger one than this, as a result of an important distinction captured by Tomuschat: "not every right held by a human being deserves to be called a human right".³² Human rights are different from other 'rights held by humans'.

³⁰ §4.2.

³¹ Costas Douzinas, *The End of Human Rights* (Hart 2000) 18.

³² Christian Tomuschat, *Human Rights* (3rd edn, OUP 2014) 3-4. Allen Buchanan, *The Heart of Human Rights* (OUP 2014) 10. See also Jerome Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20 *HRQ* 201, 203.

It is clear that 'human rights' have a distinct, and indeed superior, status as compared to 'rights held by humans'. They have a "special character",³³ and are "resistant to trade-offs".³⁴ They are "of paramount importance",³⁵ and have "law-exceeding energies and institutionally elevated juridical status".³⁶ This section will show how this special character of human rights results from the nature of the subjects in which they are vested (ie humans as living beings) and the interests that they seek to protect (ie those of paramount importance).³⁷

It is here that the terminology of *vital* rights comes into its own in describing the sort of rights found in IHRL. The word vital has two meanings – 'living' and 'essential' – both of which are found in vital rights. Firstly, human rights are vital because they are vested in vital (as in living) beings. Secondly, human rights are vital because they are grounded in vital (as in essential) interests. These two characteristics of vital rights distinguishes them from the set of rights as a whole.

6.3.1 PROTECTING THE LIVING

Because rights are vested in a right-holder, and are grounded in the interests of that right-holder, the nature of the right-holder is of

³³ HRC, General Comment 24 [18].

³⁴ James Griffin, *On Human Rights* (OUP 2008) 76.

³⁵ Maurice Cranston, *What are Human Rights?* (Bodley 1973) 67-68.

³⁶ Anna Grear and Louis Kotzé, 'An invitation to fellow epistemic travellers' in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Elgar 2015) 2.

³⁷ Which Baxi refers to as the two perplexities of human rights: "the nature of human nature [and] the question of who is to be counted as 'human'": Upendra Baxi, *The Future of Human Rights* (OUP 2002) 51; §1.3.

consequence for the nature of the rights themselves. Tomuschat's distinction between 'human rights' and 'rights held by humans' can be developed by returning to the nature of the 'human rights subject' as seen in Chapter One.

Chapter One showed that IHRL understands the human rights subject to be a real, living, embodied and embedded being.³⁸ Unlike with other legal rights ('rights held by humans'), which are vested in a legal persona,³⁹ the human rights subject cannot be *completely* parsed in this technical legal sense.⁴⁰ The subject of human rights cannot be some entirely abstract entity or constructed subject if human rights are to take human suffering seriously⁴¹ because neither humans nor their suffering are entirely abstract.⁴² Human rights are vested in real life human beings because they seek *inter alia* to protect against real life visceral suffering.

The sort of rights found in IHRL are therefore vital because they are vested in *living* beings. Although IHRL may at times fail to live up to the promise of protecting the real life human being,⁴³ it has this as its goal.⁴⁴ Because they are vested in humans qua living beings, human rights are

³⁸ §1.3.2.

³⁹ Anna Grear, 'Law's Entities: Complexity, Plasticity and Justice' (2013) 4 *Jurisprudence* 76, 83.

⁴⁰ Douzinas (n31) 19; §1.3.2.

⁴¹ §1.3.

⁴² Notwithstanding the fact that 'the human' is always, to some extent, constructed (Baxi (n37) 152).

⁴³ §1.3.2.

⁴⁴ §1.3.1, §1.5.1.

fundamentally connected to humans' status as living beings. This is why they are vital, and any other 'vital rights' must also be vested in living beings in order to retain the 'law-exceeding energies' and 'special character' of human rights.

Of course, since human rights are also 'rights held by humans',⁴⁵ there will always be a layer of legal personality between the human rights subject and the actual living human being.⁴⁶ The real must somehow be transformed into the legal. The nature of this layer will be influenced by both the design of traditional legal persons (ie "the archetypal rational, choosing, will-exercising, 'discrete possessor of rights'"⁴⁷) and IHRL's imagining of the real human being. But, because the holders of vital rights are living beings, IHRL drives it away from the former and towards the latter.⁴⁸ Indeed, IHRL does this by dialogically, 'carnivalistically',⁴⁹ and asymptotically re-imagining and enriching the content of IHRL and the human rights subject to move towards capturing actual lived experience.⁵⁰

⁴⁵ That is, vital rights are still legal rights, and are a subset of rights as a whole.

⁴⁶ §1.3.2(a).

⁴⁷ Gear (n39) 90-91.

⁴⁸ Human rights do not always achieve this goal: consider the application of human rights to companies (Marius Emberland, *The Human Rights of Companies* (OUP 2006)). But the point is that if human rights are to retain their status as vital rights, developments of this type must be opposed. (See Anna Gear, *Redirecting Human Rights* (Palgrave Macmillan 2010)).

⁴⁹ §1.3.

⁵⁰ §1.3.2(c).

Here some of the “law-exceeding energies”⁵¹ of vital rights become evident, as they grasp beyond the legal person and reach out to real living beings.

6.3.2 PROTECTING WHAT IS ESSENTIAL

The second feature of the sort of rights found in IHRL captured by referring to them as ‘vital rights’ is that they protect matters that are vital – in the sense of urgent, essential, crucial and fundamental – to the right-holder. Vital rights do not protect trivial matters or mere desiderata, but instead are grounded in those interests that are *essential* to the right-holder. This is evidenced by the fact that human rights seek to prevent human suffering and promote human flourishing (both of which are crucial to the right-holder) and is also outlined more directly in a number of descriptions of the nature of human rights.

The vital nature of the sort of rights found in IHRL has been captured by the UN General Assembly, which has stated that human rights are “of fundamental character”.⁵² This statement was made in the context of setting standards for new human rights, and so clearly demonstrates a key property of the sort of rights found in IHRL. Furthermore, Tomuschat describes the UDHR as a “legal document reflecting the basic needs of all human beings”,⁵³ and John Nickel argues that human rights protect ‘fundamental interests’, which he defines as “interest[s] in conditions necessary to surviving during a normal lifespan or to developing and

⁵¹ Grear and Kotzé (n36) 2.

⁵² UNGA, ‘Setting international standards in the field of human rights’ A/RES/41/120 (4 December 1986) [4(b)].

⁵³ Tomuschat (n32) 74.

exercising central features of human personality".⁵⁴ Such interests in survival and exercising *central* features are clearly essential to the right-holder: this is what makes vital rights 'vital'.

The essential nature of vital rights distinguishes them from rights in general. Human rights have been described as recognising "extraordinarily special, basic interests, and this sets them apart from rights, even moral rights, generally".⁵⁵ Likewise, John Rawls distinguishes human rights from other rights, noting that "human rights ... express a special class of urgent rights".⁵⁶ There is thus a noticeable difference between the interests that ground vital rights (ie vital interests) and interests in general.

The "special character"⁵⁷ of vital rights arises because the interests that ground vital rights are themselves urgent and essential. The interests grounding vital rights are not 'vital interests' only for terminological convenience, but rather because of their fundamental, crucial, urgent and basic nature. We can therefore define vital interests, the grounds of vital rights, as 'the essential interests of living beings', bringing together the two meanings of the word vital.

⁵⁴ Nickel (n21) 55.

⁵⁵ William Edmundson, *An Introduction to Rights* (CUP 2004) 191.

⁵⁶ John Rawls, *Law of Peoples* (HUP 1999) 78-79. For more on the special status of human rights, see Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 199. See also Leif Wenar, 'Rights' in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Fall 2011 edn) <<http://plato.stanford.edu/archives/fall2011/entries/rights/>> (accessed 14/1/2015) ch5.1-5.2; Hillel Steiner, 'Working Rights' in Kramer et al (n8) 257.

⁵⁷ HRC, General Comment 24 [18].

The aim of this chapter is to detail the relationship between vital rights, vital interests and dignity. Two of these linkages are clear: vital rights are grounded in the essential interests of living beings (vital interests), and vital rights can be justified by appeals to dignity.⁵⁸ Steps can now be made towards the third linkage (between dignity and vital interests) by ascertaining what can be learnt about the nature of dignity from the characterisation of rights justified by dignity as 'vital'.

6.4 DIGNITY AND VITALITY

There are two ways in which the sort of rights found in human rights can be distinguished from rights as a whole. Firstly, they are grounded in the essential interests of living beings. Secondly, human rights are specifically justified by dignity. In both of these ways, human rights can be set apart from rights that are simply 'held by a human being'. Indeed, Tomuschat specifically appeals to dignity to set 'human rights' apart from those 'rights simply held by humans', stating that "human rights are rights intimately connected to human existence in dignity".⁵⁹

These two ways of distinguishing human rights from rights as a whole provide a platform by which to develop understanding of dignity. Because dignity justifies the existence of rights that are distinguishably vital, the vitality of vital rights is connected to the notion of dignity. This section will show how properties of dignity that have already been established – that

⁵⁸ See §4.2.

⁵⁹ Tomuschat (n32) 4.

dignity is inherent and that it functions as a justification/metric⁶⁰ – can be mapped onto the two meanings of vital, drawing out some implications for the concept of dignity.

6.4.1 DIGNITY IS INHERENT IN LIVING BEINGS

Chapter One noted that human dignity is inherent in human beings. This is linked to the universalism of human rights: *all* humans have both dignity and human rights.⁶¹ Human dignity is not a status to be earned nor an aspirational target, it is simply something humans have. Morsink describes dignity as being a result of our “real, historical, and biological birth”,⁶² demonstrating that dignity is dependent on humans’ status not just as human persons but also as a living, embodied and embedded, human being.

The physical origin of (human) dignity can also be seen in another observation from Chapter One: that ignoring or violating dignity often evokes concrete physical scenarios.⁶³ The possibility of being treated in an undignified manner is a consequence of our vulnerability⁶⁴ – a vulnerability that arises through our embodied and embedded status as living organisms, since vulnerability is “an irreducible incident of physical

⁶⁰ §1.5.3.

⁶¹ §1.5.2.

⁶² Johannes Morsink, *Inherent Human Rights* (University of Pennsylvania 2009) 34. See also Grear (n39) 92.

⁶³ §1.5.2.

⁶⁴ Habermas (n6) 468; Clemens Sedmak, ‘Human Dignity, Interiority, and Poverty’ in McCrudden (n29) 565-69.

embodiment".⁶⁵ It is because humans are physical living beings that they are vulnerable, and because they are vulnerable that they can suffer (because they are harm-able). Human dignity evokes this possibility for suffering and calls out for it to be avoided.

Understanding dignity as an inherent property of living beings allows further clarification of what dignity is. As in Chapter One, this can be done by noting what dignity is not. In particular, dignity's attachment to living beings means that dignity is not some spiritual, non-material or supernatural mystery, but rather arises through biological, physical and natural processes.⁶⁶

For this reason, the value of Rosen's characterisation of dignity as an "inner transcendental kernel" cited in Chapter One is highly dependent on how the word 'transcendental' is understood. If understood as 'supernatural',⁶⁷ then transcendental implies that dignity is something beyond the natural. This clearly goes against the understanding of dignity developed here as arising through natural, living processes. The idea of dignity being 'supernatural' conjures up images of dignity being something additional and non-material implanted into the living human being, such as a Cartesian *res cogitans*, a vitalist *élan vital*, or a Christian eternal soul.

⁶⁵ Anna Grear, 'The vulnerable living order: human rights and the environment in a critical and philosophical perspective' (2011) 2 *JHRE* 23, 43.

⁶⁶ Just as "the stream of consciousness itself may have a physical rather than a spiritual source": Robin Headlam Wells and Johnjoe McFadden, 'Introduction' in Wells and McFadden (eds), *Human Nature: Fact and Fiction* (Continuum 2006) 13.

⁶⁷ See Douzinas (n31) 3.

But this is not the case. Dignity arises through our “real, historical and biological births”.⁶⁸

On the other hand, Rosen may be using the word ‘transcendental’ to mean that dignity is a “representation only”.⁶⁹ In this sense, the idea of dignity as an ‘inner kernel’ can be understood as a metaphorical representation of the complexity, the aliveness and indeed the vital interests of the living being. This is a rather different dignity to a supernatural one, and indeed must be preferred in order to retain a human dignity that is inherent in living beings. The important result is that the idea of dignity as being supernatural must be discarded, since dignity is inherent in living beings, and so a result of material processes.

There is a difference between dignity being intangible (which it is) and it being supernatural (which it is not). Although dignity clearly is an abstract concept, this does not imply that its existence is dependent on a connection to an ethereal realm. The intangibility of dignity is a result of its complexity and the multiple roles it plays as metric, justification and so on, rather than because dignity is somehow akin to a non-material ‘implant’ (eg *res cogitans*, *élan vital*, or eternal soul). As a parallel, consider the concept of ‘green’, which is clearly abstract and intangible, but also

⁶⁸ Morsink (n62) 34. See also Grear (n39) 92.

⁶⁹ ‘transcendental idealism’, *Penguin Dictionary of Philosophy* (Penguin 1997); Stang, s6.2. See Michael Rosen, *Dignity* (HUP 2012) 9, 31, 55, 143, 157; Nicholas Stang, ‘Kant’s Transcendental Idealism’ in Edward Zalta (n56 Spring 2016 edn).

emerges through evidently physical processes rather than because of some inherent mystical property of 'greenness'.⁷⁰

It is significant that dignity arises through living processes. It implies that there is no need to search for some non-material 'implant' to explain why humans merit the urgent protection of human rights. Humans are complete without such trimmings.⁷¹ Dignity emerges through vital physical processes, and not through divine intervention or the supposed metaphysical capacities of the pineal gland.⁷² While some may lament the muting of the human soul (or other similar concept),⁷³ it is remarkable that something as complex and as vital as the human and its dignity can emerge from living material processes.⁷⁴ Rather than deny these processes and their significance, it is more prudent to focus on them.

The reason why dignity's materiality is important to note for the purposes of this thesis is that the non-material 'implants' typically used to explain human dignity also have the result (perhaps even the intention) of dividing the human from the rest of the natural world.⁷⁵ However, with a material conception of dignity in hand, "the qualities of self-reflection, self-

⁷⁰ See Keekok Lee, 'The Source and Locus of Intrinsic Value: A Reexamination' (1996) 18 *Environmental Ethics* 297.

⁷¹ This is not to say the IHRL human rights subject is a complete version of the human being (it may approach it asymptotically), but that completeness of the human being does not require non-material 'implants' such as a soul.

⁷² Descartes believed the pineal gland to be the 'seat of the soul': Darren Gobert, *The Mind-Body Stage* (Stanford University Press 2013) 22-24.

⁷³ Vining in McCrudden (n29) 583ff.

⁷⁴ See Kenan Malik, 'What science can and cannot tell us about human nature' in Wells and McFadden (n66).

⁷⁵ See Catherine Dupré, *The Age of Dignity* (Hart 2015) 34; Tasioulas (n29) 294.

awareness, and rationality traditionally used to distinguish [the human species] from the rest of nature, may now seem little more than contingent and provisional forms or processes within a broader evolutionary or cosmic productivity".⁷⁶ That is, self-reflection, self-awareness and rationality are functional human capacities that exist in order to achieve other goals (in particular ones related to our embodied and embedded physical existence).

Focussing exclusively on these functional capacities at the expense of their underlying goals is a limited pathway towards explaining the full complexity of dignity (human or otherwise), because doing so overlooks the very physical origins and purposes of the capacities. Rationality and autonomy are means rather than ends.⁷⁷ This does not mean that their value should be ignored (as seen in Chapter Five), but it does mean that a description of dignity cannot only include capacities such as rationality and autonomy. The physicality of vital beings cannot be ignored.

The realisation that dignity is a material phenomenon can be linked to new materialist modes of thinking that "call for ... a renewed emphasis on materiality"⁷⁸ based in part on developments made in physics in the 20th Century.⁷⁹ In particular, Einstein's famous expression that $E = mc^2$ (ie that energy and matter (via mass) are equivalent) succinctly demonstrates how

⁷⁶ Diane Coole and Samantha Frost (eds), *New Materialisms* (Duke University Press 2010) 20.

⁷⁷ And even as means, they are contingent, provisional and replaceable: they are simply some of the tools that one particular organism has focussed on in order to effect their survival.

⁷⁸ Coole and Frost (n76) 5.

⁷⁹ *ibid.*

matter has the raw potential within it for action and process. However, although new materialism is to the point in noticing that agency is neither the exclusive preserve of the human, nor an 'other-than-matter' act,⁸⁰ it glosses too quickly over the distinction between the living and the non-living⁸¹ – a distinction that is crucial to this thesis. Part III will demonstrate how a notion of dignity that arises through physical processes can be found throughout the living world, and identify ways in which living organisms are fundamentally different from non-living matter.⁸²

6.4.2 DIGNITY CAPTURES WHAT IS ESSENTIAL

Another key role of dignity seen in Chapter One is as the justification for the existence of human rights in the first place.⁸³ This is seen most clearly

⁸⁰ eg Coole and Frost (n76) 20, 97-98, 113

⁸¹ This glossing is witnessed in the work of Coole and Frost who note that it is possible to distinguish "between the sort of mechanical, inorganic matter described by physicists and the evolving organic systems described by biologists. But new materialists are attracted to forms of vitalism that refuse this latter distinction. They often discern emergent, generative powers (or agentic capacities) even within inorganic matter, and they generally eschew the distinction between organic and inorganic, or animate and inanimate, at the ontological level" (Coole and Frost (n76) 9); Bennett, who aligns herself with a tradition in which "the distinctions between life and matter, organic and inorganic ... are not necessarily the most important ones to honor" (Jane Bennett, 'A Vitalist Stopover on the Way to a New Materialism' in Coole and Frost (n76) 48), resulting in a "materialism, which eschews the life-matter binary" (ibid 63); Barad, who argues for "a new sense of aliveness [that] applies to the inanimate as well as the animate" (Karen Barad, *Meeting the Universe Halfway* (Duke University Press 2007) 437n81); and Coole, who points to Schelling's account where "there is no essential difference between organic and inorganic nature in this account; they are merely potencies with different powers of organisation such that inanimate matter becomes living being through its internal development. This already anticipates a common thread running through many new vitalisms and materialisms". (Diana Coole, 'The Inertia of Matter and the Generativity of Flesh' in Coole and Frost (n76) 99)

⁸² In particular through the lens of 'autopoiesis': §9.2.

⁸³ Mary Ann Glendon, *World Made New* (Random House 2002) 146.

in the Preambles to the ICESCR and the ICCPR, which state that human rights derive from the inherent dignity of the human person.⁸⁴ Dignity is therefore used as the justification for the existence and creation of vital rights, which are grounded in the essential interests of living beings.

Because dignity can be used to justify rights that protect essential interests, dignity serves to indicate (a) that a particular bearer of dignity/holder of rights *has* essential interests, and (b) *what* those essential interests are. This latter function is related to dignity's role not only as a justification, but also a metric within IHRL (these two roles are in any case intertwined⁸⁵). Rights justified by dignity are protecting an essential interest of the right-holder, and the need to protect these essential interests is articulated through appeals to dignity. In this way, human dignity captures what is essential to humans (and likewise dolphin dignity can capture what is essential to dolphins).

Human dignity capturing what is essential to humans does not mean that there is a *singular* 'essence' of being human to be found within the notion of 'human dignity'. Morsink criticises essentialism (ie the idea that there is some essence that defines being human) as creating "atomic and abstract individuals" with "an essence [one] may or may not have",⁸⁶ and thus potentially leading to situations where certain portions of society are deemed not to possess such an essence (and hence become susceptible to

⁸⁴ §1.5.1.

⁸⁵ §1.5.3.

⁸⁶ Morsink (n62) 34, 32-38, 178. See also Baxi (n37) 160ff.

discrimination and oppression).⁸⁷ Dignity must avoid this problem because human rights are universal: it is not up for debate whether or not any individual human being has dignity. Human dignity cannot capture what is essential to humans by being a singular or precisely-defined reduction (and also dilution) of humanity. There is no monolithic 'essence' that defines being human.⁸⁸

Dignity can avoid the problems of essentialism by ensuring that it has many dimensions and perspectives. Human dignity must be pluralistic, encompassing a range of values and ideas as to what is essential to humans.⁸⁹ Furthermore, dignity capturing what is essential must not function as a challenge. It does not mean that in order to achieve the status of 'having (human) dignity',⁹⁰ one must exhibit properties $\{d_1, d_2, d_3 \dots\}$. Rather it means that if one has (human) dignity, then $\{d_1, d_2, d_3 \dots\}$ are of essential importance.

The need for a conception of dignity to be pluralistic rather than singular is a direct consequence of the complexity of the real life human rights subject. If the human being were simply a straightforward, one-dimensional rational actor, then dignity could likewise be simplified as being primarily about rationality or autonomy.⁹¹ However, this is not the

⁸⁷ *ibid.*

⁸⁸ Ngaire Naffine 'Legal personality and the natural world: on the persistence of the human measure of value' (2012) 3 *JHRE* 68, 69-79.

⁸⁹ See §1.5.

⁹⁰ The status which is, by definition, 'being human': §1.5.2; Michael Rosen, 'Dignity: The Case Against' in McCrudden (n29) 145.

⁹¹ See §5.6.

reality of human existence. There is a varied range of matters that are essential to humans, and human rights must protect all of these not just some subset of vital human interests. This is recognised by the 'carnivalistic'⁹² nature of contemporary IHRL, the wide range of interests it protects, and the consequently enriched understanding of the human rights subject.

The bearer of universal human rights is... no individual human being or community with a pre-posed 'essence' but a being born with a right to invent practices of identification, contest identities pre-formed by tradition, and the power to negotiate subversive subject-positions.⁹³

Dignity is not austere, but is pluralistic and celebratory of diversity. By being so, it can accommodate Quinn and Arstein-Kerslake's concern "that humans cannot be reduced to an essence... we are who we are because of our interaction in community".⁹⁴ Dignity can encompass the essential value of our interaction in community along with the many other dimensions of being human. This can be seen directly in the presence of collective and corporate rights within IHRL,⁹⁵ and, more generally, by the fact that human rights are not perfect substitutes for each other: one cannot

⁹² §1.3.

⁹³ Baxi (n37) 174.

⁹⁴ Gerard Quinn with Anna Arstein-Kerslake, 'Restoring the 'human' in 'human rights': personhood and doctrinal innovation in the UN disability convention' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 54.

⁹⁵ §1.4; §8.2.1.6.

necessarily compensate somebody for a restriction on one of their rights by providing greater freedom elsewhere.⁹⁶ Dignity is pluralistic.

This section has so far shown that dignity arises through living processes and that dignity captures what is essential to the bearer of dignity. It concludes by observing that dignity, understood in this way, is not necessarily exclusively human.

6.4.3 DIGNITY IS NOT NECESSARILY EXCLUSIVELY HUMAN

Given that this thesis is interested in the deployment of vital rights beyond humans, it would be problematic if linking vital rights to dignity implied that only humans can have vital rights. However, there is no a priori reason why only humans can have dignity.⁹⁷ Necessarily, *human* dignity can only arise in *human* beings. However, it is at the very least semantically meaningful to conceive of other forms of dignity: for example, dolphin dignity that arises in dolphins. Even though the concept of nonhuman dignity is yet to receive explicit recognition within international law,⁹⁸ it is possible that other living beings have dignity too. Nonhuman dignity will be investigated more thoroughly in Part III, but some

⁹⁶ This is distinct to the balancing of one person's rights with another person's.

⁹⁷ See Martha Nussbaum, 'Beyond "Compassion and Humanity"' in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights* (OUP 2004) 299, 305ff; Phillip Balzer et al, 'Two Concepts of Dignity for Humans and Non-human Organisms in the Context of Genetic Engineering' (2000) 13 *Journal of Agricultural Ethics* 7; Arne Naess, *Life's Philosophy: Reason and Feeling in a Deeper World* (Roland Huntford tr, University of Georgia Press 2002) 109; Arne Naess, *Ecology of Wisdom* (Counterpoint 2008) 250, 282; Tasioulas (n29) 307.

⁹⁸ Though it has within some national jurisdictions: see §8.3.4.

preliminary remarks regarding nonhuman dignity can be made at this stage.

To begin, it is worth acknowledging that it is tautologically true that only humans can have human rights and human dignity. But it is also tautologically true that only dolphins could have dolphin rights and dolphin dignity.⁹⁹ This is not problematic: dignity is malleable and so it need not always be identical. Nonhuman vital rights need not have the exact same form or content as human rights. In the words of Thomas Berry, “[r]ivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights”.¹⁰⁰

The need to consider species membership leads us back to the first word of ‘human rights’ – in particular, what is it about these rights that makes them ‘human’? Juengst warns of “a risk here of confusing the biological sense of ‘human’ as a taxonomic term (like ‘canine’ or ‘simian’) and the word’s use in ‘human rights’, where it serves as a synonym for ‘natural’, ‘inalienable’ or ‘fundamental’ to distinguish that class of moral claims from other conferred, negotiated or legislated rights”.¹⁰¹ But in fact, the word

⁹⁹ Martha Nussbaum, *Frontiers of Justice* (HUP 2006) 346-47; Ramona Ilea, ‘Nussbaum’s Capabilities Approach and Nonhuman Animals’ (2008) 39 *Journal of Social Philosophy* 547; Rutger Claassen, ‘Human dignity in the capability approach’ in Marcus Düwell et al (eds), *The Cambridge Handbook of Human Dignity* (CUP 2014) 240.

¹⁰⁰ Cited in Cormac Cullinan, *Wild Law* (2nd edn, Green Books 2011) 103). See also Judith Koons, ‘Key Principles to Transform Law for the Health of the Planet’ in Peter Burdon (ed), *Exploring Wild Law* (Wakefield 2011) 49. A ‘river’ here must be understood as the entire watershed ecosystem, not just the watercourse.

¹⁰¹ Eric Juengst, ‘What’s Taxonomy Got To Do With It?’ (2009) in Julian Savulescu and Nick Bostrom (eds), *Human Enhancement* (OUP 2009) 43, 51-52. See also

'human' serves both of these purposes: it indicates that human rights are vested in humans¹⁰² and it differentiates human rights from 'rights held by humans'.

The terminology of 'vital rights' used in this thesis refers to Juengst's class of natural, inalienable or fundamental moral claims.¹⁰³ But this thesis also notes that 'vital rights' are not *synonymous* with 'human rights'; the latter is a subset of the former (Juengst goes on to "spurn as moral idolatry... that taxonomy might determine a creature's moral status"¹⁰⁴). The important point is that although use of the word 'human' in 'human rights' does indicate their 'vital-ness', such a trick is, almost paradoxically, not restricted to 'human rights'.

Furthermore, the fact that species emerge through continuous evolutionary processes prevents dignity from being restrained within *Homo sapiens*. There is no sharp dividing line between *Homo sapiens* and its ancestors or contemporaries (this is not how speciation works: there was not a nonhuman mother who had a human child, and species barriers are often permeable¹⁰⁵). And so to preserve dignity exclusively within the human species is ultimately impossible, even if we are able today to make a

Carl Wellman, *An Approach to Rights* (Kluwer 1997) 15; Frédéric Mégret, 'Nature of Obligations' in Moeckli et al (n7) 96, 100.

¹⁰² cf Emberland (n48). However, this does demonstrate law's capacity to be flexible with regards to legal personhood.

¹⁰³ *supra* n101.

¹⁰⁴ Juengst (n101) 52.

¹⁰⁵ See Richard Dawkins, 'Gaps in the Mind' in Paola Cavalieri and Peter Singer (eds), *The Great Ape Project* (Fourth Estate 1993) 82-87; Robert Wilson (ed), *Species: New Interdisciplinary Essays* (MIT 1999).

relatively clear-cut division between 'human organisms' and 'not human organisms'.¹⁰⁶

This evolutionary perspective in fact provides yet another reason why we must consider dignity as a material phenomenon: it is unclear how evolutionary processes could produce something immaterial. The deep implications that evolution has for the idea of dignity as a non-material soul or spirit were even acknowledged by Pope John Paul II:

The theories of evolution which... consider the spirit as emerging from the forces of living matter, or as a simple epiphenomenon of that matter, are incompatible with the truth about man. Furthermore, they are incapable of grounding the dignity of the human person.¹⁰⁷

John Paul unsurprisingly thus ends up only tentatively endorsing evolution because of its necessary implications about human dignity:¹⁰⁸ that there is no obvious reason why it is exclusively human after all. Evolution makes it clear that the only way to restrain dignity within *Homo sapiens* is to use some non-material 'implant', such as being "rational, self-aware, free and

¹⁰⁶ The distinction is not *entirely* clear-cut because of controversies such as those over when (human) life begins.

¹⁰⁷ Pope John Paul II, 'Message to the participants in the Plenary of the Pontifical Academy of Science' (22 October 1996) [5]. Available at https://w2.vatican.va/content/john-paul-ii/en/messages/pont_messages/1996/index.html (in French, Spanish and Italian, author's translation, last accessed 12/6/2016).

¹⁰⁸ See also Francis Fukuyama, *Our Posthuman Future* (Farrar, Straus and Giroux 2002) 161.

self-moving agents”,¹⁰⁹ rather than simply relying on being a human, chimpanzee, or otherwise.

As such, a common method by which dignity is restricted to humans is to isolate some particular characteristic that only (and all) humans supposedly have, and then to use this as the touchstone for dignity. The usual suspects in such a procedure are rationality,¹¹⁰ autonomy,¹¹¹ or language capabilities.¹¹² However, all of these fail for a number of reasons. Firstly, it is apparent that not all humans express such characteristics (*infans* being the usual demonstrators of this), yet they are denied neither dignity nor human rights under IHRL. Secondly, not only humans hold these capabilities. It may be that humans have usually developed more sophisticated skills of rationality and language, but this is a difference in degree, not kind.¹¹³ Thirdly, it is clear that dignity is composed of more than just one of these characteristics. IHRL endorses this with its ‘carnivalistic’ nature; there is more to being human than being rational or

¹⁰⁹ Coole and Frost (n76) 8.

¹¹⁰ See Martha Nussbaum, ‘Capabilities and Human Rights’ (1997) 66 *Fordham Law Review* 273, 273; Paola Cavalieri, ‘Are Human Rights Human?’ (2005) 4 *Logos* 2, II; Douzinas (n31) 52; Alexander Alexander Gillespie, *International Environmental Law, Policy, and Ethics* (2nd edn, OUP 2014) 5-10.

¹¹¹ eg Griffin (n34) 32-33. Consider also Stephen Wise’s quality of ‘practical autonomy’: Stephen Wise, ‘Animal Rights, One Step at a Time’ in Sunstein and Nussbaum (n97) 27, 32-41.

¹¹² eg Douzinas (n31) 173-74; Baxi (n37) 162, 188; See also Lesley Rogers and Gisela Kaplan, ‘All Animals are *Not* Equal’ in Sunstein and Nussbaum (n97) 193; Paola Cavalieri, *The Animal Question* (OUP 2001) 118.

¹¹³ For discussion on nonhuman language capability for example, see Francine Patterson and Wendy Gordon, ‘The Case for the Personhood of Gorillas’ in Cavalieri and Singer (n105); Irene Pepperberg, *Alex & Me* (Harper Perennial 2009); Lawrence Johnson, *A Morally Deep World* (CUP 1991) 27.

being autonomous.¹¹⁴ Fourthly, there is a significant risk in standing by a monolithic conception of dignity, which is that “a fraction of humanity decides that it embodies such a dignity in a more eminent way than others”.¹¹⁵ Being human does not lie in one property but in the magnificent entirety of our existence. The main pathways for restricting dignity to humans are therefore severely limited.

As further motivation for considering the possibility of nonhuman dignity, note that a theory of dignity that ascribes it exclusively to humans may fail the test of being culturally acceptable across the world. A particularly clear rejection of a human-only format for dignity is found in Native American thinking where “they have indeed asked and continue to ask: what kind of existential dignity prevails when it applies only to human beings?”¹¹⁶ Other worldviews may also struggle with a conception of dignity that displaces humanity from the rest of creation.¹¹⁷

Restricting dignity to humans therefore fails the test of cultural universality (an important feature of human rights) and lacks an obvious justification that can decisively separate the human from the nonhuman. One could

¹¹⁴ §1.3; §5.6.

¹¹⁵ Claude Lévi-Strauss, ‘L’idéologie marxiste, communiste et totalitaire n’est qu’une ruse de l’histoire, entretien avec Jean Marie Benoist’ (January 21-22 1979) *Le Monde* 14, cited in Annabelle Dufourcq, ‘Editorial Preface’ (2014) 11 *Environmental Philosophy* v, vi. See also Morsink (n62) 34; Costas Douzinas (n31) 199.

¹¹⁶ Marie-Bénédicte Dembour, *Who Believes in Human Rights?* (CUP 2006) 2.

¹¹⁷ See The Mandukya Upanishad; Michael Ashkenazi, *Handbook of Japanese Mythology* (OUP 2003) 291; Millennium Ecosystem Assessment, *Ecosystems and Human Well-being* (Island Press 2003) 142.

instead resort to an argument of 'for simplicity's sake'.¹¹⁸ That is, since humans are uncontroversial holders of dignity, and since it is convenient to draw a boundary somewhere so as to know what has dignity and what does not, it might make sense to declare that all humans, and only humans, have dignity. This line of reasoning may have merits, but it remains suspect.

Comembership of the human species is, like membership of the same race, a purely biological relation: it is a matter of genealogy, similarity of genome, or potential for interbreeding. It seems hardly credible that *these* commonalities could be morally significant, any more than membership in the same race could be.¹¹⁹

The charge of speciesism bears similarities to that of racism.¹²⁰ Using membership of the species *Homo sapiens* as the defining criterion for dignity is therefore questionable. This is not to say that it is definitely indefensible to conclude that only humans have dignity but rather that to do so requires a more detailed and convincing argument.

¹¹⁸ eg as discussed (and rejected) by Stephen Wise (n111) 39. See also Cavalieri (n113) 82-83.

¹¹⁹ J McMahan, *The Ethics of Killing: Problems at the Margins of Life* (OUP 2002) 225 cited in Julian Savulescu, 'The Human Prejudice and the Moral Status of Enhanced Beings' in Savulescu and Bostrom (n101) 234.

¹²⁰ Peter Singer, *Animal Liberation* (Random House 1975) 3-9, 239; LW Sumner, *The Moral Foundation of Rights* (Clarendon 1987) 205-206; 'speciesism', *Oxford Dictionary of Philosophy* (2nd edn, OUP 1996); Cavalieri (n113) 69-85; Gary Francione and Robert Garner, *The Animal Rights Debate* (Columbia University Press 2010) 83.

The key point is that dignity (and so vital rights) can conceivably belong to individuals with taxonomic designations other than human.¹²¹ Just as the earlier terminology of 'rights of man' as a synonym for 'natural/fundamental rights' has been replaced, so too could 'human rights': "the expression '*human* rights' suggests that there is some deep conceptual connection between belonging to the human species and having rights, perhaps it should be retired – just as the phrase 'the rights of *man*' has given way to gender-neutral equivalents".¹²²

Understanding why vital rights are indeed 'vital', and drawing out the implications for dignity of the vitality of these rights opens the door to living beings other than humans possessing dignity. By definition, it is not only humans that are vital in the sense of living, although it is not the case that simply being alive points to the existence of dignity. At the very least, the second meaning of vital must exist too – the possession of vital (essential) interests is therefore of crucial importance. In order to provide a platform for Part III to analyse nonhuman dignity through the lens of vital interests, the technical structure between dignity and vital interests needs clarification. This is the task of the remainder of this chapter.

¹²¹ See Sumner (n120) 205-206.

¹²² Edmundson (n55) 191. See also Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Legal and Theoretical Perspectives* (Martinus Nijhoff 2011) 44; Edward Rubin, 'Rethinking Human Rights' (2003) 9 *International Legal Theory* 5, 9.

6.5 DIGNITY AND VITAL INTERESTS

This chapter concludes by clarifying the nature of the relationship between dignity and vital interests.¹²³ This will allow Part III to explore the possibility of nonhuman vital rights through the lens of vital interests.

A method for illuminating the relationship between dignity and vital interests is found in Habermas' statement that "human rights... can be conceived as specifications of human dignity".¹²⁴ Habermas argues that there are different aspects to human dignity, and that these aspects can be found within the content of different categories of human rights.¹²⁵ Though varied, these categories of rights are united by all being specifications of dignity.¹²⁶ The meaning and the content of dignity can thus be found within this range of categories of rights.

Though Habermas refers to a particular categorisation of human rights (roughly aligning with the 'generations' of human rights), it is perfectly possible to categorise human rights in a number of ways. Moreover, the construct of 'vital interests' introduced by this chapter provides a means by which human rights (and indeed any set of vital rights) can be categorised. That is, vital rights can be categorised according to the vital interest(s) in which they are grounded.

¹²³ See Tasioulas (n29) 295-99, 304-305, 310.

¹²⁴ Habermas (n6) 464.

¹²⁵ *ibid* 467-68.

¹²⁶ *ibid* 468.

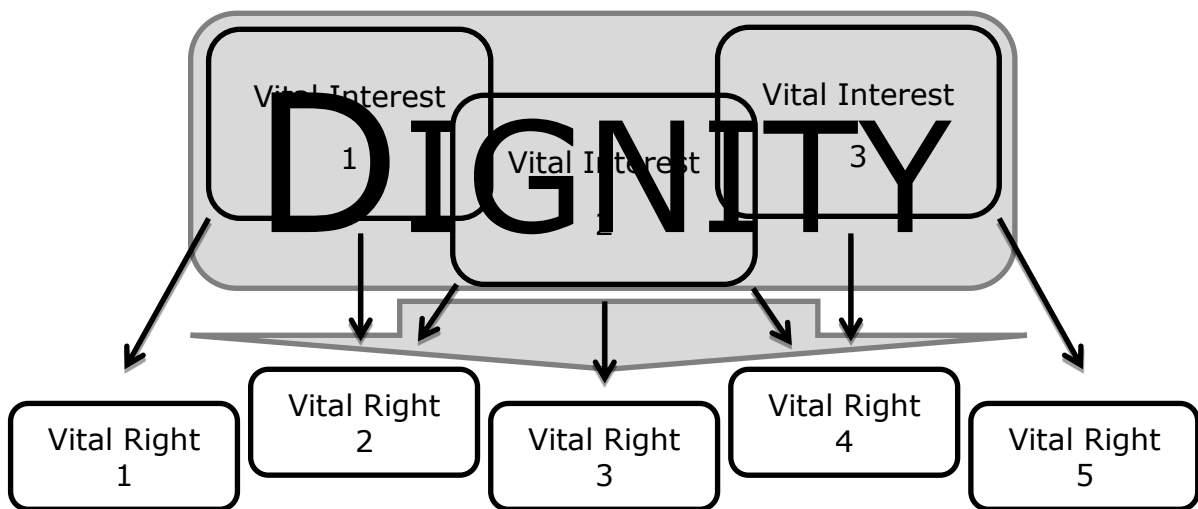
Because of the close connection between vital rights and vital interests (the former are grounded in the latter), they cover the same ground and share the same content. As Tasioulas' analysis of Raz's grounding process for human rights shows, the "fact that human rights characteristically further and protect human interests is, therefore, not a brute coincidence; it is explained by the grounding role of such interests in arguments for human rights".¹²⁷ As such, vital interests (which, like human rights, Tasioulas argues are universal, objective and pluralistic¹²⁸) are themselves specifications of dignity.¹²⁹

¹²⁷ Tasioulas (n29) 295.

¹²⁸ *ibid.*

¹²⁹ The set of vital interests shows some conceptual similarity with the concept of the 'good-of-its-kind', which refers to conditions that are fitting for something and are required by something. See Michael Bowman et al, *Lyster's International Wildlife Law* (2nd edn, CUP 2010) 73-78. See also Feinberg (n9) 165-66; HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 17; Paul Taylor, *Respect For Nature* (Princeton University Press 1986) 60-71; Gary Varner, *In Nature's Interests?* (OUP 1998) 55-76; Hugh McDonald, *John Dewey and Environmental Philosophy* (SUNY 2004) 39-40. The 'good-of-its-kind' is subtly different from the concept of 'good-of-its-own', which has a more individual hue to it. Vital rights regimes have to be generalised so as to be applicable to all vital right-holders within their target category (see §5.5.1), and so are derived from the good-of-its-kind, but designed to enable the good-of-its-own to be realised.

The three way relationship between vital rights, vital interests, and dignity can be represented diagrammatically as follows. As already seen, vital rights are functionally grounded in vital interests, and dignity rhetorically justifies vital rights. Additionally, vital interests are *specifications* of dignity: they explain some portion of it, but cannot capture the holistic sense, meaning and power of 'dignity':



Dignity (being both inherent in living beings and capturing what is essential to them) manifests itself in the essential interests of living beings. Vital interests provide handles to explain and explore both dignity and, by extension, the nature of the subject of vital rights.

The relationship between dignity and vital interests is explanatory rather than synonymising: vital interests explain what dignity comprises, but do not replace its conceptual value and validity. This is because dignity refers to the integrated, cohesive and unified fusion of vital interests. Because

dignity operates at this overarching level, it can serve as an overall rhetorical justification for vital rights (a role that vital interests are too prosaic to do): dignity and vital interests operate in "intimate union... in grounding human rights [affirming] both moral (equal human dignity) and prudential (universal human interests) elements among the grounds of human rights".¹³⁰ Dignity's overarching position also permits its function as a metric, facilitating interpretation of vital interests and vital rights, and striking a balance between them when necessary.¹³¹ Vital interests describe dignity in ways more easily understood, but they do not replace dignity nor its usefulness as a rhetorical justification for the existence of vital rights in the first place.

This recalls Raz's characterisation of interests as a necessary, but not sufficient, condition for the possessing of rights.¹³² Raz also deems it necessary that one is capable of holding rights in the first place. Although Raz identifies this with the case where one's "well-being is of ultimate value",¹³³ in this thesis the concept of dignity functions as a rhetorical justification for the possession of vital rights. Although interconnected, both dignity and vital interests serve valuable and distinguishable purposes in the grounding of vital rights.¹³⁴

¹³⁰ Tasioulas (n29) 304-305.

¹³¹ See §1.5.3; Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *EJIL* 655; *Wackenheim v France* (2002) HRC Communication No 854/1999, CCPR/C/75/D/854/1999.

¹³² See also Tasioulas (n29) 304-305.

¹³³ Raz (n4) 166.

¹³⁴ See Tasioulas (n29) 304-309.

Part III will utilise this relationship between dignity and vital interests in its investigation of the possibility of nonhuman vital rights. It will do this by extracting a set of vital interests that are protected by IHRL, and exploring their presence in nonhumans. It will also explore how dignity bears similarities to the notion of ultimate, or indeed intrinsic, value.

6.5 CONCLUSION

Chapter Six has developed understanding of vital rights, vital interests and dignity through exploring their linkages and bringing together a number of themes from across Parts I and II of the thesis. The chapter has explained what is so 'vital' about vital rights: they are (i) vested in living beings, and (ii) protect matters of essential importance to those living beings.

According to Raz's grounding process, vital rights are grounded in the essential interests of living beings (vital interests). Furthermore, because dignity can justify the existence of such vital rights, there is a conceptual link between the concept of dignity and the dual 'vitality' of vital rights.

This link between dignity and vitality has allowed understanding of dignity to be developed. Through making links to Chapter One's analysis of dignity, this chapter has shown that dignity is inherent in living beings and captures what is essential to these living beings. In particular, dignity can be conceived of as being specified by a set of vital interests. This does not mean that dignity can be entirely collapsed into vital interests, however, since dignity retains value as an overarching and cohesive notion that can serve as a rhetorical justification for vital rights.

Furthermore, the chapter has shown that dignity arises through material processes; is pluralistic; and is potentially applicable to nonhumans. These

features of dignity are maintained through parsing dignity as being 'specified in vital interests', since sets of essential interests of living beings must also have these characteristics.

Because dignity can be considered through the lens of the essential interests of living beings, it is plausible to examine whether living beings other than humans can be said to have dignity. If they do, this would provide a justification for the creation of nonhuman vital rights. Such rights represent a potential answer to the thesis' research question of how vital rights can be used to protect the natural world through international law that do not fall foul of the main critique of using human rights (that they are anthropocentric). The final Part of this thesis will therefore consider the possibility of such rights.

PART III

The final Part of this thesis investigates pathways for nonhuman vital rights to be used to protect the natural world through international law. Enquiring into the potential value of nonhuman rights is necessary in response to the anthropocentric critique of human rights seen in Part I, and is framed by the structure of vital rights developed in Part II. The analysis of rights in Part II demonstrated that rights certainly *can* be vested in nonhumans. The task of Part III is determining whether this *should* be done. This is complex, requiring consideration of the vital interests, and the dignity, of nonhumans. Chapters Eight and Nine will construct a case for the establishment of nonhuman vital rights based on the vital interest and the dignity of living organisms. That is, the thesis adopts an Interest Theory approach in order to provide a solid foundation for nonhuman vital rights.

As with human rights, it is important to be clear as to who the subjects of vital rights are. Nonhuman rights are complicated by the fact that the realm of the nonhuman is both enormous and diverse in almost every sense imaginable. Possible subjects for nonhuman rights include nonhuman animals, plants, species, ecosystems, rivers, genes, species, and so on. Furthermore, it is not only important *who* the subjects of nonhuman rights are, but it is also crucial *how* these subjects are understood. This has already been demonstrated with regards to the human rights subject in Chapter One: the nature and the content of rights depends on the ideology of the underlying subject. The thesis will argue that the vital rights subject, akin to the human rights subject, must be

understood as a 'fleshy'¹ being: one that is embodied and embedded.

Importantly, this embeddedness will be shown to be not only social, but also ecological.

A theme running throughout Part III is an interplay between rights of individual organisms and rights of ecosystems.² The former may be more smoothly aligned with human rights (because they are both predominantly rights of organisms), but the latter may be more suitable for environmental protection (because of their more holistic approach).³ To address this interplay, this thesis notes that there is a parallel to be found between the concepts of peoples' rights⁴ and ecosystem rights. That is, peoples' rights are to individual human rights roughly as ecosystem rights are to organism rights. This congruence arises because part of what it is to be a human is to belong to peoples (hence the need for peoples' rights), and part of what it is to be an organism is to belong to ecosystems (hence the need for ecosystem rights).

Chapter Seven will survey some existing approaches to nonhuman rights in theory and in practice. This will demonstrate a sense of the diversity of nonhuman rights approaches and provides a base for the more theoretical

¹ While plants and other non-animals might not be 'fleshy' in a literal sense as they are not composed of flesh, they are still made of living tissue.

² As well as other ecological 'levels-of-organisation'. See §9.3.2.

³ This mirrors the perceived conflict between animal rights and environmentalism. See eg J Baird Callicott, 'Animal Liberation: A Triangular Affair' (1980) 2 *Environmental Ethics* 311; Mark Sagoff, 'Animal liberation and environmental ethics: Bad marriage, quick divorce' (1984) 22 *Osgoode Hall Law Journal* 297; Liz McKinnell, 'Environmental Rights' (Doctoral thesis, Durham University 2010) 158.

⁴ See §1.4.

discussion presented in Chapters Eight and Nine. These chapters construct a case for bestowing vital rights on nonhumans. Chapter Eight will primarily discuss the *content* of vital rights. Chapter Nine focuses on the *subjects* of such rights. Although addressed in separate chapters, these two topics are closely interrelated. This is because how the right-holder (the subject) is understood will necessarily influence the content of vital rights.

In order to determine the potential content of nonhuman rights, Chapter Eight constructs a list of vital interests that ground existing vital rights (ie those in international human rights law (IHRL)). These vital interests demonstrate what sorts of interests merit the protection of vital rights. The existence of these vital interests in the nonhuman world will then be examined. Finally, the chapter will argue that having dignity is equivalent to having a vital interest *additional to* continued biological functioning. It is not just being alive that matters to something with dignity, but the *kind of life* matters too.

Chapter Eight identifies forming ecological communities as a proposed vital interest of all living organisms that is additional to the one in continued biological functioning. Chapter Nine has the task of determining whether such an interest does in fact exist, and if so, how this could be protected by vital rights. Chapter Nine examines the existence of a vital interest in forming ecological communities primarily through the biological concept of 'autopoiesis'. Autopoiesis describes the defining characteristics of living organisms, and demonstrates that organisms are necessarily relational with one another. Biological and ecological consideration of these relations

shows them to be far-reaching and multi-dimensional: organisms are deeply ecologically embedded and so are better thought of as 'organisms-in-their-integrans'.⁵

The ecological embeddedness of organisms indicates that all living organisms have a vital interest in forming ecological communities. Although life can be maintained despite the frustration of this interest (think caged animals or monocultures), the *kind of life* matters too. Just as being members of social groups is essential to humans, so too is being members of ecological groups to living organisms (including humans). Chapter Nine will argue that this interest can be protected through vesting rights in ecosystems, whilst remaining open to the possibility of nonhuman individual rights.

An underlying issue for Part III is the issue of legal personality: can bears, snakes or forests be vital rights subjects? This is not as problematic as it may appear. Given that the notion of '(international) legal personality' is constructed by humans, it can be defined however we wish.⁶ It is entirely possible for (international) legal personality to be bestowed on nonhumans. Consider two examples: firstly, the extension of legal personality to individual humans through the creation of IHRL as considered in Chapter One.⁷ Secondly, in the *Reparations* case, the ICJ held that the UN has legal

⁵ §9.4.

⁶ Consider Grear's discussion of Naffine's three conceptions of legal personhood which reveals them to all be a *constructus*: Anna Grear, 'Law's Entities: Complexity, Plasticity and Justice' (2013) 4 *Jurisprudence* 76.

⁷ §1.2.1.

personality, and is therefore “an entity capable of availing itself of obligations incumbent upon its Members”.⁸ The ICJ recognised that this need not lead to legal absurdities: “It is not the same thing as saying that [the UN] is a State, which it certainly is not, or that its legal personality and rights and duties are the same as a State”.⁹ Rather, they are non-identical subjects in one system of law.

There is an obvious parallel here. Granting nonhumans legal personality would not be saying that they are humans (or states, or the UN), which they certainly are not; or that their legal personality and rights and duties would be the same as those of humans.¹⁰ Instead what is under consideration is the creation of new legal subjects and thus new domains of law. The better parallel is that contained in Simpson’s characterisation of the position of individuals before the adoption of the UDHR as being similar to the “way one might fit animals, or trees, or the environment, into thinking about the existence of domestic law aimed at protecting them”.¹¹ The aim of Part III is to consider whether animals, or trees, or the environment might make the move from being legal objects to legal

⁸ Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174, 178.

⁹ *ibid* 179.

¹⁰ And any nonhuman rights themselves have to be variable; “[species-]specific and limited. Rivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights.” Thomas Berry, ‘Rights of the Earth’ in Peter Burdon (ed), *Exploring Wild Law* (Wakefield 2011) 227, 229; Christopher Stone, ‘Should Trees Have Standing?’ (1972) 45 *S Cal L Rev* 450, 457-58.

¹¹ AWB Simpson, *Human Rights and the End of Empire* (OUP 2001) 93. §3.5.

subjects.¹² There is a difference, which this thesis maintains, between stating that certain nonhumans should have vital rights and stating that certain nonhumans should have human rights.

The transition of nonhumans from legal objects to legal subjects is perhaps obstructed by their long-established status as the former and the apparent conflict between these two forms of status.¹³ However, this is by no means impassable. Humans are undoubtedly legal (and moral) subjects, but this does not prevent them being treated at times as resources by, for example, determining their labour to be worth a certain hourly rate.¹⁴ Similar directions are possible for nonhumans.¹⁵ Human creativity is an asset that can be explored and exploited in constructing fitting legal structures.

A relevant point in this regard was raised in the Separate Opinion of Judge Pinto de Albuquerque of the ECtHR in *Herrmann v Germany*.¹⁶ The case concerned freedom of expression and hunting, and so ecological ethics were thematic to the case. Judge Pinto de Albuquerque noted that animals are already protected by the ECHR in two ways: as property and as

¹² Ecofeminism has criticised the subjectification of natural entities on the basis that it is not entirely dissimilar to their objectification. Ariel Kay Salleh, 'Deeper than Deep Ecology: The Eco-Feminist Connection' (1984) 6 *Environmental Ethics* 339, 344; Patrick Curry, *Ecological Ethics* (Polity Press 2011) 107-109.

¹³ Gary Francione, *Animals, Property, and the Law* (Temple University Press 1995).

¹⁴ Similarly, things can be of *both* intrinsic *and* instrumental value, see Mattia Fosci and Tom West, 'In Whose Interest? Instrumental and Intrinsic Value in Biodiversity Law' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar 2016) 76-77.

¹⁵ *Herrmann* (n16) Separate Opinion 34.

¹⁶ (2013) 56 EHRR 7.

components in an ecosystem.¹⁷ Vesting rights in animals would provide a third dimension of legal protection.

Part III contemplates how these many perspectives of living organisms – as property (or resources), as components of ecosystems, and as beings-in-themselves – can be held together. To mirror the continuity between organism and ecosystem, between subject and object, between choice and chance,¹⁸ a multiplicity of perspectives is demanded. Part III provides pathways towards this goal.

¹⁷ Since the ECHR does provide some measure of environmental protection: §2.2.1.

¹⁸ cf: "This decisive line between chance and choice is the backbone of our morality" Ronald Dworkin, 'Die Falsche Angst, Gott zu Spielen' (1999) *Zeit-Dokument* 39 cited in Jürgen Habermas, *The Future of Human Nature* (Polity 2003) 28.

CHAPTER SEVEN

A SURVEY OF NONHUMAN RIGHTS

7.1 INTRODUCTION

This chapter demonstrates the legal plausibility and current direction of nonhuman vital rights. It does this by surveying existing approaches to nonhuman rights in theory and in practice.

There is a relatively long history of nonhuman animals being involved in legal proceedings. From a Roman legal concept that animals, as part of the natural order, were also to be included in the legal order (*jus animalium*)¹ to the prosecution of a variety of lifeforms in mediaeval courts,² the extension of the legal system beyond the human domain has already occurred in a number of ways.

However, Part III of this thesis is not about nonhumans and the law in general, but rather specifically on the concept of nonhuman vital rights. It is therefore necessary to focus on this specific conception of rights. As Part II has shown, there are fewer theoretical barriers to being a right-holder

¹ Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press 1989)16-17.

² *ibid* 18; Philip Jamieson, 'Animal Liability in Early Law' (1988) 19 *Cambrian Law Review* 45; EP Evans, *The Criminal Prosecution and Capital Punishment of Animals* (Heinemann 1906).

than there are to being a duty-bearer or power-holder,³ with the result that it is theoretically possible for nonhumans to have rights even if they cannot bear duties or wield powers. This chapter starts to consider who else exactly might vital rights be vested in and why.

There are two broad approaches that seek to bestow rights on nonhumans: 'animal rights' and 'rights of nature' (RoN). Although there are a number of academic discussions of these approaches,⁴ they are not exactly aligned with the direction of this thesis, which specifically uses Interest Theory (IT) in order to ascertain how the sort of rights found in international human rights law (IHRL) can be used to protect the natural world. This thesis follows an IT approach because it allows precision and clarity over what exactly it is that rights are⁵ and what exactly it is that rights do.⁶ Given the numerous ways in which the term 'right' is used, it is essential to have clarity over these issues.

³ §4.2; §5.2.

⁴ Christopher Stone, 'Should Trees Have Standing?' (1972) 45 *S Cal L Rev* 450; Tom Regan, *The Case for Animal Rights* (Routledge 1988); Anthony D'Amato and Sudhir Chopra, 'Whales: Their Emerging Right to Life' (1991) 85 *AJIL* 21; Paola Cavalieri and Peter Singer (eds), *The Great Ape Project* (Fourth Estate 1993); Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (OUP 2004); David Favre, 'Living Property: A New Status for Animals Within the Legal System' (2010) 93 *Marq L Rev* 1021; Gary Francione and Robert Garner, *The Animal Rights Debate* (Columbia University Press 2010); Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (OUP 2011); Cormac Cullinan, *Wild Law* (Green Books 2011); Peter Burdon (ed), *Exploring Wild Law* (Wakefield 2011).

⁵ §4.

⁶ §5.

At a general level, there is often a mismatch between the approach adopted by this thesis and 'animal rights' and/or RoN theories because the terms are often used in a much vaguer sense than the specific meaning of 'vital rights' utilised in this thesis. For example, Peter Singer and Jeremy Bentham are at times cited as supporters of 'animal rights' even though they both reject recourse to the notion of rights within the project of altering how humans treat nonhumans.⁷ This is in fact an example of the word 'right' being used in the looser sense of an important moral demand.⁸ Furthermore, as will be seen shortly, even those theories that do engage directly with the concept of rights have shortcomings that mean that they are unsuitable to provide a foundation for nonhuman rights based on an IT approach.

7.1.1 AN ANIMAL RIGHTS APPROACH?

A pertinent example of an animal rights approach is Paola Cavalieri's argument that seeks to extend human rights to animals.⁹ Cavalieri argues for an 'expanded theory of human rights'¹⁰ based on similarities in the nature and functioning of human beings and (certain¹¹) animals.¹² Because of its alignment with human rights, her theory may seem particularly pertinent to this thesis, especially as Cavalieri briefly mentions that human

⁷ Liz McKinnell, 'Environmental Rights' (Doctoral thesis, Durham University 2010) 158-62.

⁸ §4.5.3.

⁹ Paola Cavalieri, *The Animal Question* (OUP 2001).

¹⁰ *ibid* 137ff.

¹¹ Mammals, birds "and probably vertebrates in general" (*ibid* 139).

¹² *ibid* 88-113.

rights can be thought of as protecting 'vital interests'.¹³ However, Cavalieri does not openly engage with IT despite its ability to provide clarity over both why and which (nonhuman) rights could exist.¹⁴

The overlooking of IT in Cavalieri's approach is found in her criteria for "being endowed with full moral status, [which is] being an intentional being".¹⁵ As such, Cavalieri specifically details that "the criterion for the access to the protection that human rights warrant lies only in being... an intentional being that cares about its goals and wants to achieve them".¹⁶ However, her understanding of intentionality limits it to conscious beings,¹⁷ as seen in her assertion that "consciousness is the prerequisite for access to moral consideration".¹⁸ Cavalieri believes that rights require intentionality and that intentionality requires consciousness. Her theory thus moves away from interests and towards consciousness when considering the grounds of rights.

This overlaying of intentionality and consciousness arises through a claim that "in order to have the desire to go on living, a being must be aware of itself as a distinct entity, endowed with a past and a future".¹⁹ However, this clearly moves Cavalieri away from IT since having an *interest* in living

¹³ Paola Cavalieri, 'Are Human Rights Human?' (2005) 4 *Logos* 2. In particular, the interests in welfare, freedom and life itself – Cavalieri (n9) 88-113.

¹⁴ Cavalieri (n9) 88, 103.

¹⁵ *ibid* 137.

¹⁶ Cavalieri (n13) III.

¹⁷ Cavalieri (n9) 39-40, 87, 101-02, 109, 121-43.

¹⁸ *ibid* 109.

¹⁹ *ibid* 102.

is not the same as having a *desire* to go on living. It seems clear that 'living' is a broader process than 'being aware of itself as a distinct entity' (eg fungi are probably not conscious in any meaningful sense of the term).²⁰ As such, an interest in living is (at least potentially) broader than a desire in living, yet Cavalieri's approach overlooks this possibility.

This by-passing of interests by Cavalieri²¹ results in her theory having too limited a scope.²² The scope is too limited because, as an animal rights approach, it does not adequately engage with the possibility of organisms other than animals (hereinafter 'nonanimals') having interests or rights. Given that this thesis enquires into how vital rights can be used to protect the natural world in general, and that a substantial proportion of the natural world is made up of nonanimals, such a narrow scope cannot fulfil the aims of this thesis.

Given the adoption of IT in this thesis, it is appropriate to remain focussed on interests, rather than desires, which are arguably more closely orientated to a Will Theory perspective. It would of course be possible to adhere to IT, while arguing that it is only the interests of intentional/conscious beings that are eligible for the protection of (vital) rights.²³ But Cavalieri does not adequately consider the possibility of

²⁰ See §8.3.

²¹ Cavalieri (n9) 132.

²² This limitation can also be found in the work of Peter Singer and Tom Regan, on whom Cavalieri bases much of her argument (Cavalieri (n9) 88-97).

²³ See §6.2.

nonanimal intentionality, or even nonanimal interests,²⁴ nor does she provide a convincing case for the exclusion of nonanimals from the domain of potential right-holders.

Cavalieri dismisses the possibility of nonanimals being moral patients (and subsequently right-holders) based on an 'imaginative identification' argument:²⁵

Imaginative identification is usually seen as the key instrument of ethics, so much that it is defined as "the primary form of moral argument." To put oneself in the shoes of others allows us to (attempt to) understand how they may be affected by what happens to them. But can one try, for example, as Leopold suggests, to "think like a mountain"? In spite of what some advocates of the land ethic maintain, it seems that imaginative identification cannot play any role here... since if we put ourselves in [the shoes of non-conscious entities], what we find is a complete blank.²⁶

Cavalieri thus argues that because humans cannot imagine what it is like to be (eg) a tree or an ecosystem, nonanimals are therefore outside the domain of moral argument, and so cannot be right-holders.²⁷ However, it

²⁴ See §8.3.

²⁵ Cavalieri (n9) 33-37.

²⁶ *ibid* 33-34, footnotes omitted.

²⁷ *ibid* 39-40, 87, 101-02, 109, 121-43.

hardly seems reasonable to reject the possibility of certain organisms having rights based on a (purported) human limitation.

In any case, it is not clear that such a limitation exists. As Cavalieri is aware, Aldo Leopold's powerful exhortation to "think like a mountain"²⁸ specifically urges the exploration of this supposed limitation.²⁹ The possibility of thinking like a mountain (and the difficulty of it) is analysed by Warwick Fox in his exploration of three different types of self-identification:³⁰ personal (the most 'usual' kind³¹); ontological (which "refers to experiences of commonality with all that are brought about through deep-seated realization of the fact *that* things are"³²); and cosmological (a "deep-seated realization of the fact that we and all other entities are aspects of a single unfolding reality"³³). Fox argues that all three have value in understanding the natural world and its relations, allowing us to conceive "of all entities as leaves on the tree of life".³⁴ Most importantly, Fox's analysis shows that even though it may be easier to

²⁸ *ibid* 33; Aldo Leopold, *A Sand County Almanac* (OUP 1949) 129.

²⁹ See John Tallmadge, 'Anatomy of a Classic' in J Baird Callicott (ed), *Companion to A Sand County Almanac* (University of Wisconsin 1987) 124-26.

³⁰ Warwick Fox, *Toward A Transpersonal Ecology* (SUNY Press 1990) 249-68.

³¹ *ibid* 249-50, 259. Although not to be confused with identity, "that I literally *am* that tree over there, for example. What is being emphasized is the tremendously *common* experience that through the process of identification my *sense* of self (my experiential self) can expand to include the tree even though I and the tree remain physically 'separate' (even here, however, the word *separate* must not be taken too literally because ecology tells us that my physical self and the tree are physically *interlinked* in all sorts of ways)." (*ibid* 231-32, emphasis in original)

³² *ibid* 250. Fox compares with the training of consciousness associated with Zen Buddhism.

³³ *ibid* 252.

³⁴ *ibid* 261.

identify with pandas than trees, the latter is not impossible. This limited scope of the 'animal rights' approach demonstrates that Cavalieri's approach is often in need of "a deeper and more extended consideration of environmental philosophy's contribution to the animal rights debate than is achieved by Cavalieri's mere handful of comments".³⁵

Cavalieri rightly rejects speciesism, noting that "discrimination based on species is analogous to those forms of discrimination that the very doctrine condemns in sexism and racism".³⁶ But by dismissing nonanimals from her inquiry at an early stage, this discrimination is simply displaced to a different taxonomical level (ie to the kingdom Metazoa).³⁷ This discrimination – 'kingdom-ism' – is comparable with the 'sentientism' found in many other theories of animal rights,³⁸ which has been criticised as simply recreating the same problem as speciesism but in a different location.³⁹

Cavalieri's thesis, along with other 'sentientist' approaches, unsatisfactorily excludes a great number of organisms from the scope of its enquiry. Having seen the dangers of 'exclusionary' theories in Chapter One, whereby the protection of (modern) human rights was denied based on

³⁵ Chris Belshaw, 'Review of Paola Cavalieri, *The Animal Question*' [2002] *Notre Dame Philosophical Review* 12.

³⁶ Cavalieri (n13).

³⁷ Cavalieri (n9) 29.

³⁸ In particular Peter Singer, *Animal Liberation* (Random House 1975); Regan (n4).

³⁹ See Gary Varner, *In Nature's Interests* (OUP 1998) 14, 39, 78, 98, 118; Gary Varner, 'Sentientism' in Dale Jamieson (ed), *A Companion to Environmental Philosophy* (Blackwell 2001) 192; cf Richard Ryder, 'Sentientism' in Cavalieri and Singer (n4) 220.

race or sex, care must be taken to avoid exclusivity creeping back in via species or any other human-constructed biological taxon.⁴⁰ It is therefore prudent to advance without relying too heavily on any such theory that prematurely narrows the scope of enquiry through 'kingdom-ism' or sentientism. Focussing the present inquiry on nonhuman interests can help overcome this concern, and will be the approach adopted in this thesis.

7.1.2 AN EARTH JURISPRUDENCE APPROACH?

An alternative approach for nonhuman rights is that of 'rights of nature' (RoN). A wider net is cast by RoN theories, which seek to vest rights in many natural entities, including plants, species and ecosystems. The leading example of a theory underpinning a RoN approach is that of 'Earth Jurisprudence', a term coined by Thomas Berry and developed by Cormac Cullinan and Peter Burdon.⁴¹ Earth Jurisprudence is associated with holistic, ecocentric accounts of value and moral subjecthood,⁴² and has been deployed by Cullinan and Burdon as a basis as to justify Berry's claim that "[r]ivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights".⁴³ Although Earth Jurisprudence is not

⁴⁰ Cavalieri (n9) 70

⁴¹ Cullinan (n4); Burdon (n4).

⁴² See Vito de Lucia, 'Towards an ecological philosophy of law: a comparative discussion' (2013) *JHRE* 167, 173-79; Judith Koons, 'Key Principles to Transform Law for the Health of the Planet' in Burdon (n4) 47-49.

⁴³ Cited in Cullinan (n4) 103.

necessarily committed to the notion of rights, "the prevailing strategy employed within [Earth Jurisprudence] is a rights-based approach".⁴⁴

The core idea of Earth Jurisprudence is that human constructed laws should be attuned with the 'laws' that govern the functioning of the natural world. According to Burdon and Cullinan, Earth Jurisprudence is in turn founded on 'the Great Jurisprudence' or 'the Great Law'⁴⁵ (the terms should be understood as synonymous⁴⁶) which Cullinan describes as "the 'laws' or principles that govern how the universe functions".⁴⁷ These are thus more like the 'laws of physics' than the juridical meaning of law.⁴⁸

Burdon's understanding of 'the Great Law' is narrower than Cullinan's. Rather than all physical 'laws', Burdon narrows the scope of the Great Law to ecological ones: "the Great Law represents the ecological conception of community articulated by Berry. More specifically, I interpret it to refer to human interconnectedness with nature and the ecological integrity of the Earth community".⁴⁹ In any case, both Cullinan and Burdon agree that the Great Jurisprudence/Law underpins Thomas Berry's claim that "rights originate where existence originates. That which

⁴⁴ De Lucia (n42) 175.

⁴⁵ *ibid* 174.

⁴⁶ Peter Burdon, 'The Earth Community and Ecological Jurisprudence' (2013) 3 *Oñati Socio-Legal Series* 815, 827n23.

⁴⁷ Cullinan (n4) 78.

⁴⁸ See Lynda Warren, 'Wild Law – the theory' (2006) 18 *ELM* 11, 13.

⁴⁹ Burdon (n46) 827; Peter Burdon, 'The Great Jurisprudence' in Peter Burdon (ed), *Exploring Wild Law* (Wakefield 2011) 65-67.

determines existence determines rights".⁵⁰ Earth Jurisprudence thus states that RoN arise as a consequence of, and are justified by, physical laws of nature; and it seeks to situate law within an ecological framework, redirecting law towards a "conscious reintegration of human societies into the Earth Community".⁵¹

In this regard, Cullinan states that "humans are not the only members of the Earth Community that have rights, and the source of those rights is not human laws",⁵² and Burdon claims that "Earth Jurisprudence has the potential to provide the jurisprudential foundation for human rights law".⁵³ However, it is unclear how exactly Earth Jurisprudence justifies the creation of rights within international law that protect the essential interests of living beings. The holistic, ecological perspective of Earth Jurisprudence urges that "human laws and governance systems must be designed to promote human behaviour that contributes to the health and integrity not only of that human society, but also of the wider ecological communities, and of Earth itself"⁵⁴ akin to how conservationist-turned-philosopher Aldo Leopold's Land Ethic has long urged that "a thing is right when it tends to preserve the integrity, stability and beauty of the biotic

⁵⁰ Thomas Berry, *The Great Work* (Crown 2000) 103. Although this is inconsistent with Berry's claim that "All rights have been bestowed on human beings" cited in Burdon (n49) 63.

⁵¹ Cullinan (n4) 170.

⁵² *ibid* 100.

⁵³ Burdon (n46) 830.

⁵⁴ Cullinan (n4) 82-83. See also Ian Mason, 'One In All: Principles and Characteristics of Earth Jurisprudence' in Burdon (n4) 36-37.

community. It is wrong when it tends otherwise".⁵⁵ But the value of rights as tools for identifying what duties are owed to whom does not *necessarily* feature in such a design, hence the fact that Earth Jurisprudence is not committed to a rights-based approach.⁵⁶

Since Earth Jurisprudence does *not* demand the legal tool of a right, and IHRL did not originate where existence originated, but through a process of intergovernmental negotiation that recognised the inherent dignity of the human person, Earth Jurisprudence requires additional theorising to justify vital rights. Dignity, as an intrinsic property of (at least some) living beings, may well originate with existence,⁵⁷ and can serve this justificatory role.

But Earth Jurisprudence does not detail any such concept in order to explain what (or even who) RoN should protect and why they should do so.

There is a crucial step missing in Earth Jurisprudence's justification of RoN. This step requires articulation of who RoN should be vested in, and what it is about these proposed right-holders that makes them worthy of the protection of vital rights. The final Part of this thesis will work in this lacuna through the tools provided by IT and dignity. Part II of this thesis has already shown that vital rights are grounded in the essential interests of living beings. This provides a pathway to specifically justify the existence of nonhuman vital rights in a way that is broadly compatible with Earth Jurisprudence and other calls for law to develop along more ecological lines.

⁵⁵ Aldo Leopold, *A Sand County Almanac* (OUP 1949) 224. See Cullinan (n4) 114.

⁵⁶ See Burdon (n49) 66; Mason (n54) 36-44; Koons (n42) 45-47.

⁵⁷ See §1.5; §6.4.

Earth Jurisprudence as a rallying cry for designing law based on the laws of ecology bears similarities to the ecosystem approach outlined in Chapter Three, which “embodies knowledge of how complex, dynamic, interacting ecological and physical systems operate at different scales, and... highlights that environmental limits must be adhered to”.⁵⁸ Indeed, Burdon acknowledges that “the Great Law should be defined with reference to ‘first principles’ uncovered in the scientific discipline of ecology. This approach is also consistent with the current direction of environmental law”.⁵⁹ Another example of this is found in Tallacchini’s ‘Law for Nature’⁶⁰ approach which provides a comparable ecological legal theory that does not necessitate deploying ‘rights’ and whose tenets can already be found in existing environmental law.⁶¹ This thesis is attuned with furthering the movement of law into harmony with ecological principles, and does this through careful analysis of vital rights through the lens of IT.

7.1.3 A NONHUMAN VITAL RIGHTS APPROACH

It is therefore necessary to forge new ground in analysing and justifying nonhuman vital rights. While animal rights theories too readily discard other organisms, RoN theories do not provide clear justification for the creation of (new) vital rights. This thesis will thus investigate nonhuman vital interests as the grounds for nonhuman vital rights. The terrain for this lies both between and beyond that of animal rights and Earth

⁵⁸ UK National Ecosystem Assessment, *Technical Report* (UNEP-WCMC 2011) 1317.

⁵⁹ Burdon (n49) 66.

⁶⁰ De Lucia (n42).

⁶¹ *ibid.*

Jurisprudence. Like animal rights, it seeks to directly link nonhuman rights to existing human rights; and like RoN, it seeks to design a law that better reflects sound ecological principles.

The remainder of this chapter will survey legal attempts to vest vital rights in nonhuman organisms and ecosystems. The purpose of this survey is to demonstrate the sort of rights under consideration in Part III, to demonstrate how varied they are, and to demonstrate their similarity to the vital rights found in IHRL.

7.2 CASES

There have been a number of attempts to secure the legal protection of nonhumans through judicial routes. As will be seen, these have in general relied on demonstrating similarities between certain nonhumans and the humans whose interests the law was designed to protect. As such, they have sought to extend existing human rights to nonhumans, in a similar fashion to Cavalieri's animal rights approach.

7.2.1 PRIMATES

A number of attempts to establish nonhuman rights through courts have been made on behalf of chimpanzees. These attempts have in general relied upon the genetic, evolutionary and behavioural similarities between humans and other great apes.⁶²

⁶² See Jared Diamond, *The Rise and Fall of the Third Chimpanzee* (Radius 1991). Behavioural similarity may be more important than genetic similarity. Octopuses are an intriguing example: Richard Dawkins, 'Gaps in the Mind' in Cavalieri and Singer (n4) 85.

In Brazil⁶³ a petition was brought in 2005 on behalf of Suíça, a chimpanzee held at Salvador Zoo in conditions unsuitable for her wellbeing.⁶⁴ Brought by two public prosecutors, Heron and Luciano Santana, the key strategy in the writ was demonstrating the genetic, evolutionary and taxonomical similarity between chimpanzees and humans.⁶⁵ Suíça died before the judge could hear the case. However, it does appear that the judge may have been favourable to the case since he did not dismiss it *in limine* and stated that he believed the issue will remain a live one.⁶⁶

Another attempt to get courts to recognise the personhood of a chimpanzee concerns Matthew 'Hiasl' Pan. Hiasl is a chimpanzee who was abducted from Sierra Leone in 1982 and taken to Austria for the purposes of medical research.⁶⁷ Hiasl was intercepted by customs on his arrival after the intervention of animal rights activists under the regulations of CITES.⁶⁸ Hiasl was brought up by a guardian family and an animal shelter despite frequent attempts by the medical research company (Immuno) to have

⁶³ National legal processes are used as examples of the principles of nonhuman vital rights, not as evidence of their practice at the international level.

⁶⁴ 'Petition for a Writ of Habeas Corpus' (9th Salvador Criminal Court, Salvador, Bahia, Brazil no 833085-3/2005, 09/19/2005) (Valdelane Azevedo Clayton tr) <<https://www.animallaw.info/sites/default/files/Habeas%20Corpus%20on%20Behalf%20of%20a%20Chimp%20Rev2.pdf>> (accessed 19/8/2014).

⁶⁵ *ibid.*

⁶⁶ Official Diary for October 4th 2005, Judge Edmundo Lucio da Cruz (833085-3/2005), available at <<https://www.animallaw.info/case/suica-habeas-corpus>> (accessed 19/8/2014).

⁶⁷ Martin Balluch, 'Personhood Trial for Chimpanzee Matthew Pan' <<https://www.vgt.at/publikationen/texte/artikel/20080118Hiasl.htm>> (accessed 19/8/2014).

⁶⁸ *ibid.*

him extracted. In 2006 a large amount of money was donated to an animal rights association on the condition that a legal guardian be appointed for Hiasl and that Hiasl (through his guardian) and the association jointly decide how to spend the money.⁶⁹

The Austrian District, Provincial and Supreme Courts all turned down the application to appoint a legal guardian for Hiasl based on predominantly technical issues.⁷⁰ The courts reasoned that as Hiasl is not mentally handicapped or facing imminent threat, it was impossible to appoint a legal guardian, and that this ruling could not be challenged on his behalf.⁷¹ Attempting to transfer legal structures designed for humans directly onto nonhumans can result in poorly fitting outcomes. When apprised of the case, the ECtHR ruled the application inadmissible without any detailed examination of the substantive arguments.⁷²

Finally, there are currently a number related *habeas corpus* claims under consideration in New York.⁷³ The cases have been brought by the Nonhuman Rights Project (NhRP) on behalf of four chimpanzees kept in

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *Balluch v Austria* (26180/08, 4 May 2008) and *Stibbe v Austria* (26188/08, 6 May 2008). (See *Herrmann v Germany* (2013) 56 EHRR 7 Separate Opinion 38n22).

⁷³ *Nonhuman Rights Project on behalf of Tommy v Lavery* 124 AD.3d 148 (2014) (Appellate Division of the Supreme Court of the State of New York, 3rd Department); *Nonhuman Rights Project on behalf of Kiko v Presti* 124 AD.3d 1334 (2015) (Appellate Division of the Supreme Court of the State of New York, 4th Department); *Nonhuman Rights Project on behalf of Hercules and Leo v Stanley* Index No 152736/2015 (2015) (Supreme Court State of the State of New York, County of New York).

captivity: Tommy and Kiko are owned by (separate) individuals; and Hercules and Leo are used for research at Stony Brook University.

The approach adopted by NhRP has been to demonstrate the similarity between humans and the chimpanzees *in question* through considering the exhibited characteristics of Tommy et al. Eleven experts from a range of fields have submitted affidavits to support the NhRP petitions⁷⁴ chronicling the emotional, psychological, and cognitive development of the chimpanzees as evidence of both their sense of self and their autonomy, which the NhRP considers “the most important cognitive ability”.⁷⁵

As of December 2016, none of the cases have yet been successful. They are currently being appealed or re-filed by the NhRP. In the case against Stony Brook University an ‘Order to Show Cause’ was issued requiring the University to give a legally sufficient reason for detaining Hercules and Leo.⁷⁶ However, Justice Jaffe ruled that a previous determination that Tommy could not be a legal person because he could not bear duties bound her to deny the petition for *habeas corpus* in the present case.⁷⁷ The University announced in May 2016 that they would be relocating all their

⁷⁴ Available at <<http://www.nonhumanrightsproject.org/2013/12/02/legal-documents-re-tommy-kiko-hercules-and-leo-2/>> (accessed 20/8/2014).

⁷⁵ *Tommy* (n73), Verified Petition, State of New York Supreme Court, County of Fulton [21].

⁷⁶ *Hercules and Leo* (n73), ‘Order to Show Cause’.

⁷⁷ *ibid* 27-31.

chimpanzees (including Hercules and Leo) to a sanctuary, in line with the remedy argued for by the NhRP.⁷⁸

Justice Jaffe also maintained this ruling in follow-up *habeas corpus* petitions on behalf of Tommy⁷⁹ and Kiko,⁸⁰ which contained additional evidence showing that “chimpanzees routinely shoulder duties and responsibilities both in chimpanzee communities and in human/chimpanzee communities”.⁸¹ In January 2017 the Appellate Division of the New York Supreme Court will hear the NhRP’s question as to whether “the capacity to bear duties and responsibilities [has] any relationship to being deemed a ‘person’ for the purpose of demanding a writ of *habeas corpus*”.⁸² Certainly, the analysis presented in Chapter Four of this thesis has demonstrated that it is not necessary to bear duties in order to hold rights.

⁷⁸ NhRP, ‘Nonhuman Rights Project Chimpanzee Clients Hercules and Leo to Be Sent to Sanctuary’ (3 May 2016) <http://www.nonhumanrightsproject.org/2016/05/03/nonhuman-rights-project-chimpanzee-clients-hercules-and-leo-to-be-sent-to-sanctuary/> (accessed 12/12/16).

⁷⁹ Nonhuman Rights Project, on behalf of Tommy v Lavery (162358/2015) (New York Supreme Court).

⁸⁰ Nonhuman Rights Project, on behalf of Kiko v Presti (150149/2016) (New York Supreme Court).

⁸¹ NhRP, ‘New York Supreme Court Judge Denies Kiko’s Second Habeas Corpus Bid’ (11 February 2016) <http://www.nonhumanrightsproject.org/2016/02/11/new-york-trial-court-denies-kikos-latest-habeas-corpus-bid/> (accessed 12/12/16).

⁸² NhRP, ‘Appellate Court Grants New Hearing in Tommy Chimpanzee Rights Case’ (29 November 2016) <http://www.nonhumanrightsproject.org/2016/11/29/appellate-court-grants-new-hearing-in-tommy-chimpanzee-rights-case/> (accessed 12/12/16).

7.2.2 CETACEANS

Another animal taxon comparable to humans in terms of their intelligence and social nature is cetaceans.⁸³ Whales, dolphins and porpoises exhibit characteristics similar to primates and are thus obvious candidates when it comes to extending vital rights to nonhumans.

Because of this similarity, in 2011 PETA filed a complaint against Seaworld on behalf of five orcas (Tilikum, Katina, Corky, Kasatska and Ulises) held in captivity by Seaworld.⁸⁴ PETA's strategy was to use the Thirteenth Amendment to the US Constitution (designed to abolish slavery) to secure the freedom of these nonhumans.⁸⁵

Rather than drawing directly on the behaviour of Tilikum et al, the case focussed on the suitability of the conditions in which the orcas are held captive.⁸⁶ To do this, it was necessary to make reference to the natural repertoire of orcas in general, such as their complex social and communicative behaviours, their community structures and emotional

⁸³ eg Lori Marino, 'Convergence of Complex Cognitive Abilities in Cetaceans and Primates' (2002) 59 *Brain Behavior and Evolution* 21.

⁸⁴ *Tilikum et al v SeaWorld* No 11 Civ 2476, 842 F Supp.2d 1259 (Southern District Court, California 2011).

See also David Mence, 'The cetacean right to life revisited' (2015) 11 *International Journal of Law in Context* 17; Indian Central Zoo Authority, 'Policy on establishment of dolphinarium' 20-1/2010-CZA(M)/2840 <<http://www.moef.nic.in/assets/ban%20on%20dolphanariums.pdf>> (accessed 17/7/2014); and a proposed bill brought by Romanian MP Remus Cernea to recognise dolphins as nonhuman persons <www.senat.ro/legis/lista.aspx?cod=17966> (in Romanian, accessed 7/9/2014).

⁸⁵ 'Complaint for Declaratory and Injunctive Relief', *Tilikum* (n84) [1].

⁸⁶ *ibid* [1], [19]-[66].

processing.⁸⁷ The conditions the orcas are held in by Seaworld prevent them from expressing their normal behaviour and frustrate some of their most basic needs.⁸⁸

The case was thrown out for lack of subject matter jurisdiction.⁸⁹ The court ruled that only humans were intended to, and can, benefit from the Thirteenth Amendment. In reaching this conclusion, the Court determined that “the Amendment is not reasonably subject to an expansive interpretation... as ‘slavery’ and ‘involuntary servitude’ are uniquely human activities”.⁹⁰ This is however by no means an unchallengeable proposition, and given the longstanding extension of the Fourteenth Amendment (regarding equal protection of the law) to the US Constitution to corporations,⁹¹ it is clear that it would be legally possible to also interpret the Thirteenth Amendment expansively.

7.2.3 ANIMAL RIGHTS IN THE INDIAN COURTS

There have also been developments regarding animal rights from the Indian judiciary. In the *Jallikattu* case,⁹² concerns over the welfare of bulls used in jallikattu (an activity similar to bullfighting) were brought to the Supreme Court of India by the Animal Welfare Board. The concerns included twisting bulls’ tails, poking bulls with knives and sticks, cramped

⁸⁷ *ibid* [10]-[18].

⁸⁸ *ibid* [19]-[27].

⁸⁹ ‘Order Granting Motion to Dismiss’, *Tilikum* (n84) 7.

⁹⁰ *ibid* 6-7.

⁹¹ *Santa Clara County v Southern Pacific Railroad Co* 118 US 394 (1886).

⁹² *Animal Welfare Board of India v A Nagaraja & Ors* Civil Appeal No 5387 of 2014.

conditions, and a lack of food and water.⁹³ The Supreme Court accepted that the treatment of bulls in jallikattu caused them to suffer mentally and physically⁹⁴ and ruled that bulls must not be used in jallikattu or other similar activities anywhere in India.⁹⁵

The Supreme Court's readiness to refer to 'animal rights' throughout its judgment is notable. In particular, the Court acknowledged that the case concerned "an issue of seminal importance with regards to the Rights of Animals".⁹⁶ It also acknowledged the need for responsible guardianship in order to protect nonhumans,⁹⁷ and lamented the lacuna at the international level between the rights of humans and of other species.⁹⁸

However, the Court's understanding of 'rights' is at times blurry. As demonstrated in Part II, there is a difference between a purely legal claim-right and the sort of right found in IHRL. This distinction is indeed acknowledged by the Court:

Rights guaranteed to the animals under Sections 3, 11, etc. are only statutory rights. The same have to be elevated to the status of fundamental rights, as has been done by few

⁹³ *ibid* [17].

⁹⁴ *ibid* [4], [17], [63].

⁹⁵ *ibid* [77].

⁹⁶ *ibid* [2].

⁹⁷ *ibid* [26].

⁹⁸ *ibid* [47].

countries around the world, so as to secure their honour and dignity.⁹⁹

This refers to a process of turning statutory rights into vital rights (in order to secure dignity). However, this process has *not* taken place in other countries. Despite this obscurity, it seems likely that the Supreme Court does endorse the concept of vital animal rights. Evidence of this endorsement can be gleaned from *Nair v Union of India*, a case heard by the Kerala High Court, and cited in *Jallikattu*:

It is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights... If humans are entitled to fundamental rights, why not animals?... While the law currently protects wildlife and endangered species from extinction, animals are denied rights, an anachronism which must necessarily change.¹⁰⁰

7.3 LEGISLATION

Although there is no binding international legal agreement that bestows vital rights on any organism other than humans, there have been a number of texts drafted that demonstrate what form any such treaty might take. These are worth examining to get a sense of the form of proposed nonhuman vital rights.

⁹⁹ *ibid* [56].

¹⁰⁰ *NR Nair And Ors Etc vs Union Of India And Ors*, AIR 2000 34 Kerala High Court, no 155/1999 [13]. Martha Nussbaum, *Frontiers of Justice* (HUP 2006) 325.

7.3.1 1978 UNESCO DECLARATION OF ANIMAL RIGHTS

This declaration was proclaimed at the UNESCO headquarters in 1978 but failed to meet with international approval.¹⁰¹ Its 14 Articles contain a mixture of potentially enforceable rights (“All animals belonging to a wild species have the right to live freely in their natural environment, and have the right to reproduce”¹⁰²), more general exhortations (“To abandon an animal is a cruel and degrading act”¹⁰³) and provisions in-between (“Every animal has the right to be respected”¹⁰⁴).

Certain key themes can be found in the provisions. For example, issues of biological functioning,¹⁰⁵ physical liberty,¹⁰⁶ and torture¹⁰⁷ all feature.¹⁰⁸

There is also a reference to animal dignity: the Declaration stating that

¹⁰¹ Available at <http://www.vier-pfoten.ro/files/Romania/Diverse/universal_declaration_of_animal_rights.pdf> (accessed 10/6/2015).

The Declaration was revised by the International League of Animal Rights in 1989 and a number of other documents entitled ‘Universal Declaration of Animal Rights’ have been produced, notably by UK NGO ‘Uncaged’ <<http://www.uncaged.co.uk/declarat.htm>> (accessed 27/7/2015) and as part of an Animal Rights Day campaign by ‘Our Planet. Theirs Too’ <<http://www.declarationofar.org/>> (accessed 27/7/2015).

¹⁰² Article 4(1).

¹⁰³ Article 6(2).

¹⁰⁴ Article 2(1).

¹⁰⁵ Article 1, Article 5.

¹⁰⁶ Article 4.

¹⁰⁷ Article 3(1), Article 9.

¹⁰⁸ §8.2-8.3.

“animal exhibitions and entertainments involving animals are incompatible with animal dignity.”¹⁰⁹

7.3.2 HELSINKI DECLARATION

A more recent animal rights declaration is the 2010 Helsinki Declaration of Rights for Cetaceans.¹¹⁰ An output of an interdisciplinary conference, the Declaration is “based on the principle of equal treatment of all persons”.¹¹¹ The Declaration is not meant to be legally binding, but is a primarily rhetorical device. The species (or in this case order¹¹²) specific approach may be necessary to account for the diversity in the natural world: it is highly unlikely that all nonhumans should have the same rights.

The rights contained within the Declaration include: a right to life;¹¹³ a right to freedom of movement;¹¹⁴ freedom from captivity, servitude, and cruel treatment;¹¹⁵ a right to protection of their natural environment;¹¹⁶ a right to not have their culture disrupted;¹¹⁷ and a right to an international order in which their rights can be realised.¹¹⁸ These all have clear parallels

¹⁰⁹ Article 10(2).

¹¹⁰ <<http://www.cetaceanrights.org/>> (accessed 19/5/2015). See also ‘A Declaration on Great Apes’ in Cavalieri and Singer (n4) 4-7.

¹¹¹ Preamble.

¹¹² Larger than a family (eg great apes): cf UDHR Preamble, first recital and Diamond (n62).

¹¹³ Article 1.

¹¹⁴ Article 3.

¹¹⁵ Article 2.

¹¹⁶ Article 5.

¹¹⁷ Article 6.

¹¹⁸ Article 8.

in IHRL and are even overlapping. For example, a dolphin right to environment will inevitably overlap with a human right to environment since both humans and dolphins will be negatively affected by certain pollutants or alterations to ecological dynamics. The important observation is that human and nonhuman rights will often end up working in the same direction.

7.3.3 RIGHTS OF NATURE

As already noted, attempts to establish nonhuman rights have not exclusively focussed on animals. RoN approaches seek to vest rights in a diverse range of natural beings, including nonanimals, ecosystems and the Earth itself. The concept of RoN has been debated by the UNGA on a number of occasions¹¹⁹ and the idea of bestowing rights on ecosystems and other such natural entities has a long history and a growing following.¹²⁰

The standout RoN instrument is the 2010 Universal Declaration of Rights of Mother Earth (UDRME).¹²¹ Adopted at a World Peoples' Conference on Climate Change (a response to the contemporaneous Copenhagen COP 15), this exhortative Declaration ascribes rights to "Mother Earth and all beings

¹¹⁹ eg 'Harmony with nature' A/71/266 (1 August 2016); 'The Future We Want' A/RES/66/288 (11 September 2012) [39]; <<http://www.harmonywithnatureun.org/>> (accessed 3/6/2015); David Boyd, *The Environmental Rights Revolution* (UBC Press 2012) 284;

¹²⁰ Stone (n4); Nash (n1); Cullinan (n4); Burdon (n4).

¹²¹ <<http://therightsofnature.org/universal-declaration/>> (accessed 12/5/2015).

of which she is composed".¹²² The language used is a result of the heavy South American influence,¹²³ where the concepts of Pachamana (or Mother Earth) and 'buen vivir'¹²⁴ have emerged and taken root. The UDRME appears designed to mirror the UDHR, although it does not mention the concept of dignity. Within the Declaration are rights to life, to identity and integrity, to water and to clean air.¹²⁵ Notably, these rights are attached to organisms, species, natural communities and Mother Earth herself.¹²⁶ Article 4(2) UDRME also opens the door to the creation of further species- (or other taxon-)specific rights (such as IHRL and the Helsinki Declaration) complementary to those contained in the UDRME.

There are also instances of legally binding RoN within the national law of two South American states.¹²⁷ Chapter VII of the Ecuadorian Constitution¹²⁸ is entitled 'Rights of Nature' and bestows on "Nature, or Pacha Mama... the right to integral respect for its existence and for the

¹²² Article 2(1). See also Article 4(1): "The term "being" includes ecosystems, natural communities, species and all other natural entities which exist as part of Mother Earth."

¹²³ Although similar ideas are being investigated in Europe through a European Citizens' Initiative: <<http://www.rightsofnature.eu/ECI-DraftDirective-Draft.pdf>> (accessed 3/10/2016, 'ECI Draft Directive') and in the US through municipal level law.

¹²⁴ A concept with roots in indigenous thinking which critiques the Western economic development paradigm. It has been incorporated into the Constitutions of Bolivia and Ecuador. Eduardo Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) 54 *Development* 441.

¹²⁵ Article 2.

¹²⁶ Articles 2(1) and 4(1).

¹²⁷ See also <<http://www.harmonywithnatureun.org/rightsofnature.html>> (accessed 12/11/2016).

¹²⁸ Constitution of the Republic of Ecuador, National Assembly Legislative and Oversight Committee (October 20, 2008).

maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”,¹²⁹ a right to be restored,¹³⁰ and the right of persons, communities, peoples and nations to benefit from the natural environment, “enabling them to enjoy the good way of living”.¹³¹ Chapter VII coalesces human and nonhuman rights, seeing them as mutually interdependent rather than antagonistic.¹³²

These constitutional rights are legally enforceable, and Article 73 of the Constitution sets out responsibilities of the state: “The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles”. Such a provision is far-reaching and a provincial court in Ecuador has held a judgment against the state based on Chapter VII in *Wheeler and Huddle v Attorney General of the State of Loja*.¹³³ In its judgment, the court noted that “even when there are two collective interests to consider, the environment is the most important”.¹³⁴ This demonstrates the potentially far-reaching impact of RoN.

¹²⁹ Article 71.

¹³⁰ Article 72.

¹³¹ Article 74.

¹³² See also UDRME Article 1(6), ECI Draft Directive Article 4(3).

¹³³ (2011) Judgment No 11121-2011-0010. See Erin Daly, ‘Case Note’ (2012) 21 *RECIEL* 63; Karen Hulme, ‘International environmental law and human rights’ in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 285, 287, 298; Boyd (n46) 140; Laurel Fish, ‘Homogenizing Community, Homogenizing Nature’ (2013) 12 *Stanford Undergraduate Research Journal* 6.

¹³⁴ *ibid* [Décimo Segundo] (author’s translation).

Secondly, although not at the constitutional level, Bolivia has introduced a Law of the Rights of Mother Earth.¹³⁵ Unlike the Ecuadorian Constitution, but like the UDRME, the Bolivian Law assigns rights to a wide variety of subjects: to Mother Earth and all her components.¹³⁶

7.3.4 TE UREWERA AND TE AWA TUPIA

A final example comes from New Zealand where new legislation is emerging that bestows rights on particular parts of the natural world. The Te Urewera Act (2014)¹³⁷ and the Te Awa Tupua (Whanganui River Claims Settlement) Bill (2016)¹³⁸ respectively declare Te Urewera (previously a National Park) and Te Awa Tupua ("an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements"¹³⁹) to be legal entities/persons with "all the rights, powers, duties, and liabilities of a legal person".¹⁴⁰

Not only do these instruments bestow rights on nonhuman parts of the natural world, but they also set out the legal mechanisms through which these rights are to be exercised and protected. The Te Urewera Act

¹³⁵ Ley de Derechos de la Madre Tierra (2010), Law 071 of the Plurinational State. For further examples see <http://www.harmonywithnatureun.org/rightsofnature.html> (accessed 3/8/2015).

¹³⁶ Article 5.

¹³⁷ 2014/51 (27 July 2014).

¹³⁸ 2016/129-2. See Elaine Hsiao, 'Whanganui River Agreement' (2012) 42 *Environmental Policy and Law* 371.

¹³⁹ *ibid* s12.

¹⁴⁰ Te Urewera Act (n137) s11(1).

appoints a Board to act as legal guardians who must inter alia “act on behalf of, and in the name of, Te Urewera”¹⁴¹ and “promote or advocate for the interests of Te Urewera”.¹⁴² The Te Awa Tupua Bill contains comparable provisions through the establishment of ‘Te Pou Tupua’ (comprising one representative from the iwi and one from the Crown), whose purpose is to be “the human face of Te Awa Tupua”¹⁴³ and who must “promote and protect the health and well-being of Te Awa Tupua”.¹⁴⁴

It is interesting to note that these laws have been developed to improve the legal protection offered to traditional Maori iwi and cosmologies as much as for reasons of environmental protection.¹⁴⁵ Maori cosmology appears to more easily capture the interconnected relations between humans and their environments:¹⁴⁶ protecting human interests and nonhuman interests are not seen as incompatible, but rather as complementary. The retention of Maori terminology in the English language texts potentially signals understanding that some relevant iwi concepts (such as Te Awa Tupua) are missing from Western cosmologies, and that legal structures can learn from, and adapt to, indigenous philosophical and spiritual concepts.¹⁴⁷

¹⁴¹ *ibid* s17(a).

¹⁴² *ibid* s18(1)(g).

¹⁴³ *supra* n138 s18(2).

¹⁴⁴ *ibid* s19(1)(c).

¹⁴⁵ Catherine Iorns Magallanes, ‘Nature as an Ancestor: Two examples of Legal Personality for Nature in New Zealand’ (2015) *VertigO Hors-série* 22 [45].

¹⁴⁶ See n138 s71.

¹⁴⁷ Magallanes (n145) [29].

7.4 CONCLUSION

Nonhuman rights are diverse. This diversity is itself multidimensional: there are a number of potential subjects of nonhuman rights, various potential justifications for them, and variations in their content. Broadly speaking, approaches through the courts have focussed on animal rights, whereas legislative approaches have had a broader scope. As a result, the most suitable subjects for nonhumans rights is unclear. Focus at the ecosystem-level is more in line with current environmental protection, but organism rights coalesce more smoothly with existing human rights.

The general approach behind animal rights both in theory and in practice is normally one of demonstrating a similarity between humans and the animals in question, and so arguing for an extension of existing human rights to nonhumans. This has been seen in the work of Cavalieri and in the cases brought by the NhRP and PETA. An important shortcoming of using 'similar-to-humans' type arguments is that it can lead to expectations that chimpanzees (for example) must exhibit *identical* properties to humans in order to be legal persons. However, this is not the case, and comparisons between certain nonhumans and certain 'fringe cases' of humans (such as *infans*) risks portraying both in an unfavourable and unfair light.¹⁴⁸ Rather than being 'almost-human', other forms of life have adopted their own strategies for survival and for flourishing that are distinct from – although related to – human ones.

¹⁴⁸ John Rodman, 'The Liberation of Nature?' (1977) 20 *Inquiry* 83, 94.

Although moral extensionism (ie ascribing moral importance to new subjects based on comparisons and similarities with existing moral subjects) can have some traction in improving how humans treat nonhumans, it maintains a hierarchical ideology whereby a particular image of 'the human' is considered the ideal form. This invokes the outdated ideas contained in Plato's 'Great Chain of Being', an analogy that still pervades despite the discovery of evolution.¹⁴⁹ In the words of Darwin, "[i]t is absurd to talk of one animal being higher than another — We consider those, when the intellectual faculties/cerebral structure most developed, as highest — A bee doubtless would when the instincts were".¹⁵⁰

Animal rights approaches are also limited in their ability to protect the natural world because they often focus on the plight of individual organisms, and in particular on domesticated or encaged animals. They thus overlook both the need to consider more holistic issues that are key to environmental protection measures (such as species and habitat loss and ecosystem functioning), and the need to protect wild animals and other organisms.

On the other hand, the RoN approach is more all-encompassing and ascribes rights to not only many organisms, but other ecological levels-of-organisation (species, ecosystem etc) too. RoN may however be too

¹⁴⁹ Note too that the idea of being 'more evolved' is essentially meaningless. Species are as evolved as they need to be.

¹⁵⁰ Charles Darwin, *R. Notebook B: Transmutation of Species* (CUL-DAR121, 1837-38) [74].

indiscriminate with important moral and structural components of rights: does an ecosystem have dignity or a species interests? To answer these questions, clarity is needed over the nature of dignity and the content of vital interests. Any theory on these matters must avoid being overly prescriptive about how immediately comparable their manifestation in nonhumans is with human equivalents in order to avoid the pitfalls of moral extensionism.

The following two chapters build on this one by analysing and developing the theory behind nonhuman rights. They will analyse in more detail the sort of interests that ground vital rights, how these relate to dignity, and their existence within living organisms. This will fill a lacuna within Earth Jurisprudence's justifications for RoN, showing that the dignity of living organisms arises through their interconnections with other beings, and that this dignity can be protected through bestowing rights on ecosystems.

CHAPTER EIGHT

INTERESTS AND DIGNITY, HUMAN AND NONHUMAN

8.1 INTRODUCTION

Having seen the diversity of nonhuman rights in Chapter Seven, this chapter will provide clarity and precision for the way ahead. It considers the content of vital rights through the lens of vital interests. It uses the framework of dignity, vital interests and rights developed in Part II to construct a pathway for Chapter Nine to make a case for nonhuman vital rights. Chapter Eight is chiefly concerned with the construct of nonhuman dignity (what it is), and Chapter Nine with its location (where it is).

In order to analyse nonhuman vital interests and dignity, a three phased approach will be taken. Firstly, a list of the vital interests that ground international human rights law (IHRL) will be constructed. Recalling that IHRL currently offers the only example of vital rights,¹ determining what interests are protected by IHRL will generate a (non-exhaustive) list of vital interests. Secondly, the chapter will demonstrate the existence of (at least some of) these vital interests in (at least some) nonhumans.

Thirdly, having seen that nonhuman vital interests do exist, it becomes necessary to develop Chapter Six's description of the relationship between

¹ §4.2n8.

dignity and vital interests. Since dignity is a valid justification for the existence of vital rights (though not necessarily the only one), the presence of nonhuman dignity opens the way to making a case for the creation of nonhuman rights.

In analysing the nature of vital interests and dignity, this chapter will use intrinsic value (a concept from ecological philosophy²) to construct a definition of dignity. This definition states that dignity is present when something has a vital interest *additional to* the one in continued biological functioning. This is because it is not just life, but *the kind of life* that matters to something with dignity. This definition is compatible with dignity's role as both a justification and as a metric, as well as with the conceptualisation of vital interests as specifications of a pluralistic dignity seen in Chapter Six.

8.2 INTERESTS IN IHRL

Though useful, Part II's analysis that the function of vital rights is to protect vital interests does not determine which interests ought to be protected by what rights. Recall that:

When [IT] contends that rights are modes of protection for interests that are treated as worthy of such protection, it is setting forward a thesis about the general nature or structure of rights. It is not advancing any criterion or set

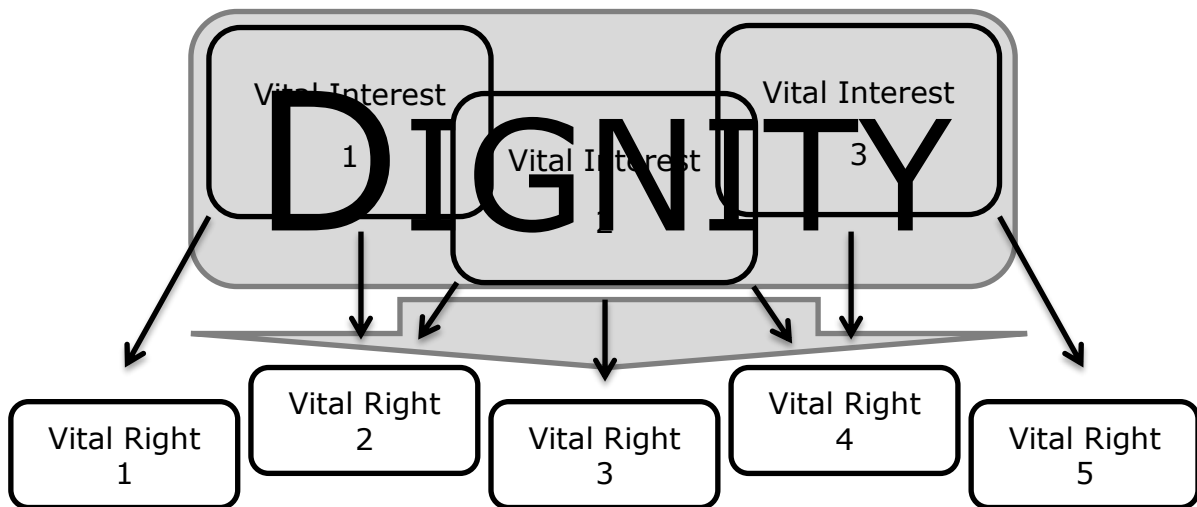
² Ecological ethics provides an appropriate resource for ideas in this regard, given its concern with both living (ie vital) beings, and with justifying and prioritising human behaviour towards the natural world.

of criteria for what should count as the 'worthiness' of an interest.³

The same is true of vital interests. However, it is possible to discover some interests that are worthy of vital rights by considering extant vital rights. The interests grounding the rights in IHRL are definitive examples of interests that are deserving of both the moral impetus and the accompanying legal structure of vital rights. By analysing what these interests are, a list of vital interests will be generated. As such, the approach taken to enlist vital interests in this thesis is not to investigate a priori which interests merit vital rights, but to discover some vital interests by looking at existing IHRL.

This list will be non-exhaustive. There is no reason to expect IHRL to already include all possible vital interests, but it will provide a clear and concrete description of the content of vital rights. Recalling the relationship between dignity, vital interests and vital rights detailed in Chapter Six (see diagram), understanding the nature of vital interests will also develop understanding of dignity.

³ Matthew Kramer, 'Rights Without Trimmings' in Mathew Kramer et al, *A Debate Over Rights* (OUP 1998) 79.



No categorisation of human rights under vital interests is immutable or undebatable. There is not one single bridge between dignity and vital rights. There are a number of consequences of this. Firstly, it is by no means the case that the set of vital interests presented here ought to be considered the only possible set. A number of other academics have undertaken similar tasks and produced lists that are congruent but not identical.⁴ This congruence suggests that finding ground between human

⁴ Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 *AJIL* 848, 852; Dieter Birnbacher, 'Ambiguities in the Concept of Menschenwürde' in Kurt Bayertz (ed), *Sanctity of Life and Human Dignity* (Kluwer 1996) 110; AC Grayling, 'Foreword' in Robin Headlam Wells and Johnjoe McFadden (eds), *Human Nature, Fact and Fiction* (Continuum 2006) xi; Martha Nussbaum, *Frontiers of Justice* (HUP 2006) 70, 76-78, 155-59, 392-401; James Nickel, *Making Sense of Human Rights* (Blackwell 2007) ch4; Johannes Morsink, *Inherent Human Rights* (University of Pennsylvania Press 2009) 161ff; James Nickel and David Reidy, 'Philosophy' in Daniel Moeckli et al (eds), *International Human Rights Law* (1st edn, OUP 2010) 39, 40-41; Charles Foster, *Human Dignity in Bioethics and Law* (Hart 2011) 49.

Consider also the UK Farm Animal Welfare Council's five freedoms: Clare McCausland, 'The Five Freedoms of Animal Welfare are Rights' (2014) 27 *J Agric Environ Ethics* 649.

rights and dignity is not a hopeless task; there are some common features that can be picked out. Secondly, the fact that they are congruent rather than identical points to the fact that dignity can be specified in alternative ways. This supports the claims that dignity is pluralistic and malleable. Once a list has been constructed, it will be compared to others established in the literature to demonstrate common features.

Thirdly, no set of vital interests will provide a watertight categorisation of rights. That is, some human rights are grounded in more than one vital interest. Again, this reinforces the “indivisible, interdependent and interrelated”⁵ nature of human rights and is a result of the inherent continuities in the world: sometimes it simply is not possible to define strict boundaries around phenomena. It is not problematic if it seems that a particular human right is grounded in more than one vital interest (the rights to education and to family will provide two good examples). This is to be expected.

Finally, it should be acknowledged that there are a number of other ways by which one could go about defending, justifying or contemplating human rights.⁶ However, here the focus is on the conclusion of Part II that rights protect interests. The fact that there are other conceptualisations of human rights does not negate the validity, appropriateness, usefulness or

⁵ World Conference on Human Rights, ‘Vienna Declaration and Programme of Action’ A/CONF.157/23 (25 June 1993) Article 5.

⁶ Such as seeing them as being about equality, prudence, protest, or as being historically or religiously contingent. These are not necessarily incompatible with an interest theory of vital rights, but rather emphasise different characteristics of said rights. See §4.2n7.

relevance of seeing them as being about protecting vital human interests. Moreover, it is a reminder that there are often a number of perspectives available to view any particular phenomenon.

8.2.1 INTERESTS IN THE INTERNATIONAL BILL OF RIGHTS

A set of vital interests protected by IHRL has been generated here through surveying the provisions of the three key IHRL instruments: the UDHR, ICCPR and ICESCR. General Comments from the HRC and the CESCR and authoritative commentaries⁷ have been used to provide additional evidence as to the intended purpose and meaning of the rights. Using this method, the following general interests can be distilled.

1. AN INTEREST IN CONTINUED BIOLOGICAL FUNCTIONING AND REPRODUCTION

The precise nature of the human condition has been debated since time immemorial, and a key part of this debate is the balance or interaction between our bodies and our souls.⁸ Although to be human may well involve more than a physical existence, this aspect of our lives is undeniable.

Humans may not be able to live by bread alone, but it is still necessary. As

⁷ Asbjørn Eide et al (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992); Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights* (Martinus Nijhoff 1999); Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights* (3rd edn, OUP 2013); Ben Saul et al, *The International Covenant on Economic, Social and Cultural Rights* (OUP 2014).

⁸ (eg) Catechism of the Catholic Church Part One, Section Two, Chapter One, Article I, Paragraph 6, Part II; Descartes and the pineal gland (Gert-Jan Lokhorst, 'Descartes and the Pineal Gland' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2014 edn) <<http://plato.stanford.edu/archives/spr2014/entries/pineal-gland/>> (accessed 27/7/2015); the eight consciousnesses in Yogācāra Buddhism, Tsong kha pa, *Ocean of Eloquence* (Gareth Sparham tr, SUNY 1993) 11-12.

such, suitable conditions for biological continuation are a vital interest of the embodied human being (the subject of IHRL).

This is recognised in IHRL through rights that protect the basic biological needs of human beings. The right to life is clearly grounded in this interest. It protects against arbitrary deprivation of life,⁹ including seeking to reduce infant mortality, malnutrition and epidemics.¹⁰ Other relevant rights include the right to health, which, although not a right to be healthy,¹¹ is concerned with “the proactive responsibility of promoting health and wellbeing”.¹² This right has a clear connection to biological survival (it is a right to the highest attainable standard of *physical* and mental health after all). There is also the right to adequate food, which has been interpreted to mean that “the diet as a whole contains a mix of nutrients ... that are in compliance with human physiological needs at all stages throughout the life cycle”;¹³ and the right to rest, which recognises the biological limitations of humans through noting the importance of “giving the individual a possibility to regain [their] strength”.¹⁴

At a broad level, the existence of this vital human interest in is also found in the right to social security and to secure a means of existence through

⁹ ICCPR Article 6(1); HRC, General Comment 6 [3], HRI/GEN/1/ (Vol I).

¹⁰ HRC, General Comment 6 [5].

¹¹ CESCR, General Comment 14 [8].

¹² Saul (n7) 979 ; CESCR, General Comment 14 [4].

¹³ CESCR, General Comment 12 [9].

¹⁴ Eide (n7) 380.

work,¹⁵ since “the right to work contributes ... to the survival of the individual and to that of his/her family”¹⁶ since it “provides an income allowing workers to support themselves and their families”.¹⁷ And “like the right to work ... the right to social security is a vital means of ensuring an individual’s subsistence”.¹⁸ Both these rights demonstrate awareness that humans have basic physical needs which need sustenance.¹⁹

There is also a trans-generational component to the interest in continued biological functioning. Biological survival also takes place through the continuation of the species. The trans-generational component to this vital interest can be found in the focus on reproductive health within the right to health²⁰ and the right to life (regarding infant mortality²¹). The Special Rapporteur on the right to health has affirmed that this right means that people should “have the capability to reproduce and the freedom to decide if, when and how often to do so”²² as well as access to infertility treatment.²³ It can also be found in the right to found a family, which

¹⁵ This is distinct from the right to work since it concerns the fruits of the labour rather than the opportunity to work itself. UDHR Article 22, Article 23(3), Article 25(1), ICESCR Article 6(1), Article 7(a)(ii), Article 9. The right to work cuts across the interests identified here since it achieves multiple goals: Saul (n7) 271-86,

¹⁶ CESCR, General Comment 18 [1].

¹⁷ CESCR, General Comment 18 [7].

¹⁸ Saul (n7) 611.

¹⁹ See CESCR, General Comment 19 [12]-[21].

²⁰ Article 12(2)(a) ICESCR. See also CESCR, General Comment 14 [44(a)].

²¹ HRC, General Comment 6 [5].

²² Echoing the declaration of an International Conference on Population and Development held in Cairo in 1994, cited in Saul (n7) 1014.

²³ Saul (n7) 1015.

“implies, in principle, the possibility to procreate”.²⁴ As such, human rights also protect and promote the human interest in reproducing and continuing the genetic line.

2. AN INTEREST IN FREEDOM FROM EXPLOITATION

IHRL recognises that it is not just being alive that matters but that conditions while alive are essential too. Freedom from torture is a particularly salient aspect to this. Torture does not cause an end to biological continuation, yet is protected against by IHRL.²⁵ As well as physical (or indeed mental²⁶) suffering, there is an additional important component to torture: according to the Convention Against Torture, it

is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.²⁷

This additional component of coercion, intimidation or discrimination signposts the general interest that grounds freedom from torture. It demonstrates that freedom from torture can be understood more broadly as freedom from exploitation; that is, freedom from taking advantage of

²⁴ HRC, General Comment 19 [5].

²⁵ Note that derogations from torture are often forbidden. ICCPR Article 4(2), ECHR Article 15(2).

²⁶ CAT Article 1; HRC, General Comment 20 [2], [5].

²⁷ Article 1. See also Joseph and Castan (n7) 217.

physical and mental vulnerabilities in order to achieve some ulterior motive. Such a reading is consistent with the fact that torture is already grouped with similar exploitative activities in Article 7 ICCPR, namely 'inhuman' and 'degrading' treatment.²⁸ There are also complementary positive requirements under Article 10(1) ICCPR to treat all persons deprived of their liberty with humanity (ie to not exploit them).²⁹

The HRC has noted a need for "safeguards for the special protection of particularly vulnerable persons"³⁰ under Article 7 ICCPR. Whilst this is clearly true, it is important to note that as living (vital) beings, all humans are inherently vulnerable. It is this vulnerability that generates the very possibility of exploitation that IHRL has set out to protect against.

Other rights within IHRL that are grounded in the vital interest in freedom from exploitation include: the right not to be enslaved or held in servitude,³¹ since "slavery occurs where one human being effectively 'owns' another, so that the former can thoroughly exploit the latter with impunity";³² freedom from forced or compulsory labour,³³ which the CESCR

²⁸ ICCPR Article 7; HRC, General Comment 7 [2].

²⁹ HRC, General Comment 20 [2], Joseph and Castan (n7) 216ff.

³⁰ HRC, General Comment [11].

³¹ ICCPR Article 8.

³² Joseph and Castan (n7) 330.

³³ ICCPR Article 8(3).

considers a “form of exploitation”;³⁴ and the right of children and young people to be protected from economic and social exploitation.³⁵

More broadly, the right to just and favourable conditions of work³⁶ and the right to benefit from one’s own work³⁷ also prevent exploitation. They ensure that one’s labour is not treated instrumentally or used for ulterior means. In particular, the CESCR has noted that it is the author of a work that has the “exclusive right to exploit his scientific, literary or artistic production”.³⁸

3. AN INTEREST IN PHYSICAL FREEDOM

IHRL does not only protect against physical restrictions when there is an exploitative element present. Rather, some measure of physical freedom for human beings is secured through a number of rights contained within IHRL. In particular, rights to freedom of movement;³⁹ to not be subjected to arbitrary arrest, detention or exile;⁴⁰ and to private life⁴¹ all maintain at least some degree of physical freedom.

The interest in physical freedom is also concerned with bodies: it entails having control over one’s physical movements. Although overlapping with

³⁴ CESCR, General Comment 11 [4].

³⁵ ICESCR Article 10(3); see also Committee on the Rights of the Child, General Comment 8.

³⁶ ICESCR Article 7.

³⁷ ICESCR Article 15(1)(c).

³⁸ CESCR, General Comment 17 [16].

³⁹ UDHR Article 13; ICCPR Article 12, Article 13.

⁴⁰ UDHR Article 9; ICCPR Article 9.

⁴¹ UDHR Article 12; ICCPR Article 17(1).

both the interests seen so far, the interest in physical freedom can be distinguished by considering it as concerned with how bodies are used rather than the conditions in which they are found or how they are treated. This distinction is meant as an explanatory one that helps to understand the interests, not as an analytically divisive and decisive one, since vital interests are interrelated.

The importance of this interest has been endorsed by the HRC, which has stated that “liberty of movement is an indispensable condition for the free development of a person”⁴² when interpreting the right to freedom of movement, and has noted that physical freedom is valuable per se since it “must not be made dependent on any particular purpose or reason”.⁴³ It is thus valid to identify it as a distinguishable interest.

Another grounding of this interest is found in Article 9 ICCPR, which stipulates, inter alia, that “no one shall be subjected to arbitrary arrest or detention”. Inevitably what amounts to ‘arbitrary’ detention is subject to interpretation, but the HRC has argued that avoiding arbitrariness requires (for example) demonstrating that “rehabilitation could not have been achieved by means less *intrusive* than continued imprisonment or detention”.⁴⁴ That imprisonment or detention is seen as inherently intrusive demonstrates that this right recognises physical freedom as a human interest.

⁴² HRC, General Comment 27 [1].

⁴³ HRC, General Comment 27 [5].

⁴⁴ Joseph and Castan 361 (n7) emphasis added.

Other rights grounded in this interest include the right not to be enslaved⁴⁵ (whilst also grounded in the previous interest, slavery also imposes a clear restriction on physical freedom); the right against interference with private life⁴⁶ (which includes the need for “personal and body search [to be] carried out in a manner consistent with the dignity of the person being searched”⁴⁷); the right against being compelled to join an association;⁴⁸ and the right to free choice of employment.⁴⁹ All of these are, at least to some extent, concerned with maintaining control regarding what one’s body is used for.

4. AN INTEREST IN PSYCHOLOGICAL FREEDOM

Alongside physical freedom, there is also an interest in psychological freedom protected by IHRL. This interest perhaps most obviously grounds the rights to freedom of thought, conscience or religion⁵⁰ and to freedom of opinion and expression.⁵¹ But psychological freedom also grounds the right to education (since “a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence”⁵²) and the right to work (since “dignity is expressed through the freedom of the individual regarding the *choice* to work”⁵³).

⁴⁵ UDHR Article 4, ICCPR Article 8(1&2).

⁴⁶ UDHR Article 12; ICCPR Article 17(1).

⁴⁷ HRC, General Comment 16 [8].

⁴⁸ UDHR Article 20(2).

⁴⁹ UDHR Article 23(1), ICESCR Article 6(1).

⁵⁰ ICCPR Article 18.

⁵¹ ICCPR Article 19, ICESCR Article 15.

⁵² CESCR, General Comment 13 [1].

The importance of psychological freedom can thus be conceived of from two directions: a lack of restraint or coercion on the psychological realm,⁵⁴ and the ability to explore and develop one's own ideas, as seen with regards to education and work. The ability not just to express opinions, but to be able to form them too,⁵⁵ is essential for psychological freedom. Autonomy – in some ways the absence of coercion⁵⁶ – thus forms an important aspect of this interest.

This interest also grounds the right to consent to enter into marriage:⁵⁷ there are both physical and psychological components to this and “men and women have an equal right to choose if, whom and when to marry”.⁵⁸ Likewise, the freedom for scientific research and creative activity⁵⁹ protected by the ICESCR contributes towards safeguarding the psychological freedom of humans.

The psychological interest is considered to be distinguishable from physical activity within IHRL. “Article 18 [ICCPR] distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief”.⁶⁰ It is therefore not enough to simply be able to carry

⁵³ CESCR, General Comment 18 [4] emphasis added, [6].

⁵⁴ HRC, General Comment 22 [5] and General Comment 25 [19]-[20].

⁵⁵ HRC, General Comment 10 and General Comment 22 [2]-[5].

⁵⁶ When autonomy is understood as “freedom from external control or influence”: *Shorter OED* (6th edn, OUP 2007).

⁵⁷ ICCPR Article 23(3).

⁵⁸ CESCR, General Comment 16 [27].

⁵⁹ ICESCR Article 15(3).

⁶⁰ HRC, General Comment 18 [3].

out a certain practice, the freedom to have one's own thoughts is also crucial.

The interest in psychological freedom is not an exclusively personal one: IHRL also protects an interest in forming groups and sharing ideas with others (both within and through generations). This is witnessed in the rights to peaceful assembly⁶¹ and to freedom of association,⁶² which the HRC has tied to freedom of opinion and expression.⁶³

5. AN INTEREST IN DEVELOPING A PERSONALITY

IHRL also recognises that development of personality is key to being (and becoming) a human. The right to education is in fact openly grounded in this interest. Article 13(1) ICESCR states that "education shall be directed to the full development of the human personality".⁶⁴ Additionally, the CESCR has recognised that the right to work⁶⁵ contributes to "development and recognition within the community"⁶⁶ because of "the importance of work for personal development".⁶⁷ The right to leisure⁶⁸ is also grounded in this interest, since "'Leisure' ... should make it possible for the individual to cultivate his mind and interests".⁶⁹ As such, IHRL provides the prerequisite

⁶¹ ICCPR Article 21.

⁶² ICCPR Article 22. See Joseph and Castan (n7) 645, 665.

⁶³ Joseph and Castan (n7) 647.

⁶⁴ Article 13(1). See UDHR Article 26(2); CESCR, General Comment 13 [4].

⁶⁵ UDHR Article 23(1), ICESCR Article 6.

⁶⁶ CESCR, General Comment 18 [1].

⁶⁷ CESCR, General Comment 18 [4].

⁶⁸ UDHR Article 24, ICESCR Article 7(d).

⁶⁹ Eide (n7) 380.

conditions for humans to develop their personalities through striving and pursuing their own satisfaction.

Other relevant rights include the right to marry and found a family;⁷⁰ the right to own property (including intellectual property);⁷¹ the right to self-determination;⁷² and the right to a name and nationality.⁷³ All of these can contribute towards the narrative that each individual traces for themselves. Also included are those economic, social and cultural rights that are specifically designated in the UDHR as “indispensable for ... the free development of ... personality”.⁷⁴ Whilst these matters are certainly connected to the interest in psychological freedom, they can be distinguished since there is also a temporal aspect to them as implied by the very notion of *development*.

There is also an important recognition contained in Article 29(1) UDHR that “[e]veryone has duties to the community in which alone the free and full development of his personality is possible”: personality development is not a purely individual affair. Taking part in cultural life is protected by the

⁷⁰ UDHR Article 16(1), ICCPR Article 23.

⁷¹ Property ownership can be individual or with others, foreshadowing the social interests. UDHR Article 17(1), Article 27(2), ICESCR Article 15(1)(c).

⁷² In the sense of individual self-determination: ICCPR Article 1, ICESCR Article 1.

⁷³ UDHR Article 15(1), ICCPR Article 24(2) and 24(3).

⁷⁴ UDHR Article 22.

ICESCR,⁷⁵ and this can benefit not only the individual, but also contributes to “progress of society as a whole”.⁷⁶

The broad array of rights grounded in this interest is necessary since the interest in developing a personality requires that individuals must be given the scope to develop their life and their personality as they wish, choosing or not choosing options (such as to marry or not). The ability to forge routes through life must be protected, even if the routes themselves need not be prepared.

6. AN INTEREST IN KINSHIP AND FORMING COMMUNITIES

Despite the indubitable importance of individual personal development, IHRL acknowledges that this alone is not sufficient for a satisfactory human life. Humans are social beings, forming ties both within our blood lines and beyond. As Allen Buchanan notes, IHRL makes it “very clear that human beings are social by nature and [goes] out of [its] way to repudiate any notion that humans are ‘atomistic individuals’.”⁷⁷ We live in togetherness and union with others, and human flourishing happens in community. This is recognised both directly and indirectly by a number of human rights, and by the construction with IHRL of a subject that is socially embedded.

For example, the right to found a family is based on recognition that “family is the natural and fundamental *group unit* of society”.⁷⁸ The basic

⁷⁵ ICESCR Article 15(1)(a).

⁷⁶ CESCR, General Comment 7 [4].

⁷⁷ Allen Buchanan, *The Heart of Human Rights* (OUP 2013) 27n30.

⁷⁸ UDHR Article 16(3); HRC, General Comment 19 [1], emphasis added.

understanding that there is such a thing as a group unit demonstrates the vital human interest in forming and participating in communities with others. Furthermore, such groups must not be understood as being limited to a particular conception of what 'family' might mean, since it is "not possible to give the concept [of family] a standard definition".⁷⁹ As such, IHRL recognises that humans form a number of different communities, and these can all be of value.

These are not limited to bloodlines. Rights to peaceful assembly and association⁸⁰ (including the right to form a trade union⁸¹) also grounded in acknowledge the value of communities formation and participation. The intentionally broad formulation of Article 20 UDHR is based on an understanding that these rights "are essential for *many* human activities".⁸² The breadth of this is further witnessed by the general right to participate in the cultural life of the community,⁸³ and a right to a social and international order in which human rights can be fully realised⁸⁴ within IHRL.

⁷⁹ HRC, General Comment 19 [2]. See also HRC, General Comment 16 [5].

⁸⁰ UDHR Article 20(1), ICCPR Articles 21-22. Including religious practice – ICCPR Article 18(1).

⁸¹ UDHR Article 23(4), ICESCR Article 8.

⁸² Martin Scheinin, 'Article 20' in Alfredsson and Eide (n7) 417, 418-19, emphasis added.

⁸³ UDHR Article 27(1). See also the duties to the community in UDHR Article 29(1), ICESCR Article 15(1)(a).

⁸⁴ The first element of this right is the relevant one here: that humans have a right to be a part of such an order. UDHR Article 28, ICCPR Article 20(1).

Other rights grounded in this interest include the right to manifest religion, which is explicitly to be exercised “either individually or in community with others”,⁸⁵ and the right to education, which exists in part because it provides the holders “the means to participate fully in their communities”.⁸⁶ Finally, the right to self-determination, as a right held by peoples rather than individuals, is evidently grounded in the social groupings that humans form. It seeks to protect these groupings per se. Rights of minorities,⁸⁷ while certainly distinguishable from the right to self-determination,⁸⁸ are also grounded in this interest, since they are concerned with ensuring that persons are not denied rights which are to be exercised “in community with the other members of their group”.⁸⁹

This interest concerns human relationships with other humans. It demonstrates the impossibility of understanding human rights (or humans themselves) in an exclusively individualistic sense. Rather, in order to promote human flourishing, the tendency to form communities with one another must be recognised and protected, and this includes protection of the communities themselves.

7. AN INTEREST IN SOCIETAL MEMBERSHIP AND RECOGNITION

This interest also concerns humans’ social nature, but is focussed on formal institutions rather than personal communities. The previous interest

⁸⁵ ICCPR Article 18(1).

⁸⁶ CESCR, General Comment 13 [1].

⁸⁷ ICCPR Article 27.

⁸⁸ HRC, General Comment 23 [2]-[3].

⁸⁹ ICCPR Article 27.

concerns the formation of and participation in communities, whereas this interest is about an individual's access to social institutions. For example, access to social welfare is recognised by IHRL as a vital right, but it is not directly grounded in an interest in forming communities.⁹⁰

There are rights that are grounded in this interest both directly and indirectly. At a direct level, the right to recognition before the law;⁹¹ the right to political participation;⁹² the right to registration, a name and a nationality;⁹³ and the right to take part in and benefit from public services (including the cultural, artistic and scientific life of the community),⁹⁴ all directly acknowledge that humans live within societies, and that being recognised by and receiving the benefits of society are of direct interest to everyone.

Other rights are grounded in this interest more obliquely. For example, the right to education exists in part to "enable all persons to participate effectively in a free society"⁹⁵ and "as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty".⁹⁶ The right to work

⁹⁰ Saul (n7) 611.

⁹¹ UDHR Article 6, Article 8; ICCPR Article 13, Article 16.

⁹² UDHR Article 21(1,3); ICCPR Article 25(a,b).

⁹³ UDHR Article 15; ICCPR Article 24(2,3).

⁹⁴ UDHR Article 21(2), Article 27(1); ICCPR Article 25(c); ICESCR Article 15(1)(a,b)(4). In particular, to appreciate the "external manifestations" of culture: Saul (n7) 1180.

⁹⁵ ICESCR Article 13(1).

⁹⁶ CESCR, General Comment 13 [1]

contributes to “recognition within community”,⁹⁷ and the right to join (as opposed to form) a trade union⁹⁸ is a means by which political and economic participation in society can be ensured. Rights to benefit from public services (such as healthcare and food) are also components of this interest, as captured in the CESCR’s comments on the need to ensure the ‘availability and accessibility’ of these rights.⁹⁹

8. AN INTEREST IN EQUALITY, NON-DISCRIMINATION AND FAIRNESS

The Preambles to the UDHR, ICCPR and ICESCR all declare that human rights are held equally by all members of the human family. Article 1 of the UDHR does not contain a right as such, but provides that “all human beings are born free and equal in dignity and rights”.¹⁰⁰ In addition, other human rights, such as to a fair trial,¹⁰¹ to equal enjoyment of human rights,¹⁰² and to equal recognition before the law¹⁰³ are grounded in an interest in equality, non-discrimination and fairness. Article 26 ICCPR is also of relevance, it affirms that “the law shall prohibit any discrimination”.

⁹⁷ CESCR, General Comment 18 [1].

⁹⁸ UDHR Article 23(4); ICESCR Article 8.

⁹⁹ See CESCR, General Comment 12 [12]-[13]; CESCR, General Comment 14 [12].

¹⁰⁰ See also Tore Lindholm, ‘Article 1’ in Eide (n7); Saul (n7) 174ff.

¹⁰¹ ICCPR Article 14; HRC, General Comment 32.

¹⁰² That is, without prejudice based on race, colour, sex, language, religion, political or other opinion etc (see ICCPR Article 20(2)), and they should only be limited for certain reasons. UDHR Article 2, Article 29(2); ICCPR Article 2, Article 3; ICESCR Article 2(1,2), Article 3.

¹⁰³ UDHR Article 7, Article 10, Article 11; ICCPR Article 14, Article 16, Article 26.

Again, this interest is discoverable within the content of other human rights too. In particular, the right to fair access to public services;¹⁰⁴ the right to work (in particular the right to equal pay for equal work¹⁰⁵ and “the right not to be deprived of work unfairly”¹⁰⁶); the right of children and mothers to proper treatment;¹⁰⁷ and equal rights of women and men¹⁰⁸ all demonstrate an overarching interest in fair, non-discriminatory and equal treatment.

8.2.2 SUMMARY

These vital interests are specifications of human dignity,¹⁰⁹ and they demonstrate how IHRL understands the human rights subject.¹¹⁰ Because of the plurality of human dignity and the diversity of human rights subjects, the set is neither monolithic nor discrete but rather overlapping and interactive. The interests flow into one another, which is to be expected since (i) dignity is vague and broad, and (ii) human rights are interrelated. But the interests are not substitutes for one another. They cannot be traded because, like human rights, they are non-fungible.¹¹¹ It is

¹⁰⁴ UDHR Article 21(2).

¹⁰⁵ UDHR Article 23(2); ICESCR Article 7(a)(i)(c).

¹⁰⁶ CESCR, General Comment 18 [4], [6].

¹⁰⁷ UDHR Article 25(2); ICCPR Article 6(5), Article 24(1).

¹⁰⁸ ICCPR Article 3; ICESCR Article 3, Article 7(a)(i). See also CESCR, General Comment 16 and HRC, General Comment 4.

¹⁰⁹ §6.5.

¹¹⁰ §1.3.

¹¹¹ Martha Nussbaum, ‘Beyond “Compassion and Humanity”’ in Cass Sunstein and Martha Nussbaum, *Animal Rights: Current Debates and New Directions* (OUP 2004) 304; Nussbaum (n4) 85, 175; Ramona Ilea, ‘Nussbaum’s Capabilities Approach and Nonhuman Animals’ (2008) 39 *Journal of Social Philosophy* 547, 550.

not necessary to be convinced that this list is the only way of specifying human dignity, or the best possible for all purposes, since there are inevitably many ways of conceptualising what dignity is. However, it is necessary for the list to be convincing, and to cover all the ground contained within IHRL. In order to confirm whether this is the case, this list will be compared with others from the literature.

8.2.3 ALTERNATIVE FORMULATIONS

As already acknowledged, drawing up a list of vital interests which operate somewhere between dignity and human rights has been done before. It is worth looking at some of these listings¹¹² to check that they are compatible with the set developed here and also to demonstrate why they do not provide more suitable frameworks.

8.2.3(A) NICKEL

James Nickel accepts that there are many justifications for human rights and adopts a pluralistic approach to their grounding.¹¹³ He acknowledges that although simplicity is satisfying, it is not really possible to justify human rights with a straightforward account since they are fundamentally multifaceted.¹¹⁴ A pluralistic account is therefore required as the grounds of human rights.

As well as considering prudential, utilitarian and pragmatic justifications, Nickel looks for arguments from plausible moral norms and values: he

¹¹² For others see *supra* n4.

¹¹³ Nickel (n4) ch4.

¹¹⁴ *supra* n6.

distils these down to four 'secure claims' which are universal, broadly agreed on and able to justify all human rights. All four of these claims protect aspects of human dignity, and in turn respecting dignity requires respecting all four claims.¹¹⁵ These are (with the congruent vital interests parenthesised):

- A secure claim to have a life (VI1)
 - This includes rights to life and health and covers basic physical needs.
- A secure claim to lead one's life (VI3, VI4, VI5, VI6, VI7)
 - This includes freedom from slavery, rights to marriage, association, movement and belief; participation in society; freedom of thought; and education. It also includes rights relevant to autonomy. In this regard, Nickel notices that nonhumans have agency too, but does not investigate what the implications of this might be.¹¹⁶
- A secure claim against severely cruel or degrading treatment (VI2)
 - This includes the prohibition of torture and slavery.
- A secure claim against severely unfair treatment (VI7, VI8)
 - This includes aspects of equality and non-discrimination although it is only relevant to human rights in so far as they ought to prevent severe unfairness and "matters of ruinous injustice".¹¹⁷

Nickel realises that these claims do not form the only possible arrangement. "If someone proposed that one or more of these principles is derivable from one or two of the others ... I would not be opposed to the possibility [and] on the other side, the theory proposed may be too simple for the job at hand".¹¹⁸

¹¹⁵ Nickel (n4) 66.

¹¹⁶ *ibid* 63-64.

¹¹⁷ *ibid* 65.

¹¹⁸ *ibid* 67.

Although Nickel's list is viable and valuable, it is too simple for the job at hand here. In particular, the secure claim to lead one's life is too compact. Finer granularity as to the interests specified by dignity and protected by human rights is needed in the present context in order to assess how they may be applicable beyond humanity.

8.2.3(B) NUSSBAUM

Martha Nussbaum opts for a different approach in determining humans' "basic entitlements".¹¹⁹ Inspired, but not convinced, by John Rawls' contractarianism,¹²⁰ Nussbaum develops Amartya Sen's capabilities approach¹²¹ to map out the core requirements that any just society ought to protect as a 'basic social minimum'. For her,

[t]he best approach to this idea of a basic social minimum is provided by an approach that focuses on human capabilities, that is, what people are actually able to do and to be, in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being.¹²²

As such, "the capabilities approach ... starts from the notion of human dignity and a life worthy of it".¹²³ Nussbaum's list of capabilities and the set of vital interests developed in this thesis merit comparison since they both

¹¹⁹ Nussbaum (n4) 155.

¹²⁰ *ibid* 56ff.

¹²¹ *ibid* 70ff.

¹²² Nussbaum (n4) 70.

¹²³ Nussbaum (n111) 305

operate at a level of abstraction between dignity and human rights,¹²⁴ even though Nussbaum's approach is not directly tied to existing IHRL. The capabilities identified by Nussbaum are broad, potentially as a result of an approach that "sees rationality and animality as thoroughly unified".¹²⁵ This rather embodied approach to specifying dignity makes Nussbaum's list of particular relevance to this thesis.¹²⁶ The capabilities she identifies are:¹²⁷

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely... (VI1)
2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter. (VI1)
3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault... having opportunities for sexual satisfaction and for choice in matters of reproduction. (VI2, VI3)
4. *Senses, Imagination, and Thought*. Being able to use the senses, to imagine, think, and reason—and to do these things in a "truly human" way, a way informed and cultivated by an adequate education ... Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice ... Being able to use one's mind in ways protected by guarantees of freedom of expression ... Being able to

¹²⁴ See Martha Nussbaum, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273, 278, 292-97; Morsink (n4) 166-72.

¹²⁵ Nussbaum (n4) 159.

¹²⁶ Nussbaum agrees that her theory "can be extended to provide a more adequate basis for animal entitlements than the other two theories under consideration" (ie contractarianism and utilitarianism). Nussbaum (n111) 305.

¹²⁷ Nussbaum (n4) 76-78.

have pleasurable experiences and to avoid non-beneficial pain. (VI4, VI5)

5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety ... (VI4, VI5, VI6)

6. *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life... (VI4, VI5)

7. *Affiliation*.
 - A. Being able to live with and toward others... to engage in various forms of social interaction... (VI6)
 - B. Having the social bases of self-respect and non-humiliation... This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin and species. (VI7, VI8)

8. *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature. (VI6¹²⁸)

9. *Play*. Being able to laugh, to play, to enjoy recreational activities. (VI5)

10. *Control over one's Environment*.
 - A. Political. Being able to participate effectively in political choices that govern one's life.... (VI7)
 - B. Material. Being able to hold property... having the right to seek employment on an equal basis with others;

¹²⁸ Once expanded, see §9.

having the freedom from unwarranted search and seizure...¹²⁹ (VI3, VI6, VI7).

Again, a clear congruence is observable between Nussbaum's list and the one developed in this thesis (the congruent vital interests are indicated above); however, Nussbaum's is further reaching.¹³⁰ Significantly, one additional aspect which Nussbaum's list covers is 'Other Species'. Whilst this thesis will go on to acknowledge that humans, as living organisms, form essential relations with other forms of life,¹³¹ the list of vital interests constructed does not include this aspect because it is not currently protected by the International Bill of Rights.¹³² Note also Nussbaum's inclusion of non-discrimination on the basis of species in capability 7B.

Given Nussbaum's list of capabilities does not emerge directly from a consideration of the interests protected by IHRL, it would be inappropriate to adopt it here. However, in view of the similarity of her task, it is reinforcing to note not only its congruence with the one generated here, but also its agreement that such a listing can be made relevant beyond the human genus.¹³³

¹²⁹ Nussbaum (n4) 76-78, 392-401; Nussbaum (n111) 312-19.

¹³⁰ See Morsink (n4) 170-71.

¹³¹ §9.2-9.4.

¹³² Although a human right to a healthy environment is groundable in such an interest.

¹³³ *supra* n126.

8.2.3(C) BIRNBACHER

German philosopher Dieter Birnbacher¹³⁴ travels directly from dignity¹³⁵ to rights in detailing how dignity ought to feature in ethical discourse.

However, the sort of rights which Birnbacher details as the content of dignity are not rights found in IHRL, but rights of a higher level of generality, thus making his list relevant to our analysis. They are:

- Right to the provision of the biologically necessary means of existence (VI1)
- Right to freedom from strong and continued pain (VI2)
- Right to minimal liberty (VI3, VI4)
- Right to minimal self-respect (VI5, VI6, VI7, VI8)

They are considered as minimal basic goods and as such are of a similar vein to the vital interests outlined above (the congruence is indicated in parentheses). They share with these interests the characteristics of minimalism and generality. That is, they apply widely and define only the minimum requirements to respect dignity. There is an overlap between these rights and the list constructed in this thesis, although only if 'self-respect' is considered as covering a considerable number of the identified vital interests. Although it is arguable that self-respect includes the development of a personality, equality and kinship, the extra work required renders Birnbacher's list less suitable for present purposes than the list of eight vital interests.

¹³⁴ Birnbacher (n4) 110. See Philipp Balzer et al, 'Two Concepts of Dignity for Humans and Non-human Organisms in the Context of Genetic Engineering' (2000) 13 *Journal of Agricultural Ethics* 7.

¹³⁵ He uses the word 'Menschenwürde', which is essentially equivalent to dignity as deployed here. See Lennart Nordenfelt and Andrew Edgar, 'The four notions of dignity' (2005) 6 *Quality in Ageing and Older Adults* 17.

*

These three other bridges between dignity and human rights are congruent, but not identical, to the list proposed here. They provide evidence to support not only the possibility of extracting vital interests, but also the content of the interests extracted. However, as Nickel points out (although with different terminology) different constructions of vital interests may be suitable for different purposes.¹³⁶ The list of eight vital interests is the most suitable for purpose here as it is both directly reliant on existing vital rights (unlike Nussbaum's), and detailed enough to allow full exploration of these interests in nonhumans (unlike Nickel's and Birnbacher's). It is not proposed that the list constructed here is inherently better than any of the others but rather the most appropriate one for the purpose of this thesis, which seeks to understand dignity through the lens of IHRL, assisted by IT.

8.3 NONHUMAN VITAL INTERESTS

*We started by cutting man off from nature and establishing him in an absolute reign. We believed ourselves to have thus erased his most unassailable characteristic: that he is first a living being.*¹³⁷

The purpose of constructing a list of vital interests was to consider the existence of these interests beyond the human genus. A brief foray into

¹³⁶ Nickel (n4) 67.

¹³⁷ Claude Lévi-Strauss, *Structural Anthropology Volume II* (first published 1973, Monique Layton tr, Penguin 1977) 41.

ethology will now reveal how prevalent these interests are in the natural world. Looking for these interests in nonhumans at times requires understanding the interests in a broadened sense. That is, one must often understand them as interests of (first) living beings. Given that the rights contained in IHRL are predominantly vested in individual humans, this section will first focus on organisms and their interests. However, consideration will also be given to the possibility of ecosystems having interests, since rights can also potentially be vested in ecosystems.¹³⁸

8.3.1 ORGANISMS

At a basic level, all living beings seek to continue their existence. They all have an interest in continued biological functioning (the first vital interest identified above). This interest is evidenced by rather straightforward activity. Animals eat and plants put down roots so that they may prolong their existence. Nonhumans are not inert with respect to their environments; they measure, react, and respond to it through internal feedback systems.¹³⁹ Unlike many of the other vital interests present in IHRL, this interest is not only immediately apparent in animals, but in plants and microorganisms too.¹⁴⁰

¹³⁸ §7.3.3-7.3.4.

¹³⁹ In animals, the two main ones are the endocrine and the nervous systems: Lee Drickamer and Stephen Vessey, *Animal Behavior* (Prindle, Weber & Schmidt 1986) 152.

¹⁴⁰ Colin Tudge, *The Secret Life of Trees* (Penguin 2005) 266-76; Peter Scott, *Physiology, and Behaviour of Plants* (Wiley 2008) 76, 149, 175, 184-190, 193-208, 225; Florianne Koechlin, 'The dignity of plants' (2009) 4 *Plant Signaling & Behavior* 78.

However, this interest is often only contingent. Some organisms willingly sacrifice themselves for the sake of procreation.¹⁴¹ The interest in continued biological functioning in such a case is only present until genetic information has been passed on. Since reproduction is essential to the process of life (and so an interest of all lifeforms¹⁴²), the interest in continued biological functioning is thus poignantly tied to the interest in reproduction. To continue functioning must at times be considered at a larger scale than the individual organism.

As for the second vital interest, it was shown above that the vital interest in freedom from exploitation has two components to it: physical (or mental) pain¹⁴³ and coercion, degradation or discrimination. Pain is an example of nociception – the detection of harmful situations¹⁴⁴ – which is by no means an exclusively human trait: it is prevalent throughout the biosphere.¹⁴⁵ Although it is unclear exactly which animals experience pain (rather than simply nociception),¹⁴⁶ a reasonable (and indeed probable)

¹⁴¹ Semelparous organisms (ie those which only reproduce once, such as Pacific salmon) die immediately after reproduction.

¹⁴² §7.3.

¹⁴³ See HRC, General Comment 20 [5].

¹⁴⁴ 'nociception', *Oxford Dictionary of Biology* (6th edn, OUP 2008).

¹⁴⁵ David Julius and Allan Basbaum, 'Molecular mechanisms of nociception' (2001) 413 *Nature* 203, 203.

¹⁴⁶ National Research Council, *Recognition and Alleviation of Pain in Laboratory Animals* (National Academies Press 2009); Elisa Aaltola, *Animal Suffering: Philosophy and Culture* (Palgrave Macmillan 2012) 5-15; Lynne Sneddon et al, 'Defining and assessing animal pain' (2014) 97 *Animal Behaviour* 201.

assumption is that pain is not exclusive to humans.¹⁴⁷ It is also reasonable to work under the principle that pain is experienced negatively by the vast majority of those that sense it.¹⁴⁸ This is what makes pain a suitable leverage point for exploitation, and this is not limited to the human domain.

The idea of degradation is also not necessarily restricted to humans. As recognised by the High Court of England and Wales, degradation does not require self-awareness: "treatment is capable of being 'degrading' within the meaning of article 3 [ECHR], whether or not there is awareness on the part of the victim".¹⁴⁹ Thus even if it is only possible to 'torture' a certain subset of organisms (not necessarily just humans¹⁵⁰), it is evidently possible to 'exploit' a greater number (consider the *Jallikatu* case¹⁵¹). It is of course common to talk about the 'exploitation' of natural resources. However, this vital interest does not mean that all use of natural resources should be protected against; but identifying the difference between 'use' and 'exploitation' of resources would be a useful avenue to pursue in defining this interest further. The Convention on Biological Diversity's differentiation between the 'conservation of biological diversity' and the

¹⁴⁷ David Fraser and Daniel Wearly, 'Animal Behavior and Animal Welfare' in Johan Bolhuis and Luc-Alain Giraldeau (eds), *The Behavior of Animals* (Blackwell 2005) 358-60.

¹⁴⁸ Peter Singer, *Animal Liberation* (Random House 1975).

¹⁴⁹ *R (Burke) v General Medical Council* [2005] QB 424 [178].

¹⁵⁰ UDRME Article 2(3); Paola Cavalieri and Peter Singer (eds), *The Great Ape Project* (Fourth Estate 1993) 4-7.

¹⁵¹ §7.2.3.

'sustainable use of biological resources'¹⁵² could prove useful in this regard, helping to generate a principle such as allowing resources to be used as long as diversity is maintained.

The vital interest in physical freedom is also evidently relevant beyond the human species: it is hardly controversial to claim that restrictive cages are unsuitable for animals. The fact that this is no longer considered acceptable in zoos or circuses, but is in factory farming potentially has more to do with the visibility of the degradation than its existence. The *Seaworld* case discussed in Chapter Seven was heavily reliant on this interest.¹⁵³ The relevance of physical freedom to almost exclusively stationary plants is questionable, but this would not render their other vital interests immediately irrelevant.

The psychological element of freedom may be less straightforward to discover in nonhuman organisms. Many animals and all plants (and other domains of life) do not have a brain or a central nervous system. However, seeing as reliance on complex psychological processes is just one particular strategy for survival,¹⁵⁴ this is to an extent irrelevant. Plants do not have brains because they do not require them. Those animals that do have a psychological life (alternatively, an awareness of self)¹⁵⁵ are likely to have

¹⁵² §3.4.

¹⁵³ §7.2.2.

¹⁵⁴ One with its own drawbacks, such as mental health problems and vulnerable infants; Jared Diamond, *The Rise and Fall of the Third Chimpanzee* (Radius 1991) 57-58, 116.

¹⁵⁵ Regan suggests this would be mammals over one year old (subjects-of-a-life) Tom Regan, *The Case for Animal Rights* (Routledge 1988). See also Nathan Emery

a vital interest in psychological freedom. The NhRP's legal cases are predominantly reliant on this interest.¹⁵⁶

Moreover, as with all the interests under discussion here, one must remember that they exist in various degrees rather than being existent or non-existent. "A pluralistic approach [has] led many authors to assert that all mental phenomena we find in humans can be found in the other animals, and that the most important capacities traditionally conceptualized as all-or-nothing – self-consciousness, capacity for autonomy, rationality, capacity for moral agency and so on – are instead multidimensional and gradational".¹⁵⁷ That dogs (eg) do not have a psychological life of the same form as that of humans does not mean that they do not have one at all.

Another interest that is less obviously widespread is personality development. Many nonhuman animals do of course exhibit personality traits (as any dog owner will know).¹⁵⁸ Furthermore, dolphins use names ('signature whistles')¹⁵⁹ and chimpanzees have (relatively poorly

and Nicola Clayton, 'Animal Cognition' in Bolhuis and Giraldeau (n147). See also Lesley Rogers and Gisela Kaplan, 'All Animals are *Not* Equal' in Sunstein and Nussbaum (n111) 180-81.

¹⁵⁶ §7.2.1.

¹⁵⁷ Paola Cavalieri, *The Animal Question* (OUP 2001) 78.

¹⁵⁸ As well as a 'theory of mind' (ie understanding the existence of others), which is "easily detectable in the great apes" Cavalieri (n157) 118. See also Rogers and Kaplan (n155) 181-83.

¹⁵⁹ Stephanie King and Vincent Janik, 'Bottlenose dolphins can use learned vocal labels to address each other' (2013) 110 *PNAS* 13216.

understood) mechanisms behind switching social roles,¹⁶⁰ thus demonstrating some sense of being able to identify themselves amongst conspecifics. The 'mirror test' and 'sniff test' for self-recognition have been passed by a number of nonhumans,¹⁶¹ demonstrating that they do have some sense of self.

However, personality development must involve not only a notion of personality (through being able to differentiate one from another), but also mental time-travel (remembering, planning and so on)¹⁶² in order for the inherently temporal process of personality *development* to make any sense as an interest. Although it is clear that many nonhumans take actions that will benefit them in the future (caching of food for example), it is less clear that this demonstrates true mental time travel and so "all that we can say about planning ahead is that it has not yet been tested in any more than a preliminary way, and so it is premature to claim that animals other than humans lack this ability".¹⁶³

Many nonhuman animals exhibit social behaviours, operating as groups rather than as individuals. Examples of this range from the very humanlike social structures of chimpanzees and orcas, to pack animals such as wolves and lions,¹⁶⁴ to eusocial insects and colonial invertebrates.¹⁶⁵ In each of

¹⁶⁰ Christine Webb et al, 'Individual differences in chimpanzee reconciliation relate to social switching behaviour' (2014) 90 *Animal Behaviour* 57.

¹⁶¹ Roberto Gatti, 'Self-consciousness: beyond the looking-glass and what dogs found there' (2015) 28 *Ethology Ecology & Evolution* 232.

¹⁶² Rogers and Kaplan (n155) 183.

¹⁶³ *ibid* 185.

¹⁶⁴ Drickamer and Vessey (n139) 566-67.

these instances, individual organisms would not thrive (and would perhaps fail to survive at all¹⁶⁶) if they were cut off from their kin and ken. Even more widespread than a fully social existence are bonds between parents and offspring. Parental care is common in mammals, fish and birds,¹⁶⁷ and is essential for the development of many young into adults.

More broadly again than this, living organisms form not only social communities but also ecological ones.¹⁶⁸ Bonds and relations permeate living systems, and so this interest – extrapolated to the ecological – may be one of all forms of life. This is recognised in Article 2(2) of the Universal Declaration of Rights of Mother Earth (UDRME): “Each being has the right to a place and to play its role in Mother Earth for her harmonious functioning”. Flourishing happens not just in social community, but in ecological community too. This observation, that living organisms exist within interrelated networks and communities and so potentially have a vital interest in forming *ecological* communities, will be central to Chapter Nine’s construction of a justification for RoN.

The interest in participation in society and culture is less directly relevant to nonhumans because it is *human* society and culture which are referred to. Although nonhumans certainly form a part of human society and culture (eg pet dogs, racing horses, national emblems etc) they do not

¹⁶⁵ *ibid* 558-61.

¹⁶⁶ Akiko Koto, ‘Social isolation causes mortality by disrupting energy homeostasis in ants’ (2015) 69 *Behavioral Ecology and Sociobiology* 583.

¹⁶⁷ Nicholas Davies et al, *An Introduction to Behavioural Ecology* (4th edn, Wiley-Blackwell 2012) 223-52.

¹⁶⁸ §9.3.

participate in it in the same way that humans do. Despite the undoubted benefits that guide dogs provide, it would be quizzical to see them given rights to be guide dogs.¹⁶⁹ However, it is not fanciful to suggest that nonhumans have their own forms of society and culture.¹⁷⁰ These civilisations are however lacking in the formal institutions to which most of the human rights grounded in this interest are directed. The conclusion is an indecisive one; there may be a widespread interest in participating in culture, but this is even harder to divorce from the previous interest for nonhumans than it is for humans.

Finally, the interest in equality, non-discrimination and fairness may be relevant in two ways. Firstly, nonhumans may themselves have such an interest: although an internal sense of fairness may not be present in the majority of nonhuman organisms, it is in some.¹⁷¹ Secondly, human interest in equality also concerns the creation of a just social order, which may also encompass nonhumans. Equal consideration is not equal treatment, but the demands of non-discrimination may require that we give consideration to those interests that happen not to be human. "Mankind's true moral test, its fundamental test (which lies deeply buried from view), consists of its attitude towards those who are at its mercy:

¹⁶⁹ Although forming relationships with humans is likely an interest of dogs.

¹⁷⁰ Hal Whitehead and Luke Rendell, *The Cultural Life of Whales and Dolphins* (University of Chicago Press 2015); Webb (n160).

¹⁷¹ Sarah Brosnan & Frans de Waal, 'Monkeys reject unequal pay' (2003) 425 *Nature* 297. See also Margaret Gruter, 'The origins of legal behavior' (1979) 2 *J Social Biol Struct* 43, 46-48; Frans de Waal, *Good Natured* (HUP 1996).

animals".¹⁷² It is this which motivates the Helsinki Declaration, whose Preamble states that it "based on the principle of the equal treatment of all persons".¹⁷³ It may be that the human interest in equality can actually justify nonhuman rights. That is, part of what it is to be a human is to be a moral agent, and this results in the taking on of duties. A unique component of human dignity may thus ground duties as well as rights.¹⁷⁴

This principle of inter-species non-discrimination can already be found in international law. The Agreement on the Conservation of Gorillas and their Habitats¹⁷⁵ states that "where human-gorilla conflict occurs, parties must take measures to reduce the conflict [which must be] to the benefit of both humans and gorillas".¹⁷⁶ This provision demonstrates that the law is able to acknowledge nonhuman interests.¹⁷⁷

8.3.2 ECOSYSTEMS

Having seen that nonhuman rights can potentially be vested in ecosystems as well as organisms,¹⁷⁸ it is necessary to consider whether ecosystems can be intelligibly said to have interests. However, doing so cannot be too

¹⁷² Milan Kundera, *The Unbearable Lightness of Being* (Faber 1984) 150. cf Catharine MacKinnon, 'Of Mice and Men' in Sunstein and Nussbaum (n111) 266.

¹⁷³ Preamble.

¹⁷⁴ §9.6.1(c).

¹⁷⁵ (2007) 2545 UNTS 55.

¹⁷⁶ Article III(2)(j).

¹⁷⁷ See also Joseph Vining, 'Dignity as Perception: Recognition of the Human Individual and the Individual Animal in Legal Thought' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 576 who discusses a US Senate Report that refers to the best interests of the chimpanzee involved with the result that "the animal emerges as an individual".

¹⁷⁸ §7.3.3-7.3.4.

closely reliant on the vital interests of organisms, since ecosystems and organisms are entities of an entirely different kind.¹⁷⁹ As such, “[w]e do not want in an indiscriminating way to extrapolate criteria of value from organism to biotic community, any more than from person to animal or from animal to plant”.¹⁸⁰

At the very least, ecosystem dynamics are not congruent with the vital interests outlined above, with the possible exception of the interests in continued biological functioning and freedom from exploitation. But even these take on a different format. “An ecosystem has no brain, no genome, no skin, no self-identification, no *telos*, no unified program. It does not defend itself against injury or death. It is not irritable”.¹⁸¹ Its processes do not result in the maintenance of the same structure of components through time, and its vulnerability to exploitation is not a result of nociception. As noted, the use of components of an ecosystem does not necessarily result in its exploitation as understood in the vital interest here.

A potential lens through which to view the interests of ecosystems is through their exhibition of emergent properties¹⁸² and response to change (for example through ecological succession¹⁸³). In these ways, the

¹⁷⁹ See §9.3.2.

¹⁸⁰ Holmes Rolston III, ‘Value in Nature and the Nature of Value’ in Robin Attfield and Andrew Belsey (eds), *Philosophy and the Natural Environment* (Royal Institute of Philosophy Supplement 36, CUP 1994) 23.

¹⁸¹ Rolston (n180) 23.

¹⁸² Properties of systems that cannot be explained in terms of constituent parts.

¹⁸³ See eg Eugene Odum, *Ecology and Our Endangered Life-Support Systems* (2nd edn, Sinauer Associates 1993) 187-203; Edward Kormondy, *Concepts of Ecology*

behaviour of ecosystems is somewhat¹⁸⁴ directed and predictable. However, ecosystem behaviour is *homeorhetic* rather than *homeostatic*; their *flows* are similar and predictable, rather than their *states*.¹⁸⁵ This means that that ecosystems do not head towards some particular steady-state 'goal'. They have no preference over what form they take.¹⁸⁶ For example, shallow lakes can reach two different stable states: "a clear state dominated by aquatic vegetation, and a turbid state characterised by high algal biomass".¹⁸⁷ Although the former is generally preferred by humans for aesthetic reasons, it is not obvious that this is in the *ecosystem's* interests.

Thus although it is potentially intelligible to talk of actions that *benefit* an ecosystem, this benefit is not really discernible from the perspective of the ecosystem itself. Rather, it is beneficial for the organisms that constitute the ecosystem (or some subset of them), or even simply to human aesthetics. An ecosystem is agnostic whereas an organism is involved and interested. The idea of ecosystem interests will therefore not be pursued

(4th edn, Prentice-Hall 1996) 299ff; Patrick Whitefield, *The Living Landscape* (Permanent 2009).

¹⁸⁴ Although the successional process is not a perfectly predictable, neatly linear one, it does exhibit a certain directionality: Fakhri Bazzas, *Plants in Changing Environments* (CUP 1996); Marten Scheffer et al, 'Catastrophic shifts in ecosystems' (2001) 413 *Nature* 591.

¹⁸⁵ Eugene Odum and Gary Barrett, *Fundamentals of Ecology* (5th edn, Brooks/Cole 2005) 9, 68.

¹⁸⁶ *ibid.*

¹⁸⁷ Marten Scheffer et al, 'Alternative Equilibria in Shallow Lakes' (1993) 8 *Trends in Ecology and Evolution* 275, 275; Marten Scheffer and Egbert van Nes, 'Shallow lakes theory revisited: various alternative regimes driven by climate, nutrients, depth and lake size' (2007) 584 *Hydrobiologia* 455.

by this thesis as a justification for RoN because it does not appear to be the case that ecosystems have interests, and even if they do, they are distinct from the vital interests enlisted above since they are not the essential interests of living beings (since ecosystems are not themselves living beings).

8.3.3 SUMMARY

The vital interests grounding IHRL are not, as a whole, unique to humans. The underlying point is that having interests is not uniquely human, since all living organisms have interests in the state of the world around them in order to effect their own survival: vital interests are the essential interests of living beings.¹⁸⁸ In this regard, note Kramer's observation that Interest Theory is applicable to animals¹⁸⁹ and "could be formulated more expansively by someone who believes that legal rights can be correctly ascribed to certain insentient entities such as trees or rivers".¹⁹⁰ For the purposes of this thesis, this indicates that congruent nonhuman vital interests can be pieced into the framework in which vital interests were first conceived. That is, the structure presented in Chapter Six of dignity, vital interests and vital rights is applicable beyond humans.

However, a difference must be maintained between entities such as trees and rivers. Trees, as living beings, do have vital interests; whereas rivers,

¹⁸⁸ §6.3.

¹⁸⁹ Matthew Kramer, 'Do Animals and Dead People Have Legal Rights' (2001) 14 *Can JL & Jurisprudence* 29, 54.

¹⁹⁰ Matthew Kramer, 'Some Doubts about Alternatives to the Interest Theory of Rights' (2013) 123 *Ethics* 245, 246n5.

as entities of an entirely different kind, do not have vital interests.

However, as will be seen, this does not entirely erase the possibility of vital rights being vested in rivers and other ecosystems.¹⁹¹

The presence of vital interests outside humanity should not be too surprising. This is because many of the interests outlined above have their roots in 'being alive' rather than in 'being human'. They describe the basics of what it is to live a (human) life and so are human embodiments of 'how to live'. The eight interests identified above are human versions of interests that operate at a more general level: the essential interests of living beings.

Other species have their own embodiment of these. Inevitably, some important ways in which humans live will not be relevant to certain nonhumans (and vice-versa), but a considerable portion of vital interests arise from humans' animality and the way humans have evolved to express this. Like Nussbaum's capability approach, we must "see rationality and animality as thoroughly unified".¹⁹² We are animal just as much as we are human, and those behaviours of ours which are thoroughly animal are unlikely to be exclusively human.

¹⁹¹ See §9. Furthermore, foundations other than dignity may be possible for vital rights.

¹⁹² Nussbaum (n4) 159. See also Val Plumwood, 'Nature, Self, and Gender: Environmental Philosophy, and the Critique of Rationalism' (1991) 6 *Hypatia* 3, 6, 10, 17-18; Foster (n4) 83; Richard Rorty, 'Human Rights, Rationality and Sentimentality' in Aakash Singh Rathore and Alex Cistelecan, *Wronging Rights?* (Routledge 2011) 108.

Further, as Lévi-Strauss noted, as well as being animals, humans are first living beings.¹⁹³ In unearthing great secrets of the human mind and our physical universe, we may also have 'unEarthed' ourselves from those crucially physical, unavoidably biological, fundamentally ecological aspects of our selves. In reflecting on this 'unEarthed' existence, humans have often overplayed their logical rationality at the expense of biological status.¹⁹⁴ But no scientific or theological framework can extricate us from our bodies. Because humans are embodied living organisms in a web of life, some vital human interests will be common to all forms of life, and it is these that this thesis is interested in:

The focus, then, is on qualities that human beings have in common with many animals and/or the rest of the larger natural world; they are powerful indicators of what we share more broadly as the essence of being.¹⁹⁵

There is a connection above and beyond direct similarities between humans and (eg) chimpanzees. We are bound together not just by directly comparable behaviour, but by a common ancestry that engenders a commonality across all living organisms. Importantly, this connection is not a result of moral extensionism. It is not about describing the Platonic

¹⁹³ *supra* n137. See Martin Daly and Margo Wilson, 'Human Behavior as Animal Behavior' in Bolhuis and Giraldeau (n147).

¹⁹⁴ This parallels the restrictions of WT which misrepresents a disembodied version of humanity. See Anna Grear, 'Law's Entities: Complexity, Plasticity and Justice' (2013) 4 *Jurisprudence* 76, 96.

¹⁹⁵ David Schlosberg, *Defining Environmental Justice* (OUP 2007) 136.

Form of a human and then drawing nonhuman comparisons.¹⁹⁶ It is about realising that much of what is vital to humans is vital to other organisms too; not because *they* are similar to *us*, but because our ancestry and genetic nature is shared. The presence of vital interests beyond humans suggests that organisms are not only vital in the sense of living, but there are also matters that are vital (ie essential) to them. This opens the gateway to the possibility of 'nonhuman dignity' being used as a justification for nonhuman vital rights.¹⁹⁷

8.3.4 NONHUMAN DIGNITY

Many, if not all, living organisms have vital interests that are comparable to human vital interests. All organisms have certain basic requirements that are required to live a life worthy of who they are. More poetically, all organisms exhibit "their own existence, their own character and potentialities, their own forms of excellence, their own integrity, their own grandeur".¹⁹⁸ This thesis enquires whether they also have their own dignity. If a notion of nonhuman dignity can be shown to exist, then a normative argument for the creation of nonhuman rights will also exist (notwithstanding the fact that dignity is not necessarily the only justification for vital rights).

¹⁹⁶ cf §7.2.

¹⁹⁷ See Nussbaum (n111) 299; Balzer (n134); Arne Naess, *Ecology of Wisdom* (Counterpoint 2008) 250, 282; *Life's Philosophy: Reason and Feeling in a Deeper World* (Roland Huntford tr, University of Georgia Press 2002) 109; John Tasioulas, 'Human Dignity and the Foundations of Human Rights' in McCrudden (n177) 307.

¹⁹⁸ John Rodman, 'The Liberation of Nature?' (1977) 20 *Inquiry* 83, 94. See also Gary Varner, *In Nature's Interests* (OUP 1998) 26-77; Warwick Fox, *Toward A Transpersonal Ecology* (SUNY Press 1990) 193.

The need to evaluate the notion of nonhuman dignity is reinforced by the fact that it appears within a number of legal regimes (although it has not yet been used to justify any vital nonhuman rights).¹⁹⁹ Article 120 of the Swiss Constitution refers to “the dignity of living beings” within the context of gene technology.²⁰⁰ Additionally, a number of national courts have referred to nonhuman dignity. In a judgment on ‘alligator-man fights’, the Israeli Supreme Court drew a comparison between animals and minors, stating that “neither of them can protect themselves, or claim their insult, or regain their dignity”.²⁰¹ The Supreme Court of India acknowledged that animals have dignity in *Jallikattu*;²⁰² and the Separate Opinion of Judge Pinto de Albuquerque of the ECtHR in *Herrmann v Germany* also refers to the “inherent dignity of all species” as well as “the existence of basic comparable interests between humans and other animals and therefore the

¹⁹⁹ The idea of an ecosystem or the Earth having dignity has also received some (rather limited) attention: see Millennium Ecosystem Assessment, *Ecosystems and Human Well-being* (Island Press 2003) 146; Rutger Claassen, ‘Human dignity in the capability approach’ in Marcus Düwell et al (eds), *The Cambridge Handbook of Human Dignity* (CUP 2014) 247; Cristiano Gianolla, ‘Human rights and nature: intercultural perspectives and international aspirations’ (2013) 4 *JHRE* 58, 65-74; ‘Harmony with nature’ A/71/266 (1 August 2016) [52].

²⁰⁰ The Swiss Federal Ethics Committee has produced a number of documents expounding on this:
<<http://www.ekah.admin.ch/en/documentation/publications/index.html>> (accessed 13/3/2015).

²⁰¹ *Let the Animals Live v Hamat Gader Spa Village Inc* 1648/96 (1997) [41]; Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *EJIL* 655, 708.

²⁰² §7.2.3; *Animal Welfare Board of India v A Nagaraja & Ors*, Civil Appeal No 5387 of 2014 [32], [51], [56], [62].

need to safeguard certain 'animal rights', metaphorically speaking, in a similar way to human rights".²⁰³

International environmental law has not employed the word 'dignity', but frequently refers to the concept of intrinsic value,²⁰⁴ most notably in the Preamble to the Convention on Biological Diversity which is "conscious of the intrinsic value of biological diversity". The concept of 'intrinsic value' shares some conceptual terrain with that of dignity, in particular with regards to dignity's role as justification.²⁰⁵ It is therefore worth inquiring into this overlap further in order to determine whether the existence of nonhuman vital interests does indeed imply the existence of nonhuman dignity. The following section will therefore analyse more rigorously the relationship between dignity, intrinsic value and vital interests, and present a framework that permits consideration of the idea of 'nonhuman dignity'.

8.4 DIGNITY, VITAL INTERESTS AND INTRINSIC VALUE

The three concepts of dignity, intrinsic value and vital interests are interlinked, and achieving clarity over their precise relations will allow for a clear conception of (nonhuman) dignity to be developed. As far as possible, the remainder of this chapter will not engage with what actually has dignity or intrinsic value, but rather with the theoretical concepts themselves. Its task is to identify what dignity is, rather than where it is.

²⁰³ *Herrmann v Germany* (2013) 56 EHRR 7 Separate Opinion 37.

²⁰⁴ §3.4.

²⁰⁵ *infra*.

Chapter Six showed that vital interests can be thought of as specifications of dignity.²⁰⁶ This section will first outline the meaning of intrinsic value, and then argue that dignity is similar, but not identical, to intrinsic value.

8.4.1 INTRINSIC VALUE

Intrinsic value is an important topic within ecological philosophy,²⁰⁷ which shows considerable conceptual overlap with the concept of dignity.²⁰⁸ The

²⁰⁶ §6.5.

²⁰⁷ See eg Aldo Leopold, *A Sand County Almanac* (OUP 1949); Arne Naess, 'The Shallow and the Deep, Long-Range Ecology Movement' (1973) 16 *Inquiry* 95; Richard Sylvan, 'Is There a Need for a New, An Environmental, Ethic?' (1973) 1 *Proceedings of the XV World Congress of Philosophy* 205; Rodman (n198); George Devall and Bill Sessions, *Deep Ecology* (Gibbs Smith 1985); Paul Taylor, *Respect for Nature* (Princeton University Press 1986); Holmes Rolston III, *Environmental Ethics* (Temple University 1988); Fox (n198); Plumwood (n192); Freya Mathews, *The Ecological Self* (Routledge 1991); John O'Neill, 'The Varieties of Intrinsic Value' (1992) 75 *The Monist* 119; Rolston (n180); Keekok Lee, 'The Source and Locus of Intrinsic Value: A Reexamination' (1996) 18 *Environmental Ethics* 297; Varner (n198); J Baird Callicott, *Beyond the Land Ethic* (SUNY Press 1999); Andrew Light and Holmes Rolston III (eds) *Environmental Ethics* (Blackwell 2003); Timothy Morton, *The Ecological Thought* (HUP 2010); Patrick Curry, *Ecological Ethics* (Polity Press 2011); Alexander Gillespie, *International Environmental Law, Policy, and Ethics* (2nd edn, OUP 2014).

²⁰⁸ See Ronald Dworkin, *Life's Dominion* (HarperCollins 1993) 238, 259fn23; Schachter (n4); Peter Singer, 'All Animals Are Equal' in Peter Singer (ed), *Practical Ethics* (OUP 1986) 215, 228; Michael Bowman, 'Biodiversity, Intrinsic Value, and the Definition and Valuation of Environmental Harm' (2002) in Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law* (OUP 2002) 43-44; Rhoda Howard, 'Dignity, Community, and Human Rights' in Abdullahi An-Nai'm (ed), *Human Rights in Cross-Cultural Perspectives* (University of Pennsylvania 1991) 81, 84; Deryck Beyleveld and Roger Brownsword, 'Human Dignity, Human Rights, and Human Genetics' (1998) 61 *Modern Law Review* 661, 667-68; Dunja Jaber, 'Human Dignity and the Dignity of Creatures' (2000) 13 *Journal of Agricultural and Environmental Ethics* 29, 31; Cavalieri (n157) 37; Nussbaum (n111) 299; McCrudden (n201) 679-80, 723; Paolo Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19 *EJIL* 931, 934; Michael Rosen, *Dignity* (HUP 2012) 10ff; Foster (n4) 100; Tasioulas (n197) 304-307; Robert Streiffer, 'Human/Non-Human Chimeras' in Zalta (n8, Fall 2014 edn) ch5,

linkage between dignity and intrinsic value can be clearly seen in Kant's early definition of dignity:

What is related to general human inclinations and needs has a *market price*; that which, even without presupposing a need, conforms with a certain taste, that is, with a delight in the mere purposeless play of our mental powers, has a *fancy price*; but that which constitutes the condition under which alone something can be an end-in-itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*.²⁰⁹

In modern parlance, what Kant is talking about is respectively, instrumental value (value that accrues from direct or indirect use); inherent value (value that arises simply through existence or amenity); and intrinsic value (value that something has regardless of the utility or amenity of others).²¹⁰ These forms of value are all commonly deployed within ecological ethics,²¹¹ and intrinsic value – as employed there – is of considerable similarity to the concept of dignity employed in this thesis. This is because both are concerned with matters that are fundamentally constitutive of (ie intrinsic to) an entity, and also with signposting what is

<<http://plato.stanford.edu/archives/fall2014/entries/chimeras>> (accessed 27/7/2015).

²⁰⁹ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (first published 1786, Mary Gregor tr, CUP 1998) 42.

²¹⁰ See Michael Bowman et al, *Lyster's International Wildlife Law* (2nd edn, CUP 2010) 62-73.

²¹¹ See Light and Rolston (n207); Gillespie (n207).

of value, worth and importance. Given the similarities between dignity and intrinsic value, and given that it is commonly argued within ecological ethics that all (or at least many) organisms have intrinsic value,²¹² this section will determine the nature of dignity and intrinsic value through the lens of vital interests.

8.4.1(A) DEFINITION OF INTRINSIC VALUE

John O'Neill has highlighted at least three definitions of 'intrinsic value'. Intrinsic value has been defined as value which (a) is non-instrumental, (b) relates to the intrinsic properties of something, and/or (c) is objective as opposed to subjective.²¹³ For the purposes of this thesis, a maximalist stance will be adopted, whereby intrinsic value is defined as combining all three definitions so as to ensure that the term is not defined too loosely. Put simply, this means that an entity is intrinsically valuable if it is an end in itself (non-instrumental), of itself (through intrinsic properties), and for itself (objective value). Perhaps the most important signifying feature of intrinsic value is that something can only intrinsically value itself: valuing something else cannot be intrinsic value.²¹⁴

²¹² eg Taylor (n207); Rolston (n180); Fox (n198) 161-76; Nicholas Agar, *Life's Intrinsic Value* (Columbia University Press 2001); Curry (n207); Gillespie (n207) 114-27; Varner (n198).

²¹³ O'Neill (n207); Mattia Fosci and Tom West, 'In Whose Interest? Instrumental and Intrinsic Value in Biodiversity Law' in Michael Bowman et al (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar 2016) 56-57.

²¹⁴ cf 'inherent value' which is often confused with intrinsic value and can meet the first two definitions above. Inherent value is found when something is valued for its mere existence, for its aesthetics, or for its amenity. See Bowman (n210) 62-63.

Because intrinsic value does not come about through an external valuer, it is self-generated and self-referential. As such, an intrinsically valuable entity is a "locus of valuational activity".²¹⁵ At this locus value is generated, rather than being bestowed by external valuational activity. For example, Sam may value their pet dog. However, this value is not intrinsic value because it is generated by Sam. At the same time, Sam's pet dog may also have intrinsic value, which is distinguishable from Sam's valuation of their dog. In this case, this is because Sam's dog is of value in itself, of itself, and for itself. As a locus of valuational activity, the dog values herself.

In order to better understand the differences between dignity and intrinsic value, the concept of vital interests will be used. This approach is warranted because vital interests are specifications of dignity,²¹⁶ and because interests can be used to justify the intrinsic value of organisms.²¹⁷

8.4.1(B) THE INTRINSIC VALUE OF ORGANISMS

Although there are other approaches to showing that organisms have intrinsic value,²¹⁸ the most prudent way for the intrinsic value of organisms to be demonstrated in this thesis is through the notion of interests. That is,

²¹⁵ Bruce Morito, 'Intrinsic Value: A Modern Albatross for the Ecological Approach' (2003) 12 *Environmental Values* 317. See also Lee (n207).

²¹⁶ §6.5.

²¹⁷ eg Varner (n198) 55ff; Regan (n155); Harley Cahen, 'Against the Moral Considerability of Ecosystems' 114-19 in Light and Rolston (n207).

²¹⁸ As well as arguments for the intrinsic value of ecosystems. See Leopold (n207); Rolston (n180); Bowman (n208) 50-51; Mathews (n207) 117ff; Robert Elliot, 'Instrumental Value in Nature as a Basis for the Intrinsic Value of Nature as a Whole' (2005) 27 *Environmental Ethics* 43.

it will be argued that organisms have intrinsic value because they have interests.

The key to seeing how interests generate intrinsic value lies in the fact that the state of the world is not value-neutral for organisms because of their interests. Things can go well or go badly for them depending on the fulfilment or the frustration of their interests. This is because organisms value certain objects, matters or states of affairs as determined by the content of their interests. As such, organisms value things instrumentally. For example, dogs instrumentally value food and sticks because they have an interest in them.

The fact that organisms instrumentally value food, sticks and so on must be based on some underlying notion of utility, worth or value. That is, if D instrumentally values S, this implies (a) that D is capable of valuation (things can go well or badly for D), and (b) that there is some reason or purpose as to why D values S. If this reason or purpose is itself also of a merely instrumental character, then one can again enquire why this reason or purpose is instrumentally valued. Continuing this chain of reasoning, one must always end up, at the bottom, with something which is of value 'simply because it is'. In the words of O'Neill, "it is a well-rehearsed point that, under pain of an infinite regress, not everything can have only instrumental value".²¹⁹ The existence of instrumental value thus logically requires the existence of intrinsic value of some form. Dogs value food because they value themselves.

²¹⁹ O'Neill (n207) 119.

The self-valuing that arises through the presence of interests meets the three definitions of intrinsic value outlined above. Firstly, such value is by definition non-instrumental value (definition (a) of intrinsic value): organisms do not value themselves for any reason other than because they do. Secondly, given that this non-instrumental value derives from an organism's own interests, this value is related to the intrinsic properties of the organism: D does not have an interest because E does, but rather because of the nature of D. The intrinsic value that arises through interests is not dependent on relative characteristics like rarity or social status, but derives from intrinsic characteristics of the organism (definition (b)). And finally, such value is not dependent on a value-judgment by an external observer: if all humans disappeared tomorrow, dogs would still be valuing sticks, food and themselves (definition (c)). As such, anything that possesses interests is itself a 'locus of valuational activity' and so a possessor of intrinsic value.

Given the proximity between intrinsic value and dignity, that organisms have intrinsic value is relevant to a consideration of nonhuman dignity. However, the existence of nonhuman intrinsic value does not imply that nonhumans have dignity. The following subsection will consider the differences between intrinsic value and dignity through the lens of vital interests in order to develop a more precise notion of what dignity is.

8.4.2 A DEFINITION FOR DIGNITY

Intrinsic value and dignity are both closely related to vital interests. The above subsection showed that if something has interests then it has intrinsic value. Additionally, Chapter Six has already shown that vital

interests are specifications of dignity.²²⁰ Both dignity and intrinsic value are connected to the interests of organisms. However, a means to distinguish them can be found by considering the implications of intrinsic value and dignity.

Consider two entities, X and Y, that both have both intrinsic value and dignity. As they are intrinsically valuable, they are both ends-in-themselves and so ought to be treated as such.²²¹ And as the possessors of dignity, they should lead a life of dignity.²²² The crucial difference between these two normative implications is that X's and Y's intrinsic values provide rather limited information as to how they should be treated: as ends-in-themselves. On the other hand, X's and Y's dignities provide more in-depth information concerning how they should be treated. They should not be exposed to any form of undignified treatment, and should be allowed to flourish.²²³

The meaning of 'X leading a life of dignity' is more nuanced than that of 'Y being treated as an end-in-itself'. In particular, the meaning of the latter is not specific to Y, but a rather general proposition. 'Leading a life of dignity' on the other hand requires further interpretation, which can be done

²²⁰ §6.5.

²²¹ Kant (n209), Fox (n198) 161-76.

²²² See McCrudden (n201) 679; Dina Townsend, 'Taking dignity seriously? A dignity approach to environmental disputes before human rights courts' (2015) 6 *JHRE* 204, 216.

²²³ §1.5.

through dignity's specifications via vital interests.²²⁴ As such, dignity is a fuller notion: it implies that the *kind of life* one leads matters, as specified by the relevant vital interests. Intrinsic value is only concerned with *whether* something has vital interests, dignity needs to know *what* these vital interests are.

To state that 'Y has intrinsic value' provides *less* information than stating that 'X has dignity'. This is because intrinsic value is simply a thing that Y has or does not have. Intrinsic value is 'off the shelf'. Dignity is richer; it is 'à la carte'. X's intrinsic value and Y's intrinsic value provide the same information: an observation that X and Y have vital interests and so are loci of valuational activity.²²⁵ Whereas X's dignity and Y's dignity will take on different shapes and features, as defined by the content of the vital interests of X and Y.²²⁶

Dignity's dual-function within IHRL captures this difference. It is as justification that dignity shares its terrain with intrinsic value ("these rights derive from the inherent dignity of the human person"²²⁷); but it is as a metric (eg "aspects of school discipline may also be inconsistent with human dignity"²²⁸) that dignity demonstrates itself to be a fuller notion than intrinsic value. This is because dignity, when operating as a metric,

²²⁴ Although dignity can be specified via vital interests, it is important to recall that it cannot be reduced to them: dignity also operates as an overarching and cohesive justificatory level: §6.5.

²²⁵ See Mathews (n207) 122.

²²⁶ §1.3-1.5; §6.5.

²²⁷ ICCPR/ICESCR Preamble.

²²⁸ CESCR, General Comment 13 [41]; §1.5.

provides some information about appropriate treatment: dignity covers both *what* matters and *why* it matters.²²⁹ Intrinsic value, on the other hand, exists statically as a consequence of vital interests: it can serve as a justification but not a metric.

This theoretical difference between dignity and intrinsic value reveals an important distinction between them. If something has dignity, then it is possible (though undesirable) for it to lead an undignified life. As such, dignity refers not only to the fact that something should be treated as an end-in-itself, but also to how it should be treated *while it is alive*. That is, dignity arises when there are things *other than mere survival* that are of value. To something with dignity, not only life, but the *kind of life* one leads matters: they should not just survive, but flourish. The following subsection will link this distinction back to vital interests.

8.4.3 HOW MANY VITAL INTERESTS?

Because matters other than mere survival are of value to something with dignity, the interest in continued biological functioning is not in itself enough to demonstrate the existence of dignity, even though it does demonstrate that something has intrinsic value. For something to have dignity at least one *additional* vital interest must be present in order to provide a way in which its dignity can be violated while it remains alive.²³⁰

Requiring an additional vital interest in order to have dignity may seem to suggest that plants and other nonanimal lifeforms may not be the

²²⁹ §1.5. Claassen (n199) 244-45.

²³⁰ See Nussbaum (n4) 362.

possessors of dignity. Whereas it takes little imagination to see how Tommy or Tilikum²³¹ can be treated in an undignified manner without necessarily killing them (simply consider some other vital interests of theirs),²³² the same is not so immediately obvious for trees or bacteria because other vital interests of theirs are not as immediately apparent. However, the dignity of plants is potentially meaningful,²³³ and should not be dismissed *in limine*.

In this regard, it is important to realise that the content of dignity is not everywhere identical; it varies across species just as vital interests vary.²³⁴ That it is not immediately apparent what a violation of tree dignity looks like may simply be a result of a lack of imagination (or even an unwillingness) to explore the abstract concept of dignity in its poorly-chartered territories.²³⁵

²³¹ §7.2.

²³² See Sarah McFarland and Ryan Hediger (eds), *Animals and Agency* (Brill 2009) especially 1-22.

²³³ See Claassen (n199); Koechlin (n140); Ariane Willemsen (ed), 'The dignity of living beings with regards to plants' (ECNH 2008) <<http://www.ekah.admin.ch/fileadmin/migrated/content/uploads/e-Broschure-Wurde-Pflanze-2008.pdf>> (accessed 27/7/2015); Balzer (n134) 14-19; Joel Feinberg, 'The Rights of Animals and Future Generations' in *Rights, Justice, and the Bounds of Liberty* (Princeton University Press 1980) 159, 164-66; Matthew Hall, *Plants as Persons* (SUNY Press 2011).

²³⁴ Nussbaum (n4) 351.

²³⁵ This is perhaps tied to human difficulty in understanding what it might be like to be another organism. See Jakob von Uexküll, *A Foray into the Worlds of Animals and Humans* (first published 1934, Joseph O'Neill tr, University of Minnesota Press 2010); Steven Bartlett, 'Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks' (2002) 8 *Animal Law* 1.

A way to conceptualise plant dignity can in fact emerge from considering that all forms of survival for a plant are hardly equivalent. For example, petrochemical-fuelled monocultural agribusiness is not the same as agroecology, permaculture²³⁶ or rewilding farming methods. The oil-slicked Ogoniland is not only bad for humans, but for the land community itself too. Life may continue in fragmented ecosystems, but it seems a poorer variety of life than in better connected ones where it can truly flourish. Such ideas are found in Deep Ecology,²³⁷ Leopold's Land Ethic,²³⁸ and many other branches of ecological thought.²³⁹ For instance, the Earth Democracy Movement is based on the understanding that "every form of life is intrinsically valuable, and diversity is to be prized because it signifies freedom, whereas monocultures are produced by the dominance of one species, variety, race, or religion, and the exclusion of others".²⁴⁰

These intuitions may simply be reflecting an aesthetic human preference. Or they may be capturing an important manifestation of the dignity of plants and other organisms:²⁴¹ a plant may be able to survive in many

²³⁶ Patrick Whitefield, *Permaculture in a Nutshell* (Permanent 1993).

²³⁷ Devall and Sessions (n207).

²³⁸ Leopold (n207); J Baird Callicott (ed), *Companion to A Sand County Almanac* (University of Wisconsin Press 1987).

²³⁹ Sylvan (n207) 205; Gregory Bateson, *Mind and Nature* (Fontana 1980); Masanobu Fukuoka, *The Road Back to Nature* (Japan Publications 1987); John Muir, *My First Summer In the Sierra* (first published 1911, Sierra Club Books 1988); Morton (n207); Curry (n207); Schlosberg (n195).

²⁴⁰ Cited in Cormac Cullinan, *Wild Law* (2nd edn, Green Books 2011) 163. Productivity is actually dependent on diversity: Whitefield (n183) 10ff.

²⁴¹ John Rodman, 'Four Forms of Ecological Consciousness Reconsidered' in Alan Drengson and Yuichi Inoue (eds), *The Deep Ecology Movement* (North Atlantic Books 1995) 251; Taylor (n207) 122; Val Plumwood, *Feminism and the Mastery of*

conditions, but to truly flourish and to have its dignity respected, it must fulfil its role in a diverse and interconnected ecological community. Such an interest can in fact be found in the vital interests outlined above. The human vital interest in forming social communities can be considered an example of a broader interest in forming communities in general, including ecological ones. Already it has been seen that human flourishing happens in community;²⁴² and it is potentially meaningful to understand organism flourishing as happening in ecological community. Dignity can be understood – in line with ideals from Earth Jurisprudence that refer to the Earth as a communion of subjects²⁴³ – to include the existence of a vital interest in forming ecological communities. The presence of such an interest in living organisms would demonstrate the presence of nonhuman dignity.

A pivotal vital interest of organisms has thus been identified for their possession of dignity. The remainder of this thesis will be concerned with the proposed vital interest of living organisms in forming ecological communities. This is pivotal because if this vital interest can be shown to exist, then all organisms will be shown to have dignity and thus potential bearers of vital rights.

Nature (Routledge 1993) 210; Schlosberg (n195) 137; Angela Kallhoff, 'Plants in Ethics: Why Flourishing Deserves Moral Respect' (2014) 23 *Environmental Values* 685.

²⁴² §1.3.1; §1.4.1.

²⁴³ Cullinan (n240) 79-83; Ian Mason, 'One In All: Principles and Characteristics of Earth Jurisprudence' 37 and Judith Koons, 'Key Principles to Transform Law for the Health of the Planet' 46-52 both in Peter Burdon (ed), *Exploring Wild Law* (Wakefield 2011)37.

8.5 CONCLUSION

This chapter has constructed a list of eight vital interests through establishing the grounds of existing vital rights (ie those found in IHRL). These vital interests are worthy of the elevated protection of vital rights because they are the essential interests of living (human) beings and together sketch the contours of human dignity. The list is neither monolithic nor exhaustive: it is plausible that human vital interests can be categorised in alternative ways, and that new vital interests will emerge as IHRL continues to enrich its understanding of the human rights subject.

The chapter has also shown that at least some of these vital interests are present in at least some nonhumans. This is not surprising, since they are the essential interest of living beings and humans are not the only living beings. Importantly, the existence of nonhuman vital interests is not a result of moral extensionism: the argument is not that nonhumans have vital interests because they are similar to humans, but rather that all living beings have essential interests that arise through their physically embodied and embedded nature.

Because dignity can be specified through vital interests, the existence of nonhuman vital interests opens the door to nonhuman dignity. Closer engagement with the concept of nonhuman dignity can assist theories seeking to justify both animal rights and RoN. This thesis seeks to do just that through exploring more closely what it means to have dignity – and whether nonhumans do indeed have it. This will allow the creation of a case for nonhuman vital rights through the lens of Interest Theory.

In order to do this, this chapter developed the relationship between dignity and vital interests through comparison with 'intrinsic value', a concept which is comparable to dignity and often seen in environmental philosophy and law. It argued that intrinsic value simply requires the presence of an interest, whereas to have dignity require the existence of a vital interest *additional to* the one in continued biological functioning. This is because it is not just mere survival that matters to something with dignity, but the kind of life matters too. It is possible (though not desirable) to live an undignified life. This aligns with dignity's dual-role as both justification and metric within IHRL. As a justification, dignity signposts that things matter, as a metric it indicates what kind of life matters.

The chapter concluded by identifying a vital interest (additional to the one in continued biological functioning) that may be present in all living organism: a vital interest in forming ecological communities. This interest can be conceived of through a broadening of the human interest in kinship and forming social communities (and a consequent enriching of the vital rights subject). Chapter Nine will complete this thesis by investigating whether such an interest does indeed exist, and how it is best protected.

Although the focus remains on the interests and dignity of organisms, the thesis will retain the possibility of vesting rights in ecosystems. This is because the individualism latent in assessing the dignity, interests and rights of individual organisms may prove unsuitable for the ecocentric approaches found in environmental law and philosophy. Although rights may historically have their roots in unassailable individualism, this need no

longer be the case.²⁴⁴ In particular, it has already been seen that IHRL has softened its individualism through the establishment of group rights and other rights grounded in the vital interest in forming communities. Vesting rights in ecosystems may prove to be an effective means to protect the ecologically relational aspects of organisms' dignity, in a comparable fashion to how peoples' rights are used to protect the socially relational aspects of human dignity.

²⁴⁴ cf Holmes Rolston III, 'Rights and Responsibilities on the Home Planet' (1993) 18 *YJIL* 251, 253-62.

CHAPTER NINE

ECOLOGISING

To ecologize any field ... is to radicalize it. This is because ecology stands for an interrelational view of reality that radically contradicts our ruling ontologies [which are] dualistic, particularistic, mechanistic, reductionistic, individualistic, commodifying, etc.¹

The capacity of a being as an entitlement-holder will not hinge on the unproblematic unity of the being, but on the status bestowed by the relevant legal system.²

9.1 INTRODUCTION

Chapter Nine demonstrates how nonhuman vital rights can be justified and designed. It does this through demonstrating and analysing of the relational nature of living organisms. In particular, it will use biological and ecological insights to demonstrate that all organisms have a vital interest in forming ecological communities, and then argue that this interest can be protected through vesting rights in ecosystems.

¹ Andy Fisher, 'Three Arguments for a Radical Ecopsychology' (2013) 5 *Ecopsychology* 225, 225-26.

² Matthew Kramer, 'Rights Without Trimmings' in Mathew Kramer et al, *A Debate Over Rights* (OUP 1998) 57.

The vital interest in forming ecological communities has two pertinent consequences for the purposes of this thesis. Firstly, it demonstrates the existence of nonhuman dignity, since it is a vital interest *additional to* the one in continued biological functioning.³ In other words, there are matters other than mere survival that are of value to living organisms. Secondly, it means that living organisms are ecologically embedded. That is, organisms do not exist apart from the environment(s) in which they live, but rather the two mutually constitute each other. The first consequence indicates that nonhuman vital rights can be justified, the second informs how these rights should be designed.

Although it is individual organisms that have vital interests (and so dignity), this chapter demonstrates that these organisms are not so individual after all. Like many investigations into the nature of living systems, Chapter Nine is concerned with the construction and consequences of “a metaphysics that takes account of the reality and importance of relationships and systems as well as of individuals”.⁴ It will demonstrate that entirely individualistic or ‘closed-box’ models of organisms are insufficient in their ability to capture the nature of vital rights subjects and their interests. There are numerous ways in which notions of organisms as entirely isolated and atomistic can be questioned. The three main strands that will be identified throughout the course of this chapter are that:

³ §8.4.3.

⁴ John Rodman, ‘Four Forms of Ecological Consciousness Reconsidered’ in Alan Drengson and Yuichi Inoue (eds), *The Deep Ecology Movement* (North Atlantic Books 1995) 242, 250. See also Michael Nelson, ‘Teaching Holism in Environmental Ethics’ (2010) 32 *Environmental Ethics* 33, 36.

- (a) External *relations* are just as important as internal properties;
- (b) The natural world is as much *continuous* as it is discrete; and
- (c) There are always many *perspectives* from which to view reality.

These three strands are themselves intertwined with one another. As such, this chapter will demonstrate the relational, continuous and perspectived (or together '*ecological*' in a semi-metaphorical sense⁵) from a number of angles, exploring a number of related perspectives through which to approach and understand *ecologising*. The conclusions of these many approaches point in the same direction: towards a re-imagining of organisms (the primary subjects of vital rights) as truly *ecological*.

The relationality, continuity and perspectived nature of the natural world forces a re-imagining of the vital rights subject as deeply ecologically embedded. In response to this ecological embeddedness, the thesis proposes that vital rights should be vested in ecosystems in order to protect the vital interests of organisms in forming ecological communities. This parallels the use of peoples' rights to protect human interests in forming social communities.⁶

⁵ Mesology is an older term for ecology which helps understand this meaning. It derives from *mesos*, meaning 'middle' or 'the midst'. Mesology is the study of what happens in intervening spaces. See Augustin Berque, 'Offspring of Watsuji's theory of milieu (Fudo)' (2004) 60 *GeoJournal* 389, 391; Augustin Berque, 'Médiance et pensée japonaise' (traduction d'un article à paraître dans Kan 環 n 54, juillet 2013); Andreas Philippopoulos-Mihalopoulos, 'Actors or Spectators? Vulnerability and Critical Environmental Law' (2013) 3 *Oñati Socio-Legal Series* 854, 860-63, 867.

⁶ §1.4.

Understanding organisms as relational and continuous, and shifting towards an ecosystem perspective, does not negate the significance of individual organisms. This chapter recognises that although living organisms are interrelated, they still retain meaning as individuals: the ecological world is one of continuity without indistinguishability.⁷ Distinguishability must be maintained in order to be able to identify meaningful units (of differing kinds) within the natural world. The many ways of doing this (such as through the organism perspective or the ecosystem perspective) simply provide different perspectives of the same reality.

9.2 THE RELATIONALITY OF AUTOPOIETIC SYSTEMS

The first section of this chapter introduces the concept of 'autopoiesis' and demonstrates that autopoietic systems⁸ are a priori relational. Autopoiesis is a biological description of the defining characteristics of living organisms that is "on the one hand close to [being based on] strictly empirical grounds, yet provides the decisive entry point into the origin of individuality and identity, connecting it, through multiple mediation with

⁷ Val Plumwood, 'Nature, Self, and Gender: Environmental Philosophy, and the Critique of Rationalism' (1991) 6 *Hypatia* 3, 19.

⁸ Autopoietic entities are systems, but they are also 'composite unities'. It is the very fact that they are autopoietic that allows them to be considered both systems and unities – Francisco Varela et al, 'Autopoiesis: The Organization of Living Systems, Its Characterization and a Model' (1974) 5 *Biosystems* 187, 187-88; Maturana, 'Man and Society' in Frank Benseler (ed), *Autopoiesis, Communication and Society* (Campus Verlag 1980) 29; Andreas Weber and Francisco Varela, 'Life after Kant: Natural purposes and the autopoietic foundations of biological individuality' (2002) 1 *Phenomenology and the Cognitive Sciences* 97, 115.

human lived body and experience, into the phenomenological realm".⁹ Its potential to illuminate the nature of the vital rights subject, and the fact that it has been used to justify the intrinsic value of organisms,¹⁰ renders autopoiesis a useful starting point for considering the vital interests of living organisms in general.

9.2.1 DEFINITION

Autopoiesis, from the Greek *autos* meaning self and *poiein* meaning creation or production, is a term coined by biologists Francisco Varela and Humberto Matarana to describe living organisms.¹¹ Its theoretical approach to understanding what distinguishes living organisms from inanimate matter¹² makes it a pertinent concept for this thesis to consider. An autopoietic system is defined as being self-organising and self-producing.¹³

⁹ Weber and Varela (n8) 116.

¹⁰ See Warwick Fox, *Toward A Transpersonal Ecology* (SUNY Press 1990) 165-76; Freya Mathews, *The Ecological Self* (Routledge 1991) 125n9; Robyn Eckersley, *Environmentalism and Political Theory* (SUNY 1992) 60-61; J Baird Callicott, 'Aldo Leopold's Metaphor' in Robert Costanza et al, (eds), *Ecosystem Health: New Goals for Environmental Management* (Island Press 1992) 51-53; Michael Bowman, 'Biodiversity, Intrinsic Value, and the Definition and Valuation of Environmental Harm' (2002) in Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law* (OUP 2002) 48-49; David Schlosberg, *Defining Environmental Justice* (OUP 2007) 136-37; Cormac Cullinan, *Wild Law* (Green Books 2011) 79-80.

¹¹ Varela (n8) 188; Francisco Maturana and Humberto Varela, *Autopoiesis and Cognition* (Kluwer 1980); John Mingers, *Self-Producing Systems* (Plenum Press 1995) 13-17; Pier Luigi Luisi, 'Autopoiesis: a review and reappraisal' (2003) 90 *Naturwissenschaften* 49, 51.

¹² A valid distinction, and a crucial one for this thesis. See Ernst Mayr, *This is Biology* (HUP 1997) 21-22 for the distinguishing characteristics of life: evolved programs, regulatory mechanisms, organisation, teleonomic systems, life-cycles, open systems, self-replication, metabolism, self-regulation, response to stimuli.

¹³ Maturana and Varela (n11) 100-102; Luisi (n11) 51-56; Mingers (n11) 13-17, 43-45.

These two processes are reliant on one another: it is through self-organisation that autopoietic systems produce themselves, and through self-production that they organise themselves. That is, "autopoietic systems are self-producing systems – their components participate in processes of production the result of which is those very same components".¹⁴ An autopoietic system therefore has some concept of 'self' (autos) that is continually produced and organised.

A third condition for autopoietic systems is that they organise and produce themselves within a well-defined spatial region: their self must be bounded and this bounding is done by semi-permeable membranes.¹⁵ This spatial delimitation received less emphasis in Varela and Maturana's initial definition, despite the fact that "the notion of boundary is, in fact, central in the theory of autopoiesis"¹⁶ since without it there could be no identifiable 'self' to be organised and produced.

There are thus three necessary conditions for autopoiesis: self-organisation, self-production, and the existence of a boundary delimiting the 'self' relevant for these reflexive actions. Although autopoiesis was initially coined to characterise unicellular lifeforms, it can be applied to multicellular ones too.¹⁷ Autopoiesis provides a way to distinguish between

¹⁴ Mingers (n11) 206.

¹⁵ Note that it is not strictly necessary for this boundary to be produced by the organism, even though this is usually the case: Pablo Razeto-Barry, 'Autopoiesis 40 years Later. A Review and a Reformulation' (2012) 42 *Orig Life Evol Biosph* 543, 550-52.

¹⁶ Luisi (n11) 50.

¹⁷ Mingers (n11) 21, 41-43; Luisi (n11) 51-52, Razeto-Barry (n15) 559-60.

living and non-living systems,¹⁸ and so can be used to identify the particular features and functions of living systems. It will be used here to understand why it is that living organisms have vital interests and what these vital interests are.

9.2.2 AUTOPOIESIS AND INTRINSIC VALUE

Because they are autopoietic, organisms have a goal: the continued organisation and production of themselves. Because they have a goal, organisms are not neutral or impartial as to how the world unfolds: they tend towards their own self-production and self-organisation, allowing their biological functioning to continue.

Not only do autopoietic systems have a goal, they also participate in activities in order to achieve this goal. They self-organise in order to self-produce, and self-produce in order to self-organise. As such, organisms are not inert; they do not simply 'hope for the best', but rather have agency in the world.¹⁹ Organisms tend towards activities that promote their goals and away from those that do not. They sense and perceive relevant

¹⁸ Razeto-Barry (n15) 560.

¹⁹ Analysis of the concept of agency is beyond the scope of this thesis, though autopoiesis – and its connection with autonomy – provide useful starting points for such analysis: see Weber and Varela (n8) 115-17; Humberto Maturana and Francisco Varela, *The Tree of Knowledge* (Shambhala Publications 1987) 48; Luisi (n11) 49-52; Bernd Rosslénbroich, *On the Origin of Autonomy* (Springer 2014) ch3; Mingers (n11) 37-38; Rodman (n4) 242, 251; Thomas Heyd (ed), *Recognizing the Autonomy of Nature* (Columbia University Press 2005); Matthew Hall, 'Plant Autonomy and Human-Plant Ethics' (2009) 31 *Environmental Ethics* 169; Sarah McFarland and Ryan Hediger (eds), *Animals and Agency* (Brill 2009) 5-8, 13-14.

changes in circumstances and then react and respond to these changes so as to make the best of them from their own point of view.²⁰

Such goal-oriented behaviour demonstrates that organisms prefer some particular states of affairs over others: they “are subjects having purposes according to values encountered in the making of their living”.²¹ They have values: things can go better or worse for them. For example, being quenched is (normally) better than being thirsty since dehydration inhibits metabolic processes that are crucial for self-production. Organisms value situations that aid their self-production and self-organisation (‘the making of their living’) and disvalue those that do not. Through this valuing, organisms have interests in the state of the world around them. As a very minimum, autopoietic organisms have an interest in continued biological (ie autopoietic) functioning. Rolston captures this feature of organisms in a way that makes clear the shortcomings of some animal rights based approaches:

So the oak grows, reproduces, repairs its wounds and resists death. The physical state that the organism seeks, idealised in its programmatic form, is a valued state. Value is present in this achievement. A life is defended for what it is in itself ... [thus] a really vital ethic respects all life, not

²⁰ §9.4.2.

²¹ Weber and Varela (n8) 102.

just animal pains and pleasures, much less just human preferences.²²

All organisms therefore have intrinsic value; their vital interest in continued functioning renders them loci of valuational activity. However, this thesis is interested in whether organisms have dignity, which requires the presence of an additional vital interest since it is not just life, but the sort of life, that matters to something with dignity. In order to explore the potential existence of another vital interest of all organisms, the third characteristic of autopoiesis – the autopoietic boundary – must be examined. It will be shown that this boundary, and crucially its semi-permeability, implies the existence of a vital interest in forming ecological communities.

9.2.3 THE AUTOPOIETIC SELF

In order to be able to *self-organise* and to *self-produce*, autopoietic systems must have a 'self' on which to perform these actions. This self is defined by the semi-permeable boundary or membrane that is a necessary component of an autopoietic organism. This boundary creates an 'inside' and an 'outside'; a 'self' and an 'other'. However, an organism is by no means a closed system.²³ Its boundary is not only semi-permeable but it in

²² Holmes Rolston, cited in Alexander Gillespie, *International Environmental Law, Policy, and Ethics* (2nd edn, OUP 2014) 127.

²³ Razeto-Barry (n15) 547. From the point of view of entropy, this must be the case: the second law of thermodynamics states that entropy, or disorder, must increase over time within a closed system. However, each organism is itself an example of matter coming together in a highly structured and organised fashion. Therefore, an individual organism cannot be a closed system. See Erwin Schrödinger, *What Is Life?* (CUP 1944); Jeremy England, 'Statistical physics of

fact must be permeated in order for the organism to continue. Organisms are dependent on exchange (of energy, nutrients, ideas etc) with the 'other' for their survival.

The continued existence of autopoietic organisms is dependent on exchange that takes place across its membrane. The creation and continuation of the autopoietic 'self' is thus entirely dependent on the 'other'. Isolationism is futile, and the organism constantly (re-)defines and (re-)shapes both its self and its environment.²⁴ There is thus a "mutual co-emergence of environment and living structure".²⁵ The living structure (the organism) is both clearly demarcated from and totally bound up with its environment. Nobel Prize winning biochemist Peter Mitchell states that:

I cannot consider the organism without its environment...
From a formal point of view the two may be regarded as equivalent phases between which dynamic contact is maintained by the membranes that separate and link them.²⁶

self-replication' (2013) 139 *The Journal of Chemical Physics* 121923; Natalie Wolchover, 'A New Physics Theory of Life' *Quanta Magazine* (22 January 2014) <<https://www.quantamagazine.org/20140122-a-new-physics-theory-of-life/>> (accessed 13/3/2015).

²⁴ Note that what is being 'environ-ed' here is not (necessarily) a human. The world is replete with multitudinous environments.

²⁵ Luisi (n11) 58.

²⁶ Cited in Nick Lane, *The Vital Question* (Profile 2015) 77.

Autopoietic organisms are, by definition, "organisationally closed"²⁷ by semi-permeable membranes. But they are also reliant on 'dynamic contact' with the outside – they are "interactively open".²⁸ Living organisms persist both by having membranes that both separate and link them with their environment. Understanding organisms thus requires a dialethic²⁹ viewpoint: they are both closed and open simultaneously (organisms are 'clopen'³⁰).

There is a poignant juxtaposition here: the organism divides the world into 'self' and 'other', only for the self and the other to be inextricably bound together. Interacting across the boundary is essential to autopoietic organisms: without such interactions the organism could not self-organise and self-produce (hence they are perhaps better thought of as 'intra-actions'³¹). But such interactions could not take place without the organism having some boundary demarcating the self from the other in the first place.

Autopoiesis therefore demonstrates that organisms are necessarily relational. "There cannot be an individuality which is isolated and folded

²⁷ Mingers (n11) 31.

²⁸ *ibid* 33. See also Razeto-Barry (n15) 553.

²⁹ Dialethism, or dialetheism, is the view that contradictions may be true. See 'dialethism', *Penguin Dictionary of Philosophy* (Penguin 1997); Graham Priest, Richard Routley and Jean Norman (eds), *Paraconsistent Logic: Essays on the Inconsistent* (Philosophia Verlag 1989) 3ff.

³⁰ A technical mathematical term that describe a set that is both open and closed. Furthermore, the inverse of a clopen set is by definition itself also clopen: clopenness is mutual.

³¹ Barad's term, see *infra* §9.4.1. For Barad's discussion of boundaries see Karen Barad, *Meeting the Universe Halfway* (Duke University Press 2007) 153-61.

into itself. There can only be an individuality that copes, relates and couples with the surroundings".³² This suggests that the vital interests of living organisms cannot be restrained within an isolating and enclosing boundary.

Furthermore, autopoiesis forces a reconceptualization of the notion of 'self'. The 'self' of an autopoietic system cannot be only a closed, bounded self, but instead must also be open and relational. This seeming paradox is a useful observation for this thesis. In order to vest rights it is necessary to be able to identify a holder (the enclosed self), but this holder must necessarily be relational in order to survive – forming bonds are vital to the Self.

The expansive idea of selfhood is also found in Arne Naess's Deep Ecology,³³ and other related theories of ecological ethics.³⁴ Naess' idea of Selfhood (and the one resulting from full consideration of autopoiesis) is fundamentally relational.³⁵ Naess understands the Self (capitalised), *contra* the narrow ego,³⁶ to be composed of relations, including those with nature:

³² Weber and Varela (n8) 117.

³³ See eg Arne Naess, 'The Shallow and the Deep, Long-Range Ecology Movement' (1973) 16 *Inquiry* 95; Arne Naess, 'Self-Realization: An Ecological Approach to Being in the World' (1987) 4 *The Trumpeter* 35; Bill Devall and George Sessions, *Deep Ecology* (Gibbs Smith 1985); Arne Naess, *Ecology, community and lifestyle* (David Rothenberg tr, CUP 1989) 197; Drengron and Inoue (n4); Arne Naess, *Ecology of Wisdom* (Counterpoint 2008).

³⁴ In particular Mathews (n10); Fox (n10). See also UNEP, 'Bio-Cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy' (2009) 69-70.

³⁵ Naess (n33 1987); Naess (n33 2008) 88-92. See also Fox (n10) 215.

³⁶ Naess (n33 2008) 172.

We may be said to be in, and of, nature from the very beginning of ourselves. Society and human relationships are important, but our own self is much richer in its constitutive relationships. These relationships are not only those we have with other humans and with the human community... but also those we have with other living beings.³⁷

This Self is fundamentally ecological³⁸ because it forms relations with all living beings. Naess' notion of Self has "incorporated insights from modern physics and ecology into human understanding of the natural world. Much Western philosophy, Naess argued, relies on an outdated view of the world in which humans are believed to be separate from one another and from the natural world".³⁹ Naess' Self addresses this separatism through understanding that seemingly external relations are in fact essential components of living organisms.

An intrinsic relation between two things A and B is such that the relation belongs to the definition or basic constitutions of A and B, so that without the relation, A and B are no longer the same things.⁴⁰

³⁷ Naess (n33 1987) 35.

³⁸ Hence the title of Mathews (n10). See also Naess (n33 2008) 81-119.

³⁹ Clare Palmer, *Environmental Ethics*, (ABC-Clio 1997) 16.

⁴⁰ Naess (n33 1973) 95.

Without the relation, they are no longer the same thing. Autopoietic relations are not secondary: they are primary, describing and defining the thing itself. Thus, although they are external (because they are relations), they are still intrinsic.⁴¹ Much environmental philosophy is based on this fundamental relationality of life,⁴² which leads to a “metaphysical holism [which] originates in ecology and recognizes that no individual can be understood independently of its environment”.⁴³ Autopoiesis demonstrates that this relationality can be traced down to a fundamental level: autopoietic systems, and so living organisms, are by definition relational.

9.3 AN ‘ECOLOGICAL’ WORLD

This section will consider how the relationality of autopoietic organisms manifests itself in reality. It will consider the multiple interconnections between living organisms that arise through their biological and ecological relations. This will demonstrate that living organisms are not just relational

⁴¹ cf GE Moore, *Philosophical Studies* (Routledge 1922) 253-75; John O’Neill, ‘The Varieties of Intrinsic Value’ (1992) 75 *The Monist* 119, 123-25.

⁴² John Muir, *My First Summer In the Sierra* (first published 1911, Sierra Club Books 1988); Aldo Leopold, *A Sand County Almanac* (OUP 1949); Richard Sylvan, ‘Is There a Need for a New, An Environmental, Ethic?’ (1973) 1 *Proceedings of the XV World Congress of Philosophy, Varna, Bulgaria* 205; John Rodman, ‘The Liberation of Nature?’ (1977) 20 *Inquiry* 83; Gregory Bateson, *Mind and Nature* (Fontana 1980); Devall and Sessions (n33); Paul Taylor, *Respect for Nature* (Princeton University Press 1986); Holmes Rolston III, *Environmental Ethics* (Temple University 1988); Patrick Whitefield, *Permaculture in a Nutshell* (Permanent 1993); J Baird Callicott, *Beyond the Land Ethic* (SUNY Press 1999); Fox (n10); Bryan Norton, *Toward Unity Among Environmentalists* (OUP 1991); Robin Attfield and Andrew Belsey (eds), *Philosophy and the Natural Environment* (Royal Institute of Philosophy Supplement 36, CUP 1994); Gary Varner, *In Nature’s Interests?* (OUP 1998); Timothy Morton, *The Ecological Thought* (HUP 2010); Patrick Curry, *Ecological Ethics* (2nd edn, Polity Press 2011).

⁴³ Norton (n42) 223.

but deeply ecologically embedded. This indicates that living organisms have a vital interest in forming ecological communities, and has implications for how the subjects of vital rights are to be understood in a comparable fashion to the (re-)imagining of the human rights subject as embodied and socially embedded.⁴⁴

9.3.1 BIOLOGICAL RELATIONS

There are such things as individual living organisms. Pandas and bamboo, sponges and mosquitos, all exist and are readily identified as 'things-in-themselves'. Not only can organisms be identified and named as instances of their species, but they can also be given individual names. Humans are the most obvious example of this, but pets, farmyard animals, and trees (such as The Major Oak) are also often given names to distinguish them from everything else in the universe. However, autopoietic living organisms also form relations with the world outside them, and the intertwining nature of these relations demonstrate how the organism is not an entirely individualistic and separable being. Some examples from biology illustrate this.

The human body is awash with life. Healthy human bodies contain many more nonhuman microbial cells than they do human ones.⁴⁵ These microbes (collectively known as the human microbiome) play a crucial role in the continued functioning of the human body.⁴⁶ Digestive tracts in

⁴⁴ §1.3-1.4.

⁴⁵ Peter Turnbaugh et al, 'The Human Microbiome Project' (2007) 449 *Nature* 804.

⁴⁶ *ibid.*

particular are home to hundreds of different species of gut flora that allow humans (and indeed all animals⁴⁷) to digest and metabolise food. Without these distinguishable living organisms sharing our bodies, our ability to continue functioning would be hampered. The makeup of mammalian gut flora is not identical for every individual of a particular species and furthermore can have a noticeable impact on the appearance and properties of the host,⁴⁸ affecting aspects as diverse as propensity to obesity⁴⁹ and sexual attractiveness.⁵⁰ What are commonly presented as traits of humans are in fact the result of 'intrinsic relations' with microscopic organisms.

Buried even deeper inside living bodies is another biological interrelationship. Mitochondria are organelles found in most cells that are essential to cell (and so organ and therefore organism) functioning. They play a number of crucial roles such as the production of the chemical ATP,⁵¹ which is required for metabolism. Yet mitochondria have their own DNA, independent of the rest of the cell (and body) to which they belong. This appearance of distinct mitochondrial genes within cells can be

⁴⁷ Ruth Ley et al, 'Worlds within worlds: evolution of the vertebrate gut microbiota' (2008) 6 *Nature Reviews Microbiology* 776.

⁴⁸ Eugene Rosenberg and Ilana Zilber-Rosenberg, 'Symbiosis and Development: The Hologenome Concept' (2011) 93 *Birth Defects Research C Embryo Today* 56. See also Eric Juengst, 'What's Taxonomy Got To Do With It?' in Julian Savulescu and Nick Bostrom (eds), *Human Enhancement* (OUP 2009) 43, 52-53.

⁴⁹ Michele Petruzzelli and Antonio Moschetta, 'Intestinal Ecology in the Metabolic Syndrome' (2010) 11 *Cell Metabolism* 345.

⁵⁰ Through smell: Mahmood Bhutta, 'Sex and the nose: human pheromonal responses' (2007) 100 *Journal of the Royal Society of Medicine* 268, 270.

⁵¹ Michel Jacob Morange, *Life Explained* (Yale University Press 2008) 102.

explained by the theory of endosymbiosis. According to this theory, mitochondria (and other endosymbiotic organelles, such as chloroplasts) have their origins in more fully-formed standalone bacteria, which became assimilated into cells and today constitute an entwined part of them.⁵²

The concept of endosymbiosis is a particular example of the general and more well-known concept of symbiosis where two or more organisms are closely reliant on the behaviour or characteristics of one another. This need not result in mutual benefits occurring for both species (as in mutualism) and may even be detrimental to one of the two species (parasitism). Classical examples of this include: specific bee populations that are responsible for the pollination of particular plants; the 'three sisters' farming method; tapeworms living in the guts of humans; and nitrogen-fixing bacteria that live in root nodules.⁵³ Each demonstrates how intimate the interrelations composing living organisms can be.

Probing further into the worlds of other lifeforms reveals additional challenges to notions of organisms as individual and isolatable. A striking example of this is slime moulds. These can exist either as single-celled organisms or as a conglomerate multicellular mass, a 'grex'. As single-celled amoebae they are perfectly well-contained and able to survive until their environment changes (a reduction in available food for example). They then send signals to one other to combine into a multicellular organism that exhibits behaviours not possible for the individual amoebae

⁵² Michael Gray et al, 'Mitochondrial Evolution' (1999) 283 *Science* 1476.

⁵³ Colin Tudge, *The Secret Life of Trees* (Penguin 2005) 258-62.

(such as standing upright and cell specialisation).⁵⁴ However, exactly how the grex is able to co-ordinate its behaviour is unknown.⁵⁵ The dry scientific observation that slime moulds are "social amoeba that lie in the interface between unicellular and multicellular organisms"⁵⁶ indicates the interrelatedness and the continuity of living systems.

More generally, the lifestyles of fungi,⁵⁷ ant colonies,⁵⁸ yeasts,⁵⁹ polyps,⁶⁰ brittlestars,⁶¹ some deepwater fish⁶² and lichens⁶³ demonstrate the flexible approach living organisms have towards self-identification. Through their 'intrinsic relations', organisms often continuously blur into one another

⁵⁴ Andreas Wagner, *Paradoxical Life: Meaning, Matter, and the Power of Human Choice* (Yale University Press 2009) 78-79.

⁵⁵ Eirikur Palsson and Hans Othmer, 'A model for individual and collective cell movement in *Dictyostelium discoideum*' (2000) 97 *PNAS USA* 10448.

⁵⁶ Arturo Casadevall, 'Amoeba and Slime Mold: Host of Virulence Evolution' in Joseph Heitman et al (eds), *Molecular Principles of Fungal Pathogenesis* (ASM Press 2006) 231.

⁵⁷ The *Armillaria ostoyae* can live for over 2,000 years and reach a size of over 2,000 acres. Craig Schmitt and Michael Tatum, 'The Malheur National Forest, Location of the World's Largest Living Organism [The Humongous Fungus]' (2008) *United States Department of Agriculture Forest Service* <http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_033146.pdf> (accessed 3/6/2014).

⁵⁸ Deborah Gordon, *Ant Encounters* (Princeton University Press 2010).

⁵⁹ Horst Feldmann, *Yeast: Molecular and Cell Biology* (Wiley-VCH 2010).

⁶⁰ Laurence Simmons, 'Towards A Philosophy of the Polyp' in McFarland and Hediger (n19) 343.

⁶¹ Barad (n31) 369-84.

⁶² Theodore Pietsch, 'Dimorphism, parasitism, and sex revisited: modes of reproduction among deep-sea ceratioid anglerfishes' (2005) 52 *Ichthyological Research* 207.

⁶³ Thomas Nash III (ed), *Lichen Biology* (2nd edition, CUP 2008).

across their semi-permeable membranes, often resulting in ambiguity over where a living organism begins and where it ends.

DNA may seem to provide a way to distinguish decisively between organisms, but this has its limitations too. Recall organelles, and consider also that identical twins have the same DNA (although identical twins often have non-identical scents, which can be detected by trained German Shepherds⁶⁴). Furthermore, asexual reproduction abounds in the natural world:⁶⁵ propagation, budding, sporulation, fission, cloning and fragmentation all allow the creation of new organisms that have identical DNA to the parent. Even the humble garden lawn calls into question any straightforward notion of a clearly defined organism: should each blade of grass be considered the relevant unit; or a patch connected by the same rhizome; or even the entire lawn? Different DNA does not straightforwardly mean a different organism, and nor does the same DNA necessarily signpost the same one. As such, DNA cannot be an indicator providing clear differentiation between living organisms.

Sharpening the focus on living organisms reveals them to have blurred edges. It may be intuitively obvious what a slug or a termite is, but when they are looked at in more detail defining this both precisely and accurately is challenging. Thus although it is eminently possible to identify organisms, to give them names, assign them properties and make them

⁶⁴ Ludvík Pinc et al, 'Dogs Discriminate Identical Twins' (2011) 6 *PLoS ONE* 1.

⁶⁵ Whole domains of life (eg bacteria) reproduce asexually, as do some animals: polyps, annelid worms and even sharks: DD Chapman et al, 'Parthenogenesis in a large-bodied requiem shark, the blacktip *Carcharhinus limbatus*', (2008) 73 *Journal of Fish Biology* 1473.

Hohfeldian position-holders,⁶⁶ it must be acknowledged that organisms are interrelated and continuous with one another. This suggests that their interests, and therefore their dignity, will be interrelated and continuous too. Zooming out and looking at lifeforms from wider perspectives further demonstrates the intrinsic relationality of living systems.

9.3.2 ECOLOGICAL INTEGRONS

Drawing a clear boundary around an organism is not trivial. Although in a sense it is correct to understand autopoietic semi-permeable membranes as demarcating organisms (autopoietic functioning requires distinction between self and other), the relations that organisms form across this membrane (again a necessary aspect of autopoietic functioning) blur the boundary. Attempts to divorce the self from the other are further challenged by the ecological networks that living organisms form.

Living organisms are reliant on inputs and outputs in order to survive. It is well-known that the cells and molecules a living organism is made of do not remain static over time but are in a state of constant flux. It is not what an organism is made of that defines it but rather how it makes itself:⁶⁷ through exchange with the outside.

[T]he particles of matter that make up the organism in each moment are only temporary and passing contents. Their identity does not converge with the identity of the whole through which they pass. But it is exactly by the

⁶⁶ §4.3.

⁶⁷ Lane (n26) 53-86.

passing of alien matter as part of itself that the whole maintains its spatial system, the living form. From a material point of view it is never the same, although it keeps its identity exactly by not keeping the same matter.⁶⁸

Inputs and outputs of passing content do not only exist in theory; they are clearly observable. An obvious example is through digestion. A more subtle example is the leaves on a tree. These certainly form part of the tree when they are green and attached, but what about when the leaves fall to the ground in Autumn? Is that mosaic of brown and yellow crumples still a part of the tree or have those fallen leaves suddenly become 'other'? The fallen leaves may no longer be attached, but the tree designed to shed those leaves just as much as it designed to grow them. The leaves will decompose, recycling nutrients, creating food and habitats for other creatures, which the tree itself depends on in turn. Dropping leaves is part of the function of deciduous trees: their leaves fall and perform a new task. It is *not* entirely clear cut when a leaf is no longer part of a tree.

Because organisms are dependent on constant inputs and outputs, intricate networks are formed amongst living organisms that tightly enmesh⁶⁹ them with their surroundings. Food webs provide an obvious example of this, as they show how each organism is dependent on numerous predator/prey and decomposition relations. Trophic cascades – when changes in predator behaviour have far-reaching effects on other

⁶⁸ Hans Jonas, cited in Weber and Varela (n8) 113.

⁶⁹ See Morton (n42) 28.

species through food web dynamics –demonstrate how organism functioning both influences and is dependent on the networks of inputs/outputs around it.⁷⁰ Other nutrient cycles similarly demonstrate this: consider, for example, the ‘whale pump’ whereby “marine mammals can enhance primary productivity in their feeding areas by concentrating nitrogen near the surface through the release of flocculent fecal plumes”.⁷¹ The activities of marine mammals can quite directly alter the composition of their surroundings through the redistribution of nutrients.

The relationality between organisms and their environments is also witnessed by invasive species, which can often “change whole ecosystems by altering hydrology, fire regimes, nutrient cycling, and other ecosystem processes”,⁷² and by the processes of ecological disturbance and succession, whereby external pressures can severely alter the structure and/or behaviour of organisms, populations, and ecosystems.⁷³ Organisms must be considered in the light of the networks they form and are part of. The interrelatedness of living organisms with their surroundings is in many ways the fundamental principle underlying the study of ecology.⁷⁴ John

⁷⁰ See eg William Ripple and Robert Beschta, ‘Trophic cascades in Yellowstone: The first 15 years after wolf reintroduction’ (2012) 145 *Biological Conservation* 205.

⁷¹ Joe Roman and James McCarthy, ‘The Whale Pump: Marine Mammals Enhance Primary Productivity in a Coastal Basin’ (2010) 5 *PLoS ONE* 1, 1.

⁷² Rüdiger Wittenberg and Matthew Cock (eds), *Invasive Alien Species* (CABI 2001) 4.

⁷³ See STA Pickett and PS White (eds), *The Ecology of Natural Disturbance and Patch Dynamics* (Academic Press 1985) 4.

⁷⁴ Michael Begon et al, *Ecology: From Individuals to Ecosystems* (4th edn, Blackwell 2006) 3-5.

Muir's famous statement that "when we try to pick out anything by itself, we find it hitched to everything else in the Universe"⁷⁵ could be considered as the 'Fundamental Theorem of Ecology'.⁷⁶

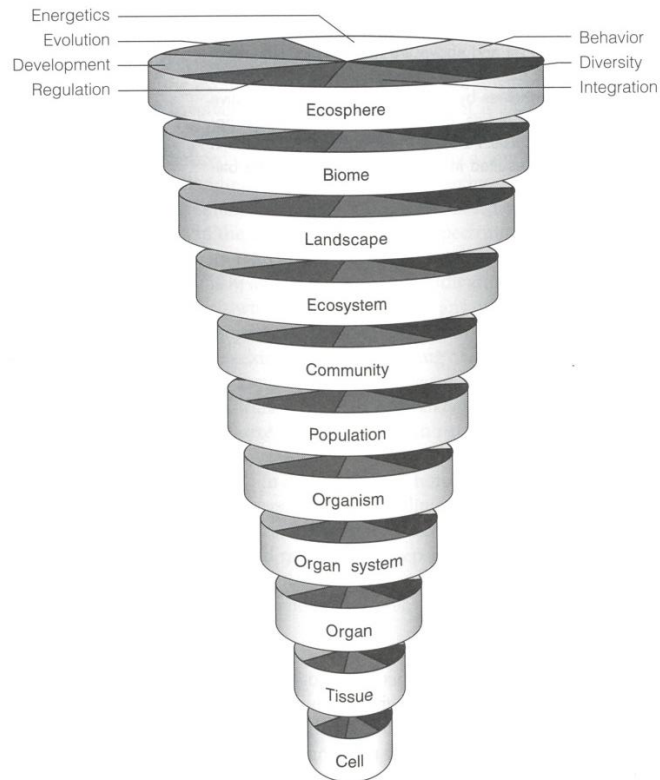
There is added depth to ecological connectedness because organisms are not simply connected to other organisms, cells to other cells, and so on, but connections run 'up and down' as well as 'side to side'. That is, not only is a squirrel fundamentally connected to other squirrels, the tree where its drey is built, and the humans which (inadvertently) feed it, but it is also impregnably bound up with its cells and its ecosystem, entities of an entirely different kind. The study of ecology is concerned with various interlocking 'levels-of-organisation' at which living systems can be considered, as represented in the figure below.⁷⁷

⁷⁵ Muir (n42) 110.

⁷⁶ This is not a theorem in the *strict* mathematical sense, but in the looser sense of the fundamental theorems of calculus, arithmetic and algebra. It both gives a flavour for the discipline as a whole and provides a crucial idea which underpins it.

⁷⁷ Eugene Odum and Gary Barrett, *Fundamentals of Ecology* (5th edn, Brooks/Cole 2005) 5.

Figure 1-3. Ecological levels-of-organization hierarchy; seven transcending processes or functions are depicted as vertical components of eleven integrative levels of organization (after Barrett et al. 1997).



Relations exist between as well as within these levels since the “individual organism, for example, cannot survive for long without its population, any more than the organ would be able to survive for long as a self-perpetuating unit without its organism”.⁷⁸ Furthermore, each one of these levels provides a new perspective from which to view the natural world, providing insight and information not available from the other levels. Modern ecology is based on the realisation that to understand any one of these levels, one must also understand how it is situated within these nested levels.

Thus although each level may seem ‘complete’ in itself, there is always additional information and value in understanding how relations operate

⁷⁸ *ibid* 7.

between the layers. This is captured in François Jacob's conceptualisation of the levels-of-organisation as 'integrans'.⁷⁹

'An integrans is formed by assembling integrans of the level below it; it takes part in the construction of the integrans of the level above.' Each integrans has new characteristics and capacities not present at any lower level of integration; these can be said to have emerged.⁸⁰

The 'integrans' conceptualisation captures the entwined nature of the levels-of-organisation, the value of switching perspective to a new level, and the "wholey part and partly whole"⁸¹ nature of the levels. The useful terminology of 'integrans' will be retained in this chapter as a synonym for 'level-of-organisation'.

Ecological realities demonstrate that the living world is composed of interrelated integrans at a number of levels. The relations of organisms both within and between these integrans are neither superfluous nor secondary: organisms are not just reliant on ecological and biological relations – they mutually constitute one other. Your environment determines what you are like. The future of an acorn depends not only on its genetic material but also where it lands.

⁷⁹ François Jacob, *Logic of Life* (Betty Spillman tr, Vintage 1976) 299-324. See also Cullinan's concept of 'holons in holarchy': Cullinan (n10) 147; Linda Sheehan, 'Earth Day Revisited' in Peter Burdon (ed), *Exploring Wild Law* (Wakefield 2011) 242

⁸⁰ Mayr (n12) 19 (citing Jacob). See also Morange (n51) 101-109.

⁸¹ Wagner (n54) 62ff.

An oak is a noble tree in a forest or a park but an acorn that falls in a fissure in some Scottish crag may spend a couple of centuries in bonsai'd mode, never more than a twisted stick. Yet it may turn out acorns which, if they should be carried to some fertile field, could again reproduce magnificence. Is the twisted stick less of an oak because it fell on stony ground?⁸²

In part, this is the nature versus nurture debate reformulated. However, it is clear that external surroundings are partly nature and partly nurture. As with the debate as a whole, the answer is that it is impossible (and possibly futile) to separate the two.⁸³

Just as it is impossible to extract an organism from all its (endo)symbiotic relations and internal parts, it is impossible to extract any living thing from its environment (ie its external parts). Thinking of (other) integrons as external parts of an organism may seem strange. But this can be relieved by realising that it is the *relations* with the other integrons that form a part of the organism, not the other integrons themselves. Organisms form 'intrinsic relations' not just with other organisms but with cells and ecosystems too.

⁸² Tudge (n53) 14. This emphasises that there is not one 'ideal' status for any (kind of) organism. There is not one best way for a human life to be lived, but value in diversity: we cannot all be lawyers.

⁸³ See Dale Goldhaber, *The Nature-Nurture Debates* (CUP 2012).

9.3.3 A VITAL INTEREST IN FORMING ECOLOGICAL COMMUNITIES

So far this section has demonstrated that relationality permeates the living world. This relationality is inevitable given the relationality of autopoietic systems, and manifests itself in the formation of biological and ecological integrons. Organisms do not (want to⁸⁴) live in isolation; as autopoietic systems they seek bond-formation. They (want to) form integrons. Just as the human rights subject is socially embedded,⁸⁵ so the vital rights subject is ecologically embedded.

Being ecologically embedded is essential to the very nature of organisms. It is not just vital to their continuation but also to their mode of being. An organism divorced from its integrons and unable to form the 'intrinsic relations' it naturally would have had a fundamental aspect of its constitution frustrated: 'without the relations, it is no longer the same thing'.⁸⁶ Organisms therefore do have a vital interest in forming ecological communities,⁸⁷ an essential interest that directly arises from their status as

⁸⁴ In the sense that they are autopoietic and so goal-directed.

⁸⁵ §1.4.

⁸⁶ *supra* n40.

⁸⁷ The language of 'communities' is retained here, not only to maintain correlation with the human vital interest in forming social communities, but because the technical ecological meaning of 'community' provides an appropriate integron perspective through which to understand this interest. A community is a group of populations of different organisms in a particular place: it is "essentially, the biotic component of an ecosystem" ('community', *Oxford Dictionary of Ecology* (4th edn, OUP 2010)). It is thus communities that are formed through organism-organism intrinsic relations, and it is the organism, as the locus of valuational activity, with which this thesis is primarily concerned.

However, that the interest is in forming communities should not be taken too literally to mean that it is only the community integron that organisms form. This cannot be the case, given the interrelatedness of all levels-of-organisation.

living beings. This implies that living organisms do indeed have dignity since they have more than one vital interest; it is not just life itself that matters to them, but also the sort of life they lead.

To break organisms (including humans) apart from their integrons is a violation of their dignity. It compromises their very nature, and means treating them in a way that they should not be treated. Though such treatment will often endanger the survival of the organism in question, it is also possible to threaten an organism's relationality without necessarily threatening its survival. As Bateson points out, "[t]he artificially homogenized populations of man's domestic animals and plants are *scarcely fit* for survival".⁸⁸ Zoos, monocultures, factory farms, laboratory specimens and other ways in which living organisms are prevented from fulfilling their role within ecological communities all present potential violations of dignity. Organisms flourish when in community with one another.

How nonhuman flourishing and dignity, and in particular the vital interest in forming ecological communities, can be best protected is of central concern to this thesis. The following two sections will argue that it is valid to protect the vital interest of living organisms in forming ecological communities through shifting perspective and establishing ecosystem rights. This in some ways mirrors the protection of humans' social

⁸⁸ Gregory Bateson, *Steps to an Ecology of Mind* (first published 1972, University of Chicago 2000) 457, emphasis added.

embeddedness through peoples' rights.⁸⁹ The first step in this process is to construct a conceptualisation of organisms that better imagines the ecologically embedded subject of vital rights.

9.4 ORGANISMS-IN-THEIR-INTEGRONS

The previous section demonstrated that living organisms are constituted by their relations with other organisms and are inextricably embedded in ecological integrons. This has implications for how the organism, the bearer of dignity and so primary subject of vital rights, is to be understood. An important lesson of the previous section is that an organism is constituted as much by its surroundings as by its internal components. In the words of Powhatan-Ren'pe writer Jack Forbes:

You could cut off my hand, and I would still live. You could take out my eyes, and I would still live. Cut off my ears, my nose, cut off my legs, and I could still live. But take away the air, and I die. Take away the sun, and I die. Take away the plants and the animals, and I die. So why would I think my body is more a part of me than the sun and the earth?⁹⁰

That organisms do not exist as discrete units has been demonstrated through a number of fields, including biochemistry,⁹¹ ecology,⁹² and

⁸⁹ §1.4.

⁹⁰ Cited in Kathleen Moore, *The Pine Island Paradox* (Milkweed Editions 2004) 58-59.

⁹¹ *supra* n26.

⁹² §9.3.2.

ecological philosophy.⁹³ Within evolutionary biology, Dawkins' concept of the 'extended phenotype' refers to a comparable idea,⁹⁴ compelling us to ask whether "the beaver phenotype stop[s] at the end of its whiskers or at the end of a beaver's dam?"⁹⁵ Given that part of being a beaver is to construct dams, there seems good reason to consider the dam just as much part of the beaver as any other part. Naturally, the damming of a river has a considerable knock on effect for the other nearby organisms. These organisms are dependent on the beaver just as a parasite is dependent on its host. Understanding the vital rights subject requires understanding its ecological context(s) and intrinsic relations.

A valuable way to conceptualise organisms' deeply seated ecological embeddedness is to re-imagine the organism, paraphrasing Bateson, as an 'organism-in-its-integrans'.⁹⁶ Bateson argues that there is no such meaningful unit as an isolated organism, but rather the organism must always be considered as 'always-already' bound up with, embedded in, and constituted by, its environment (ie its integrans).⁹⁷ The following subsections will draw out the meaning of 'organism-in-its-integrans', a term densely packed with information.

⁹³ *supra* n42.

⁹⁴ Though Dawkins wished to focus attention the gene, a different perspective shift to the one adopted in this thesis.

⁹⁵ Morton (n42) 34.

⁹⁶ Bateson refers to an 'organism-in-its-environment': Bateson (n88) 457; Mathews (n10) 106; Begon (n74) ch1.

⁹⁷ Bateson (n88) 457.

9.4.1 BEING-INTRA-ACTIVE

The idea of something being 'always-already' the case is important in the work of Martin Heidegger,⁹⁸ and his philosophy helps draw out what is meant by an organism being *in-its-integrans*. Heidegger's phenomenological analysis in *Being and Time* reveals that being happens *in a space* (both spatially and temporally) and this situating is fundamental to being. Heidegger refers to the human as *Dasein*, literally translated as 'being-there'. The point is that *Dasein* finds itself always-already bound up in the world around it, and this is how *Dasein* makes sense of existence. Situations are essential to *Dasein*'s way of being,⁹⁹ and these situations are not secondary to *Dasein* but form a primary constitutive part of how *Dasein* experiences being. *Dasein* exists in a relational mode to the world around it, which Heidegger terms 'being-in-the-world', a term bearing conceptual similarity to 'organism-in-its-integrans'. Consider the following passage, and consider its meaning with the words 'Dasein' and 'the-world' replaced by 'organism' and 'its-integrans':

[B]eing-in is not a 'property' which *Dasein* sometimes has and sometimes does not have, *without* which it could *be* just as well as it could with it. It is not the case that human being 'is', and then on top of that has a relation of being to the 'world' which it sometimes takes upon itself. *Dasein* is

⁹⁸ Michael Inwood, *Heidegger: A Very Short Introduction* (OUP 2000) 52-53.

⁹⁹ After 'The Turn', Heidegger shifted focus from *Dasein*'s being to understanding *Dasein* as a mode of being. Significantly, this can overturn the more anthropocentric elements of Heidegger's thought.

never 'initially' a sort of being which is free from being-in, but which at times is in the mood to take up a 'relation' to the world. This taking up of relations to the world is possible only *because*, as being-in-the-world, Dasein is as it is.¹⁰⁰

Organisms are never 'initially' free from their integrons: their taking up of relations is simply a matter of how they are. The hyphenation of organism-in-its-integrons is thus also crucial: the organism exists always-already in-its-integrons, not as first an isolated organism that is subsequently placed into integrons.¹⁰¹ An organism-in-its-integrons is "not a detached observer but a participant in the system".¹⁰² The hyphenation of organism-in-its-integrons must be understood like the hyphenation of Heidegger's 'being-in-the-world', where the hyphenation emphasises that

it is a '*unitary* phenomenon' that can only be understood when 'seen as a whole'. Dasein and the world are fundamentally misunderstood if taken as two self-sufficient entities that can subsequently enter into an external relationship.¹⁰³

¹⁰⁰ Martin Heidegger, *Being and Time* (first published 1927, Joan Stambaugh tr, SUNY 2010) 57.

¹⁰¹ cf Naess (n33 1973) 95; Christian Diehm, 'Arne Naess and the Task of Gestalt Ontology' (2006) 28 *Environmental Ethics* 21, 21-22.

¹⁰² Cullinan (n10) 12. Referring to the famous observer effect. See also Christopher Stone, 'Should Trees Have Standing?' 45 *S Cal L Rev* 450, 456n26.

¹⁰³ Mark Wrathall and Max Murphey, 'An Overview of *Being and Time*' in Mark Wrathall (ed) *The Cambridge Companion to Heidegger's Being and Time* (CUP 2013) 6 (footnote omitted). See also Haim Gordon, *Heidegger-Buber Controversy:*

The organism-in-its-integrans formulation captures the depth of organisms' embeddedness:¹⁰⁴ the organism and its integrans are co-constitutive¹⁰⁵ of each other.

This immediacy of embeddedness is also found in Watsuji Tetsurō's etymological analysis of the Japanese word for humanity, *ningen* (人間).¹⁰⁶ Watsuji suggests that the two characters which together compose 人間 unravel its meaning.¹⁰⁷ As standalone characters, the first represents an individual human being, and the second represents the concept of relationship or 'betweenness' (*aidagara*). The individual does not precede the betweenness (nor vice-versa) and it is in this space of betweenness that 'intrinsic relations' and communion with other beings takes place. A single isolated human (人) is not an individual unit of *ningen* because the

The Status of the I-Thou (Greenwood Press 2001) 87; Hubert Dreyfus, *Being-in-the-World* (Massachusetts Institute of Technology 1999) 43; Inwood (n98) 22.

¹⁰⁴ Note that Heidegger implores Dasein to break free of its embeddedness in order to live an 'authentic' life. Wrathall and Murphey (n103) 12.

¹⁰⁵ Or mutually constitutive. See Barad (n31) 33, 57, 147, 181, 197, 241.

¹⁰⁶ Steve Odin, *The Social Self in Zen and American Pragmatism* (SUNY Press 1996) ch1; Harumi Befu, 'Watsuji Tetsuro's Ecological Approach: Its Philosophical Foundation' in Pamela Asquith and Arne Kalland (eds), *Japanese Images of Nature* (Curzon Press 1997); Robert Carter, 'Watsuji Tetsurō' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2013 edn) <<http://plato.stanford.edu/archives/spr2013/entries/watsuji-tetsuro/>> (accessed 27/7/2015). Note that Watsuji was writing in response to Heidegger.

¹⁰⁷ See also Merleau-Ponty in (eg) Anna Grear, 'The vulnerable living order: human rights and the environment in a critical and philosophical perspective' (2011) 2 *JHRE* 23, 38-44; Anna Grear, 'Towards a New Horizon: in Search of a Renewing Socio-Juridical Imaginary' (2013) 3 *Oñati Socio-Legal Series* 966, 972-75, 978-79; and Levinas in (eg) Mark Coeckelbergh and David Gunkel, 'Facing Animals: A Relational, Other-Oriented Approach to Moral Standing' (2014) 27 *Journal of Agricultural and Environmental Ethics* 715, 721-22.

body forms only the first (although still crucial) part of 人間 (humans are socially embedded). The twofold nature of *ningen* is not sequential: it is not the case that there are first atomised individuals, which then proceed to enter into relationships.¹⁰⁸ Rather, existence in shared betweenness arises at the same time as existence as an individual: *ningen* is always-already contextual. A clear analogy exists with the organism (人) and its integrons (間), which arise and emerge together rather than sequentially.

Thus it is not enough to say that organisms are merely 'part of' their integrons: they are much more intensely bound up than this; they are 'partly whole and whole parts'. This intense relationality is also captured in Karen Barad's idea of 'intra-action', which refutes the idea of "separate individual agencies that precede ... interaction"¹⁰⁹ based on Bohr's interpretation of quantum physics.¹¹⁰ In contrast, intra-action "signifies the mutual constitution of *entangled* agencies".¹¹¹ Organisms are entangled with their integrons; one does not exist without the other. Intra-action recognises the "ontological inseparability"¹¹² of distinguishable entities (such as integrons), and acknowledges that things like organisms and

¹⁰⁸ For discussion relating these ideas to law, see Richard Parker, 'Law, Language, and the Individual in Japan and the United States' (1988-1989) 7 *Wisconsin International LJ* 179.

¹⁰⁹ Barad (n31) 33. See *supra* n19.

¹¹⁰ *ibid* 97-131.

¹¹¹ *ibid* 33, emphasis added.

¹¹² *ibid* 128.

ecosystems “do not precede, but rather emerge through, their intra-action”.¹¹³

Like intrinsic relations, intra-actions are primary constitutive aspects of organisms, not secondary capabilities. And like Barad, ecological realities call into question traditional Newtonian ontologies with their isolated interacting entities. As such, both ecological philosophy and new materialism (of which Barad’s work is an important example) have emphasised alternative cosmologies, such as Spinozan substance monism,¹¹⁴ Eastern mysticism,¹¹⁵ or modern physics.¹¹⁶

Because of their relationality, organisms operate through intra-active processes. Barad refers to a brittlestar’s “boundary-drawing practices by which it differentiates itself from the environment with which it intra-acts and by which it makes sense of its world”.¹¹⁷ This recognises the dialectic (‘clopen’) nature of an organism’s intra-action with its integrons: the organism must differentiate itself by drawing boundaries in order to ‘make sense of its world’, but it must also intra-act through this boundary to maintain its autopoietic status.

It is precisely because organisms and integrons intra-act rather than inter-act that it is valuable to think of organisms as organisms-in-their-integrons.

¹¹³ *ibid* 33.

¹¹⁴ Naess (n33 2008) 233; Diane Coole and Samantha Frost (eds), *New Materialisms* (Duke University Press 2010) 8.

¹¹⁵ Fritjof Capra, *Tao of Physics* (Wildwood House 1975).

¹¹⁶ Mathews (n10) 50-59; J Baird Callicott, ‘Intrinsic Value, Quantum Theory, and Environmental Ethics’ (1985) 7 *Environmental Ethics* 257; Barad (n31).

¹¹⁷ Barad (n31) 375.

Of course it is not only organisms that intra-act, but intra-action takes place within and across all levels-of-organisation. There are (eg) ecosystems-through-their-organisms and genes-in-their-biome too¹¹⁸ – indeed, “when we try to pick out anything by itself, we find it hitched to everything else in the Universe”.¹¹⁹

9.4.2 UMWELT

It is also important to note that organisms are embedded not in *the* environment but in *their* integrons. This does not simply refer to the fact that different species occupy different functional niches (penguins cannot live in the desert), but rather that each and every organism has its own relations with – and so perspective on – the world it is embedded in. This is significant, as it demonstrates that Heidegger’s and Watsuji’s description of a deeply relational existence is not limited to the human domain.

An organism’s perspective arises because every living organism, as an autopoietic system and hence locus of valuational activity, finds its own meaning in the world around it. Each organism is an “autonomous centre of concern capable of providing an interior perspective”.¹²⁰ In the words of Jakob von Uexküll, all living organisms construct their own *Umwelt*

¹¹⁸ This is the very perspective that Dawkins seeks to adopt via the extended phenotype.

¹¹⁹ Muir (n42) 110.

¹²⁰ Weber and Varela (n8) 97. See also Barad (n31) 149 who notes that “in some instances, ‘nonhumans’ ... emerge as partaking in the world’s active engagement in practices of knowing [which is a matter of intra-acting]”. It appears that the instances that Barad is referring to is those instances when the ‘nonhuman’ in question is a living organism.

(lifeworld), their own conception of the world they find themselves in.¹²¹ It is through their *Umwelt* that each organism makes sense of its existence through focussing attention on those features and relations that are relevant to its autopoietic continuation.

Von Uexküll uses the example of a tick and how it senses and reacts to the presence of a mammal through sensing butyric acid.¹²² The tick must be able to find out when a mammal is near in order to be able to feed, and it does this through the senses it has available to it. The tick thus constructs its own lifeworld according to its own senses and its own interests.

Because it has a *perspectived* conception of the world it is a tick-in-its-integrans; its *Umwelt* has butyric acid odours and warm bodies, not four-legged creatures and mating calls.

An organism's *Umwelt* is constructed through those relations that are meaningful to it:¹²³ organisms are in *their* environment, not *the* environment. A dog lives predominantly in a lifeworld of smells rather than images and, although unable to recognise itself in the mirror, is able to

¹²¹ Jakob von Uexküll, *A Foray into the Worlds of Animals and Humans* (first published 1934, Joseph O'Neill tr, University of Minnesota Press 2010). See also Lee Drickamer and Stephen Vessey, *Animal Behavior: Concepts, Processes and Methods* (Prindle, Weber and Schmidt 1986) 295; Jörg-Peter Ewert, 'Stimulus Perception' in Johan Bolhuis and Luc-Alain Giraldeau (eds), *The Behavior of Animals* (Blackwell 2005) 14-16; Traci Warkentin, 'Whale Agency' in McFarland and Hediger (n19) 23; Kelly Oliver, *Animal Lessons: How They Teach Us to Be Human* (Columbia University Press 2009) 20; Berque (2013 n5) (referring to "la mésologie d'Uexküll"); Ted Toadvine (ed), 11(1) *Environmental Philosophy* (2014); Rodman (n4) 251-53; Simmons (n60) 343, 353-54; Curry (n42) 53; Gear (2013 n107) 979.

¹²² von Uexküll (n121) 44ff.

¹²³ See Mayr (n12) 72-73.

distinguish scents (including its own) with an aptitude unavailable to humans. A dog and its human owner may live in the same house but they occupy different lifeworlds; the integrons they intra-act with are both the same and different.

To summarise the meaning of each word in 'organism-in-its-integrons': 'organisms-' are autopoietic systems intra-acting across semi-permeable membranes; '-in-' must be understood not simply as physically located in, but as always-already embedded in; '-their-' indicates that this construction is unique to each organism and its *Umwelt*; and '-integrons' are themselves intra-acting levels-of-organisation with their own emergent properties.

As the autopoietic possessor of vital interests, the central subject of concern for nonhuman vital rights is the organism. But the organism is in fact an organism-in-its-integrons because of its vital interest in forming ecological communities. It may therefore not be straightforward for the law to protect the vital interests of these highly complex and deeply relational subjects. Questions arise as to who the right-holder will be and what rights they will have. The remainder of this chapter argues that organisms' vital interest in forming ecological communities can be best protected through vesting rights in another level-of-organisation: the ecosystem.

9.5 MULTISTABLE PHENOMENA

In order for the law to vest rights, it needs to be able to extract meaningful units to be legal subjects with identifiable interests from the ecological mesh. Despite the multitude of ecological relations, this is evidently possible (else IHRL could not exist) through focussing on particular levels-

of-organisation. It is important to realise that the different extractions offered by different integrons present different perspectives of the same reality.

9.5.1 GESTALTISM AND PHENOMENA

The existence of ecological (and social etc) webs does not mean that all is a homogeneous blur. As aptly demonstrated by ecology's integrons, it is possible to isolate parts of these webs and to consider these parts as units, and therefore as subjects of study in their own right. The world is one of continuity without indistinguishability.¹²⁴ This is true at many levels of reality.

[T]he idea of chemical 'atoms', for instance, is [not] completely false. Such entities as the hydrogen and oxygen 'atoms' exist. But they are *not* fundamental building blocks. They are more like eddies on the surface of a river. The Universe is seamless but not featureless.¹²⁵

Neither of course is it false that organisms and ecosystems exist. The natural world is made up of a continuous mesh of interrelations, but this does not prevent the extraction and categorisation of meaningful units (or integrons) from within it. In fact, such categorisation is commonplace. Humans are not only able to make distinctions along continuous spectra and to group things together, but they also exhibit a tendency to do so.

¹²⁴ Plumwood (n7) 13, 19.

¹²⁵ Brian McCusker, *The Quest for Quarks* (CUP 1983) 150.

This has been termed 'gestaltism'¹²⁶ and has influenced some environmental philosophers.¹²⁷ Gestaltism – demonstrated in the figures below – echoes von Uexküll's *Umwelt* and Heidegger's being-in-the-world in that it suggests that perceptions are dependent as much on the perceiver as on the perceived.¹²⁸



Figure 41

Not six patches, but twice three patches; neighbors fuse into groups. Other organizations, for example into three pairs, require effort and fall apart immediately when the effort subsides. (From W. Köhler: *Psychol. Probleme*. Berlin, 1933.)



Figure 42

The dotted pair of circles is hardly different from the drawn one (figure 17, p. 16). There are not forty-two dots, but rather two circles with dots on them. Gestalt laws work unchanged despite partition and interruption.

This should not be taken to mean that *any* perception is valid, but rather that there are often many valid perceptions. Through gestaltism, it is possible to identify, extract and analyse valid and meaningful unities, or gestalts, from the mesh. 'Organisms' and 'ecosystems' exist, even if they are fundamentally intra-active with and continuously blur into everything else.

¹²⁶ Wolfgang Metzger, *Laws of Seeing* (first published 1936, Lothar Spillman tr, MIT Press 2006) ch3.

¹²⁷ Naess (n33 1989) 54-61; Diehm (n101); Bateson (n42) 47-49.

¹²⁸ Metzger (n126) 30.

In ecology the isolated community is an abstraction in that no real collection of species exists which interacts solely with its own members and which receives no propagules from outside. But the total isolation of a group of species from all interactions with other species is not a requirement of the usefulness of the community as an analytical tool... thus, it is not an argument against the population or the community as entities, that boundaries are not absolute between them, any more than that the existence of some intersexes destroys the usefulness in biology of distinguishing males and females.¹²⁹

The same is valid for ecosystems and any other integron.¹³⁰ Like organisms, biomes and ecosystems do have boundaries, even if these boundaries are neither definitive nor impermeable. Although it is impossible to determine precisely where the edge of a lake, forest or mountain actually is,¹³¹ it is still possible to understand an ecosystem as a thing: as a unit which can be studied and have various properties assigned to it.

¹²⁹ Richard Levins and Richard Lewontin, 'Dialectics and Reductionism in Ecology' in Esa Saarinen (ed), *Conceptual Issues in Ecology* (Kluwer 1980) 128-29. See also Morton (n42) 84-85.

¹³⁰ See Arthur Tansley, 'The Use and Abuse of Vegetational Concepts and Terms' (1935) 16 *Ecology* 284, 299; Edward Kormondy, *Concepts of Ecology* (4th edn, Prentice-Hall 1996); 'ecosystem', *Oxford Dictionary of Ecology* (4th edn, OUP 2010).

¹³¹ Karin Limburg et al, 'Complex systems and valuation' (2002) 41 *Ecological Economics* 409, 410; Cullinan (n10) 77.

The key is to acknowledge that organisms, ecosystems and atoms exist without insisting that they are completely isolated and discrete entities or fixed pictures of reality.¹³² Instead, each gestalt provides a particular perspective of that part of the universe. As Barad highlights, this perspectived viewpoint is a direct consequence of the intra-active nature of reality: “the primary ontological unit is not independent objects with independently determinate boundaries and properties but rather what Bohr terms ‘phenomena’ ... phenomena are the ontological inseparability of agentially intra-acting components”.¹³³ Bohr and Barad understand that phenomena – the basic units of reality¹³⁴ or existence¹³⁵ – are not “independent objects with inherent boundaries and properties”¹³⁶ but are, like autopoietic organisms-in-their-integrans, always-already embedded in everything they intra-act with.

Phenomena arise through a ‘cut’ being made that “marks off and is a part of a particular instance of wholeness”.¹³⁷ That is, the gestalt offered by a particular phenomenon is dependent on (and intra-acts with) a particular ‘cut’ being taken. Consider how different ‘cuts’ can be made to view the above figures, even if they do “require effort and fall apart immediately when the effort subsides”.¹³⁸ Gestaltism and phenomenal cuts do not

¹³² Another dialetheia (n29).

¹³³ Barad (n31) 33.

¹³⁴ *ibid* 33.

¹³⁵ *ibid* 333.

¹³⁶ *ibid*.

¹³⁷ *ibid* 119.

¹³⁸ *supra* n128.

provide access to Ultimate Truths, but instead provide perspectived ways to intra-act with the world. In fact, they “[call] into question the very notion that objects have an independent existence”,¹³⁹ whilst also generating ways of understanding and perceiving.

Gregory Bateson captures this possibility of extracting perspectived gestalts from the ecological mesh in noticing that “there are times when I catch myself believing that there is such a thing as something, which is separate from something else”.¹⁴⁰ This belief is possible thanks to Gestaltism and phenomenal cuts, both of which transform entwined and intra-related meshes into meaningful units. It is therefore both true and false (dialethic) that there are things which are separate from other things. The upshot is that there is not only one way that the world can be conceptualised, but many. A *multistable* outlook must therefore be adopted, one which allows the existence of different perspectives of the same reality.

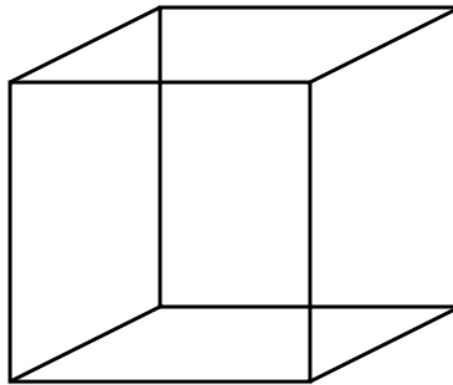
9.5.2 MULTISTABILITY

The concept of multistability comes from the realm of optical illusions. The most common example of this is the Necker cube. Although it is familiar that this two-dimensional representation of a cube can be seen to ‘pop up’ or ‘pop down’ from the paper, it is not possible to actually see both cubes

¹³⁹ Barad (n31) 127. 393.

¹⁴⁰ Gregory Bateson in ‘An Ecology of Mind: The Gregory Bateson Documentary’, available at <<https://www.youtube.com/watch?t=118&v=AqiHJG2wtPI>> (accessed 26/3/2015).

at once.¹⁴¹ Although we know they are both there, we cannot directly perceive them simultaneously. Just as more than one perception of the cube exists, so are there many available perspectives and categorisations of the natural world.



This multistability is inherent in Barad's phenomena, which "designate *particular instances of wholeness*"¹⁴² rather than being fixtures of reality. Other instances of wholeness are always available and "[i]t is only through specific intra-actions that the boundaries and properties of 'components' of phenomena become determinate and that particular articulations become meaningful".¹⁴³ Boundaries and properties are thus multistable: they are dependent on the 'cut' made, on the perspective adopted, on the question asked. Different perspectives (such as 'popping up'/'popping down', or organism/ecosystem) provide different pictures of the same reality.

¹⁴¹ J Orbach et al, 'Reversibility of The Necker Cube' (1963) 17 *Perceptual and Motor Skills* 439. See also Ludwig Wittgenstein, *Philosophical Investigations* (first published 1953, GEM Anscombe tr, Blackwell 2001) 165-66, 171-77

¹⁴² Barad (n31) 119, emphasis added.

¹⁴³ *ibid* 148.

Multistability operates in the real world in almost every place one cares to look: at the subatomic level (electrons are both waves and particles); within relationships (a person can be an employee, a brother, and a friend); at a biological/ecological level (a tree is a collection of cells and an element of a forest); within legal theory (is law codified morality or distinct from moral concerns¹⁴⁴) and so on. There is no correct answer to the question 'what is a tree?' unless one knows the context in which it is being asked. Just as "if you ask reality a wave question, you will get a wave answer; ask it a particle question, and you will get a particle answer",¹⁴⁵ if you ask a tree a biochemical question, you will get a biochemical answer; and if you ask it a habitat question, you will get a habitat answer.

Any categorisation of the universe is thus at best *contingently* truthful. But this does not advocate shying away from categorisation itself (nor from rejecting certain categorisations). Categorisation is a useful, practical and natural way to respond to the world around us (viz gestaltism). Rather, it alerts us to the fact that many categorisations are both possible and meaningful; they are equiprimordial.¹⁴⁶ One must therefore be wary at all times that a categorisation – as foreground or background, as whole or part, as particle or wave – is just that: a categorisation rather than *the* categorisation. In Bateson's words, "the division of the perceived universe into parts and whole is convenient and may be necessary, but no necessity

¹⁴⁴ §4.2, especially the 'Colossal' nature of rights.

¹⁴⁵ Mathews (n10) 55, citing Fritjof Capra, *The Turning Point* (Fontana 1983) 77.

¹⁴⁶ Heidegger's word. See Wrathall and Murphey (n103) 13.

determines how it shall be done";¹⁴⁷ and, according to Bohr's *Elefantordenen* motto: 'Contraria Sunt Complementa'.¹⁴⁸ Trees are of both intrinsic and instrumental value, and Tommy is a member of *Pan troglodytes*, an individual living being, and a component in an ecosystem.¹⁴⁹

Aiming for immutable categorisations is therefore a hopeless task. There may be a comfort in everything being 'in its right place',¹⁵⁰ but no such placement can be permanent. Instead of searching for the Ultimate Categorisation, it will prove more fruitful to accept that there are many valid perspectives available. In fact, more than one perspective is often needed to fully understand what something is. Consider the blind men touching the elephant, or how adopting an ecosystem perspective provides new (ecological) information on what life is like and how life originated: which came first – the ecosystem or the organism?¹⁵¹

Multistability means that there are many perspectives that describe the same reality. In particular, the different integrons provide different but

¹⁴⁷ Bateson (n42) 47-49.

¹⁴⁸ The highest order of Denmark, <www.nbi.dk/hehi/logo> (accessed 3/12/2016).

¹⁴⁹ §7.2.1; §IIIIn15.

¹⁵⁰ In the Radiohead song 'Everything in Its Right Place', Thom Yorke sings about there being 'two colours in his head' – the dichotomy of off/on, black/white is a comforting one. But the song "presents a musical scenario in which expectations of resolution are continually frustrated" (p57). It is a song which creates a "schizophrenic split within the subject" (p92). Rather than seeking comfort in an impossible preordained order, we may be better off accepting unpredictability, vulnerability and absence of control. Both quotes from Marianne Tatom Letts, *Radiohead and the Resistant Concept Album* (Indiana University Press 2010).

¹⁵¹ Morange (n51) 108.

equally valid perspectives of the same natural world. The organism perspective permits understanding of vital interests and dignity, but it is not necessarily the case that such a perspective is well-suited in the creation of legal rights. Accepting multistability does not mean accepting that all perspectives are equally appropriate for a given situation, but rather that different perspectives may be more valuable depending on the context. The following section argues that because organisms are organisms-in-their-integrations, it is appropriate to adopt an ecosystem perspective in order to protect their vital interest in forming ecological communities.

9.6 CORPORATE ECOSYSTEM RIGHTS

As Kramer notes, law can create legal subjects out of our 'ecological' world: "the capacity of a being as an entitlement-holder will not hinge on the unproblematic unity of the being, but on the status bestowed by the relevant legal system".¹⁵² International law has already created legal subjects out of humans, international organisations and peoples, and it can do so too with (other) integrations: if ecologists can meaningfully identify and intra-act with integrations, then so too can lawyers. Flexibility concerning the nature of legal subjects is necessary to model the complexities of both ecology and law.¹⁵³ As Tallacchini observes:

¹⁵² *supra* n2. See also Stone (n102) 494n125.

¹⁵³ Anna Grear, 'Law's Entities: Complexity, Plasticity and Justice' (2013) 4 *Jurisprudence* 76, 76-77.

The relationship between the world of natural objects and the world of legal objects is mediated... by perceptions and representations of reality. The way in which we build the entities of the world by drawing the boundaries of things, the choices with which we distinguish the objects around us, ascribing to them the character of wholeness or of parts... [L]egal notions themselves are charged with their own Gestalt, which conveys a particular partitioning of the world.¹⁵⁴

Pertinently, an organism 'partitioning' is necessary to grasp that organisms have interests and dignity, but an alternative 'partitioning' is needed to fully protect these interests and dignity via vital rights. This is because individualism alone cannot prevail within environmental protection: "the moral atomism that focuses on individual animals and their subjective experiences does not seem well adapted to coping with ecological systems".¹⁵⁵ An alternative perspective is required to complement the relationality of the natural world, and to respond to the realisation that not only organisms themselves, but also their interests and dignity are interrelated and continuous. Interests do not always work in isolation and opposition, but are frequently shared. This is apparent both within humans and the ecosphere in general.

¹⁵⁴ Mariachiara Tallacchini, 'A legal framework from ecology' (2000) 9 *Biodiversity and Conservation* 1085, 1092-93.

¹⁵⁵ Rodman (n42) 89.

People do have interests that make *essential* and not merely accidental or contingent reference to those of others, for example, when a mother wishes for her child's recovery, the child's flourishing is an essential *part* of her flourishing... we must see human beings and their interests as *essentially* related and interdependent.¹⁵⁶

[P]olicies serving the interests of the human species as a whole, and in the long run, will serve also the 'interests' of nature, and vice versa.¹⁵⁷

It makes sense to protect these *essentially* related and interdependent interests by protecting the relations themselves, as well as the integrons that emerge through them. This section provides four reasons as to why it is appropriate to vest rights in ecosystems (ie to create RoN) in order to protect the natural world through international law. There are both pragmatic and theoretical reasons for adopting such a perspective, but in short it is because doing so would improve the law's alignment with ecological principles.¹⁵⁸

9.6.1 FOUR REASONS FOR ADOPTING ECOSYSTEM RIGHTS

In order to protect the ecologically embedded nature of organisms-in-their-integrons, it makes sense to switch perspective to one of the higher levels-of-organisation in which this embeddedness takes place. Given that it is an

¹⁵⁶ Plumwood (n7) 20.

¹⁵⁷ Norton (n42) 240.

¹⁵⁸ See §7.1.2.

interest in forming ecological *communities* that has been identified, it may seem appropriate to use the ecological community¹⁵⁹ as a suitable perspective for protecting that interest. However, as will be seen, there is in fact value in instead opting for the ecosystem.¹⁶⁰

9.6.1(A) TO PROTECT THE VITAL INTEREST IN FORMING ECOLOGICAL COMMUNITIES

Plainly, for organisms' vital interest in forming ecological communities to be protected, it is necessary for the communities themselves to be protected. Ensuring that ecological communities do not only exist, but are healthy, resilient, diverse and have integrity will ensure their continuation, and allow organisms to be able to form appropriate relations with(in) them and to fulfil their role within their ecological community. It will allow organisms (the possibility) to flourish, since part of this flourishing happens in community.¹⁶¹ However, in order to ensure the health and integrity of communities, it will sometimes be necessary to also be concerned with the health and integrity of ecosystems.¹⁶²

The key difference between a community and an ecosystem is that a community is a group of intra-acting species in a particular location,

¹⁵⁹ *supra* n87.

¹⁶⁰ The other integron options are for the main part not tempting: a population is clearly too narrow, since it concerns only intra-species relations, and the landscape and biome are too spatially and theoretically divorced from the organism. The biome, as the totality of life on the planet, does provide a potential alternative, as recognised in the Gaia Hypothesis.

¹⁶¹ An important aspect of dignity §1.3.1n53.

¹⁶² See §2.3 These are inevitably contested concepts: see Vito de Lucia 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 *JEL* 91, 102-103.

whereas an ecosystem also includes the abiotic elements in that location.¹⁶³ It is thus the community as the communion of organisms that is the locus of the relational aspects of organism dignity, just as a 'people' carries some of the relational aspects of human dignity.¹⁶⁴ However, in order to protect a community, consideration must be given to abiotic factors too, just as protection of a 'people' also requires consideration of societal (ie a human) infrastructure such as language.¹⁶⁵ It is the community/people where the dignity is realised, but protecting this dignity requires attention to be given to the ecosystems/society perspective.

A community cannot exist without an ecosystem, nor vice-versa. But because an ecosystem is defined more broadly than a community, protecting the ecosystem necessarily entails protecting the community (an ecosystem is a 'community-plus'). That is, everything that must be in place for a community to be considered healthy must also be in place for the corresponding ecosystem to be healthy. However, at times it will also be necessary to consider abiotic elements in order to ensure the health and integrity of a community.

For example, the integrity of a riparian community is dependent on the state of the watercourse: a canalised river will not be able to support as

¹⁶³ The CBD (Article 2) defines an ecosystem as a "dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit".

¹⁶⁴ §1.4-1.5.

¹⁶⁵ See HRC, General Comment 23 [5.3]. And perhaps even broader: "a people can be thought of as a nation or a country, including a territory and its associated flora and fauna" James Summers, *Peoples and International Law* (2nd edn, Nijhoff 2014) 359.

diverse and resilient a community as a meandering one.¹⁶⁶ Or consider how contaminated soils inhibit soil microorganism functioning, resulting in “a decrease in the amount of microbial biomass and a change in community structure”.¹⁶⁷ It is therefore necessary to consider the abiotic elements of an ecosystem, as well as the biotic ones, in order to protect organisms’ vital interest in forming ecological communities.

Protecting the health and integrity of ecosystems will effectively protect organisms’ interest in forming ecological communities. Note that there is a considerable overlap here with the argument of Chapter Two that a human right to a healthy environment should be defined *inter alia* in terms of ecosystem health.¹⁶⁸ As living organisms, humans too have an interest in forming ecological communities, and this interest can be protected by vesting rights in ecosystems to ensure their health and integrity.

9.6.1(B) TO PROTECT OTHER VITAL INTERESTS

As seen in Chapter Eight, nonhuman organisms have vital interests other than the one in forming ecological communities.¹⁶⁹ At the very least, they have a vital interest in continued biological functioning, from which interests in essentials such as clean air and water can be derived. These organism interests can potentially be protected through the perspective of

¹⁶⁶ Stephen Addy et al, ‘River Restoration and Biodiversity: Nature-based solutions for restoring rivers in the UK and Republic of Ireland’ (IUCN-CREW 2016) 15.

¹⁶⁷ Ken Giller et al, ‘Toxicity of heavy metals to microorganisms and microbial processes in agricultural soils: a review’ (1998) 30 *Soil Biology and Biochemistry* 1389, 1395.

¹⁶⁸ §2.3.

¹⁶⁹ §8.2.1.

ecosystem rights to clean air and water. Again, the ecosystem perspective provides a valuable way to protect the dignity of organisms, which is justifiable since “despite their exceptional moral and legal status, the fate of cetaceans [...for example...] remains tied to the health of marine ecosystems”.¹⁷⁰

Through ensuring ecosystem health and integrity, *other* vital interests can also be secured. Such a cascading process is already discoverable in the ‘respect, protect, fulfil’ typology within IHRL whereby states must ‘create an environment in which rights are enjoyed’.¹⁷¹ Although clearly a different meaning of the word ‘environment’ is intended here, the overarching point stands that healthy ecosystems create an environment in which organisms’ many vital interests can be enjoyed.

Adopting an ecosystem perspective for RoN does not preclude vesting vital rights in some individual nonhumans who may merit additional protection (an ecosystem perspective does not entail ecofascism¹⁷²). Organisms that are more discrete than continuous (eg pandas compared to slime moulds); or those with more developed psychological lives (who have a vital interest in psychological freedom¹⁷³); or those expressing a greater level of self-

¹⁷⁰ David Mence, ‘The cetacean right to life revisited’ (2015) 11 *International Journal of Law in Context* 17, 39.

¹⁷¹ §2.5.

¹⁷² See eg J Baird Callicott, ‘Holistic Environmental Ethics and the Problem of Ecofascism’ in *Beyond the Land Ethic* (SUNY 1999). Also see UDRME Articles 1(6) and 4(2) which allow for species-specific rights; Thomas Berry, ‘Rights of the Earth’ in Burdon (n79) 227, 229.

¹⁷³ §8.2.1.4.

awareness (as in the NhRP cases¹⁷⁴) are the lead candidates for individual nonhuman vital rights. When it is relatively easy to identify isolatable organisms in these ways, it may be reasonable to then focus rights at this level too. At other times, when it is more difficult to pick the organism out from the ecosystem, rights will work best at the ecosystem level. The possibility of species- (or other taxon-)specific rights (such as IHRL or the Helsinki Declaration of Rights for Cetaceans) is specifically provided for in the Universal Declaration of Rights of Mother Earth (UDRME), stating that “[n]othing in this Declaration restricts the recognition of other inherent rights of all beings or specified beings”.¹⁷⁵

9.6.1(C) TO REFLECT HUMAN RESPONSIBILITY

An ecosystem perspective is also pragmatic. It acknowledges humans have responsibility towards living organisms without attempting to vest rights in every single creature (a surely impossible task). Ecosystem rights create a more manageable structure: just as it is sometimes appropriate in ecology to consider the ecosystem perspective, so too for law.¹⁷⁶ That every organism is a locus of valuational activity with dignity does not mean that humans must ensure every life is lived perfectly. Instead, humans must ensure that their activities take proper account of the vital interests of other lifeforms.

¹⁷⁴ §7.2.1.

¹⁷⁵ Article 4(2).

¹⁷⁶ See Levins and Lewontin (n129) 128-29.

As seen in Chapter Four, rights are always a relation between two actors.¹⁷⁷ It may be valid to consider the nature and indeed the limitations of both these actors when designing the structure of rights – and in particular the claim-rights that specifically *secure* in vital rights¹⁷⁸ given their auxiliary and derivative nature.¹⁷⁹ In this case, with humans and/or human constructed institutions as the duty-bearers, it makes sense to design the rights such that these duty-bearers can actually comply with their duties.¹⁸⁰ Pragmatically speaking, this may be facilitated by vesting rights in ecosystems.

The pragmatism of an ecosystem perspective is also found in its mirroring of existing international environmental law. As seen in Chapter Three, the ‘ecosystem approach’ is the primary framework for action under the Convention on Biological Diversity, as well as being utilised in other fora,¹⁸¹ and the burgeoning concept of ‘ecocide’¹⁸² also adopts an ecosystem perspective. Vesting rights in ecosystems can segue with these approaches, while also increasing the urgency of protection afforded to the natural world through international law. The ecosystem approach has both

¹⁷⁷ §4.3.

¹⁷⁸ §4.6.

¹⁷⁹ §6.2.

¹⁸⁰ See also the discussion of fairness in §8.3.1 and how this may contribute towards grounding human duties.

¹⁸¹ See de Lucia (n162).

¹⁸² Polly Higgins, *Eradicating Ecocide* (Shepherd-Walwyn 2010) 63; <<http://eradicatingecocide.com/>> (accessed 18/4/2015)

anthropocentric and ecocentric interpretations,¹⁸³ and De Lucia notes that the ecocentric accounts

[R]eflect a modal shift in the understanding of reality, and of nature: away from the atomistic and towards the systemic and relational. Ecosystems are thus apprehended as wholes, and all participants—humans and non-humans alike—are connected in a relational field comprised of places, processes, individuals and ecological communities.¹⁸⁴

This interpretation of the ecosystem approach is clearly compatible with imagining vital rights subjects as organisms-in-their-integrans, and with aligning the law with ecological principles. Creating ecosystem rights would build on this existing account of the ecosystem approach, encouraging it to serve as “one of the picklocks for a radical reconstruction of a legal subjectivity no longer centred on abstract rational agency, but on a plurality of embodied, vulnerable agencies”.¹⁸⁵ There will always be room for conflict between anthropocentric and ecocentric accounts, but an ecological re-imagining of the vital (including human) rights subject can help overcome this divide.

¹⁸³ de Lucia (n162) 103-106.

¹⁸⁴ *ibid* 105.

¹⁸⁵ *ibid* 105-106.

There will also always be conflict between the interests of the ecosystem and of individuals,¹⁸⁶ presenting conundrums to environmental governance systems. Whether or not an invasive species should be culled; or whether or not humans should assist wounded prey animals are not straightforward issues. But rights neither create nor immediately solve these problems: natural systems always include events that work against the interests of certain individuals (death is inevitable). Working out the correct balance between the interests of an organism and the integrity of an ecosystem (and hence the interests of other organisms) is a balancing act which is likely to be context dependent. Part of this balancing requires acknowledging that just as we have greater responsibilities to our friends and family than distant strangers, we likely have more engaged responsibility to other humans than to beetles. This does not remove duties, but rather contextualises and interprets them.

Vital rights cannot provide perfect or permanent solutions to the complex tension between organism dignity and ecosystem health,¹⁸⁷ but they can provide a framework for doing so. A benefit of developing the theory of RoN is to detail the nature and the content of human duties, to be further fleshed out through interpretive processes.¹⁸⁸ As with the margin of appreciation utilised by the ECtHR, RoN should set broad standards that

¹⁸⁶ See eg Simon Hailwood, 'Bewildering Nussbaum: Capability Justice and Predation' (2012) 20 *The Journal of Political Philosophy* 293.

¹⁸⁷ cf Schlosberg (n10) 145-46; Daniel Crescenzo, 'Loose Integrity and Ecosystem Justice on Nussbaum's Capabilities Approach' (2013) 10 *Environmental Philosophy* 53, 56-59.

¹⁸⁸ See §2.3-2.5.

can be achieved in a variety of ways in different situations and different societies.¹⁸⁹

9.6.1(D) TO RESPECT ECOCENTRIC INTRINSIC VALUE CLAIMS

Finally, not only can adopting an ecosystem perspective for rights potentially mirror the interests (and dignity) of individual organisms, it also corresponds with claims that the ecosystem itself is the bearer of intrinsic or systemic value.¹⁹⁰ One could potentially construct an argument for the rights of ecosystems entirely at this level if a convincing case for such value could be made.

Perhaps more usefully, the fact that an ecosystem exhibits some quasi-autopoietic¹⁹¹ properties provides signals as to what ecosystem-level functions (or 'interests') should be focussed on in order to protect the ecological aspects of organisms' dignity. The integrity of a homeorhetic¹⁹² ecosystem can be maintained by protecting dynamic functions such as succession, soil formation, population regulation and nutrient cycles.

¹⁸⁹ See *Evans v UK* (2007) 46 EHRR 728 for an example of where "the irreconcilable rights of two individual were at stake, although with a significant public interest dimension." David Harris et al, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 387, 9. See also *SAS v France* (2015) 60 EHRR 11 [129]; UDRME Article 1(7).

¹⁹⁰ eg Holmes Rolston III, 'Value in Nature and the Nature of Value' in Attfeld and Belsey (n42) 23; Mathews (n10) 119; Robert Elliot, 'Instrumental Value in Nature as a Basis for the Intrinsic Value of Nature as a Whole' (2005) 27 *Environmental Ethics* 43.

¹⁹¹ Or 'sympoietic', see Beth Dempster, 'Boundarylessness: Introducing a Systems Heuristic for Conceptualising Complexity' in Charles Brown and Ted Toadvine (eds), *Nature's Edge* (SUNY Press 2007) 93.

¹⁹² §8.3.2.

9.6.2 COMPARISON WITH PEOPLES' RIGHTS

Regulating human interaction with the natural world sometimes requires the adoption of an ecosystem perspective. It is therefore prudent to vest vital rights in ecosystems, even though dignity arises at the organism level. Such an approach is valid because 'ecosystems' and 'organisms' are different perspectives or 'partitionings' of the same underlying reality. There is a valuable parallel here between rights of ecosystems and of peoples. Both are held by corporate entities whose precise composition is difficult to identify; neither have immediately apparent boundaries. Yet both exist as units that are not totally arbitrary despite these ultimately blurry edges. Both are examples of corporate rights being used as the best way to protect relational aspects of the dignity of their members. Just as the formation of social communities is essential to humans, so the formation of ecological communities is essential to all living things. Ecosystem rights would allow the law to protect the ecologically relational aspects of organisms' dignity just as peoples' rights allow the law to reflect the socially relational aspects of human dignity.¹⁹³

There is however an important distinction between peoples' rights and ecosystem rights. Peoples' rights function alongside individual human rights and therefore need only protect the social dimension of human dignity. On the other hand, ecosystem rights, if used as the perspective through which the majority of individual organisms' interests are protected, must keep closer track of these individual interests. For example, they

¹⁹³ §1.4-1.5.

must be able to ensure that organisms' vital interests in continued biological functioning are not violated. This chapter ends by considering the actual content of RoN in order to see how these multiple goals might be achieved.

9.7 MAKING SENSE OF RIGHTS OF NATURE

So far this chapter has focussed on the justifications for RoN. It has not considered in detail any actual rights. It concludes with a consideration of what rights could be vested in ecosystems by considering those contained within the UDRME and how they align with the analysis of this chapter. It is worth restating that the rights contained within the UDRME are applicable to "Mother Earth and all beings of which she is composed".¹⁹⁴ However, a number of these can be seen as being more appropriate for organisms, and others as more suitable for ecosystems. Greater precision over who exactly are the subjects of RoN would facilitate their establishment and their interpretation.

9.7.1 RIGHTS AND INTERESTS IN THE UDRME

The first right in the UDRME is the right to life and to exist.¹⁹⁵ This right should be interpreted in line with IHRL to mean that no organism should be *arbitrarily* deprived of life¹⁹⁶ by human agency.¹⁹⁷ What is arbitrary will

¹⁹⁴ Article 2(1). Not all of the rights will be considered here. Those excluded are the right to be respected (Article 2(1)(b)); the right to not have genetic structure modified (Article 2(1)(i)); and to play a role in Mother Earth (Article 2(2)).

¹⁹⁵ Article 2(1)(a).

¹⁹⁶ See ICCPR Article 6(1); HRC, General Comment 6 [3], HRI/GEN/1/ (Vol I).

¹⁹⁷ The duty-bearers for RoN will almost certainly be human (institutions).

likely be species specific: the deprivation of a tree's life will require a different justification than for a whale or a human.¹⁹⁸ When applied to ecosystems, the right to exist makes more sense than to life:¹⁹⁹ an ecosystem itself is not in any obvious sense a living being,²⁰⁰ but the complete destruction of an entire ecosystem will surely violate the dignity of its organisms. Ecosystems themselves must be protected for organisms' vital interests to be protected. The proposed crime of 'ecocide' also recognises the need for international law to better protect ecosystems, notably for the benefit of "any living species dwelling in a particular place",²⁰¹ and there is potential for synergies between the two approaches of RoN and ecocide.²⁰²

The rights to water,²⁰³ clean air,²⁰⁴ integral health,²⁰⁵ and freedom from contamination²⁰⁶ in the UDRME are all examples of organism interests being containable within ecosystem rights. They recognise the need for RoN to protect the individual interests of organisms as well as their ecological interests, while adopting a suitable and practical method of

¹⁹⁸ Since trees are not whales are not humans.

¹⁹⁹ See 'Harmony with nature' A/71/266 (1 August 2016) [36], referring to the "fundamental legal rights of ecosystems and species to exist, thrive and regenerate".

²⁰⁰ Importantly, they are homeorhetic rather than homeostatic (§8.3.2). cf The Gaia Hypothesis and claims that ecosystems are autopoietic.

²⁰¹ Polly Higgins, *Eradicating Ecocide* (Shepherd-Walwyn 2010) 63.

²⁰² *ibid* 155-56, 168.

²⁰³ Article 2(1)(e).

²⁰⁴ Article 2(1)(f).

²⁰⁵ Article 2(1)(g).

²⁰⁶ Article 2(1)(h).

doing so: an ecosystem right to integral health may be the best way to ensure the health of its constituents. Such rights can be aligned with environmental human rights²⁰⁷ and can likely work in co-operation with them (interests are frequently shared rather than competitive).

The right to integral health (or ones to integrity and to health) is in fact of utmost importance within RoN. This is because it would transform environmental law from reactive and protective measures to enhancement and improvement. "What is being regulated at present is how much destruction can occur. By contrast, an Earth Jurisprudence model asks: 'What would a healthy system look like?'"²⁰⁸ Duties concerned with the creation and maintenance of healthy systems would give environmental law renewed vigour.

The right to live free from torture²⁰⁹ appears to primarily require an organism perspective. When couched as an organism right, it is compatible with parallel ideas from human rights (and no doubt some nonhuman organisms merit such a right). However, it can be made relevant to the ecosystem level by understanding it broadly as freedom from exploitation;²¹⁰ nature does not only exist as repository of natural resources for humans. Whilst humans necessarily must make use of the

²⁰⁷ See Ksentini Report, Draft Principles Articles 5-8; 'Harmony with nature' (n199) [36].

²⁰⁸ 'Harmony with nature' (n199) [43].

²⁰⁹ Article 2(3).

²¹⁰ See §8.2.1.2.

natural world, it is not necessary to exploit it. Humanity should seek to work with, rather than against, natural processes.

At the ecosystem level, the UDRME contains two rights of predominant interest: the “right to regenerate bio-capacity and to continue vital cycles and processes free from human disruptions”;²¹¹ and the right to “maintain identity and integrity as a distinct, self-regulating and interrelated being”.²¹² Both of these pick up on ideas and themes developed in Part III and are examples of rather complex Hohfeldian bundles concerned with processes beyond the level of the organism. They can be rationalised by understanding protecting vital cycles and maintaining integrity are necessary to secure functioning ecosystems, in which the vital interests of organisms have the best chance of being met.

The RoN contained within the UDRME are compatible with the pathways for justification sketched in this chapter. They focus at both organism and ecosystem levels (although greater precision over the subjects of RoN is needed), and they protect the ‘intrinsic relations’ and vital interests of living systems. By using rights to directly protect the conditions and processes through which living systems achieve their autopoietic status, international law can enhance the protection afforded to the natural world.

9.7.2 STRUCTURES FOR RIGHTS OF NATURE

It is necessary to ascertain how this model of rights constructed in Part II maps onto RoN. This chapter has demonstrated a way in which the moral

²¹¹ Article 2(1)(c).

²¹² Article 2(1)(d).

component at the 'core' of a right can be found for RoN. The *securing*²¹³ of the parallel moral core within IHRL consists primarily (but not exclusively) of state duties to respect, protect and fulfil the core rights. The same model is feasible for RoN.²¹⁴ However, the need for human institutions to conceptualise the natural world as a global good is even more pressing here than it is for environmental human rights.²¹⁵ Because of their holistic and relational outlook, RoN demand better international cooperation and more dispersed duties (including 'up' to international organisations and multinational corporations; 'down' to businesses and other national actors; and 'diagonally' between states and areas normally considered outside their jurisdiction²¹⁶). This is recognised in the UDRME which seeks to place duties on "[h]uman beings, all States, and all public and private institutions".²¹⁷

It has been shown that ecosystems represent a suitable level-of-organisation in which to vest RoN. However, given the ultimately global interconnectedness of living systems, it may in fact be the case that a number of rights (such as to regenerate bio-capacity and continue vital cycles²¹⁸) can also be vested in the entire biosphere. The duties *securing*

²¹³ §4.6.

²¹⁴ See also Stephen Turner, *A Global Environmental Right* (Routledge 2014) 70-100.

²¹⁵ §2.4.1(a).

²¹⁶ John Knox, 'Diagonal Environmental Rights' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 82.

²¹⁷ Article 3(2).

²¹⁸ UDRME Article 2(1)(c).

such rights would certainly necessitate greater co-operation between state and non-state duty-bearers.

Related to, but distinguishable from, identifying the correct holders of RoN is their legal representation. In Part I it was demonstrated that suitable representation for peoples' rights may not be straightforward, but is eminently possible. The same holds true regarding RoN. Clearly human agency will be required for legal representation of any natural entities vested with RoN. As seen in the introduction to Part III, the concept of legal representation is neither new nor controversial, but it does require careful identification of the most suitable guardians.

There are two main alternatives here. The first is to allow any natural or legal person to make representations for RoN through vesting the relevant Hohfeldian power(s) in all. This is the approach taken in the UDRME²¹⁹ and the Ecuadorian Constitution.²²⁰ A shortcoming of this approach is the latent potential for 'hijacking' of RoN for personal gain.²²¹ Alternatively, a specific set of bodies could be enlisted which have the relevant powers. Most likely these would include relevant NGOs and/or members of the local community. For example, the Whanganui Agreement appoints two Guardians, one from the Government and one from the local population.²²²

²¹⁹ Article 3(2)(h).

²²⁰ Article 71.

²²¹ Laurel Fish, 'Homogenizing Community, Homogenizing Nature' (2013) 12 *Stanford Undergraduate Research Journal* 6, 8.

²²² See §7.3.4.

At stake here is the appropriate representation of the interests of the natural world and issues of common concern. The ability of NGOs to play this role can be seen through their key involvement in existing international environmental law where their involvement is often the driving force behind treaty regimes,²²³ and their existing position giving communities a voice in international law.²²⁴ However, this is not to say that only NGOs can perform such a task – both individuals and indeed states²²⁵ could do so too. The involvement of a diverse range of actors with an expanding portfolio of roles within international law can contribute towards the creation of a law better able to deal with extraterritorial/transboundary issues of common concern.²²⁶

One can imagine RoN functioning through an example. Consider the construction of a new airport on an estuary. The construction of this airport will clearly have impacts on both the local ecosystem and the global climate system. Already human rights and environmental law require that such a project must involve consultation with local human communities and consideration of their interests; the Aarhus Convention²²⁷ and the

²²³ Farhana Yamin, 'NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities' (2001) 10 *RECIEL* 149.

²²⁴ Consider *Ogoniland* (§2.4.1(a)); *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (Dissenting Opinion of Judge Oda) [8]; Stone (n102) 466.

²²⁵ Consider *Whaling in the Antarctic (Australia v Japan)* (Separate Opinion of Judge Cançado Trindade) [53]-[60].

²²⁶ See also §2.5.3.

²²⁷ Articles 6-8.

ECtHR's judgment in *Hatton*²²⁸ make this clear. In addition, environmental impact assessments (EIAs) provide some protection to the estuary ecosystem itself, but this is merely procedural since construction can normally go ahead with purely token modifications even if the EIA shows up serious environmental damage.²²⁹ RoN on the other hand provide substantive protection to the natural world. Other environmental law such as laws protecting certain species or habitats could be relevant, but only if there are protected species or habitats in the area.

RoN on the other hand would protect the vital natural processes found in the estuary which the airport must not interfere with. These would include nutrient cycles and geomorphology within the river and impacts on nearby breeding grounds and migration routes (from the ecosystem perspective); and potential negative effects on local cetacean populations (an organism perspective perhaps reliant on something akin to the Helsinki Declaration). These concerns would not only receive clear substantive recognition, but also a greater level of priority due to the rhetorical power of rights resulting in greater weight in balancing processes.

The inalienability of rights would also mean that construction should only go ahead if the requirements of the relevant rights can be met. Rights do not always have the widest scope imaginable, but nor do they ever completely disappear. States (and other duty-bearers) would have flexibility in meeting their obligations, but would not be able to derogate

²²⁸ See §2.2.1.

²²⁹ Birnie et al, *International Law & the Environment* (OUP 2009) 165.

from them entirely. This would have the overall effect of ensuring that human activities seek to work with, rather than against, natural processes. Importantly too, by rights being vested in ecosystems, any reparations for damages incurred through violations of RoN would be owed to the ecosystems themselves, rather than any property owners. The difference between legal subjecthood and being treated as an inanimate object is here rather telling.

The use of RoN would also allow guardians to speak on behalf of the natural world to ensure that activity does not threaten its vital interests. Arguments against environmental damage are often couched in long-winded demonstrations of the damage it will have on humans.²³⁰ Although these arguments are valid, a more direct (and more honest) route is to acknowledge that it is not only humans (and their short-term interests) that merit legal protection and may require reparations. A great strength of RoN is their endorsement of the agency, the subjecthood, the value, and the dignity of the nonhuman world. This is carried by the definitive moral urgency that is contained within the semiotics of 'rights'. RoN can help resituate humans as players in the natural world, rather than as commanders of it. This is best achieved by realising a shared ethical framework underlying both human rights and RoN. That is,

[t]he proposed application of the term 'right' to animals and the environment is therefore of great epistemological

²³⁰ See Wouter de Groot et al, 'Fostering Committed Action for Nature' (BIOMOT project, Radboud University 2016).

significance because it has been a term so tightly attached to and associated with the human: if and when applied to other species it promises to change the very nature of these beings and entities because it alters how they are described and so understood to be. It repositions the rest of nature in relation to us and in so doing it also changes us.²³¹

Finally, because of the potential transboundary impacts of the airport (through greenhouse gas emissions), an international, cosmopolitan, public good perspective addressing issues of common concern can also be adopted through RoN. RoN can empower both guardians for the Earth and non-nationals who are potential victims of climate change to challenge environmentally destructive activity, supporting less fragmented approaches towards preventing catastrophic environmental damage.

9.5 CONCLUSION

This chapter has shown that all living organisms have a vital interest in forming ecological communities as a result of their autopoietic nature. Organisms flourish in ecological community. This implies that all living organisms have dignity, since they have a vital interest additional to the one in continued biological functioning. As all living organisms have dignity, there is justification for vesting vital rights in nonhumans.

²³¹ Ngaire Naffine, 'Legal personality and the natural world: on the persistence of the human measure of value' (2012) 3 *JHRE* 68, 71.

These vital rights must protect the vital interests of living organisms. It is therefore necessary for nonhuman vital rights to protect inter alia organisms' vital interest in forming ecological communities. The frustration of this interest underlies much ecological degradation (for example habitat loss and soil contamination) and so protecting it will prove a valuable way to protect the natural world through international law.

An effective way to protect this interest is through vesting rights in ecosystems rather than organisms. This can be justified by both theoretical and practical reasons. Theoretically it is justifiable because the natural world can be viewed from many perspectives: it is multistable. The organism perspective and the ecosystem perspective are different views of the *same* reality: organisms and ecosystems co-constitute one another through their intra-actions. Protecting the ecosystem entails protecting the dignity of its organisms, since these ought to be imagined as organisms-in-their-integrans. Ecosystem rights can protect the ecologically relational aspects of the dignity of organisms in a similar fashion to how peoples' rights protect the socially relational aspects of the dignity of humans.²³²

Practically, it makes sense to focus RoN at the ecosystem level because forming ecological communities is reliant on properties and processes that operate at scales other than the organism. The interest in forming communities can therefore be best assured (or at least disproportionate human interference with it best prevented²³³) by shifting perspective to the

²³² §1.4-1.5.

²³³ §9.6.1(c).

ecosystem level and considering how human activity affects the health and integrity of the ecosystem. Doing so prevents RoN having to hold the perspective of every organism within their gaze at all times. It also builds on existing directions within international environmental law (in particular the ecosystem approach) that are focussing more and more on ecosystems and their processes.

Establishing RoN would have definitive practical benefits because they would enhance international law's ability to protect the natural world. In particular, RoN would ensure that all ecosystems were protected both substantively and procedurally; insist that reparations and remedies in the case of a breach were directed towards the ecosystem itself; allow environmentalist arguments to be made without necessarily referring to human interests; and augment environmental law through focussing on the enhancement of natural systems as well as limiting their destruction.

RoN have other indirect benefits too. They enrich understanding of the vital rights subject (both human and otherwise) as living beings embedded in an ecological world. This further enrichment of the (non)human rights subject provides a pathway to improve law's construction of the human and the nonhuman alike, and thus better protect real living beings rather than abstract legal personas.²³⁴ Just as peoples' rights have played a role in imagining the human as socially embedded, so too can ecosystem rights allow the law to reflect the ecologically embedded nature of all living beings.

²³⁴ §1.3.

Developing an understanding of dignity and the interrelated nature of vital interests also encourages closer collaboration between environmental and human rights law. Entwining human rights and environmental law more tightly in their justifications can potentially help align their practices too. Preventing human suffering and providing for human flourishing requires the existence of healthy ecosystems;²³⁵ and dissecting human dignity leads towards realisation that dignity is not an exclusively human trait. The divide between humanity and nature is softened when it is examined more closely; both humans and nonhumans stand to benefit from this softening.

Human interest in healthy ecosystems arises in part because humans have an interest in forming ecological communities. The mental health benefits of contact with nature and the sense of connectedness and solace that people feel within the natural world²³⁶ can potentially be better understood and better secured²³⁷ through establishing RoN. These benefits arise because humans too are ecologically embedded. Individual human rights must of course remain, and other individual organisms can also stand to benefit through the creation of vital rights designed to protect their vital interests.

What remains challenging, and cannot be fully explored in this thesis, is how the organism and the ecosystem perspective can best work side-by-side in practice. Living organisms may be like eddies on a river or drops in

²³⁵ §1.3; §2.3; §3.2.1.

²³⁶ §3.2.1.

²³⁷ §4.6.

a stream, “but the expression ‘drops in the stream of life’ may be misleading if it implies the individuality of the drops is lost in the stream. Here is a difficult ridge to walk: to the left we have the ocean of organic and mystic views, to the right the abyss of atomic individualism”.²³⁸ Neither mystic views nor individualist abysses can provide appropriate environmental protection. Reconciling the individual and the whole is far from straightforward, but RoN can legally endorse that they are different pictures of the same reality, and provide key reference points to guide law’s functioning.

²³⁸ Naess (n33 1989) 165.

CONCLUSION

10.1 OVERVIEW

This thesis has described, analysed, critiqued and developed a number of different methods by which vital rights (ie the sort of rights found within international human rights law) can be used for to protect the natural world. This has been done through an analysis of human rights law theory and practice; through developing a model that describes the structure and function of vital rights; and through investigating approaches towards nonhuman rights and establishing a theory to underpin them.

Environmental vital rights are diverse in terms of their subjects, content, feasibility, and current establishment. They also appear in different places on anthropocentric-ecocentric, human-nonhuman, and individual-corporate axes. The table overleaf summarises the rights considered in this thesis.

Rights	Individual -Group	Human -Nonhuman	Anthropocentric -Ecocentric	Current Establishment
Greened existing human rights (eg right to health, right to life)	Individual (although some corporate)	Human	Anthropocentric	Well established at the regional level (especially Europe and America)
Procedural environmental rights (eg Aarhus Convention)	Individual (although could be corporate)	Human	Broadly anthropocentric	Well established at the regional level (especially Europe)
A human right to a healthy environment	Individual and corporate	Human	Justification must be anthropocentric, but content should be broadly ecocentric	Established at the regional level (especially America and Africa)
Additional environmental human rights (to protection, conservation etc)	Individual and corporate	Human	Justification must be anthropocentric, but tenor could be quite ecocentric	Established in UNDRIP, some may be necessary to secure other rights.
Individual nonhuman rights (eg freedom from torture, right to liberty)	Individual	Nonhuman	Biocentric and/or ecocentric (could include a nonhuman right to a healthy environment)	Growing discussion at the national level
Rights of nature (eg ecosystem rights to regenerate bio-capacity and to integrity)	Corporate	Human and nonhuman	Ecocentric	Some appearance at the national level, referred to by the UN

Out of the assemblage of environmental rights there are two standout candidates in terms of their potential effectiveness in protecting the natural world through international law. These are a human/peoples' right to a healthy environment (with a broad definition of 'healthy environment') and rights of nature (RoN) vested in ecosystems. These are particularly well-suited to enhancing environmental protection because of the holistic ecosystemic perspective they provide. Furthermore, if used in conjunction, they can head towards a suitable balance between anthropocentrism and ecocentrism. Combined, they have an ability to soften the divide between humanity and nature: this emerges partly because both are grounded in (inter alia) the vital interest of organisms in forming ecological communities.

Another promising area for the deployment of nonhuman rights is individual rights of certain domesticated species. Although such rights can do less by way of environmental protection, they are still relevant to this thesis. Each of these three kinds of right will be reviewed in more detail. First though, it is worth summarising what this thesis has demonstrated about 'vital rights' themselves.

10.2 VITAL RIGHTS: A SUMMARY

This thesis has specified and analysed a particular kind of right: the sort of rights found in international human rights law (IHRL). Labelled 'vital rights', these are a subset of all rights, and include – but are not restricted to – IHRL. Vital rights are 'Colossal': like the Colossus of Rhodes, they stand astride two distinguishable but connected domains (law and morality), and

they dominate these domains because of their potency, urgency and function.

Vital rights are vital in two senses: they are vested in *living* beings, and they protect *essential* interests. In short, vital rights are grounded in the essential interests of living beings (vital interests). The subject of vital rights is thus a real life embodied and embedded living being rather than an abstract legal persona: this is an important feature of vital rights.

Although there must remain an element of technical legal personality to the vital rights subject (since they are legal rights), they must also continuously develop their ability to imagine their subjects as real living, 'fleshy' beings.

This thesis has analysed vital rights using Interest Theory and the Hohfeldian schemata of rights. This analysis has shown that vital rights are complex bundles of Hohfeldian positions containing a core bundle as well as claim-rights specifically designed to *secure* this core. The core bundle can typically be represented by a shorthand expression such as 'the right to life' that is grounded in vital interest(s) of the right-holder. These vital interests are fundamental enough to justify the creation of legal claim-rights in a protective perimeter specifically designed to secure them. Within IHRL, these claim-rights are between individuals and their state, and can be analysed through the respect, protect, fulfil typology.

The moral character of rights is thus predominantly found in their core, and their legal effect in their securement. Understanding vital rights as both moral and legal can also enhance understanding of their function. From a legal perspective, vital rights are grounded in interests; as moral

entitlements, they are justified by (eg) dignity. This duality means that dignity can be understood as being specified in a set of vital interests: this is compatible with dignity's characterisations as pluralistic and inherent in living beings. Furthermore, the thesis has argued that to have dignity is to have a vital interest *additional to* the one in continued biological functioning. This is because *more than mere survival* is of value to something with dignity.

Through this framework for vital rights, this thesis has argued that vital rights both could and should be vested in nonhumans. This is because nonhumans do have dignity: in particular, organisms have a vital interest in forming ecological communities.

Although this thesis has considered dignity as the attribute of fundamental moral importance that vital rights protect, it is not contended that only dignity can provide the moral foundation for vital rights. Although a pluralistic conception of dignity provides it with plenty of room to cover a wide range of moral concerns, it might be possible to understand the essential moral demands of composite entities such as peoples and ecosystems through other conceptual handles.¹ The thesis acknowledges that related concepts such as 'intrinsic value' or 'integrity' could also be used to justify vital rights.

The thesis has not sought to explore all the many facets of vital rights, but rather to survey and analyse existing and potential approaches and

¹ David Schlosberg, *Defining Environmental Justice* (OUP 2007) 145-46; Daniel Crescenzo, 'Loose Integrity and Ecosystem Justice on Nussbaum's Capabilities Approach' (2013) 10 *Environmental Philosophy* 53, 56-59.

justifications for environmental human and nonhuman rights. In particular, further research is needed to explore the detailed technical ramifications of establishing new vital rights and how they could function within international law. For example, whether the model for IHRL (with states as the primary duty-bearers) can be seamlessly transposed, or whether more nuanced models (in particular with regards to duties and representation) are required to take into account the transboundary and public good nature of the natural world² remains to be seen. The concepts of citizenship, jurisdiction and sovereignty may provide challenges here.

A final point is to reflect on whether or not the focus of this thesis on rights was prudent. There are a number of difficulties in using rights in environmental protection, much of which is due to the history they come laden with. That is, rights are traditionally viewed as individualistic and adversarial: two properties which this thesis has shown to be anathema to suitable legal structures to protect the natural world. Rights are also often thought of as exercisable and combative: that is, right-holders themselves must be able to actively demand and deploy their rights against others. Again, this cannot be maintained for many of the rights suggested here. Indeed, a number of theories doubt the value of recourse to the notion of 'rights' altogether within environmental discourse.³

² §2.4.1(a); §2.5.3; §9.7.

³ Mark Sagoff, 'On Preserving the Natural Environment' (1974) 84 *Yale LJ* 205; Peter Singer, *Animal Liberation* (Random House 1975); PS Elder, 'Legal Rights for Nature –The Wrong Answer to the Right(s) Question'(1984) 22 *Osgoode Hall Law Journal* 285; Bill Devall and George Sessions, *Deep Ecology* (Gibbs Smith 1985); Paul Taylor, *Respect for Nature* (Princeton University Press 1986); Cynthia

However, previously supposed properties of historical 'rights' have already been eroded by the development of contemporary IHRL (viz Baxi) and clearer understanding of the technical structure of rights (viz Hohfeld). Rights must no longer be considered as mere political trumps of land-owning men; nor is it the case that duties or powers must come bundled with claim-rights. Both the ethos and the structure of rights have developed and must continue to develop as the content of what they protect evolves, and as understanding of their underlying subjects enriches. This thesis contributes towards this evolving understanding of what a 'right' is. The concept of 'rights' as a legal tool did emerge from Enlightenment Europe and were apotheosised by the American and French Revolutions. However, they are just that: a legal tool. And the use of this tool must change as how we wish to use it changes. The legal structures for environmental rights may require innovation, but such creativity is one of humanity's greatest strengths.

Even once it is accepted that rights in general are suitable for usage in environmental protection, the focus of this thesis on vital rights may be open to challenge. Other species of 'rights' that place greater emphasis on their legal rather than moral character may be able to provide more efficient environmental protection within a shorter time-frame. With the appropriate Hohfeldian filter in place, it can be argued that nonhumans already do have a number of legal rights through, for example, legislation

Giagnocavo and Howard Goldstein, 'Law Reform or World Re-form: The Problem of Environmental Rights' (1990) 35 *McGill Law Journal* 345; Conor Gearty, 'Do human rights help or hinder environmental protection?' (2010) 1 *JHRE* 7, 7-10.

designed to protect animal welfare.⁴ The thesis could instead have explored these approaches.

However, there is something important about the *specific designation of a right* that is found in vital rights.⁵ This deliberate use of 'rights-language' channels the particular potency of rights, and can provide environmental law with much needed urgency and emphasis. There is a significant difference between animal welfare laws and RoN, which is in part a consequence of the rhetorical potency of 'rights'. This potency may be required if the oft-predicted and multiple global environmental catastrophes are to be avoided. Furthermore, consideration and establishment of nonhuman vital rights can develop insight into human's undeniable nature as living beings. By understanding nonhuman rights as emerging from the same ground as human rights, the divide between humanity and nature can effectively be softened.

10.3 KEY ENVIRONMENTAL RIGHTS

Although there are a number of interrelated ways in which rights can be used to protect the natural world, there are three forms that show promise for legal development: a human right to a healthy environment; (ecosystemic) rights of nature; and animal rights.

⁴ Mathew Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14 *Canadian Journal of Law and Jurisprudence* 29; *Tilikum et al v Sea World*, 842 F.Supp.2d 1259 (SD Cal 2012) 7 and *Animal Welfare Board of India v A. Nagaraja & Ors* Civil Appeal No. 5387 of 2014 [49], [51], [55], [60].

⁵ §4.2; §9.7.2. With respect to RoN, see Christopher Stone, 'Should Trees Have Standing?' (1972) 45 *S Cal L Rev* 450, 488-89; Christopher Miller, *Environmental Rights* (Routledge 1998) 176-87; Ngaire Naffine, 'Legal personality and the natural world: on the persistence of the human measure of value' (2012) 3 *JHRE* 68, 71.

10.3.1 A HUMAN RIGHT TO A HEALTHY ENVIRONMENT

A human right to a healthy environment exists in numerous national constitutions; has been created within the African and Inter-American regional human rights regimes; and has been referred to by the European Aarhus Convention. This right goes above and beyond the 'greening' of existing human rights since it provides a clear endorsement of the importance of environmental conditions to human dignity and permits for environmental issues to feature directly in standard setting and balancing processes within IHRL.

Furthermore, by operating under a broad definition of 'healthy environment' – including both ecocentric and anthropocentric reference points such as clean, diverse, beautiful and functioning ecosystems – this right can truly offer increased substantive protection to both humans and nonhumans. In particular, it would place states under obligations to create and implement legal frameworks to protect biodiversity, and enhance IHRL's ability to set (context-specific) standards for determining appropriate environmental conditions. Such a broad definition is not only possible, but has received support within national and international law. Furthermore, it would ensure that a human right to environment is not redundant by providing levels of environmental protection that 'greening' cannot.⁶ It would also contribute towards softening the divide between humanity and nature through its endorsement of the human need for healthy ecosystems.

⁶ §3.3.

This thesis suggests that a human right to a healthy environment should be codified at the global level and should be vested in both individuals and groups. There are dimensions of environmental protection better understood as being of individual (or collective) concern (eg local pollution issues), but there are also environmental problems that necessitate a group response (eg global biodiversity loss). The groups to be protected by a human right to a healthy environment are envisaged here as broader than the definition of a 'people' normally seen within IHRL.⁷ In fact, a truly global understanding of groups is required to meet the global environmental problems facing the world today. That is, the nature of issues such as climate change potentially means that:

The only viable perspective is a global one, focused not on the rights of individuals, or peoples, or states, but of humanity as whole. It would reconceptualize in the language of economic and social rights the idea of the environment as a common good or common concern of humanity.⁸

Limitations remain to using human rights to effect environmental protection. The important criticism that drove the remainder of this thesis was the problem of anthropocentrism. This can be overcome to an extent by using ecocentric reference points for a 'healthy environment'. However, human rights are by definition vested in humans and are thus unavoidably

⁷ §1.4.2.

⁸ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *EJIL* 613, 641.

anthropocentric. This anthropocentrism can be softened by understanding the human rights subject as not only embodied and socially embedded (as IHRL currently does), but as ecologically embedded too. Humans, as living organisms, have a vital interest in forming ecological communities. This interest contributes to grounding a human right to a healthy environment and demonstrates why the definition of a 'healthy environment' should include ecocentric reference points.

However, the recognition that (human) flourishing happens in ecological as well as social communities points to a more radical, and potentially more successful, way to overcome this anthropocentrism. This is through the use of nonhuman rights. All organisms flourish in ecological communities and have an interest in healthy environments. The two approaches are interconnected and potentially highly compatible: both environmental human rights and RoN can be grounded in organisms' vital interest in forming ecological communities.

Another possibly undermining limitation of environmental human rights is related to scale. In terms of both time and space, environmental problems function in a way that extends IHRL to its limits. The conferral of standing upon future generations,⁹ and the achievement of closer alignment between extraterritorial applications of human rights and transboundary problems in international environmental law¹⁰ may potentially help solve these problems.

⁹ §2.4.1(b).

¹⁰ §2.5.3.

This thesis has demonstrated how best human rights can be used to protect the environment. By defining a human right to a healthy environment broadly, some of the key problems associated with it (such as redundancy) can be overcome, and a differentiation made between greened human rights and a human right to environment. The latter right can be a useful tool in protecting the natural world as long as it does not become the pinnacle for ecocentric environmental protection. The reason why it must not do so is because it is a priori incapable of acknowledging that moral duties are not only owed to humans. Since human rights are vested in humans, they can only protect the natural world *for the sake of humans*. No matter how ecocentrically defined, a human right to a healthy environment cannot capture that “[e]very form of life is unique, warranting respect regardless of its worth to man”.¹¹ This is a significant limitation, since ecocentric formulations of morality are key to both environmental ethics and law.

Future research can build on this thesis by exploring how a human right to a healthy environment could be established globally (eg through a standalone treaty, a protocol, or through General Comments); further elaborating the particular duties that would arise from the right; and investigating how an ecocentric definition of a healthy environment can align with other human rights. The concepts of ecohealth, biophilia, solastalgia and relational values may be helpful here,¹² as might the

¹¹ WCN, Preamble.

¹² §3.2.1.

development and alignment of principles from both IHRL and environmental law regarding extraterritoriality and intertemporality.

10.3.2 RIGHTS OF NATURE

The other category of environmental rights suggested as a valuable tool for environmental protection by this thesis are rights of nature (RoN). These are less well-established, but the idea of nonhumans as rights-holders is gaining momentum within national law and recognition within international fora. Part II of this thesis demonstrated that it is technically possible to vest rights in nonhumans; Part III constructed an argument that vital rights should be vested in nonhumans.

The thesis has used an Interest Theory approach to provide a stable foundation for RoN and to interlink them with IHRL. It has done this by showing that RoN, conceptualised as vital rights, can be conceived of as protecting nonhuman vital interests and dignity, just as IHRL protects human vital interests and dignity.

The case made in this thesis for the creation of nonhuman vital rights is thus reliant on demonstrating the existence of nonhuman dignity. An argument for the existence of nonhuman dignity has been made in a non-extensionist way. That is, rather than identifying attributes of certain other organisms that make them similar to humans, the thesis has analysed the very nature of vital interests and dignity. In particular, it has argued that dignity arises when something has a vital interest additional to the one in continued biological functioning.

The thesis has shown that many of the vital interests grounding IHRL are applicable beyond the human species. This is not because other organisms are somehow 'nearly human', but rather because the subject of vital rights (including the human rights subject) is a living being. As such, it is not surprising that other living beings also have vital interests: they are the essential interests of living beings after all.

Living beings have essential interests because they are autopoietic. Being autopoietic means that organisms have internally-defined goals (self-organisation and self-production), and they participate in activities in order to achieve these goals. As such, organisms have interests in the state of the world: things can go well or badly for them according to the fulfilment of their goals. Organisms are not neutral, but are loci of valuational activity with their own perspective on the world (their *Umwelt*). At the very least, organisms have a vital interest in continued biological functioning.

Furthermore, the inherent relationality of autopoietic organisms means that they have an additional vital interest. Autopoietic organisms are inherently relational because in order to self-produce, they must intra-act through semi-permeable membranes with the world 'outside'. The ecological 'Self' and 'other' are not independent, but co-constitutive. The ecological world is composed as much of relations as of matter, and the intrinsic relations and communities formed by organisms are essential to their flourishing. As a result, all organisms have a vital interest in forming ecological communities. This implies that organisms too have dignity: it is not just mere survival that matters to organisms, the kind of life matters too.

Because living organisms have dignity, they are viable candidates for the protection of vital rights. Nonhuman dignity is not the same as human dignity, and so nor should nonhuman rights be the same as human rights. Dignity is variable and pluralistic, and so vital rights should be variable in response: human rights are for humans, dolphin rights are for dolphins, forest rights are for forests. However, discerning parallels in the justifications for IHRL and RoN facilitates re-imagining of humans and the natural world as unified rather than distinct. This is potentially the greatest strength of RoN.

The thesis has also argued that the dignity of organisms can be best addressed at the ecosystem level. That is, rather than seeking to bestow rights on “Mother Earth and all beings of which she is composed”¹³ as the UDRME does, this thesis has argued that it is more manageable and justifiable to vest RoN in ecosystems, even though they are ultimately justified by the dignity of organisms. This is a valid approach because ‘organisms’ and ‘ecosystems’ are two perspectives of the same underlying reality. Organisms are ‘organisms-in-their-ecosystems’, and ecosystems are ‘ecosystems-through-their-organisms’: the ecosystem and the organism are equiprimordial.

The ecosystem perspective is appropriate for the vesting of RoN because it immediately captures and is concerned with the relationality of organisms. By protecting the ecosystem, organisms’ interest in forming ecological communities can be respected, protected and fulfilled. This is comparable

¹³ Article 2(1).

to how peoples' rights are used by IHRL to protect the social embeddedness of humans.

There are, moreover, additional motives for protecting the dignity of organisms through ecosystem rights: both ecology and existing environmental law are often already focussed at this level-of-organisation; they provide a defensible simplification that overcomes the impossibility of accounting for the interests of every living being; and ecosystems are themselves potential bearers of dignity¹⁴ and/or intrinsic value.¹⁵ As well as vesting rights in ecosystems, it may also be appropriate to vest RoN in the whole biosphere (or Mother Earth). Although ecosystems can be identified as units (and legal subjects can be made of them), they will always interact with one another. As a result, many environmental problems are truly global in scope (eg climate change), and solutions to such problems require a whole-Earth perspective. Vesting rights in the Earth would also help reconceptualise the natural world as a common good not only of humanity, but of all forms of life. Such an approach is certainly possible, and warrants further investigation: it is not clear that the same justifications and content for vital rights can simply be extrapolated to a different level-of-organisation.

Focussing on ecological interconnectedness for justifying RoN is, however, not without its flaws. Examples can doubtless be given of the extraction of organisms from their natural environment that hardly seem to entail a

¹⁴ §8.3.4.

¹⁵ §9.6.1(d).

violation of dignity. It seems unlikely that RoN should protect against the keeping of houseplants, for instance.¹⁶ This may be a result of the difficulty in moving between the organism perspective and the ecosystem perspective, or it may demonstrate a need to develop understanding of the vitality and versatility of many nonhuman lifeforms. In either case, the balance between individual interests and ecosystem integrity is an issue that RoN will have to engage with more fully in order to further solidify their justification, their content, and their duties.

Examples that may help understand how to balance these discrepancies are particularly abundant in agricultural systems. The differences between monoculture and permaculture, or between fertilisation by petrochemicals and by nutrient-recycling, indicate the importance of connection without demanding that rights be vested in every single organism. Food systems in general provide an excellent arena for developing many of the themes discussed in this thesis (factory farming and therapeutic horticulture being other examples). Further research in this area could identify agricultural practices that are and are not compliant with RoN, for example.

As regards some of the technical aspects of RoN, it is clear that they require the creation of new legal subjects. This is technically unproblematic. Since legal personhood is a construct invented by humans, it can be defined however humans wish. The Hohfeldian analysis has demonstrated that legal subjects need not hold identical or symmetrical legal positions

¹⁶ Although these are hardly isolated: the soil is full of life. See Rudolf Steiner, *Agriculture Course: The Birth of the Biodynamic Method* (George Adams tr, Rudolf Steiner Press 2004) 68-69.

(in particular, being a right-holder does not require being a duty-bearer). This appropriately non-identical extension of legal personhood has already been seen in the creation of IHRL and in the *Reparations* case. Furthermore, the apparent 'fuzziness' of the boundaries of ecosystems should not be seen as too damaging: both peoples and indeed individual humans show some element of fuzziness in their boundaries too, yet legal systems have plainly proved capable of vesting rights in them.

Related to, but distinguishable from, the identification of the correct holders of RoN is their representation. As seen in established RoN laws, it is possible for appropriate representation for RoN to be found (NGOs are perhaps the best candidate). The detailed arrangements for this within international law requires further research. Recalling the divide seen in Chapter Three between legal viability and moral legitimacy, representation falls into the former category, whereas this thesis was primarily concerned with the moral legitimacy of RoN.

Finally, although the content of ecosystem rights has been discussed in this thesis, greater detail is still needed. Identifying appropriate duty-bearers for RoN, and the content of their duties, is an issue connected to this. Precedents from RoN in Bolivia, Ecuador and New Zealand, and from the mock tribunals set up by the Global Alliance for Rights of Nature,¹⁷ may help determine what works and what does not work from both legal and environmental perspectives. What seems promising is for the content of RoN to be focussed on the processes through which living organisms

¹⁷ See <<http://therightsofnature.org/lima-2014-tribunal/>> (accessed 21/4/2015).

regenerate themselves (such as water and nutrient cycles), as well as on safeguarding ecosystems that are themselves resilient, focussing on non-fragmentation, diversity, and undammed rivers. An overarching principle that can guide the content of RoN is for humans to work with rather than against natural processes.

Broadly speaking, the RoN approach gives a voice to the nonhuman natural world which is difficult to achieve without the legal tool of a right. Vital rights have been used to elevate and protect the most important aspects of being a human, coded for through 'human dignity'. They can also be used to protect nonhuman dignity. This thesis has contributed to RoN-theory by demonstrating how RoN can be aligned with IHRL through an Interest Theory approach. This can play a valuable role in the creation of a new cosmology (or mythology) which resituates humans as a part of the natural world and can effectively guide human action in the 21st Century. It also allows human rights to be seen as an example of the species-specific rights referred to in Articles 1(6) and 4(2) of the UDRME, further endorsing humans' status as first living beings. A cosmology which endorses RoN will see humans as first violin, rather than the conductor, of Earth's living orchestra.

10.3.3 INDIVIDUAL NONHUMAN RIGHTS

There is also a strong case (and evolving legal pathways) for individual rights of certain nonhuman organisms. This thesis has demonstrated that it is technically possible for nonhumans to be the holders of rights through a rigorous and clear Hohfeldian analysis of the nature of rights themselves. Individuals of domesticated species, and those which are more 'individual'

than they are 'continuous'¹⁸ (including livestock, pets and animals used for research) are the forerunners here. The content of these rights can be aligned (though not equated) with the content of human rights.

However, it is not readily apparent that such rights contribute towards environmental protection. They may improve the lives of caged chimpanzees and factory farmed pigs, but they are not directly concerned with the state of the natural world at large. On the other hand, if bestowed on wild animals (such as in the Helsinki Declaration), then their role in environmental protection is more visible. In particular, human and (eg) dolphin rights to a healthy environment could be seen to work in tandem. Individual nonhuman rights also contribute towards shifting attitudes towards the nonhuman world and demonstrate the softness of the divide between humanity and nature. Their effect can therefore be seen as indirect rather than direct.

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A potential problem with the nonhuman rights seen in this thesis must be noted. An asymmetrical development of nonhuman rights may be under development. Certain organisms (eg chimpanzees) and certain ecosystems (eg Te Urewera) could be bestowed with legal rights before others. There may be a prioritisation towards the more culturally and/or ecologically significant species and ecosystems in this regard. Such rights cannot then be said to be universal, an important feature of human rights. This trap can be dealt with by pointing out that dignity and the moral core is

¹⁸ §9.6.1(b).

universal, even if the securing claim-rights are not. The differentiation arises in considering where it is that human responsibility lies.¹⁹ The legal architecture protecting nonhuman dignity is dependent on the relationship between the humans and the nonhumans in question. It is essential in this regard to remember that the creation of nonhuman rights is concerned with regulating *human* behaviour (humans are the only suitable Hohfeldian duty-bearers after all). Choosing the most suitable legal forms must have in mind the nature of human duties appropriate to secure rights as much as philosophical theories underpinning claims and liberties worthy of being rights.

10.4 DIGNITY, HUMANITY, ANIMALITY

The concept of dignity has been integral to the thesis. It is worth summarising what has been seen about it and making some final observations concerning it. Dignity may be a vague and abstract concept, but it is not entirely arbitrary and meaningless. This thesis has established a number of features of dignity.

10.4.1 DIGNITY SIGNPOSTS WHAT MATTERS AND WHY IT MATTERS

Dignity serves two functions within vital rights. Dignity is both a metric, shepherding the content of vital rights and assisting in their interpretation; and a justification for the existence of vital rights 'to begin with'.²⁰ Because dignity serves as both metric and justification, it signposts both what matters and why it matters. The contours of dignity follow the contours of

¹⁹ §9.6.1(a).

²⁰ §1.5.1n191.

suffering and flourishing; but dignity also has the ability to invoke responses and call for action. Dignity demands that suffering be prevented and flourishing promoted.

These two roles are inevitably intertwined: chimpanzees (eg) matter because there are things that matter to and about them. They must be treated with dignity because they have dignity; and they have dignity because it is possible to treat them in an undignified way. Dignity is multifaceted and multifunctional – it must be for it to be able to underpin the potent legal and moral norms contained within vital rights.

10.4.2 DIGNITY ARISES WHEN MORE THAN SURVIVAL MATTERS

The possibility (though undesirability) of undignified treatment also reveals an important feature of dignity. Because dignity is a metric as well as a justification, it is a richer and more variable concept than the similar concept of intrinsic value. In this thesis a distinction between the two has been drawn on account of the fact that dignity, unlike intrinsic value, is also concerned with the detailed nature of appropriate treatment, rather than just being an end-in-itself.²¹ Having dignity means that it is desirable to live a life in dignity, the details of which are determinable through dignity's role as a metric. The possibility of living an undignified life means that dignity exists when there are things *other than mere survival* of value.

As there are potentially numerous things other than mere survival that are of value to organisms, and because these are not necessarily universally

²¹ §8.4.1-8.4.2.

applicable, dignity is pluralistic, flexible and variable.²² It is not just life that matters to something with dignity, but the kind of life. This thesis has further explained this distinction through the lens of vital interests.

10.4.3 DIGNITY CAPTURES WHAT IS ESSENTIAL TO LIVING BEINGS

Vital interests are the essential interests of living beings. Because vital rights protect both dignity (rhetorically) and interests (analytically), it is possible to overlap the two concepts. This thesis has argued that dignity is specified through vital interests because dignity captures what is essential to living beings.²³ Furthermore, since dignity arises when more than mere survival is of value, dignity arises when something has a vital interest *additional to* the one in continued biological functioning.²⁴

The thesis has shown that organisms' essential interests arise through their autopoietic nature.²⁵ There is a reason why possessing dignity requires an interest additional to the one in biological functioning. This is because that interest can in some senses be considered to be the basic interest: it is not possible to have other vital interests without having one in continued biological functioning. The possession of further interests, though they are indicative of more complex forms of life, also represent restrictions and limitations on how an organism can survive and flourish. Organisms have these further interests because they are limited in how

²² §6.4.2.

²³ §6.5.

²⁴ §8.4.2.

²⁵ §9.2.

they can effect their continued biological functioning: not all conditions are equal from an organism's point of view, and it is the simpler organisms such as bacteria that are able to survive under a much greater variety of conditions and so have fewer vital interests. There is thus somewhat of a hierarchy between vital interests, which is connected to the varying complexity of life and the increased specialism and limitations that increased complexity brings. This thesis provides ground for further research into this area: linking concepts such as autopoiesis, autonomy, dignity, agency, legal subjectivity, capabilities, and vulnerability.

It is also important to note that dignity cannot be entirely reduced to vital interests. Dignity carries something above and beyond what a simple set of interests can. This is because dignity also represents the fusion and the togetherness of these interests and the subject they inhere in. Through this overarching character of dignity, it is able to call out for action in a coherent and unified fashion and so function as a justification for vital rights. Dignity represents the fullness and vitality of life, something so complex that any attempt to analyse it will always provide only a limited perspective.

10.4.3 DIGNITY INHERES IN EMBEDDED ORGANISMS

Because dignity is tied to the very essential processes of life, and because dignity is not a status to be awarded,²⁶ dignity is inherent in living organisms (a result of 'a real, historical and biological birth'²⁷). As such,

²⁶ §1.5.2.

²⁷ §6.4.1n62.

dignity arises through physical processes: it is not a supernatural phenomenon, nor is it some non-material 'implant', but instead it is bound up in and emerges through the embodied and embedded nature of living organisms.²⁸

The thesis has shown that much of the content of dignity is not exclusively human, nor is human dignity derived from a status of humans-as-opposed-to-animals, but rather from humans' status as living beings.²⁹ This is important: dignity should not be used in a vain attempt to maintain an arbitrary division between the human and the nonhuman, but rather to celebrate the vulnerability and animality of humanity that we share with other forms of life.

Humans have the privileged ability to reflect on our own existence. Through this capacity, we have unEarthed ourselves from our bodily world into a psychological, mythological and philosophical one. The development of most major world religions in the first millennium BCE "made it possible in principle for the self to become disembedded from society and society from the given world of nature".³⁰ However, humans cannot escape our worldly and bodily selves: attempting to deny these results in an impoverished conceptualisation of what it is to be human since they are crucial and axiomatic to who we are. Denial of our animality works to the detriment of humans and nonhumans alike.

²⁸ §6.4.

²⁹ §6.4.3; §8.2-8.3.

³⁰ The so-called 'Axial Age': Robert Bellah, *Imagining Japan* (University of California Press 2003) 6.

Perhaps most importantly, dignity is shared and arises through relation.³¹ Although the loci of dignity may be individual organisms, these organisms are not exclusively individual after all. They exist through intrinsic relations and their flourishing happens in community.³² Dignity therefore is caught up in relations and processes which are not only physically 'outside', but even operate at levels-of-organisation other than the individual altogether (eg families or ecosystems). The importance of the social dimension of being human is gaining recognition through, inter alia, peoples' rights. This thesis contends that there is a parallel to be found in the ecological dimension of dignity, one common to all forms of life, to be recognised and protected through, inter alia, ecosystem rights.

10.5 CONCLUSION

There is not one simple approach by which vital rights can be used to protect the natural world, but many related ones. The various approaches overlap with one another. For example, procedural and substantive environmental human rights work best in tandem; both humans and nonhumans have a demonstrable interest in living in a healthy environment; and RoN share content with environmental human rights. Perhaps most significantly, the interest in forming ecological communities can ground both a broadly defined human right to a healthy environment and rights of ecosystems.

³¹ §1.4-1.5; §2.4.1; §3.4; §4.4; §5.5.2, §6.4; §7.3.3; §8.4; §9.2-9.4.

³² §9.2-9.4.

These overlaps are a result of the shared nature of interests of living beings. That interests are shared in this way is a consequence of our thoroughly relational, interconnected and continuous world. Given Part II's defence of the claim that rights protect interests, it follows that neither the subjects nor the content of environmental rights can be housed in watertight boxes. Importantly, this is true as much between humanity and nature as it is within the nonhuman realm. That is, human interest in the state of the natural world operates broadly in tandem with nonhuman interest in the state of the natural world. As (first) living beings, it is impossible to cut human interest apart from the interest of other living systems. An important consequence of this is that it is ultimately in the interest of humans that nonhumans be protected too. This is in line with Bryan Norton's 'Convergence Hypothesis' which states that "policies serving the interests of the human species as a whole, and in the long run, will serve also the 'interests' of nature, and vice versa".³³

There will of course be discrepancies between the immediate interests of humans, other organisms, and the ecosystem (conflict will be felt both within and between these three categories). But the role of vital rights is to demarcate the boundaries within which these discrepancies cannot be traded off. They are the moral bedrock, not the solution to all ethical and legal dilemmas. Already a degree of balancing is present within both environmental and human rights law, and the creation of more ecocentric rights would simply frame these balancing processes. That is, additional

³³ Bryan Norton, *Toward Unity Among Environmentalists* (OUP 1991) 240.

environmental rights would allow for concerns over the state of the natural world and over the moral demands of nonhuman organisms to feature in the same framework – and with the same language, rhetoric and legal form – as other important values which have already received the protection of vital rights.

A plurality of environmental rights also allows for a plurality of pragmatic approaches. It allows flexibility in terms of which level to focus at (ecosystem or organism, human or nonhuman). This flexibility serves to strengthen the twinned systems of environmental and human rights law by providing mutually supporting (although at times contrasting) ways to understand complex problems. As seen in Chapter Nine, a multitude of perspectives is essential.

In terms of establishment, a piecemeal introduction of environmental rights seems both likely and appropriate. Rights of individuals of domesticated species, rights of culturally or ecologically important ecosystems, and a human right to a healthy environment are the forerunners in this regard.

The existence of nonhuman vital interests, or nonhuman intrinsic value, or even nonhuman dignity, does not mean that the creation of nonhuman rights is mandatory. Rather, it simply provides a possible justification for them. The decision to create RoN is ultimately a political one. This may well turn out to be a sensible decision, given its potential to protect all living beings (humans included). The point is to add ecological dimensions

to existing ethics, not to replace an anthropocentric ethic with a misanthropic one.³⁴

Vital rights, justified by dignity, can be used as tools to protect life on this planet. Much of human dignity is shared with and similar to that of others, both human and nonhuman. These overlaps are most apparent when considering the ecological aspects of dignity, but exist elsewhere too. Environmental rights can work best when their adversarial nature is turned down and their ability to protect corporate entities such as ecosystems used. To this end, ecocentric models for rights, with both humans and nonhumans as their subjects, presents the most promising way forward for using vital rights to protect the natural world through international law.

³⁴ Patrick Curry, *Ecological Ethics* (2nd edn, Polity Press 2011) 57-59.

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