Introduction: the right to a healthy environment revisited as a necessary leverage point in times of climate crisis in Europe and beyond?

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ORIGIN

This edited book was originally intended as a tribute to Luc Lavrysen, Emeritus Professor at the University of Ghent, to be presented to him on the occasion of his retirement ceremony. It is by no means an exaggeration to say that Luc, who was appointed judge in the Belgian Constitutional Court in 2001 and became its President in 2020, has been one of the leading legal scholars in the field of EU and constitutional environmental law during the past decades. His list of professional awards and achievements is too long to include here. As recently as April 2023 he received a medal of honour from the World Jurist Association for his contribution to the promotion of the rule of law. Few people have researched and practiced the right to a healthy environment as long and as intensively as Luc Lavrysen. In the meantime Luc’s retirement ceremony had already taken place in late 2021. Fortunately, we were able to present a collected work in Dutch with a focus on climate litigation, in which the most recent case law developments were discussed.1 However, given Luc’s international appeal as a scholar, we did not let go of the quest for a tribute book in English.

The book’s main focus is the right to a healthy environment, Luc’s principle field of expertise during the last two decades. In this light, the choice of a topic for his tribute book was not particularly hard, especially since many of Luc’s colleagues and friends also have a vast expertise and experience in this field. As a result, the contributors to these chapters share not only their particular

1 Hendrik Schoukens and Carole Billiet (eds), Klimaatrechtspraak. Waarom rechters het klimaat (niet) zullen redden (die Keure 2021).
expertise in the field of environmental law and the human right to a healthy environment, but also their friendship and admiration for Luc.

Yet in the meantime the relevance of the human right to a healthy environment for mankind as a whole needs little further explanation. These are unprecedented times. Not only for the planet, but also for its human and non-human inhabitants. When finalizing this book in July 2023, it was confirmed that June 2023 had been the warmest June globally on record, according to data released by the European Union’s Copernicus Climate Change Service. And the hottest day ever on Earth since records began occurred on July 3, 2023, recent findings revealed. This frightening record was quickly smashed. Just one day later it was revealed that July 4, 2023 was the hottest day on Earth in as many as 125,000 years. The average global temperature reached 17.01°C. The impact of climate change has become increasingly more tangible on the European continent as well. Just one year ago, in 2022, Europe experienced the hottest summer on record and the second warmest year ever, according to the latest European State of the Climate report. Especially in Western Europe, peak summer temperatures were as much as 10°C higher than normal, with temperatures in the United Kingdom reaching a record of 40°C. According to recent figures, the heatwave of last summer caused 61,000 heat-related deaths in Europe, which appears to be the fastest-warming region in the world. Other studies highlighted that temperatures across Europe are rising at twice the

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4 ‘This July 4 was hot. Earth’s hottest day on record, in fact’, https://www.washingtonpost.com/climate-environment/2023/07/05/hottest-day-ever-recorded/, accessed July 15, 2023.

5 ‘2022 was Europe’s hottest summer but warmer years are likely to come’, https://www.newscientist.com/article/2369908-2022-was-europes-hottest-summer-but-warmer-years-are-likely-to-come/, accessed July 15, 2023.


global average rate, with the continent having experienced 2.2°C of warming since pre-industrial times.⁸

The effects of this steep temperature rise are particularly noticeable in the polar regions. Records are shattered every year. Since satellite measurements started 40 years ago, about half of the sea ice area in the Arctic has been lost, recent studies have revealed.⁹ On February 21, 2023, sea ice in the Antarctic set a record low for the second year in a row, which was unprecedented.¹⁰ The shrinking sea ice cover both in the Arctic Ocean and in Antarctica, while partly dependent on yearly weather conditions, probably represents one of the most worrisome illustrations of global warming, i.e. the intensified greenhouse effect caused by burning fossil fuels and clearing forests at an ever faster pace. Other planetary boundaries are being exceeded as well. The advent of industrial agriculture at the beginning of the 20th century has skyrocketed human-induced nitrogen emissions, significantly disrupting the natural nitrogen cycle.¹¹ Nitrous oxide levels are currently higher than at any other time during the last 800,000 years.¹² The massive extent of the current biodiversity crisis, which results from the above-mentioned human activities, led Paul Crutzen to dub the time period in which we live, and which is officially labeled the ‘Holocene’, the ‘Anthropocene’ in 2000.¹³

The Anthropocene is also impacting the European continent, which represents the main territorial focus of this book. In spite of the return of large carnivores and other charismatic species to some parts of the European continent, only small portions of protected species and habitats are currently in a favorable conservation status, with many farm-related species facing a continuous decline.¹⁴ These bleak findings arguably stand in sharp contrast with the image the European Union (EU) wants to project globally. Although EU environmen-

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¹² Adrian Schilt et al., ‘Glacial–Interglacial and Millennial-Scale Variations in the Atmospheric Nitrous Oxide Concentration during the Last 800,000 Years’ (2010) 29(1–2) Quaternary Science Reviews 182–192.
tal and climate policies have yielded substantial benefits over recent decades, the EU still fails to halt ongoing biodiversity loss and struggles with mitigating environmental risks to well-being and health.\textsuperscript{15} For instance, the European Environment Agency’s 2020 State and Outlook report on the European environment pointed out that the EU climate policies have succeeded in reducing greenhouse gas emissions by 22\% between 1990 and 2017, while emissions of pollutants to both water and air have also been significantly slashed.\textsuperscript{16} Yet, at the same time energy demand has increased, harmful emissions from transport and agriculture have risen and the production and consumption of hazardous chemicals have remained stable.\textsuperscript{17} It also remains unclear to what extent the EU Emissions Trading Scheme (ETS), which has proven to be effective to significantly reduce greenhouse gas emissions in the sectors to which it applies, does not lead to ‘carbon leakage’. Recent reports indicate a gradual shift in emissions towards regions outside Europe, which can also be seen in the rising carbon footprint of European consumption.\textsuperscript{18}

In a study released in June 2023, the European Court of Auditors concluded that the EU Member States remain notoriously vague in their plans to meet climate targets and, due to a significant financing gap, could risk not meeting the EU’s objective of reducing emissions by 55\% below 1990 levels by 2030,\textsuperscript{19} whereas a heated political debate has arisen about the desirability of adopting the Nature Restoration Law, which was proposed by the European Commission in June 2022.\textsuperscript{20} By promulgating a comprehensive EU regulation focusing on the restoration of Europe’s degraded habitats, which constituted a vital building block of the EU’s Green Deal, an ambitious package of policy initiatives and legislation, which aims to set the EU on the path to a green transition with the ultimate goal of reaching climate neutrality by 2050, the EU would have been a pioneer as the first region in the world with a comprehensive set of binding legal rules aimed at the restoration and protection of eco-

\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
systems, and also beyond the existing protected sites. However, the proposed regulation is vehemently opposed by a coalition of farmers, industrialists and conservative politicians. Long gone are the days when the EU appeared capable of producing new packages of progressive environmental legislation. The despair among many scientists faced with this recent surge in political opposition to a new, much-needed wave of legislation aimed at both curbing the greenhouse gas emissions and adapting the European continent to a warmer future has become particularly palpable in the wake of June 27, 2023, which saw the rejection of the proposed EU Nature Restoration Law by the European Parliament’s Committee on Environment, Public Health and Food Safety.

Although the EU Nature Restoration Law was provisionally adopted in the plenary session of the European Parliament on July 12, 2023, many amendments were passed which seriously weakened the content of the proposed regulation. In November 2023, negotiators from the European Commission, EU countries and the European Parliament agreed on a compromise text, which still had the major aim of restoring at least 20% of Europe’s land and sea areas by 2030 and all ecosystems in need of restoration by 2050. Whereas the core of the proposed legislation was maintained, some major concessions were made to appease the critics of the law. Changes include removing the requirement to renature 10% of farmland and adding an emergency brake to freeze farmland targets in case they impact food security or production. Concessions were also made around rewetting peatlands, whereas the general non-deterioration clause was turned into an efforts-based obligation (rather than a result-based duty).

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A BEACON OF HOPE AT INTERNATIONAL AND NATIONAL LEVEL

In sharp contrast with the doom and gloom arising from the impending environmental challenges and recent political discussions, even in a region such as Europe, which is often presented as an environmental frontrunner, recent international developments with respect to the right to a healthy environment seem to justify this fresh wave of optimism. For indeed, recent years have seen a major breakthrough when it comes to the legal recognition of the right to a healthy environment. In an unprecedented move, on October 8, 2021, the United Nations (UN) Human Rights Council adopted Resolution 48/13, recognizing that a clean, healthy and sustainable environment is a human right. This new reality was further underscored by the UN General Assembly in the summer of 2022, with 161 votes in favour, and eight abstentions, declaring access to a clean, healthy and sustainable environment to be a universal human right. The resolution stipulates that the right to a healthy environment is related to existing international law and affirms that its promotion requires the full implementation of multilateral environmental agreements. It also explicitly recognizes that the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, and the resulting loss in biodiversity interfere with the enjoyment of this right – and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights. It was further highlighted that this ‘human’ right was a right for all, not just a privilege for some.

This landmark resolution is to be regarded as the provisional last step in a long process of gradual recognition of the right to a healthy environment at both national and international levels. While this resolution has a non-binding character, it represents yet another argument why this book on the right to a healthy environment is very timely and relevant. Indeed, the precedent value of the latest developments cannot be understated, especially since they represent the provisional last step of a decades-long gradual evolution towards the comprehensive integration of environmental concerns into the body of human rights law. The traditional understanding of the evolution of human rights holds that there are three generations of human rights. While the first and second generations of human rights reflect more individual-based approaches, as enshrined in the International Covenant on Civil and Political Rights and

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the International Covenant on Economic, Social and Cultural Rights, the third
generation emphasizes the collective dimensions. The collective rights that
appeared at the forefront of the discourse included the right to peace, the right
to self-determination and the right to a healthy environment. Although the
sharp distinction between these three generations of rights is often criticized, it
still helps to understand the gradual emergence of the right to a healthy envi-
ronment on the international plane.  

International rights-based efforts to better protect the environment go back
to the 1972 Stockholm Declaration, which already stipulated that ‘[m]an has
the fundamental right to freedom, equality and adequate conditions of life, in
an environment of a quality that permits a life of dignity and well-being, and
he bears a solemn responsibility to protect and improve the environment for
present and future generations’.  

However, the 1972 Stockholm Declaration lacked binding force, while at the level of the United Nations no significant
efforts were undertaken to further recognize the importance of the right to
a healthy environment at the international level. Even so, the 1972 Stockholm
Declaration undoubtedly facilitated the further manifestation of the right to
a healthy environment at regional and national level. This in turn paved the
way for national commitments. As of today, the right to a healthy environment
can undoubtedly be singled out as one of the most popular manifestations of
environmentalism during the past decades, achieving some form of constit-
tutional or legal protection in more than 150 states. Also in the EU, Article
37 of the Charter of Fundamental Rights of the European Union includes
a reference to the protection of the environment, stipulating that ‘[a] high
level of environmental protection and the improvement of the quality of the
environment must be integrated into the policies of the Union and ensured in
accordance with the principle of sustainable development’.

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The recent international developments and their increased popularity at the national level seem to underscore the normative value of the right to a healthy environment. Especially at the national level, the right to a healthy environment appears to be the most impactful, for instance as a precursor of more progressive environmental policies and legislation or as a shield against unsustainable project decisions or the backsliding of environmental protection in court cases. However, it is fair to say that the debate as to the alleged added value of the right to a healthy environment has not yet been settled. And thus it presents another reason why this book comes at the right moment.

In his seminal 2011 study on the instrumental effects of the constitutional enshrinement of the right to a healthy environment, David Boyd outlined the main advantages attached to such an approach. It is believed, pursuant to Boyd, that the constitutional recognition of the right to a healthy environment will advance environmental protection, for instance by providing an impetus for stronger environmental legislation, bolstering its enforcement, offering a safety net and protecting environmental laws and regulations from rollbacks under future governments. On a more general level, it is hoped that the constitutional protection of the right to a healthy environment will also serve as an incentive for the strengthening of environmental democracy through the promotion of environmental transparency and public participation as well as its potential function as a lever for better education of citizens, judges, politicians and public servants as to the urgent importance of environmental protection.

In his research, Boyd has demonstrated that many of these hopes are supported by a more in-depth analysis of the concrete operationalization of the right to a healthy environment in 193 constitutions and court decisions in more than 100 nations in Europe, Latin America, Asia and Africa. There indeed appears to be a correlation between the legal recognition of the right to a healthy environment, especially when included in the national constitution, and stronger environmental laws and enforcement. Boyd suggests, based upon the available research regarding the environmental performance of states, that there might even be a link between constitutional protection of the environment and superior environmental performance and improved quality of life.
However, during recent decades the added value of a human right to a healthy environment has remained somehow contentious and has still been challenged by some, pointing out among other things its limited effectiveness, inherent vagueness and lack of enforceability. Some authors submit that the perceived popularity of the right to a healthy environment is tied to the fact that it remains blurry at best as to the level of ‘environmental quality’ it presupposes. Alston, among others, aptly quoted that the ‘chameleon-like quality’ of the right to a healthy environment facilitates the garnering of consensus. In light of its vague wording, which is further underscored by the usage of notoriously broad terms such as ‘health’, ‘adequate’, ‘clean’ and even ‘environment’, nobody is really worried enough to gather forces to oppose it, since everyone can read in it whatever he or she wants and, even when implemented in the constitution, nothing will ever change. This ties in with the well-known criticism that is often voiced vis-à-vis the use of concepts such as sustainability and sustainable development, which is linked to their inherent vagueness. As a result, ‘sustainability’ has become a buzzword, also indirectly leading to greenwashing and other deceptive marketing campaigns. ‘Weak’ sustainability, for instance, considers the economic system as a closed and isolated system that can grow infinitely. ‘Strong’ sustainability, by contrast, assumes that there are some critical natural capital resources and services, which are irreplaceable and must be preserved at all costs. In other words, whereas the former notion seems to leave ample room for economic interests as a guiding factor for environmental policies, the latter seems to accept the planetary (ecological) boundaries as a strict framework which is to be observed when developing economic policies.

A similar critique might also arise in the context of the right to a healthy environment. As mentioned by influential scholars such as Prudence Taylor, even defining the relatively straightforward term ‘environment’ raises a number of complex questions. ‘Environment’ can mean, according to Taylor, ‘any point on a continuum between the entire and the immediate physical surroundings of a person or a group, and because it is a neutral term, environment can be pristine or decimated, or its condition can be defined as falling somewhere in’

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38 Ibid, 33.
40 Boyd (n 33) at 33–34.
In addition, with respect to the term ‘adequate’, which refers to the absolute or qualified nature of the right to a healthy and adequate environment, the World Commission of Environment and Sustainable Development (WCED) Legal Experts Group clarified that adequate makes clear that there are limits to the protection of the environment for the purpose of promoting the health and well-being of human beings. Indeed, those limits may to some extent even be dictated by the need to promote the health and well-being of human beings (e.g. by food production or housing).

More recently, a 2019 report of the United Nations Human Rights Committee, written by Special Rapporteur David Boyd, tried to identify the ‘vital elements’ that could be part of the right to a healthy environment, in particular in the context of air pollution and climate change, yet the debate has clearly not reached a final conclusion.

Furthermore, in terms of practical enforcement, the continued uncertainty in this regard might create further challenges when enforcing the right to a healthy environment in the courtroom. For instance, environmental activists might use the right as a tool to enforce rapid greenhouse gas reductions, whereas more moderate business people might paradoxically praise it as a justification for a slower and more gradual push towards sustainability. Of course, one might rebut part of this criticism regarding the vagueness of the right to a healthy environment, by pointing out that its alleged ‘fuzziness’ might also be liberating. Since nobody can really rally against the right to a healthy environment, it can still serve as a useful building block for more concrete environmental policies, aimed at the precise operationalization of its alleged environmental credentials.

However, from a legal perspective this contentious debate runs deeper. Some claim that the inherently vague wording of the right to a healthy environment renders it ‘unjustifiable’. If judges were to enforce such opaque norms, they would step into the shoes of the legislator, the argument goes, since they would prioritize their own ideological views when interpreting the constitutional provisions that include the right to a healthy environment. For

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43 Taylor (n 27) at 361.
a considerable time, this more conservative approach towards third-generation human rights also effectively hampered the development and further enforcement of the right to a healthy environment.\(^{47}\)

These lines of criticism might appear partly outdated, especially since recent experiences with the enforcement of a constitutionally enshrined right to a healthy environment show that it can effectively be enforced,\(^{48}\) yet should not be taken lightly since they tap into the recent opposition among some scholars against climate lawsuits, especially when based on relatively vaguely defined norms, such as tort law or even human rights, including the right to a healthy environment.\(^{49}\) The reliance on open-texture norms, such as the duty of care, in recent climate cases is often singled out as flying in the face of some core democratic principles, with some authors pointing out the lack of democratic support for the further operationalization of open-texture norms aimed at, for instance, stricter greenhouse gas reduction targets.

In this respect, the principle of \textit{trias politica} (separation of powers doctrine), according to which it is not for the judge to legislate, came to the forefront as a major obstacle. Pursuant to a traditionalist approach to the separation of powers doctrine – which in some jurisdictions is better known as the so-called ‘political question’ theory\(^{50}\) – it would not be possible to ask judges to order the government to enact rules or, alternatively, to hold the state liable based on open-ended provisions. It would in such instances be up to the (elected) legislator to step in and fill the gaps by adopting stricter environmental standards. Asking unelected judges to issue injunctions forcing the legislator or executive branches to step up their environmental targets would amount to a form of judicial activism which would fly in the face of the traditional approach to the separation of powers.\(^{51}\) Accordingly, going to court to order the government to enact more stringent environmental rules constitutes a fundamentally undemocratic move, merely aimed at avoiding the political stalemate

\(^{47}\) Boyd (n 33) at 37–38.


\(^{51}\) Bergkamp and Hanekamp (n 49) 106.
concerning serious environmental issues. Whereas Boyd in his 2011 analysis downplayed the risk of such excessive judicial activism based on his own findings, also pointing out the expansion of procedural environmental rights,\(^{52}\) it cannot be denied that this factor still remains influential in recent strands of environmental litigation, especially in the context of climate lawsuits.\(^{53}\) In its renowned 2019 decision in *Urgenda*, the Dutch Supreme Court elegantly articulated why its reduction order, which was based upon positive human rights duties, was compatible with the principle of *trias politica*\(^{54}\). However, other national courts, such as the Brussels Court of Instance in the Belgian climate case (*Klimaatzaak*),\(^{55}\) declined issuing concrete injunction orders, referring to the separation of powers doctrine. The provisional outcome of *Juliana*, the youth-based climate lawsuit against the United States government, in which the claims were partially based on the rationale of a constitutionally enshrined right to a stable climate, is illustrative of the contentious nature of lawsuits based on constitutionally guaranteed rights, such as due process, rights to life, liberty and property, as well as on the government’s duty to protect water and air. In dismissing the claims, the Ninth Circuit Court held that the argument and claims raised by the youth in this case pertained to the drafting of climate remedial plans, which required the court to delve into political discussions.\(^{56}\) It is thus safe to say that this debate has not reached a final conclusion as of yet and might re-emerge, especially in light of the growing relevance of the right to a healthy environment, both at international and national levels.

There is yet another point of criticism that often emerges in the context of a more rights-based approach to environmental protection. Some authors have held that enshrining the right to a healthy environment might create the illusion of a quick fix for complex topics, such as climate change, since it might give rise to the idea that all environmental challenges will be fixed if only one additional clause is added to the constitution, while the more systemic failures of our society, which are often deeply rooted in implementing legislation and regulations, are left untouched.\(^{57}\) Or, alternatively, that the right to a healthy

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\(^{52}\) Boyd (n 33) at 248–249.


\(^{55}\) *Asbl Klimaatzaak v Etat Belge et al.* (2021) 2015/4585/A.

\(^{56}\) *Juliana v United States*, 947 F.3d 1159 (9th Cir. 2020).

\(^{57}\) See for instance with respect to ‘green’ provisions in former Eastern European constitutions, which failed to produce any tangible effect: Ernst Brandl & Hartwin Bungert, ‘Constitutional Entrenchment of Environmental Protection: A Comparative
environment is redundant, as only existing human rights, such as the right to life, can be given a greener interpretation, as is also illustrated by recent judicial decisions in climate cases such as Urgenda,\(^{58}\) while others contend that it adds relatively few extra layers of protection to the existing environmental laws, which contain precise environmental standards and enforceable integration clauses. Yet, at the end of the day, it is precisely the presence of such binding provisions that ensures that unsustainable permit policies, for instance in the field of intensive agricultural practices and fossil fuel-based project developments, can be strictly reviewed in court.\(^{59}\)

This criticism might be particularly relevant for regions with sophisticated environmental legislation, such as the EU, which will, partly for that reason, be the main focus region of this book. For instance, the recent heated societal debate on the reduction of livestock numbers in the Netherlands,\(^{60}\) which undoubtedly touches on systemic environmental challenges, was the immediate result of a lawsuit\(^ {61}\) based on the 1992 Habitats Directive, an important yet relatively technical EU environmental directive which focuses on nature protection.\(^ {62}\) This also illustrates that, irrespective of the precise degree of enforceability of the national manifestation of the right to a healthy environment in the respective legal order, systemic lawsuits might be more effective when based on ‘technocratic’ yet more precise and concrete environmental laws, which include strict substantive provisions that are to be observed throughout the decision-making process for potentially harmful plans and projects. Lastly, the case law referred to above also questions whether the most significant strides in the quest for better environmental protection should still be based on anthropocentric approaches to environmental law. The levels of nitrogen deposition that were at issue in the Netherlands, for instance, did not immediately threaten human health (anthropocentrism), yet posed a further obstacle for the recovery of EU-protected habitats (ecocentrism). It raises the question to what extent

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\(^{58}\) *Urgenda* (n 54).

\(^{59}\) David R. Boyd also mentioned this line of criticism: Boyd (n 33) at 35.


non-human entities, such as rivers or forests, should also be brought under the substantive scope of the right to a healthy environment.63

**PROCEDURAL ENVIRONMENTAL RIGHTS AS A NECESSARY COMPLEMENT?**

Even though the right to a healthy environment has not led to a green revolution in the multiple jurisdictions in which it has been explicitly implemented, it cannot be denied that the right to a healthy environment has served as a catalyst for stronger environmental policies, stricter enforcement, stronger environmental performance and greater public participation in environmental decision-making.64 There appears to be a mutually reinforcing relationship between the right to a healthy environment and procedural rights. Or, to quote Boyd, ‘A key development in access to justice has been the use of the constitutional right to a healthy environment (and legislation implementing this right) to rewrite traditional rules of standing to include collective and diffuse interests.’65 In the wake of the adoption of the 1992 Rio Declaration, which represented the first comprehensive effort at international level to highlight the normative importance of access to information,66 public participation and access to justice in environmental matters in its renowned Principle X, the intersection between the human right to a healthy environment and procedural environmental rights became an increasingly seminal battleground for many environmental lawyers67 – precisely because it made a distinction between ‘the law in the books’ and ‘the law on the ground’. Without effective access to justice and proper participation, the right to a healthy environment risks remaining a mere theoretical principle and paper tiger with limited added value as in such a situation the state would have retained the exclusive right to represent (and protect) the public interest. One might thus submit that procedural environmental rights are a necessary precondition for the further materialization of the right to a healthy environment. And also in this regard, Europe has been a frontrunner in some respects.

Whereas the 1992 Rio Declaration is to be qualified as a soft-law instrument, the first set of binding rules regarding procedural environmental rights was adopted in the context of the United Nations Economic Commission for

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63 Taylor (n 27) at 373–379.
64 Boyd (n 33) 233–252.
65 Ibid, 239.
Europe (UNECE) in Aarhus a mere six years later. The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) protects every person’s right to live in a healthy environment by granting the public three key rights on environmental issues. While the Aarhus Convention does not in itself contain any substantive environmental quality norms and standards, its Article 1 explicitly supports the premise that increased transparency, public participation and effective legal protection in the context of environmental matters will ultimately lead to a heightened level of environmental quality:

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 in accordance with the provisions of this Convention.

The fundamental role of the Aarhus Convention as a ‘driving force of environmental democracy’ has been widely acknowledged in academic literature. And while its implementation at EU level (regarding direct access to the Court of Justice of the EU – the CJEU) has faced serious obstacles, which ultimately caused the Aarhus Compliance Committee in 2017 to find the EU to be in violation of the access to justice provisions that are included in the Aarhus Convention, the recent case law of the CJEU clearly pushed national courts to relax their traditionally strict standing rules for environmental organizations. In recent years, this ‘Aarhus rationale’ has also been exported to other regions of the world. The 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the

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71 Communication ACCC/C/2008/32 (Part II) (European Union), adopted March 17, 2017, paras 93–120.
Caribbean (the ‘Escazú Agreement’), which has been signed by 25 countries and ratified by 15 countries in Latin America and the Caribbean, serves as the most recent illustration of this trend to further activate procedural environmental rights as a lever to achieve substantive goals, such as the right to a healthy environment.

ONGOING RELEVANCE AND DEBATE

Notwithstanding the progressive emancipation of the right to a healthy environment, both in the national and the international planes, its precise scope as well as its procedural and substantive repercussions have remained in constant flux during the past decades. This book aims to take the legal debate a step further from where it was left by the aforementioned, groundbreaking work of David Boyd, Dinah Shelton, and John Knox and Ramin Pejan, who, throughout their respective works, have comprehensively analyzed the evolution and use of the right to a healthy environment, both at the international level and in many different jurisdictions around the globe. As mentioned above, Boyd’s 2011 comprehensive analysis of 193 constitutions and the laws and court decisions of more than 100 nations in Europe, Latin America, Asia and Africa has revealed a positive correlation between constitutional protection, the right to a healthy environment and stronger environmental laws, smaller ecological footprints, superior environmental performance and improved quality of life. However, Boyd’s analysis dates back to 2011, whereas in the meantime climate- and biodiversity-based litigation strategies, as well as new international conventions, such as the Paris Agreement, have drastically changed the outlook of environmentalism. This is also the case at

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75 Boyd (n 33).
77 Knox and Pejan (n 29).
78 Boyd (n 33) at 253–276.
EU level, where the aforementioned Green Deal has led to the adoption of a whole new string of EU climate laws, yet recently seems to falter in light of increased political opposition, both at EU and national levels, as was further highlighted in 2023 by the heated opposition to the last building block of the EU’s Green Deal, the EU Nature Restoration Law. Accordingly, the further operationalization and implementation of the human right to a healthy environment in a context where global warming and the massive degradation of biodiversity are increasingly palpable are giving rise to a new string of complex legal questions, which have only partially been treated in existing literature, including the valuable and inspiring work of Louis Kotzé and others regarding environmental constitutionalism. These novel challenges, litigation strategies and practical developments constitute the main threads of this book.

For indeed, whereas most people would agree that, in generic terms, an adequate environmental quality constitutes a self-evident precondition for human survival, the precise delineation of what exactly constitutes such adequate quality remains contested at best. At the same time, some of the arguably most influential climate lawsuits of the past decade, such as Urgenda, have paradoxically demonstrated that in jurisdictions where the right to a healthy environment is not enshrined in the national Constitution, traditional human rights, such as the right to life and private life, family life, home, and correspondence, which are enshrined in Articles 2 and 8 of the European Convention on Human Rights (ECHR), can serve as an equally powerful lever to force governments to step up their efforts in reducing greenhouse gas emissions. It created the impression that the explicit recognition of an enforceable right to a healthy environment is no longer essential for progressive litigation strategies to yield success, since the greening of classic (first generation) human rights might serve as a more potent alternative here. The positive human right duties

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82 E.g. Louis J. Kotzé, Global Environmental Constitutionalism in the Anthropocene (Bloomsbury, 2016); Joshua Gellers, The Global Emergence of Constitutional Environmental Rights (Routledge, 2017).

83 Urgenda (n 54).


85 See also: Boyd (n 27) at 35.
that are present in these ‘classic’ human rights turned out to be very effective in persuading judges and courts to order national authorities to step up their mitigation policies in the context of the fight against climate change. Even in cases where judges more explicitly relied on the constitutional clauses which encompassed the right to a healthy environment in a more clear-cut way, such as the Norwegian Arctic Oil case, courts usually defer to the margin of appreciation which national parliaments and administrations enjoy when operationalizing the right to a healthy environment. For instance, in the latter case, the Norwegian Supreme Court accepted that Article 112 of the Norwegian Constitution, which encompasses the right to a healthy environment, can also be invoked in court as a benchmark to review decisions from national authorities, even when they have been endorsed by a political majority in parliament. However, it held that the threshold for review, i.e. manifest violations of the constitutionally enshrined duties, had not been met. Similarly, the Irish Supreme Court affirmed that there is no right to a healthy environment in Irish law, arguing that such a right is not distinct from other human rights and, even if it were, its contents are not clear or precise enough. Moreover, the traditional conflict between traditional property rights and the right to a healthy environment has also re-emerged in recent case law developments and the ongoing political debate regarding new binding rules for environmental protection. These rising conflicts are addressed in several chapters of this book.

INDIVIDUAL RIGHTS VS INTERGENERATIONAL AND ECOCENTRIC APPROACH?

Beyond the aforementioned challenges, more fundamental and systemic hurdles are appearing on the horizon for the human right to a healthy environment. For instance, in the context of climate change and shrinking CO₂ budgets, it has become clear that acting in our own individual interest does not necessarily and always serve mankind as a whole. Overcoming this short-sighted approach, with an almost exclusive focus on the best interests

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86 Nature and Youth Norway, Greenpeace Nordic, Friends of the Earth Norway (intervener), The Grandparents Climate Campaign (intervener) v The State represented by the Ministry of Petroleum and Energy (2021) No: HR-2020-2472-P, Case No. 20-051052SIV-HRET.


of ourselves and our close relatives, represents an almost existential question for our species. Our limited perception of our own needs and time do not seem apt enough to address long-term challenges such as climate change. Yet, if we turn a blind eye to the future, we also negate the fact that the future generations also have a right to life. So, how to integrate the intergenerational aspect in the context of the right to a healthy environment? Who are the beneficiaries and bearers of this right?

The significance of intergenerational solidarity and future generations has slowly but surely been recognized as a crucial building block of the right to a healthy environment. While, as mentioned above, the 1992 Rio Declaration did not expressly provide for the right to a healthy environment, it underscores an evolution of the concept of the right to a healthy environment, translated into the principle of sustainable development composing the rights of future generations. Intergenerational solidarity is inextricably linked to the concept of sustainable development. This well-used concept was defined in the World Commission on Environment and Development’s 1987 Brundtland report, ‘Our Common Future’ as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. More generally speaking, intergenerational equity views the human race as a partnership between all generations, in which each has the right to inherit an environment which is suitable for maintaining life and equitable access to its resources. Within this context the idea is entertained that the present generation is the custodian of the planet for future generations.

Whereas the intergenerational nature of the right to a healthy environment no longer seems to be disputed, its concrete operationalization appears to be notoriously challenging. For, irrespective of the further definition of what represents an ‘adequate’ environment, the question arises how far into the future one can go when applying this intergenerational logic. One could easily agree that future generations refers to people that are not yet alive. Should one only take into account the next generations, which will live in the 21st century and be directly impacted by the present climate change? Or should one go further?

An interesting application of intergenerational solidarity in the context of the constitutionally enshrined right to a healthy environment was provided for in the German climate case, where the German Constitutional Court concluded that, taking into account the applicable national climate targets as included in German climate law, future generations would be unduly burdened if one aims to stay within the national carbon budget. The applicable targets, the Court reasoned, were not ambitious enough, and would require the young claimants and the future generations to reduce greenhouse gas emissions at an even faster pace.\(^{92}\) Even though it is the prerogative of the legislature to establish climate goals, such low ambitions violate the duty to take climate action, which is enshrined in Article 20a of the German Constitution, among others.\(^{93}\) This groundbreaking jurisprudence makes the inherent conflict between the ‘individual’ approach to human rights and a more intergenerational approach very palpable.

Another relevant paradigm shift which is gradually materializing is the recent emergence of approaches aimed at recognizing ‘Nature’ as a legal stakeholder with inalienable rights, which also increasingly seem to question the anthropocentric premises on which the human right to a healthy environment is based. If our exclusive focus on individual rights is not the key to combating long-term challenges of climate change, why would we then still assume that the intrinsic right of the human species to survive should remain the most seminal focus of our environmental policy? Is this anthropocentric approach still tenable in light of the ongoing biodiversity crisis, which leads to the irreparable extinction of countless species? Do these non-human animals and, more broadly speaking, Nature also have intrinsic moral and perhaps even legal rights? And would that still fall within the scope of the human right to a healthy environment?

When Christopher Stone wrote his now famous 1972 article, ‘Should Trees Have Standing?’,\(^{94}\) his theory received little support and little recognition in legal literature.\(^{95}\) However, over the past few decades the idea of recognizing rights of Nature has in fact been implemented in a diverse and growing number of jurisdictions, in particular in the past 15 years.\(^{96}\) The notion of ‘rights of

\(^{92}\) Neubauer (2021) 1 BvR 2656/18, para. 192.
\(^{93}\) Ibid, paras 194–268.
\(^{96}\) For a comparison of different types of legally recognized natural entities, see Craig M. Kauffman and Pamela L. Martin, ‘Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand’ (2018) 18 Global Environmental Politics 43, table 1.
‘Nature’ entails the idea of granting legal rights to Nature as a whole or to categories of natural entities such as all rivers or water bodies in a particular territory, to collectivities such as particular rivers, ecosystems or populations, or to individuals. The most prominent examples include Ecuador’s constitutional amendment recognizing rights for Nature or Pacha Mama, Bolivia’s national Law of the Rights of Mother Earth, New Zealand’s Whanganui River Claims Settlement and court decisions such as the Bangladesh Supreme Court’s recognition of rights for rivers and the Colombian Constitutional Court’s and Colombian Supreme Court’s recognitions of rights for the Atrato river and Amazon ecosystems respectively. Although Europe has so far seen relatively limited manifestations of rights of nature, the 2022 Spanish Law granting legal personhood to the Mar Menor Lagune can be quoted as a first precedent in this respect. Even though the added value of rights of nature remains contested at best, especially amongst EU-based legal scholars, its growing popularity also impacts the philosophical underpinnings of the human right to a healthy environment. For instance, it remains unclear to what extent such right to a healthy environment should be exclusively human-centered. Against the backdrop of the ensuing biodiversity crisis, the advent of zoonotic diseases – such as Covid 19 – and the overarching climate change-based concerns, the question arises whether the traditional anthropocentric premises on which the right to a healthy environment used to be based are still relevant today in an age where the focus has shifted more to the interdependency between humans and nature and less on the Cartesian dualistic approach, which fueled modern science by definitely separating humans from nature.

98 Law 071 of the Rights of Mother Earth of 2010 (Ley 071 de Derechos de la Madre Tierra).
100 Writ Petition No. 13989, Upheld by the appellate division of the Supreme Court of Bangladesh 2020.
101 Acción de tutela interpuesta por el Centro de Estudios para la Justicia Social ‘Tierra Digna’, Expediente T-5.016.242, T-622 de 2016.
103 Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca.
A EUROPEAN PERSPECTIVE

This book aims to take stock of the aforementioned challenges and ongoing debates that arise when operationalizing the right to a healthy environment in the era now dubbed 'the Anthropocene' by scientists and characterized by the materialization of dangerous climate change as well as massive biodiversity extinction and pollution. However, as stated above, it does so by explicitly taking an almost exclusively European perspective, with the exception of one chapter focusing on the recent development of the right to a healthy environment at international level and a case study on the implementation of the right in the Chinese legal order.

This ‘European’ focus is justified by five specific grounds. First and foremost, 19 out of 27 EU countries have already integrated the right to a healthy environment into their constitutions and 17 into their national laws. Only Austria, Denmark, Germany, Luxembourg, Malta, the Netherlands, Poland and Sweden have declined to do so as of today, yet some of the latter still have similar provisions in their respective constitutions. Second, it should be noted that on a more fundamental level, the European legal and philosophical liberal traditions were the cradle of the concept of individual human rights, which has been exported to other parts of the world in the wake of (often very brutal) colonialism and globalization. Against this backdrop, it remains particularly interesting to see how the right to a healthy environment could evolve in this context. While Article 37 of the Charter of Fundamental Rights of the European Union stipulates that a high level of environmental protection must be integrated into EU policies, it does not recognize an individual right to a healthy environment. In the meantime, the emergence of the EU as the main environmental player at supranational level has led to a plethora of environmental EU directives, which have succeeded in addressing several (but by no means all) environmental stressors. The European context therefore presents a perfect case study in which the added value of the legal recognition of the right to a healthy environment can be comprehensively analyzed and tested. The European Parliament, in its June 2021 resolution on the EU biodiversity strategy for 2030, held that the right to a healthy environment should be recognized in the EU Charter and that the EU should take the lead in the international recognition of such a right. Moreover, the Aarhus Convention in Europe serves as a universal beacon for its focus on procedural

106 European Parliament Resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives (2020/2273(INI)).
Introduction

Third, the existence of the ECHR allows us to assess the interplay between first-generation rights, such as the right to life, and third-generation rights, such as the right to a healthy environment. While, as already highlighted, the ECHR does not explicitly recognize a human right to a healthy environment, the application of Articles 2 and 8 of the ECHR has given rise to a string of remarkable ‘environmental’ rulings, especially in the context of climate change litigation. Moreover, on September 29, 2021, the Parliamentary Assembly of the Council of Europe recommended the drafting of an additional protocol in order to explicitly recognize the right to a healthy environment at European level.

Fourth, the clash between the very rational and liberal European legal traditions, which rely heavily on a more dualistic approach to man and nature, and more integrative and holistic approaches, such as rights of nature, will evidently yield interesting new insights.

And fifth, an increasing number of judicial decisions, both at national and regional levels in the context of climate litigation, as well as air pollution, might present very interesting and realistic case studies with respect to the operationalization of the right to a healthy environment, both within and outside Europe. It is also interesting that recent judicial decisions, such as the 2021 ruling of the Dutch district court in the Shell case, indirectly highlight the incremental relevance of human rights duties, including the right to a healthy environment, for business and companies, which had remained relatively underexplored in jurisprudence.

CONCEPTUAL AND PRACTICAL APPROACH

This book has a dual objective. It not only wants to address more conceptual and philosophical questions, such as the theoretical underpinnings surrounding the emergence of the right to a healthy environment, but also to lay bare its more practical consequences in recent litigation practices. For instance, how to operationalize the right to a healthy environment in the context of the devastating impact of poor air quality on people’s lives, health and human rights, or the right to water, which is also increasingly becoming a challenge on a European scale.

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The right to a healthy environment in and beyond the Anthropocene

continent impacted by successive heatwaves and droughts? The chapters of this book include several practical case studies relating to the operationalization of the right to a healthy environment in a European context, which might offer new insights into the concrete application of the right to a healthy environment. We feel that the theoretical and practical lenses are inseparable: one cannot fully discuss the conceptual questions revolving around the right to a healthy environment without taking a closer look at the practical materialization of this instrument. This two-pronged approach will make this edited collection interesting for legal scholars (academics) as well as for practitioners, who might find novel lines of argumentation that can be used in future lawsuits. The analysis will offer a good overview of recent environmental litigation strategies, for instance in the field of climate change, nature protection and air quality litigation, against the backdrop of the right to a healthy environment. The European context thus might serve as an interesting laboratory for legal challenges that might also emerge in other regions of the world.

The multitude of questions that arise when applying and, most importantly, enforcing the right to a healthy environment in practice constitute the backbone of this scientific analysis. For instance, what does the explicit recognition of the human right to a healthy environment by the UN General Assembly precisely entail in terms of legal consequences for national jurisdictions and lawsuits? Who has a right to a healthy environment? Is the right limited to existing generations or do the rights of future generations also come into play, for instance in the specific context of climate change and air quality litigation? What about primates and other sentient beings, like domesticated cattle or monkeys that are held in captivity? Do they also count? And do ecosystems themselves enjoy an intrinsic and legal right to be healthy? What types of sanctions and restoration measures can be imposed when the right to a healthy environment is violated? And, a question which has gained increased relevance these past few years: can a constitutionally recognized right to a healthy environment serve as a justification for breaking (other) laws in order to protect the environment, for instance in the context of (non-violent) public disobedience, which has become an increasingly popular tool used by climate activists over recent years?

STRUCTURE OF THE BOOK

Following the present introductory chapter, this collected work comprises five parts, each of which deals with a particular sub-theme with respect to the overarching theme of this book.

Part I: As already mentioned, the right to a healthy environment has received ample international attention and recognition these past few years. In the first section, the emphasis is put on the evolving international context...
with respect to the right to a healthy environment. In addition to assessing the renewed importance of the right to a healthy environment in light of its recent reassertion at the level of the United Nations, the interplay between the right to a healthy environment and the greening of existing regional human rights conventions is analyzed. The increasing importance of biodiversity protection on the international plane, for instance as a nature-based solution in the combat against climate change, is also discussed.

In Chapter 1 (‘A half-century journey of human rights and the environment: from separation to integration’) Meng Zhang explores the changed international outlook with respect to the right to a healthy environment in general, taking stock of the two milestone resolutions, the HRC Resolution 2021 and the UN GA Resolution 2022, in this context. The chapter addresses the legal significance and implications of these new developments. It explores the precise impact of the universal recognition of the human right to a healthy environment by the UN GA for people, governments, businesses and NGOs. It concludes that the half-century journey of integrating human rights and the environment has clearly demonstrated that neither human rights promotion nor environmental protection can fully be achieved without respect for each other and thus they appear to be inseparable twins.

In Chapter 2 (‘Greening the European Convention on Human Rights: how to determine the substance of environmental human rights’) Laurens Lavrysen shifts the focus to regional human rights law by analyzing the right to a healthy environment in the specific context of the ECHR. Although the author points out that the Convention does not explicitly provide for such a right, the case law of the European Court of Human Rights has applied the ECHR in a context where environmental nuisance affects other Convention rights, such as the right to life (Article 2) and the right to respect for private life and home (Article 8). Lauren Lavrysen’s chapter finds that in most cases where the ECHR found violations in the environmental sphere, such cases involved procedural deficiencies, for instance in the context of environmental accidents, or more manifest failures to comply with national environmental legislation. What is lacking, the author opines, is a more substantive development of the environmental rights that are implicitly present in the ECHR. It is argued, however, that the rationale used in the ECHR industrial pollution cases of *Cordella and Others v Italy* (2019) and *Pavlov and Others v Russia* (2022) may pave the way for stronger substantive protection in environmental matters within the realm of the ECHR. Lavrysen concludes that, while awaiting the Court’s future rulings in the pending climate cases, in these two specific cases, the Court clearly applies stricter scrutiny when screening the substantive justification provided by the national authorities for their alleged action or inaction in the field of environmental protection.
In Chapter 3 (‘Strengthening the link between human health and biodiversity’) An Cliquet and Frank Maes explore the increasingly relevant interplay between human health, biodiversity and the human right to a healthy environment at the international level. The authors stress that scientific knowledge of the importance of biodiversity for human health is fairly recent, as is the application of the human right to a healthy environment in biodiversity-related cases. Cliquet and Maes make a case for a more comprehensive approach to the right to a healthy environment, which should also cover the right to a biodiverse environment. In the chapter, three possible pathways to strengthen this link are outlined: a more explicit legal recognition and concretization of the right to a biodiverse environment; a better integration of the topic of biodiversity loss and its impact on human health in the context of decision-making procedures; and, lastly, through strategic biodiversity litigation using human rights arguments.

Part II: The right to a healthy environment is predicated on the availability of a sustainable climate on our planet, clean air in the streets and access to water. The second part of the book focuses on the renewed relevance of the right to a healthy environment in the context of these three elements, which have been the subject of extensive environmental legislation at EU level. In recent years, however, more progressive litigation strategies, most prominently in the fields of climate change and air quality, have pushed governments to reassess their existing policies and permitting schemes. In this context more open-textured norms, such as the duty of care and general human rights, enshrined in the ECHR, are also increasingly used as a lever for stepping up existing reduction goals and programs in the court room. Recent jurisprudential evolutions have indeed underlined the prominent role of rights-based discourses in the context of climate litigations. One of the most noteworthy developments is the recent success of rights-based court actions in the field of climate change, with the decisions of the Dutch courts in the Urgenda and, more recently, Shell cases as the most remarkable standouts. Yet what role is there still left for the right to a healthy environment in such novel litigation strategies?

In Chapter 4 (‘The Shell case and the human rights argument in climate litigation: building the narrative?’) Carole Billiet zooms in on the relevance of rights-based claims in the context of climate litigation, with a specific focus on the 2021 Shell decision of the Dutch district court of the Hague, in which Royal Dutch Shell was ordered, on the basis of the duty of care, among others, to reduce the CO₂ emissions of the Shell group by 45% net by 2030 compared to 2019 levels, through the Shell group’s corporate policy. This ruling sets a strong precedent, since it is the first time a company has been legally obliged to align its policies with the Paris climate agreements based on national tort law and human rights duties. This chapter argues that, while the right to a healthy environment in itself played a minor role in the rationale used by
the court, it nevertheless makes an entirely original contribution to the field of human rights law by providing new pathways to operationalize the human right to a healthy environment in the fight against global warming.

In Chapter 5 (‘Healthy air as an obligation of result in the whole European Union’) Delphine Misonne explores the relevance of the right to a healthy environment in the specific context of air quality. In the EU, strategic litigation based on explicit EU air quality legislation used to be framed within the context of the pursuit of better health protection and became increasingly successful in court. In the wake of certain groundbreaking decisions of the CJEU, national courts forced national and regional authorities to do more to protect the health of their citizens in the context of air quality. However, the author concludes that it remains unsure to what extent future case law developments and proposed EU legislation in the field of air quality protection will suffice to guarantee the observance of the right to a healthy environment in the field of air quality.

Chapter 6 (‘The right to water and the right to a healthy environment: does the Water Framework Directive map out the way ahead?’) puts the emphasis on yet another interesting policy challenge when operationalizing the right to a healthy environment, i.e. the right to water. Peter De Smedt and Helena F.M.W. Van Rijswick start their interesting analysis from a logical premise: water is a necessity of life and therefore is a crucial building block of the right to a healthy environment. And while the right to water has already been declared a human right at international level, ecological parameters also play a crucial role in ensuring that there remains a sufficient quantity of water of good quality available for people and the environment. Both authors assess the legal development of the right to water within an international policy context, yet also analyze how this right to water is further developed within the EU context, using the EU Water Framework Directive as an immediate benchmark. The conclusion is that this directive serves as a good starting point for the further operationalization of the right to a healthy environment in the context of water management, yet points out that further improvements are necessary to face future challenges, such as the increasing number of successive droughts and heatwaves the European continent will face.

Part III: The anthropocentric and individualistic underpinnings of the human right to a healthy environment are increasingly being challenged in times when rights of nature and animal rights are making headway in several jurisdictions. The third part assesses when these new trends and approaches give rise to a reinterpretation of the right to a healthy environment.

In Chapter 7 (‘Right to a healthy environment: linking ecocentrism with anthropocentrism’) Kari Kuusiniemi embarks on an interesting quest for the intersection between anthropocentrism and ecocentrism, starting from the 1992 Biodiversity Convention and other national constitutions in which
The right to a healthy environment in and beyond the Anthropocene

...the intrinsic value of nature and biodiversity is recognized. He questions whether there really is a conflict between approaches which grant legal rights to nature and more anthropocentric rationales that underscore the human duty to protect nature and biodiversity for the present and future generations. The author develops an interesting hypothesis, claiming that rights-based Anglo-American legal traditions mostly tend to underscore the rights of legal subjects, which might also open the door for the recognition of the legal rights of natural objects, whereas the continental legal traditions in Europe tend to put more emphasis on the human duties vis-à-vis the environment.

In Chapter 8 (‘Rights of nature in the European Union: a rights-based approach as an inevitable outcome of increased environmental protection in the Anthropocene?’), Hendrik Schoukens takes up this topic where Kari Kuusiniemi left it and delves deeper into the potential for operationalizing rights of nature within the context of the EU legal order. Hendrik Schoukens first sketches recent experiences with the legal manifestations of rights of nature in other legal orders, such as Ecuador, New Zealand and the United States. Subsequently he outlines the potential for implementing rights of nature in the EU legal order. He concludes that, as of today, the environmental acquis does not reflect a rights-based approach to nature protection and, in addition, contains major loopholes in terms of access to justice, especially when it comes to direct actions against potentially harmful EU decisions. Even so, recent case law developments with respect to existing EU environmental directives, such as the EU Habitats Directive, underscore the ecocentric premises of some protection clauses. When it comes to the future development of rights of nature, the author concludes that rights of nature will not guarantee a quick fix for the many challenges the EU faces in terms of environmental policy. Even so, he advocates that recent manifestations of rights of nature, such as the granting of legal personhood to the Mar Menor Lagune in Spain, can be greeted as the explicit emanation of a hidden reality, namely that at least some protected sites, such as Natura 2000, already implicitly enjoy some legal rights in the existing EU legal order.

In Chapter 9 (‘Some explorations about extending the right to a healthy environment to future generations and animals’), Geert Van Hoorick and Elien Verniers explore to what extent the right to a healthy environment can be reinterpreted to also cover the rights of future generations and animals, two groups of ‘voiceless’ beings that are traditionally left outside its scope. In their chapter, both authors contend that recent case law developments before national courts, as well as the European Court of Human Rights, have already underlined the potential for an extension of the scope of the right to a healthy environment to animals and future generations. Going beyond the existing frameworks, the two authors also outline how the legal representation of animals and future generations could take shape.
Introduction

Part IV: Whereas the theoretical underpinnings of the right to a healthy environment are crucial to assess its existing and future role in the development of environmental law, its practical impact in the court is also vital in order to ensure its lasting relevance. Indeed, in times of unprecedented climate change the right to a healthy environment needs to aim to be more than just a paper tiger. Three case studies explore whether the right to a healthy environment can also make a difference in recent litigation strategies.

In Chapter 10 (‘The right to a healthy environment and climate change: a necessary match?’) Robert Carnwath critically assesses the role open-textured human rights duties play within recent and prominent judicial decisions in climate cases, such as Leghari (2015) and Urgenda (2019). Taking stock of these recent case law developments, where the constitutional rights to life and the human right to a healthy environment increasingly come to the forefront, the author points out the limits of using human rights law as a benchmark in the fight against climate change. Carnwath concludes that, ultimately, there is no real alternative for a political consensus on the greenhouse gas emission goals, translated into robust legal frameworks that are rubberstamped in national parliaments. He cites the UK Climate Change Act 2008 as a potent example of the latter strand of argument, since it contains precise, enforceable targets, which are in turn based on independent expert advice. He concludes that a similar approach is also applicable within the context of EU environmental law, as recent EU climate legislation that has been promulgated in the context of the Green Deal also contains enforceable reduction commitments, which make for a more easily enforceable benchmark in court.

In Chapter 11 (‘China and the right to a healthy environment in the last decade: practices from an unexpected frontrunner’), we move beyond the exclusive European sphere and are introduced to the application of the right to a healthy environment within the Chinese constitutional order. Whereas China’s constitution does not explicitly acknowledge the right to a healthy environment, it is argued by Jianwei Zhang that through the incorporation of the ecological civilization as a constitutionally enshrined goal, the legal protection of the environment has significantly improved in China. Zhang outlines the most important shifts in the applicable environmental legislation in China and points out that some legislative changes, such as stricter enforcement of environmental laws, are inspired by European legislation. He concludes that, interestingly enough, the increasingly available pathways for public interest litigation and the creation of specialized environmental courts help advance the operationalization of the right to a healthy environment in the Chinese legal order.

Chapter 12 (‘Green constitutionalism in Belgium: the right to a healthy environment as a principle of non-regression’) contains an interesting case study on the operationalization of the right to a healthy environment in the Belgian legal
order. Whereas the right to a healthy environment is enshrined in Article 23 of the Belgian Constitution, the available case law illustrates that as of today, it does not grant subjective rights to Belgian citizens that can be enforced through courtroom action. However, the case law of the Belgian Constitutional Court has identified a non-regression principle in Article 23, which is consequently used as a strict benchmark when reviewing legal acts against the backdrop of the constitution. It is concluded that this strand of case law could serve as a source of inspiration for other jurisdictions, especially since the principle of non-regression has gained more recognition on the international plane.

Part V: The last part of this book tackles the alignment between the right to a healthy environment and the enforcement of environmental law, with a particular focus on the restoration duties that apply when the environment has been damaged by human activities. In this regard, the question arises as to whether the right to a healthy environment is also instrumental in guaranteeing better compliance with existing EU environmental standards, based on the existence of effective legal remedies in a context of environmental crimes and accidents.

In Chapter 13 (‘Right to a healthy environment and the remediation of ecological damage: seeking effective remedies’) Ann Carette explores to what extent the legal recognition of the right to a healthy environment entails better prospects for the restoration of ecological damage. The author contemplates that translating ecological damage into an infringement of a human right, such as the right to private and family life or, in extreme instances, the right to life itself, might constitute a fertile pathway for more comprehensive restoration duties in the context of environmental crimes and accidents. Given the growing importance of ecological restoration in what is dubbed the ‘Decade of Ecosystem Restoration’ by the United Nations, the author submits that establishing a more direct link between the right to a healthy environment and ecological restoration is crucial in achieving a more sustainable society where environmental damage is effectively repaired.

In Chapter 14 (‘The role of national courts: does the right to a healthy environment make a difference to the environment? Lessons learnt from national court rulings’) Fruszina Bögös shifts the focus to the precise articulation of the right to a healthy environment in a recent string of renowned judicial decisions in climate cases in the Netherlands, Ireland and Norway. In this chapter, the focus is placed upon the most important procedural and substantive obstacles that are to be faced when enforcing the right to a healthy environment in the context of climate change. Amongst other things, an assessment is made as to what extent the relatively vague wording of the right to a healthy environment in the national constitutional order constitutes an obstacle for its further enforcement in concrete climate-based lawsuits. It is also pointed out that national courts to some extent still defer to the leeway enjoyed by national
parliaments and authorities when using the constitutionally enshrined right to a healthy environment as a concrete benchmark for reviewing national permitting policies for fossil fuel projects. Accordingly, the principle of trias politica (separation of powers) gives rise to further hurdles in this regard, although it is not necessarily an insurmountable obstacle in all the lawsuits that are discussed. The varying degree of success of the recent lawsuits exposes the limits of the recent manifestation of the right to a healthy environment at national level.

In Chapter 15, the final chapter (‘Civil disobedience for a healthy environment’) Pierre Lefranc theorizes about the role of civil disobedience in the operationalization of the right to a healthy environment. The author departs from the renowned work of Hannah Arendt, where she noted that it is notoriously difficult for lawyers to see the ‘civil disobedient’ as members of society rather than as individual lawbreakers and hence defendants in court. The author adopts Arendt’s viewpoint to assess the outcome of some of the most recent court decisions in cases of civil disobedience, where climate activists were tried.

CONCLUSION

The recent resurgence of the right to a healthy environment has sparked new hope in the eyes of many environmental activists in times of unprecedented climate change, increasing biodiversity losses and persistent air, water and soil pollution. Against the backdrop of the massive implementation of the right to a healthy environment in national legal orders and its recent recognition at international level, one might be inclined to think that better times lie ahead for environmental activism. Yet, the common thread of the chapters that constitute this collected work is that in spite of its reinforced importance, the right to a healthy environment will in itself not bring us ecological paradise. In fact, one of the most prominent challenges is linked to its anthropocentric foundations as well as its inherently vague and limited nature, especially when measured against more explicit environmental standards. This is further evidenced by the experience gained in the European context, where both EU environmental directives and, perhaps surprisingly, even the ECHR indirectly serve as a further operationalization of the right to a healthy environment. Rather, the main conclusion of this collected work appears to be that the right to a healthy environment is the inevitable outcome of the evolution towards more environmental protection. It presents itself as the logical foundation of the shift towards more environmental rule of law. Even though it will not always be a concrete and justiciable lever in environmental litigation, it will still serve as a logical interpretation standard when operationalizing more concrete environmental legislation.
As evidenced by the analysis of the intersection between the right to a healthy environment and the existing environmental *acquis* in the EU legal order, the former is neither a definitive end-point nor a beginning in the search for more progressive environmental legislation. While the case studies have revealed that national manifestations of the right to a healthy environment might serve as a shield against further backsliding of environmental rules and standards, its more proactive role as a lever for stepping up existing environmental policies is still challenged and contentious. Furthermore, its articulation with existing human rights of the first generation and the alignment with novel approaches, which aim to grant legal rights to ecosystems, animals and the future generations, will give rise to new promising legal and jurisprudential evolutions in the years to come. Since there are currently three climate cases pending before the European Court of Human Rights,\(^{110}\) it can be presumed that future years will yield novel and crucial insight into the complex tango between individual human rights and the protection of the environment. In times that are characterized by heatwaves, ecological degradation and droughts, it might be a sobering thought to conclude that even the recent international recognition of the human right to a healthy environment does not represent a silver bullet for existing environmental troubles. Even so, it is clear that any sustainable solution to the ongoing climate and biodiversity crisis will inevitably have to be based on a further recognition of the right to a healthy environment, both for current and future generations, as well as other species, on our planet.

\(^{110}\) On January 11, 2023 the Grand Chamber held a procedural meeting in the three so-called climate cases pending before it – Verein Klimaseniorinnen Schweiz and Others v Switzerland, Carême v France and Duarte Agostinho and Others v Portugal and 32 Others. A hearing in the Verein Klimaseniorinnen Schweiz and Others and Carême cases was due to be held in March 2023, and a hearing in the Duarte Agostinho and Others case was due to be held before the same composition of the Grand Chamber in September 2023. See: https://www.google.be/url\?sa=t\&rct=j\&q=&esrc=s\&source=web\&cd=&ved=2ah\UEwiQvdToqqyAAXvSHqKKhbyCBY8QFnoECA4QAiw\&url=https\%3A\%2F\%2Fwww.echr.coe.int\%2Fdocuments\%2Fdocuments\%2Fdocuments\%2Fechr\%2Fclimate\%2Fclimate_change_eng\&usg=AOvVaw2EbQRltfiauMWNKDuy0Z_7&opi=89978449, accessed July 15, 2023.