Abhandlungen

Life Beyond the Law – From the 'Living Constitution' to the 'Constitution of the Living'

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Abstract

Among the many legacies left by Rudolf Bernhardt, the significance he attached to the doctrine of the 'living instrument' is crucial. Accordingly, the European Convention on Human Rights (ECHR) must be interpreted as evolving and dynamic – as a 'living' organism. In this article, I reflect on what it would mean to move from a 'living constitution' to a 'constitution of the living'. To answer this question, I consider what constitutes life itself – which forms of life currently merit legal consideration and care. The argument unfolds in three steps, each tracing a different way in which the protection of life is being reconfigured against the backdrop of ecological and climate change. The first part of the article is devoted to the 'liberal response' to

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ecological threats posed to life, which calls for a recognition of a self-standing human right to a healthy environment to better protect human life. The second part focuses on the 'critical liberal response', which advocates granting rights to nature to safeguard nonhuman life. Finally, I explore how the protection of life appears in critical posthumanist, new materialist, and decolonial understandings of liveability. My objective here is not to propose a legal reform of the institutional functioning of the ECHR, but to speculate about how this 'living constitution' could 'constitute the living' differently. If the metaphor of life acts as a ruling device in the interpretation of the ECHR, only particular life-forms get protected, while others are eclipsed. I therefore think with Bernhardt's invitation to consider the 'living' nature of the ECHR to reconceptualise the protection of life that animates human rights theory and practice today.

Keywords

Life – Living Instrument – Human Right to a Healthy Environment – Rights of Nature – Nonhuman Agency – Constitution of the Living

I. Introduction

> *An evolutive treaty interpretation is the adequate and necessary response to the changing character of international law and the intensified cooperation between States. This kind of interpretation requires careful consideration and, sometimes, restrictive application. But it should be considered an adequate response to modern questions and problems.*
>
> Rudolf Bernhardt (1999)[1]

Working as a Judge and later President and Vice-President of the European Court of Human Rights (ECtHR), Bernhardt consistently advocated for the European Convention on Human Rights to be interpreted 'dynamically' in light of 'modern questions and problems' – the convention, he and his colleagues believed, should be seen and handled as a 'living instrument'.[2] In

1 Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights', GYIL 42 (1999), 11-25 (25).

2 European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U. N. T. S. 222, entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

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this article, I reflect on 'modern questions and problems' that confront contemporary human rights theory and practice today. The 'modern questions and problems' I focus on are those of ecological collapse and climate change-induced social struggles. Planetary turbulences, ecological catastrophes, and social unrest are indeed the 'present-day conditions' against the backdrop of which the ECHR must be interpreted.[3] This, I will argue, presents profound challenges to human rights law, which seems ill-tuned to the spatial, temporal, and material features of such disruptions. At the same time, I also linger with the metaphor of 'life' – of vitality, evolution, and open-endedness that sits at the heart of Bernhardt's interpretative canon. If the instrument of the ECHR is 'living' indeed, so too is the environment in which the rights it enshrines are situated. And yet, the 'living environment' of the ECHR is the big absentee of the text.

This silence of the ECHR, however, did not detract the ECtHR from actively protecting the environment over the course of its last seven decades.[4] The paradox of a *de facto* protection of the environment in relation to human rights by the ECtHR despite a *de jure* lack of explicit grounds to do so, is amplified today by a series of 'high profile' climate cases pending before the court. A particular understanding of the protection of life underlies the ECtHR's integration of environmental concerns within the corpus of human rights: a concern for the 'general interest' of European peoples and the need to preserve and safeguard a 'European way of life' that the ECHR aimed to guarantee. This 'way of life' rests on what the ECHR proclaims as rights and freedoms that 'everyone' ought to enjoy under the jurisdiction of 'European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law', as per the preamble of the ECHR.[5] How, then, can we think of an evolutive treaty interpretation of the convention in light of the existential threats posed by ecological catastrophes to the very possibility of a sustained life on Earth? What rights, and of whom, ought to be guaranteed, when the very processes of life-making are being eroded? Where are lines drawn between whose life is sensed and safeguarded – and who, in this encounter, is designated to do the drawing?

This article focuses on the 'living' ecology of the ECHR. If the metaphor of 'life' has played a key role in discussions on how to interpret the convention, would it be possible, and what would it entail, for the 'living' convention – of which Rudolf Bernhardt so eloquently spoke – to become a

3 The notion of 'present-day conditions' comes from ECtHR, *Tyrer v. United Kingdom*, judgment of 25 April 1978, no. 5856/72, para. 31.

4 See Factsheet on the 'Environment and the European Convention on Human Rights' (June 2022), at <www.echr.coe.int/documents/fs_environment_eng.pdf>.

5 ECHR (n. 2), preamble and Art. 2 on the Right to life.

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'convention for the living'? What would it mean, in other words, to analytically shift attention from the 'living constitution' to the 'constitution of the living'? To answer this question, one first has to confront the difficult interrogation of what 'life' is and what forms of life currently merit legal consideration and protection – or, to put in Judith Butler's terms, what forms of life are 'grievable' and 'ungrievable' in the legal, political, and aesthetic understandings of the protection of life in Europe today.[6] A differential degree of care is attributed to life among humans, with the life of some worth more than others – think, for example, of the allegations by Josep Borrell about Europeans living in a 'garden' invaded by Europe's Others living in a 'jungle', thereby inevitably echoing the 'ungrievable life' of the twenty-five thousand migrants and refugees lost to the Mediterranean Sea.[7] A differential degree of care is also unequally distributed among nonhumans, with the protection of megafauna and megabiota of over-ground life disproportionally attracting the lion's share of protection.[8] And, of course, life is differentially protected between humans and nonhumans, with the 'abundance of life' drastically declining in the number of insects, vertebrates, and plant species every day.[9]

To better protect both human and nonhuman life, rights-based approaches to environmental protection have flourished over the past decades.

6 Applied to a different context – of how war divides populations into those who are grievable and those who are not – Butler asks whose lives are considered valuable, whose lives are mourned, and whose lives are considered ungrievable. An ungrievable life is one that cannot be mourned because it has never lived, that is, it has never counted as a life at all. See Judith Butler, *Frames of War: When Is Life Grievable?* (Brooklyn and London: Verso 2016). In a similar vein, critical Black theorist Walcott speaks of 'Black life-forms' in relation to the life of Black people that does not count as (human) 'life' in the eyes of the law: 'Euro-American definitions and practices of the human offer Black life no conceptual or actual space within the terrain of the human'. Here, 'death [or the constant urgency of living with death] is the means toward Black life' a 'death – the central motif of Black life […] – is a primal constituting element of Black life-forms'. Rinaldo Walcott, 'Black Life-Forms', in: Rinaldo Walcott, *The Long Emancipation: Moving Toward Black Freedom* (Durham, NC: Duke University Press 2021), 9, 15.

7 See 'Josep Borrell as Europe's racist "gardener"', at <www.aljazeera.com/opinions/2022/10/17/josep-borrell-eu-racist-gardener>; and Missing Migrants Project, at <https://missingmigrants.iom.int/region/mediterranean>.

8 See Arie Trouwborst, 'Megafauna Rewilding: Addressing Amnesia and Myopia in Biodiversity Law and Policy', Journal of Environmental Law 33 (2021), 639-667; Brian J. Enquist et al., 'The Megabiota are Disproportionately Important for Biosphere Functioning', Nature Communications 11 (2020), 699. On the need to protect and harness the under-ground mycorrhizal networks that regulate the Earth's climate and ecosystems, see the Society for the Protection of Underground Networks (SPUN), <www.spun.earth>.

9 See 'Sixth Mass Extinction Could Destroy Life as We Know It', at <https://ec.europa.eu/research-and-innovation/en/horizon-magazine/sixth-mass-extinction-could-destroy-life-we-know-it-biodiversity-expert>.

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These developments can be narrated as a continuous evolution and expansion of the understanding of life and its protection. Today, two main proposals are being advocated to reinforce and extend the protection of life in light of existential threats posed by ecological and climatological disorders. One proposal is the recognition of a self-standing *human right to a healthy environment*, which I refer to as the *liberal response*. As I will argue in the first part of this article, this proposal is framed around an anthropocentric understanding of human life and all the environmental conditions that need to be protected in order to sustain, nurture, and safeguard such life. The notion of life that is treasured here, is perhaps best visualised in the precarious, innocent, and vulnerable faces of 'future generations'. A particular projection of a specific 'way of life' that is worth protecting lingers in these invocations. Against this anthropocentric protection of life as part of a protected environment, another popular proposal consists in advocating for the protection of nonhuman life by recognising *rights of nature*, which I refer to as the *critical liberal response* to ecological threats posed to life. As I will argue in the second part of the article, this proposal extends to 'nature' the protective status so far granted to liberal human subjects. These two responses 'constitute the living' differently. When thinking with and against these responses through contemporary biological theory, new materialism, and decolonial posthumanism, the ideals of the 'living' that are protected in the 'liberal' and 'critical liberal' proposals appear as narrow, limiting, and ill-suited. In contrast, the 'living' that is present in the strands of theory and practice I draw upon, is neither that of a human life worth protecting as part of a containing environment, nor that of a liberal expansion of subjecthood to include nonhumans. Rather, the strands of theory and practice I draw upon open up a 'more-than-human' perspective on life, where life is co-constituted by and through entangled human and nonhuman relations. In the third and final part of this article, I therefore speculate about how a 'more-than-human life' reveals a distinct 'constitution of the living'. My key argument is that legal thinking in the sphere of human rights and environmental protection can benefit from a 'more-than-human' understanding of the living. What I suggest, then, is not a 'more-than-human *law*', but for a 'more-than-human *life*' to appear before the law. My main objective is therefore not to propose a concrete legal answer to ecological threats posed to life, but to rethink, expand, and enrich the concept of the 'living' that currently receives legal attention.

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II. The 'Liberal Response' to Ecological Threats Posed to Life

Human rights-based approaches to environmental protection have been developed, mainstreamed, and amplified over the past decades. The very emergence of 'modern' international environmental law was already marked by debates about whether or not to recognise, and in which terms, a 'human right to a healthy environment'.

Such a right was formulated as soon as environmental concerns made their entry into global institutional fora. Principle 1 of the 1972 Stockholm Declaration on the Human Environment stated indeed that 'Man 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'.[10] While not explicitly expressed as a 'right to a healthy environment', it is evident that a right to live in an 'environment of quality that permits a life of dignity and well-being' is conditional upon a 'healthy environment'. This was also noted by Fatma Zohra Ksentini – named United Nations (UN) Special Rapporteur on Human Rights and the Environment by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1989 – who observed how a 'shift from environmental law to a right to a healthy and decent environment' had taken hold of international environmental law with the adoption of the Stockholm Declaration in 1972.[11] If international environmental law and human rights law emerged as autonomous and independent bodies of law, they evolved in the second half of the twentieth century towards ever-closer normative and institutional interconnections.[12] Over the past five decades, the human rights to life and to health were increasingly referred to in international environmental legislations,[13] and the need to protect the environment to ensure the fulfilment of such

10 Report of the UN Conference on the Human Environment, Stockholm (5-16 June 1972), UN Doc.A/Conf.48/14/Rev.1 (1973), 11 ILM 1416 (1972). The rest of the provision stated that '[Man] bears a solemn responsibility to protect and improve the environment for present and future generations'.

11 UN Commission on Human Rights, Final Report prepared by Fatma Zohra Ksentini, former Special Rapporteur on Human Rights and the Environment (6 July 1994), UN Doc E/CN.4/Sub.2/1994/9, paras 22-23.

12 On this evolution – the synergies and tensions that underpin it – see also Marie-Catherine Petersmann, *When Environmental Protection and Human Rights Collide: The Politics of Conflict Management by Regional Courts* (Cambridge: Cambridge University Press 2022).

13 See, e. g. the explicit link between human health and environmental protection in the 1992 Helsinki Convention, which defines 'transboundary impacts' on the environment as entailing 'effects on human health and safety'. Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992), Art. 1.

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rights was also recognised in international human rights instruments – with the notable exception of the ECHR adopted more than twenty years prior to the 1972 Stockholm Declaration.[14] Yet, despite such formal recognitions, a human right to a healthy environment is not justiciable as such before international and regional human rights courts.[15] While particular human rights violations can be invoked when environmental issues directly interfere with them, no one is entitled to claim a right to have the 'environment' protected as such, if it does not specifically interfere with their lives. As a result, environmental human rights scholars actively advocated for the recognition of a self-standing human right to a healthy environment at a global level and in an internationally legally binding instrument. If the latter failed in May 2019 when UN Member States decided not to adopt a Global Pact for the Environment,[16] the former finally saw the day in July 2022.

Indeed, the decades-long efforts to reinforce the linkages between environmental and human rights protection culminated with the recognition by the UN Human Rights Council (UNHRC) of a 'right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights' on 8 October 2021;[17] and, one year later, by the UN General Assembly (UNGA) of a 'right to a clean, healthy and sustainable environment' on 28 July 2022.[18] The Member States of the Council of Europe (CoE) took action, too. On 29 September 2021, the Parliamentary Assembly of the CoE (PACE) adopted a resolution recommending the crea-

14 See 1981 African Charter on Human and Peoples' Rights, Art. 24; 1988 Protocol of San Salvador to the American Convention on Human Rights, Art. 11(1); 2004 Arab Charter on Human Rights, Art. 38; 2009 European Union Charter of Fundamental Rights, Art. 37; 2012 ASEAN Human Rights Declaration, Art. 28(f). The ECHR is the only regional human rights instrument that does not refer to environmental protection. This corroborates the idea of a Stockholm influence in human rights law, since the ECHR is also the only regional human rights instrument adopted before 1972. Petersmann (n. 12), 50-52.

15 In all these instruments, the protection granted to the environment in connection to human rights is of declaratory importance and does not provide for justiciable protection at the individual level. Petersmann (n. 12), 51.

16 See Global Pact for the Environment, at <http://pactenvironment.org/>. Art. 1 of the draft text recognised that '[e]very person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment'. On 22 May 2019, the Ad Hoc Open-Ended Working Group established by UNGA Resolution 72/277 entitled 'Towards a Global Pact for the Environment', rejected the adoption of a legally binding treaty. On the making and un-making of this Global Pact, see Marie-Catherine Petersmann, '"I Wish There Was a Treaty We Could Sign": An Inquiry into the Making of the Global Pact for the Environment', Ind. J. Global Legal Stud. 28 (2021), 7-80.

17 UNHRC, 'The Human Right to a Safe, Clean, Healthy and Sustainable Environment', UNHCR Res A/HRC/48/L.23/Rev.1 of 8 October 2021.

18 UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment', UNGA Res A/76/L.75 of 28 July 2022.

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tion of a new Additional Protocol to the ECHR safeguarding a 'right to a healthy environment'.[19] The PACE stated that 'such a legal text would finally give the [ECtHR] "a non-disputable base for rulings concerning human rights violations arising from environment-related adverse impacts on human health, dignity and life"'.[20]

While progressive in its aspiration to align the ECHR to 'modern questions and problems' – as Bernhard insisted[21] – I qualify this response as 'liberal', since the emphasis remains centred on 'human health, dignity and life'. Many might frown upon this explicitly anthropocentric formulation. Even more concerning in my opinion – since it might be counter-intuitive to critique a human right for protecting human life – is that such formulation reinscribes a liberal individualisation of ecological concerns, which by their very nature exceed such categorisations. The liberal response is concerned with expanding the scope of judicial protection available to individual human victims as subjects of law, in light of increasing ecological disruptions of their lives. The rationale behind this response, in other words, is to ensure that the liberal autonomous human subject can claim a human right to a healthy environment and have a 'healthy life' judicially protected. It is this individualising tendency of liberal thought that preoccupies me here.

What is more, should a human right to a healthy environment be recognised in an Additional Protocol to the ECHR – as recommended by the PACE – then not only would individual applicants have to be directly concerned by the environmental issues at stake, but the latter would also need to reach a certain degree of severity to be considered by the ECtHR in the first place. Indeed, for a case dealing with environmental matters to be admitted by the ECtHR, a certain level of severity must be established. This 'minimum level of severity' must go beyond the degree of interference of 'environmental hazards inherent to life in every modern city'.[22] But what standards of 'life' in modern cities and their peripheries is the ECtHR referring to, here? What counts as living *in* a modern city, when this implies living *from* environmental pollution that materialises 'slowly, gradually, and

19 Resolution 2400 on Combating Inequalities in the Right to a Safe, Healthy and Clean Environment'; and Resolution 2396 (29 September 2021), at <https://pace.coe.int/en/files/29523>. Note that in 2009 the PACE had already recommended that its Committee of Ministers draft an Additional Protocol to the ECHR in which a right to a healthy environment would be incorporated, but the Committee did not vote in favour of this resolution.

20 PACE News, at <https://pace.coe.int/en/news/8452/the-right-to-a-healthy-environment-pace-proposes-draft-of-a-new-protocol-to-the-european-convention-on-human-rights->. The PACE's draft will now be considered by the CoE's Committee of Ministers, which has the final say on whether to draft a new Additional Protocol.

21 Bernhardt (n. 1), 25.

22 ECtHR, *Fadeyeva v. Russia*, judgment of 30 November 2005, no. 55723/00, paras 68-70.

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ought of sight' – far away and far South from European urban centres?[23] For the ECtHR, it is clear, 'mere tenuous connections or remote consequences [of environmental harms] are not sufficient'.[24] The environmental harms must be 'serious', 'specific', and 'imminent',[25] in addition to being tied to individuated human victims. In its more recent jurisprudence, the ECtHR traded the condition of 'immanence' in favour of a precautionary approach, by emphasising rapid actions before potentially disastrous environmental damages would materialise.[26] Yet, despite a certain loosening of the high threshold of severity for environmental cases to be considered by the ECtHR, a causal link between environmental harms and human rights violations must always be established for an 'actual interference' to exist.[27] This can prove to be a difficult exercise for ecological issues with spatially diffused, temporally deferred, and materially dispersed implications.

Against this backdrop, many commentators noted how litigants in 'high profile' climate cases currently pending before the ECtHR strategically stretched the victim status to more than one single individual.[28] The *KlimaSeniorinnen* case, for instance, was brought by an association representing nearly 200 elderly women aged on average 73 years old; while the *Duarte Agostinho* case was brought by six Portuguese children and young adults

23 The distinction between the 'land we live *on*' and the 'land we live *from*' comes from Pierre Charbonnier, *Abondance et liberté: Une histoire environnementale des idées politiques*, (Paris: La Découverte 2020). In a similar vein, and as Schultz puts it: '[l]a rupture spatiale entre le monde *où* on vit et le monde *dont* on vit a toujours été associtée à une rupture temporelle entre l'époque *à laquelle* on vit et celle *de laquelle* on vit. [Les générations passées vivaient] *dans* le present mais *de* l'avenir, une réalité rendue d'autant plus visible par la menace réelle qui pèse désormais sur les conditions matérielles d'habitabilité des générations futures'. Nikolaj Schultz, *Mal de Terre* (Paris: Essais Payot 2022), 24. The notion of 'slow violence' comes from Nixon, in reference to 'a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all'. Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge, MA: Harvard University Press 2011), 9.

24 ECtHR, *Balmer-Schafroth and others v. Switzerland*, judgment of 26 August 1997, no. 22110/93, para. 32.

25 ECtHR, *Balmer-Schafroth and others*, (n. 24), para. 40.

26 See, e. g. ECtHR, *Hardy and Maile v. United Kingdom,* judgment of 9 June 2012, no. 31965/07, paras 191-192.

27 This was recently reiterated in ECtHR *Pavlov and Others v. Russia,* judgment of 11 October 2022, no. 316112/09, paras 61-62 (where the court recognised the severity of air pollution in a large industrial city as causing the violation of the applicants' right to private life).

28 See Corina Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability', EJIL 33 (2022); Natalia Kobylarz, 'Balancing Its Way Out of Strong Anthropocentrism: Integration of "Ecological Minimum Standards" in the European Court of Human Rights' "Fair Balance" Review', Journal of Human Rights and the Environment 13 (2022), 16-85; Helen Keller and Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR', Nordic Journal of Human Rights 40 (2022), 153-174.

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aged from 8 to 21 against 33 States as well as the EU; and the *Greenpeace Nordic* case by six young climate activists, among whom two Sámi applicants, along with two environmental Nongovernmental Organisations (NGOs).[29] Yet, despite such efforts to expand the victim status to groups of applicants whose life is collectively affected by environmental harms, that the 'general interest in environmental protection' is no valid ground for an *actio popularis* to be admitted before the ECtHR is a matter of law.[30] In all the climate cases currently pending before the ECtHR, the plaintiffs had therefore to establish a direct link when invoking their 'right to live in a healthy environment' against insufficient climate mitigation and adaptation measures taken by their States. While it remains to be seen if these cases will be admitted and reach the merit stage, the ECtHR is seemingly countering its reputation of 'keep[ing] out of trouble with governance'[31] by deferring climate cases to national authorities – as Başak Çalı observed in the last Rudolf Bernhardt Lecture delivered in 2020[32] – by 'staying with the trouble' of climate change, as Donna Haraway would put it.[33]

Yet, the expansion of the number of victims in environmental cases before the ECtHR does not do away with the necessity to link the effects of an

29 See ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* no. 53600/20, communicated on 17 March 2021, relinquished to the Grand Chamber on 26 April 2022, first hearing on 29 March 2023; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Other States,* no. 39371/20, communicated on 13 November 2020, relinquished to the Grand Chamber on 29 June 2022; ECtHR, *Greenpeace Nordic et al. v. Norway*, no. 34068/21, communicated on 16 December 2021. The expansion of the victim status aligns with the jurisprudence of the ECtHR, who long reckoned that 'the term "victim" […] must be interpreted in an evolutive manner in the light of conditions in contemporary society. […] An] excessively formalistic […] interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory'. ECtHR, *Gorraiz Lizarraga and others v. Spain,* judgment of 17 April 2004, no. 62543/00, para. 38 (as cited in Margaretha Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change', Climate Law 9 (2019), 224-243 [232]).

30 See Art. 34 of the ECHR. See also ECtHR, *Kyrtatos v. Greece*, judgment of 22 May 2003, no. 41666/98, para. 52: 'the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere *and not simply the general deterioration of the environment*' – '[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide *general protection of the environment as such*' (emphases added).

31 Erik Voeten, 'The ECtHR's Coping Strategy: The Pitfalls of Subsidiarity and Deference as Strategies to Avoid Backlash', Verfassungsblog, 30 September 2022, at <https://verfassungsblog.de/the-ecthrs-coping-strategy/>.

32 On the topic of deference and subsidiarity, see the 3rd Bernhardt Lecture delivered by Professor Başak Çalı, at <www.mpil.de/en/pub/news/events.cfm?event=calendar.Display&cat=3&iDisplayID=7&event_ID=612&date=10/13/2020>.

33 See Donna J. Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Durham, NC: Duke University Press 2016).

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environmental harm attributable to a state to particular rights of the applicants. Already in 2010, in *Bacila v. Romania*, the ECtHR had recognised a 'right of the persons concerned to enjoy a balanced and healthy environment'.[34] If such a right was afforded to the 'persons concerned', the concern at stake is always physiological. A concerned person, in other words, is one who is physically or mentally affected by the environmental harm at stake. Ecological grief, eco-anxiety, or 'solastalgia' will not play in the balance.[35] These are merely sentimental and emotional states that may animate each and every person worried about ecological collapse and its effects. This inevitably limits the interpretation of persons concerned, leaving open only the possibility of invoking pre-existing rights of 'future generations' as an expression of ecological activism.[36] As it stands, to be concerned about – rather than concerned with – ecological issues, is no sufficient ground for taking action before the ECtHR.

Once and if a self-standing human right to a healthy environment will be recognised by the CoE in an Additional Protocol to the ECHR, around 830 million European citizens might be entitled to claim such a right before their domestic courts and, after exhaustion of domestic remedies, before the ECtHR.[37] These 830 million European citizens, however, will all need to be individually affected and physiologically concerned with the environmental harms at stake for their case to be admissible before the ECtHR. If a recogni-

34 ECtHR, *Bacila v. Romania*, judgment of 30 March 2010, no. 19234/04, para. 79.

35 Blanche Verlie, *Learning to Live with Climate Change: From Anxiety to Transformation* (New York: Routledge 2021); Lesley Head, *Hope and Grief in the Anthropocene: Reconceptualising Human-Nature Relations* (New York: Routledge 2016). 'Solastalgia' describes a form of emotional and existential distress caused by environmental change. See Glenn A. Albrecht, *Earth Emotions: New Words for a New World* (Ithaca: Cornell University Press 2019).

36 The rights of 'future generations' were indeed invoked in the three pending climate cases before the ECtHR, the *KlimaSeniorinnen, Duarte Agostinho* and *Greenpeace Nordic* cases (n. 29). The failure to take eco-anxiety into account in relation to the right to life was explicit in the recent *Torres Strait Islanders* petition, where the UN Human Rights Committee held that: '[it] takes into account the authors' argument that the health of their islands is closely tied to their own lives. However, the Committee notes that while the authors evoke feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides, and availability of traditional and culturally important food sources, they have not indicated that they have faced or presently face adverse impacts to their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity'. UNHRC, *Torres Strait Islanders*, CCPR/C/135/D/3624/2019 (22 September 2022), para. 8.6..

37 Rik Daems, 'Climate Change and Protection of the Environment as a Question of State Policy?' in: *Human Rights for the Planet: Proceedings of the High-level International Conference on Human Rights and Environmental Protection*, Council of Europe, 5 October 2020, 73-76 (76). Rik Daems was the President of the PACE from 2020 to 2022.

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tion of a human right to a healthy environment would offer an important and powerful tool for climate litigants, we should remain cautious about the limitations that an individualised right necessarily performs – making this response a thoroughly liberal one. In short, with a human right to a healthy environment, the life that is protected is that of atomised individual human victims. Only a *human* life is here judicially constituted. Against this anthropocentric approach, another response to ecological threats posed to life has been to diversify and expand the very nature of the victims of environmental harms by including nonhumans as part of it. In the next section, I turn to the movement of granting rights to 'nature'.

III. The 'Critical Liberal Response' to Ecological Threats Posed to Life

In this second part of the article, I analyse how granting rights to nature operates as a 'critical liberal response' to ecological threats posed to life. This response remains 'liberal' since – like with the recognition of a self-standing human right to a healthy environment – only individualised victims can have their rights protected. Yet, this response is also 'critical' since at its core lies a critique of traditional humanism centred on the human figure. The critique offers therefore an important corrective to the narrow anthropocentric focus on human life. By calling for nonhumans to be recognised as victims of ecological harms and bearer of rights, the 'critical liberal response' *de*-anthropocentres the understanding of the victim of environmental harms by extending it to nonhuman life-forms.

In this context, many environmental human rights scholars see in rights of nature a way to 'salvage the planet' from 'Anthropocenic'[38] living condi-

[38] While denoting a geological marker that distinguishes the current geological epoch from the Holocene of the past 12.000 years due to anthropogenic disruptions of ecological functionings, the term 'Anthropocene' turns a blind eye to racial, economic, and socio-political power imbalances. Critiques of the 'Anthropocene' are voiced to resist the universalising and totalising approach to anthropogenic disruptions of ecosystem processes and attend to the colonialist and capitalist roots of the geological era that the 'Anthropocene' has become the name of. See Donna J. Haraway, 'Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin', Environmental Humanities 6 (2015), 159-165 (159). For a compelling critique of the erasure of structurally dispossessed, de-humanised, and de-subjectivised Indigenous, Black, Creole, and Other 'inhumans' associated with the 'geologically white' Anthropocene, see also Kathryn Yusoff, *A Billion Black Anthropocenes or None*, (Minneapolis: The University of Minnesota Press 2019); and the special issue edited by Andrew Baldwin and Bruce Erickson on 'Race and the Anthropocene', Society and Space 38 (2020).

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tions.[39] By way of illustration, the current UN Special Rapporteur on human rights and the environment, David Boyd, qualified rights of nature as a 'legal revolution that could save the world'.[40] But which 'world', and of whom, is to be saved, precisely?[41]

Like with the 'liberal response' that materialised at an international plane after domestic legal systems had recognised a human right to a healthy environment in their internal jurisdictions, the global movement of granting rights to nature is following suit after thirty-nine countries already adopted constitutional, legislative, or policy measures recognising rights of nature as of 2022.[42] The vast majority of these countries are situated in Latin America, where rights of nature were first constitutionally recognised. In the late 2000s, postcolonial states like Ecuador and Bolivia underwent what Roger Merino called a 'plurinational and inter-cultural re-constitutional process', which enabled a legislative recognition of rights of nature based on ancestral cosmovisions of local Indigenous peoples, Afro-descendant, Maroon and Native communities who had been marginalised by constituent powers.[43] In such countries, rights of nature are therefore deeply entangled with resisting communities invested in *de-* and *re-*constitutionalising the relationships between humans and nonhumans differently – to articulate new modes of living

39 See Alice Bleby, 'Rights of Nature as a Response to the Anthropocene', U. W. Austl. L. Rev. 48 (2020), 33-67; Joshua C. Gellers, 'The Rights of Nature: Ethics, Law, and the Anthropocene' in: Joshua C. Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law* (New York: Routledge 2020), 104-139; Hugo Tremblay, 'Perspectives Critiques sur le Droit de l'Environnement Face a l'Anthropocene', Ottawa L. Rev. 51 (2019), 429-459; Jens Kersten, *Das Anthropozän-Konzept: Kontrakt – Komposition – Konflikt* (Baden-Baden, Nomos 2014).

40 David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto: ECW Press 2017). In this spirit, see, e. g. Kersten, who contends that 'we should imagine the possibilities of Nature as a legal person with its own rights as the most innovative and inspiring concept to save our planet, and ourselves'. Jens Kersten, 'Who Needs Rights of Nature' in: Anna Leah, Tabios Hillebrecht and Maria Valeria Berros (eds), *Can Nature Have Rights? Legal and Political Insights* (Rachel Carson Center Perspectives: Transformations in Environment and Society 6/2017, 9-13.

41 On how narratives about 'saving the world' tend to be motivated by the task of securing White futures, and how futurists visions drawn from Black, Indigenous and People of Color (BIPOC) enable to reimagine more just and vibrant futures, see Audra Mitchell and Aadita Chaudhury, 'Worlding Beyond "the" "end" of "the world": White Apocalyptic Visions and BIPOC Futurisms', Int'l Rel. 34 (2020), 309-332.

42 Alex Putzer, Tineke Lambooy, Ronald Jeurissen and Eunsu Kim, 'Putting the Rights of Nature on the Map. A Quantitative Analysis of Rights of Nature Initiatives Across the World', Journal of Maps 18 (2022), 89-96.

43 Roger Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America', LJIL 31 (2018), 773-792 (777). See also Philipp Wesche, 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision', Journal of Environmental Law 33 (2021), 531-555.

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in the service of creating a liveable future.[44] Today, however, it is the former European colonial powers that erased, silenced, and marginalised these modes of inhabiting the Earth to impose their 'mononaturalist' worldview,[45] that turn to rights of nature and advocate a 'becoming indigenous' as a new governmental imaginary to navigate the Anthropocene.[46]

Indeed, whether through litigation on behalf of trees in Belgium,[47] a proposed rights of nature amendment to the constitution of Sweden,[48] a suggested recognition of the river Rhein and the Rigi mountain as rights-bearing entities in Switzerland,[49] a motion on special rights for the Wadden Sea in the Netherlands,[50] or a legislative recognition of rights of nature in Northern Ireland,[51] all these developments point towards an expansion of the liberal category of the right-holder *beyond* the human, thereby giving rise to what some scholars have called '*post*-human rights'.[52] If, until now, these

44 See Tiffany Lethabo King, Jenell Navarro and Andrea Smith (eds), *Otherwise Worlds: Against Settler Colonialism and Anti-Blackness* (Durham, NC: Duke University Press, 2020).

45 John Law, 'What's Wrong with a One-world World?' Distinktion: Journal of Social Theory 16 (2015), 126-139. Law critiqued hegemonic 'Northern' strategies that naturalise mononaturalism – or the natural/physical character of the world, disconnected from the cultures, peoples, and beliefs that form the multicultural character of the world – and reduce Indigenous realities to beliefs which may be discounted. He denounced how the Global North enacted this 'mononaturalism' while inhabited by multiple-natures.

46 Calls to 'become indigenous' abound in governing imaginaries for the Anthropocene, from Latour's analogy of 'becoming Earthbound' by 'learning this from [Indigenous peoples]', to Danowski and Viveiros de Castro's argument that in the Anthropocene, 'we would thus all be indigenous, that is Terrans, invaded by Europeans, that is Humans'. See David Chandler and Julian Reid, *Becoming Indigenous: Governing Imaginaries in the Anthropocene* (Lanham: Rowman & Littlefield 2019), 7-9. Chandler and Reid warn against the tendencies in 'ontopolitical anthropology' that exoticise Indigenous knowledges and practices and thereby 'ontologize indigeneity' when advocating for 'non-modernist' approaches to being in the Anthropocene.

47 'Requête en intervention volontaire: l'aulne à feuille cordée et l'ensemble des 81 autres arbres', at <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191216_2660_na.pdf>.

48 'Amendment for the Rights of Nature in the constitution of Sweden', at <https://naturensrattigheter.se/2019/05/15/amendment-for-the-rights-of-nature-in-the-constitution-of-sweden/>.

49 'Rhein und Rigi sollen vor Gericht ziehen dürfen', at <www.bernerzeitung.ch/rhein-und-rigi-sollen-vor-gericht-ziehen-duerfen-988012964068>.

50 Tineke Lambooy, Jan van de Venis and Christiaan Stokkermans, 'A Case for Granting Legal Personality to the Dutch Part of the Wadden Sea', Water International 44 (2019), 786-803.

51 'Northern Ireland Council "first on these islands" to recognise the "rights of nature"', at <www.belfastlive.co.uk/news/belfast-news/northern-ireland-council-first-islands-20897949>.

52 Post-human approaches aim at dismantling both the gendered, racial, and class-based hierarchies between humans, and the hierarchies between humans and all other living and non-living, animate, and inanimate entities. By expanding the 'right' category beyond the human and thereby de-centring the human as the exclusive category of right-holders (or at least the privileged category of right-holders, if one considers that private corporations also own rights), rights of nature can then be understood as post-human. See Emily Jones, 'Posthuman International

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developments remained policy aspirations, since the 22 September 2022, Spain became the first European country to formally grant a legal personhood status to the threatened saltwater lagoon of Mar Menor.[53]

Ecologists had warned for years that Mar Menor is slowly dying due to the runoff of fertilisers from nearby farms. Some might remember the images from August 2021, when millions of dead fish and crustaceans washed up on the shores of the lagoon – a phenomenon blamed on agricultural pollution.[54] The legal representation and guardianship of the lagoon will now be exercised through an authority that will include representatives of public administrations, members of universities, research, and scientific centres, and residents of local municipalities. If the public administration does not fulfil its obligation to conserve, preserve, and restore the lagoon, this authority – as new 'legal person'[55] – will be

Law and the Rights of Nature', Journal of Human Rights and the Environment, JHRE 12 (2021), 76-102. As will become clear throughout this article, my understanding of post-humanism is embedded in a refusal of humanist commitments to the category of the liberal (human) subject as an autonomous, free, and rational agent. As such, my working with post-humanism is to be distinguished from legal activists who use it to inflate the category of the subject beyond the human without necessarily questioning the values of humanism at its core. By way of illustration, Stucki argues that 'human rights turned into (human and nonhuman) animal rights are *post-human* rights – not "rights of posthumans", nor an anti-humanist regression, but rather, a post-humanist progression of human rights'. Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Cham: Springer 2023), 99. In such accounts, post-humanism is reduced to post-anthropocentrism. While post-anthropocentrism is key to my understanding of post-humanism, I want to rethink relations between humans and nonhumans against or beyond humanist modes of representation and subjectification to reconfigure modes of living away from violent what I see as subjections to racialised, colonial, and liberal inscriptions of subjective 'rights', whether human or nonhuman. See Marie Petersmann, 'In the Break (of Representation): On Rights of Nature and More-than-human Sociality' (forthcoming 2023).

53 'Spain grants personhood status to threatened Mar Menor lagoon', at <www.thelocal.es/20220922/spain-grants-personhood-status-to-threatened-lagoon/>.

54 'Spain bans fertilisers near saltwater lagoon after dead fish wash up', at <www.theguardian.com/environment/2021/aug/26/spain-bans-fertilisers-near-saltwater-lagoon-after-dead-fish-wash-up>.

55 I use 'legal person' in scare quotes to emphasise the hybrid nature of this category, which differentiates it from a strictly human 'legal person'. As Fischer-Lescano notes: 'the non-human person (river, animal, etc.) is complemented by a natural person (individual plaintiff) or a juridical one (collective plaintiff), forming a juridical association with it, and thereby a new legal person. As a "natural person" in the law, this person constitutes a hybrid of non-human and (individual or collective) human actors'. Andreas Fischer-Lescano, 'Nature as a Legal Person: Proxy Constellations in Law', Law & Literature 32 (2020), 237-262 (246-247). Fischer-Lescano cautions against these novel forms of representations of nonhumans through an expansion of personhood. As he questions: 'How is it possible to hold those acting as nature's representatives accountable for the integrity of their interests? How can we prevent the subjugation of nature and animals by purported advocates? How can we organize and articulate the internally heterogeneous interests of rivers, for example? How can we avoid the trap of advocatorial violence, as described by Gayatri Spivak and Boaventura de Souza Santos for the transnational human rights movement, or by Samera Esmeir for processes of colonization?', 248.

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entitled to demand criminal and administrative action before Spanish tribunals. Could Spanish citizens, via the public authority that represents the interests of Mar Menor, seize the ECtHR on behalf of the lagoon, following exhaustion of domestic remedies? This configuration seems implausible, since the direct link discussed above would require the applicants to be individually affected and physiologically concerned, thereby excluding the rights of the lagoon from the jurisdictional scope of the ECtHR. In a foreseeable future, however, Spanish citizens might have a chance to seize the Court of Justice of the European Union, in case the proposed European Union (EU) Charter on Fundamental Rights of Nature that was drafted by a group of experts and submitted to the European Economic and Social Committee in December 2019, gets adopted.[56] This initiative built on the 2017 European Citizens' Initiative Draft Directive for Rights of Nature, which advocated for a recognition of rights of nature in the EU to regulate 'legal relationships between society and nature, based on principles of applied ecology'.[57] As it stands, however, the 'critical liberal response' to ecological threats posed to life remains aspirational in most Member States of the CoE, with the exception of Spain.

By aspiring to expand the granting of rights from *human* to *nonhuman* victims, are we then moving towards a recognition of '*more-than-human* rights' – as argued by some?[58] What would it mean to bear 'more-than-human *rights*', and who would hold such rights? While the conceptualisation of 'more-than-human' concerns has long been explored in Science & Technology Studies,[59] political ecology,[60] international rela-

56 Michele Carducci et al., 'Towards an EU Charter of the Fundamental Rights of Nature', (European Economic and Social Committee, 2019), at <www.eesc.europa.eu/sites/default/files/files/qe-03-20-586-en-n.pdf>.

57 Draft Directive ECI for Rights of Nature by Mumta Ito, para. 49, at <https://natures-rights.org/ECI-DraftDirective-Draft.pdfat>. Ito is one of the co-authors of the EU Charter of the Fundamental Rights of Nature. On these developments, see Marie-Catherine Petersmann, 'Rights of Nature in the EU? On Colliding Cosmovisions, Relationalities, and Entanglements' in: Costas Douzinas and Alexis Alvarez-Nakagawa (eds), *Non-Human Rights: Critical Perspectives* (Cheltenham: Edward Elgar, forthcoming 2023).

58 See César Rodríguez-Garavito, 'Climatizing Human Rights: Economic and Social Rights for the Anthropocene', NYU School of Law, Public Law Research Paper (2021), Working Paper No. 21-41.

59 See Donna J. Haraway, 'A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century' in: Donna J. Haraway, *Simians, Cyborgs and Women: The Reinvention of Nature* (New York: Routledge 1991), 149-181 (149); Bruno Latour, *Politiques de la nature: Comment faire entrer les sciences en démocratie* (Paris: La Découverte 2004).

60 See Petra Tschakert, 'More-than-human Solidarity and Multispecies Justice in the Climate Crisis', Environmental Politics 31 (2020), 277-296; Michelle Bastian, Owain Jones, Niamh Moore and Emma Roe (eds), *Participatory Research in More-than-Human Worlds* (New York: Routledge 2017).

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tions,[61] anthropology,[62] sociology,[63] and feminist ecological philosophy,[64] work on these themes in legal studies remains rather marginal.[65] I contend this is so because a 'more-than-human' *law* is antithetical to the modernist understanding of legal relations between separated (human) subjects and (nonhuman) objects of law. Yet, the turning of nonhumans into subjects of law is often perceived as an articulation of 'more-than-human rights'.[66] But a broader incorporation of nonhumans' interests into law sticks to a legal imaginary of strict ontological and epistemological separation between humans and nonhumans.

The notion of the 'more-than-human' I draw upon, in contrast, attends not (only) to the *interests* but to the *agency* of nonhumans – such as plants, animals, or technologies – and emphasises the impossibility of disentangling nonhumans' agency from humans' ability to act. As Christoph Bernhardt – one of the sons of Rudolf Bernhardt who, as an environmental historian, specialised in the agency of water bodies – reckons: '"agency" can be defined as the power to change something or somebody', noting how 'the

61 See Franziska Müller, 'Agency in More-than-Human, Queerfeminist and Decolonial Perspectives' in: David Chandler, Franziska Müller and Delf Rothe (eds), *International Relations in the Anthropocene – New Agendas, New Agencies and New Approaches* (Cham: Springer, 2021), 251-269.

62 See Erin Fitz-Henry, 'Multiple Temporalities and the Non-Human Other', Environmental Humanities 9 (2017), 1-17; Eduardo Kohn, *How Forests Think* (Oakland, CA: University of California Press 2014).

63 See Olli Pyyhtinen, *More-than-Human Sociology: A New Sociological Imagination* (London: Palgrave Macmillan 2016).

64 See Anna L. Tsing, Jennifer Deger, Alder Keleman Saxena and Feifei Zhou, *Feral Atlas: The More-than-human Anthropocene*; Haraway (n. 33); Anna L. Tsing, *The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins* (New Jersey: Princeton University Press 2015). A much earlier articulation can be found in David Abram, *The Spell of the Sensuous: Perception and Language in a More-Than-Human World* (New York: Vintage Books 1996).

65 See Michelle Lim, 'Fiction as Legal Method: Imagining with the More-than-Human to Awaken Our Plural Selves', Journal of Environmental Law 33 (2022), 501-506; Hans Lindahl, 'Place-holding the Future: Legal Ordering and Intergenerational Justice for More-than-human Collectives', Rivista di Filosofia del Diritto 10 (2021), 313-330; Part IV on 'More-than-Human' instead of; Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Cheltenham: Edward Elgar 2017). See also Marie-Catherine Petersmann, 'Response-abilities of Care for More-than-Human Worlds', Journal of Human Rights and the Environment 12 (2021), 102-124.

66 By way of illustration, see, e. g. Rodríguez-Garavito, according to whom: '[i]n the twenty-first century, defending the right to health requires going beyond a concern with present generations of humans. It entails also defending the health of the "more-than-human world" constituted by nature and future generations […] In addition to present-day humans' rights, it requires advancing what I have called "more-than-human rights," that is, the rights of future generations and non-humans'. César Rodríguez-Garavito, 'More-Than-Human Rights', *Open Global Rights* (forthcoming).

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classical sociological concept of *human* agency is currently being challenged and is increasingly questioned' in light of the agency of nonhumans.[67] More-than-human perspectives are thereby deeply embedded in post-anthropocentric thinking.[68] Thinking past the centrality of the human subject destabilises dominant ideas about knowledge, sociality, causality, determinism, and ethics, in favour of approaches that are more relational, dynamic, material, hybrid, and performative.[69] A common starting point in 'more-than-human' literature is therefore that compositional politics with nonhumans are required, thereby shifting the narrative from *acting for* to *acting-with* nonhumans.[70] Yet, if the turn to 'relationality' has become prevalent in 'more-than-human' literature today, a confusion often persists about *how* entities relate.

If one takes the example of the 'liberal response' that calls for a self-standing human right to a healthy environment, the human right is framed as conditional upon a healthy environment. A relation is thereby established between a human subject and the quality of the environment in which it lives. Such relations of *inter*-dependence were already at the heart of humanist understandings of environmental protection, as illustrated in German *Naturphilosophie*.[71] But thinking relationality from a 'more-than-human' perspective discards the understanding of relations as *inter*-connections – where the entities that relate always pre-exist their relation, each with respective agency and autonomy to *act on* this relation. In this liberal understanding of relations, not only is the agency between the relating entities separated, but a hierarchy between different forms of agency is also established, with humans'

67 Christoph Bernhardt, 'Concepts of Urban Agency and the Transformation of Urban Hinterlands: The Case of Berlin, Eighteenth to Twentieth Centuries', in: Tim Soens, Dieter Schott, Michael Toyka-Seid and Bert De Munck (eds), *Urbanizing Nature: Actors and Agency (Dis)Connecting Cities and Nature Since 1500* (New York: Routledge 2019), 50-64 (51, 62). I thank Christoph Bernhardt for the valuable exchange of thoughts after the Lecture in Heidelberg and for sharing his chapter with me.

68 Andrés Jaque, Marina Otero Verzier, Lucia Pietroiusti and Lisa Mazza (eds), *More-than-Human* (Rotterdam: Het Nieuwe Instituut 2020), 1. Applied to environmental law, see Anna Grear, Emille Boulot, Iván D. Vargas-Roncancio and Joshua Sterlin (eds), *Posthuman Legalities: New Materialism and Law Beyond the Human* (Cheltenham: Edward Elgar 2021). On the expansion of legal personhood to nonhumans as a post-subject or non-subject approach, and the granting of rights to nonhumans as a subject-less form of entitlement, see also Andreas Fischer-Lescano, 'Subjektlose Rechte', KJ 50 (2017), 475-496.

69 Wendy Steele, Ilan Wiesel and Cecily Maller, 'More-than-human Cities: Where the Wild Things Are', Geoforum 106 (2019), 411-415 (413).

70 See Floor Fleurke at al., 'Constitutionalizing in the Anthropocene', Journal of Human Rights and the Environment (forthcoming 2023) (where we argue for a juridical recognition of a form of 'co-agency' between humans and nonhumans).

71 See Andrea Wulf, *The Invention of Nature: Alexander von Humboldt's New World* (New York: Alfred A. Knopf 2015).

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agency over nonhumans often prevailing in such narratives and imaginaries. In contrast, thinking relationality from a 'more-than-human' perspective foregrounds an entanglement of human and nonhuman agency. It is the mutually constitutive agency of entities-entering-into-relations that acts as a starting point in relational thinking and action, with entities emerging *through* their relations. From strict separation and hierarchy, space opens up for entangled care for life-forms spread across time, space, and matter. By way of consequence, and as Barad insists: 'relata do not preexist relations'.[72] Barad therefore usefully discards the notion of '*inter*-action' in favour of '*intra*-actions'.[73] Rather than attributing finite, fixed, and static properties to an ecosystem, it is its living ecology – the movement and transformation of matter and energy that constitute this ecosystem – that matters. A 'more-than-human' perspective is then less about 'a merely formal constitutional, institutional, or normative edifice' – as Coole and Frost note – and more of 'an ongoing process of negotiating power relations' between humans and with nonhumans, by accounting for the entanglements of events across time, space, and matter.[74] Fundamentally indeed, 'more-than-human' perspectives are not about 'everything being connected to everything', but about attending to this ongoing process of negotiating differential and asymmetrical power relations that produces 'differences out of, and in terms of, a changing relationality'.[75] From a 'more-than-human' perspective, then, the agency of nonhumans is recognised as co-constitutive of human actions. How this co-constitution could apply to legal and political actions remains speculative. As it stands, law discards the constitutive and disruptive agency of nonhumans – or nonhumans' power to change, affect, and move human actions – by conceptualising and designing legal and political actions as stemming only from human power relations, thereby (re)inscribing an imaginary that views

72 Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter* (Durham, NC: Duke University Press, 2007), 139-140.

73 While 'interactions' assume separate individual agencies that precede each action, the concept of 'intra-action' signifies the mutual constitution of entangled human-nonhuman agencies. Barad (n. 72), 33.

74 Diana Coole and Samantha Frost, 'Introducing the New Materialisms' in: Diana Coole and Samantha Frost (eds), *New Materialisms: Ontology, Agency, and Politics* (Durham, NC: Duke University Press 2010), 1-43 (18).

75 Barad (n. 72), 93. Certain strands of new materialism (especially neo-vitalists who claim that vital forces are identical with matter) have been critiqued for being politically insufficient, historically suspicious, unnecessarily metaphysical, and conceptually vague, thereby falling short in organising social struggles, assigning responsibility, and overcoming idealism. Against an optimistic, biocentric, and agnostic posthuman vitalism, Nail suggests instead a 'philosophy of movement'. See Thomas Nail, 'What's the Matter with Life?' in: S. E. Wilmer and Audronė Žukauskaitė (eds), *Life in the Posthuman Condition: Critical Responses to the Anthropocene* (Edinburgh: Edinburgh University Press 2023), 241-260.

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nonhumans as inert, passive, or dead matter amenable to human control. It is in this spirit that environmental and human rights law tend to protect the 'living', by categorising it into hierarchical matters of human concern – whether expressed as a human right to a healthy environment or as rights of nature.

To what extent, then, are rights of nature aligned with a 'more-than-human' perspective? On the one hand, to recognise nonhumans as bearers of rights grants them greater attention and care. In this sense, rights of nature share with 'more-than-human' perspectives the *de*-centring of the 'human' by *de*-humanising rights narratives. On the other hand, however, a 'more-than-human' perspective would require that the very agency of nonhumans is *co*-constitutive of the legal and political actions at stake. As such, 'more-than-human' thinking is antithetical to calls to better represent the nonhuman through its rights, since such aspirations reinscribe fixed boundaries between pre-constituted humans *acting for and on behalf of* – rather than *acting-with* – nonhumans. *How* the agency of nonhumans could be(come) *co*-constitutive of legal and political actions is what should animate a 'more-than-human rights' agenda. This agenda, however, is different from that of granting rights to nature. From a 'more-than-human' perspective, the purpose should not be to *extend* the subjectivity of the human *onto* the nonhuman, but to reconfigure legal thinking and practice as enactments of entangled agencies between humans and nonhumans, with differential and asymmetrical power relations. What, then, could be learned for legal thinking and action from a 'more-than-human' perspective on life? What forms of life are being written out of the understandings of the 'living' that are being juridically protected by the 'liberal' and the 'critical liberal responses' to ecological threats posed to life? Could a 'more-than-human' perspective more attuned to how the 'living' is constituted (where 'life' emerges from entangled yet differential and asymmetrical agencies between humans and nonhumans) shift our attention from the 'living constitution' – or the 'living instrument' that underpins rights-based interpretations of environmental protection – to a more-than-human 'constitution of the living'? This is what I will explore in the next and final part of this article.

IV. From the 'Living Constitution' to the 'Constitution of the Living'

The European doctrine of the 'living instrument' is reminiscent of the United States (US) 'living constitution' and the Canadian 'living tree' doc-

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trines, which all refer to an understanding of society as a 'living organism'.[76] One thread of this metaphorical lineage traces back to the US in the early twentieth century. Five years before his election as president, Woodrow Wilson – who was born and raised in the segregated South by parents who were supporters of both slavery and the Confederacy[77] – puts it in precise terms when stating that: '[s]ociety is a living organism and must obey the laws of life, not of mechanics; it must develop'.[78] What does it mean to view a society as a 'living organism' that 'obeys the laws of life, not of mechanics'? What are these 'laws of life' that Wilson invokes against the 'laws of mechanics', which apply to the motion of nonliving objects? For living organisms, life is a process, not a substance – an unfolding, not an attribute. In biology, this process is usually understood as revolving around key functions that define 'living' organisms, such as order, sensitivity or response to stimuli, reproduction, adaptation, development or growth, regulation, homeostasis,

76 See Baroness Hale of Richmond, 'Beanstalk or Living Instrument, How Tall Can the ECHR Grow?', at <www.echrblog.com/2011/06/convention-beanstalk-or-tree.html>. The US doctrine of the 'living constitution' is referred to as the 'living tree doctrine' in Canadian constitutional law. These doctrines contrast with 'constitutional originalism', which asserts that the constitution must be interpreted in a way that reflects the original meaning when it was drafted. In Europe, this static, originalist, or 'frozen' approach is referred to as the 'textual interpretation' of the ECHR. Arguably, such originalist interpretation could be considered a 'constitution of the dead', instead of a 'constitution of the living'. I thank Liam McHugh-Russell for this comment. As will become clear, my understanding of the 'living' is entangled with death, where accounting for the living present is indissociable from accounting for the haunting death of – as Neyrat puts it – 'past generations, the sacrificed ones, the wretched of the Earth, the damned of the Anthropocene'. Frédéric Neyrat, 'Towards a Planetary Coalition (A Preamble)', Journal of Human Rights and the Environment (forthcoming, on file with author).

77 Woodrow Wilson, *Constitutional Government in the United States* (New York Chichester, West Sussex: Columbia University Press 1908), 22. The overtly racist policies of President Wilson are a matter of record. Whilst in the election of 1912, W. E. B. Du Bois endorsed Wilson in exchange for his promise to support Black causes, Du Bois would later express his discontent and disappointment with Wilson's segregationist policies. See William E. B. Du Bois, 'My Impressions of Woodrow Wilson', The Journal of Negro History 58 (1973), 453-459. As Feagin noted: 'Wilson, who loved to tell racist "darky" jokes about black Americans, placed outspoken segregationists in his cabinet and viewed racial segregation as a rational, scientific policy'. Joe R. Feagin, *Systemic Racism: A Theory of Oppression* (New York: Routledge 2006), 162. If I refrain from delving into this question here, how Wilson combines his understanding of the 'laws of life' that must determine a society, with his overtly racist, white supremacist, and segregationist beliefs, deserves critical attention. For a critique of the racial logic that has dominated Western science, philosophy, and political theory since the Enlightenment, see Zakiyyah Iman Jackson, *Becoming Human: Matter and Meaning in an Antiblack World* (New York: New York University Press 2020).

78 Ronald J. Pestritto, *Woodrow Wilson: The Essential Political Writings* (Lanham: Rowman & Littlefield 2005), 121.

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and energy processing.[79] How, then, do these properties of life, which *constitute the living*, speak to the idea of a *living constitution*? And if society is a 'living organism', does what surrounds it – its 'environment' – not obey the 'laws of life', but 'the laws of mechanics'? I might be overwhelming the reader with questions, here, but I believe it is important to reflect on the logic of the 'living instrument' as a logic of mirroring: the life of the law mirroring the 'living organism' of society – and I raise these questions to signal something troubling in who tends to appear in this mirror and how: what it reflects, what it fractures, and what it obscures.

In asking these questions, I take my cue from Margaret Davies, who in her recent book *EcoLaw: Legality, Life, and the Normativity of Nature*, deplores how '[s]cientific narratives, like philosophy and social theory, have often reflected the grand assumptions and preferences of modernism', listing as prominent examples 'the individualizing tendencies of liberal thought reflected in organism-centric investigations of life'.[80] By 'organism-centric', Davies refers to those 'investigations of life' that emphasise 'the compulsion of the single entity rather than its relational existence and its co-productive capacities and reliances'[81] – or what I referred to earlier as entangled agencies. By focusing on single organisms instead of their entanglements with(in) the milieu through which they sustain themselves and others, such 'investigations of life' inevitably reinforce individualised understandings of life, instead of relational and compositional ones. Yet, as biologists Gilbert, Sapp, and Tauber have argued: '[f]or animals, as well as plants, there have never been individuals'.[82] Against a Darwinist understanding of evolution that centres on the 'survival of the fittest' at the expense of its Others, what Gilbert, Sapp, and Tauber invoke as a 'symbiotic view of life' re-orients the so-called 'natural selection' towards '"relationships" rather than individuals'.[83] This observation is inspired by biologist Lynn Margulis' work on the 'symbiogenesis of holobionts', which are an assemblage of a host and the many species living in and around it.[84] As

79 Various forms of life exist, such as plants, animals, fungi, protists, archaea, and bacteria. See 'Introduction to Biology' in: Charles Molnar and Jane Gair, *Concepts of Biology – 1st Canadian Edition* (Victoria, BC: BCcampus Open Publishing).

80 Margaret Davies, *EcoLaw: Legality, Life, and the Normativity of Nature* (New York: Routledge 2022), 7.

81 Davies (n. 80), 68.

82 Scott Gilbert, Jan Sapp and Alfred Tauber, 'A Symbiotic View of Life: We Have Never Been Individuals', The Quarterly Review of Biology 87 (2012), 325-341 (336).

83 Scott Gilbert et al., 'Symbiosis as a Source of Selectable Epigenetic Variation: Taking the Heat for the Big Guy', Philosophical Transactions of the Royal Society of London, Series B, 365 (2019), 671-678 (673).

84 Lynn Margulis, *Symbiotic Planet: A New Look at Evolution* (New York: Basic Books 1998), 35-37. On this definition, of 'holobionts', see Lena Reitschuster, 'Beyond Individuals: Lynn Margulis and Her Holobiontic Worlds' in: Bruno Latour and Peter Weibel (eds), *Critical*

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Gilbert, Sapp, and Tauber conclude, '[w]hat we usually consider to be an "individual" may be a multispecies group that is under selection'.[85] Also the 'human', in this sense, is always a composition: a host for bacteria, fungi, and viruses, variably attached to and entangled with other species and sites – from the subterranean to the atmospheric. With both Davies and Margulis, in short, we get a picture of the 'human' as relationally composed and entangled with nonhumans – a gathering of the 'more-than-human'.

This appreciation reaches deep into the perception of what is within and around 'us'. As Emanuele Coccia argues, this implies a shift from a situatedness through a 'point of view' to what he calls a 'point of life', where lifeforms modify their milieu and are modified by it.[86] The oxygen that animals breathe comes from plants, while the CO_2 plants use in the process of photosynthesis to produce oxygen comes from animals' breathing.[87] A 'point of life' – rather than a 'point of view', which always assumes an external observer – is what entangles uneven abilities of humans and nonhumans to breathe in metabolic flows.[88]

From a 'point of life' perspective, the sense of individuality and autonomy of the liberal human subject appears troubling.[89] The question, then, should

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Zones: The Science and Politics of Landing on Earth (Cambridge, MA and London: MIT Press 2020), 351.

85 Gilbert et al. (n. 83), 673.

86 Emanuele Coccia, *The Life of Plants: A Metaphysics of Mixture* (trans. Dylan J. Montanari), (Cambridge, UK, Oxford, UK and New York: Polity Press, 2019) (20).

87 Martin Guinard and Bettina Korintenberg, 'Observatories for Terrestrial Politics: Sensing the Critical Zones' in: Latour and Weibel (n. 84), 410. For an experiential essay on a Black feminist, queer, and more-than-human relations to breathing, see also 'Breathe' in: Alexis Pauline Gumbs, *Undrowned: Black Feminist Lessons from Marine Mammals* (Stirling and Oakland, CA: AK Press 2020), 21-27. As Gumbs notes, by way of illustration: 'the breathing of whales is as crucial to our own breathing and the carbon cycle of the planet as are the forests of the world. Researchers say, if whales returned to their pre-commercial whaling numbers, their gigantic breathing would store as much carbon as 110,000 hectares of forest, or a forest the size of Rocky Mountain National Park' (24).

88 On the uneven distribution of breathing and the biopolitical and necropolitical forces tied to it due to the continuation of extractive capitalism, imperialism, and structural racism in a contemporary era marked by the increasing contamination, weaponisation, and monetisation of air, see Jean-Thomas Tremblay, *Breathing Aesthetics* (Durham, NC: Duke University Press, 2022). See also Timothy Choy, 'Distribution' (Theorizing the Contemporary, 2016), at <https://culanth.org/fieldsights/distribution>; and Astrida Neimanis, 'The Sea and the Breathing', (e-flux, 2020), at <www.e-flux.com/architecture/oceans/331869/the-sea-and-the-breathing>. The documentary 'All that Breathes' offers a rich visualisation of the 'community of breaths' at stake, at <www.allthatbreathes.com>.

89 For a problematisation of the 'subject' as it appears in law, in light of biological realities of 'sympoietic co-becoming', see Marie-Catherine Petersmann, 'Sympoietic Thinking and Earth System Law: The Earth, Its Subjects and the Law', Earth System Governance 9 (2021), 100114. See also Anna Grear, 'Legal Imaginaries and the Anthropocene: "Of" and "For"', Law and Critique 31 (2020), 351-366, who speaks of 'sympoietic normativities'.

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not be how the human depends on nonhumans – an imaginary commonly invoked in narratives on 'humans being part of nature'.[90] The question, rather, is how humans and nonhumans are relationally composed and recursively re-composed, iteratively. In short, how humans and nonhumans *intra*-act in the very 'constitution of life'. Yet, it is instead an 'individualised' and 'organism-centric investigation of life' that human rights instruments like the ECHR reproduce in their conceptualisation of the protection of the 'living'. To appear 'before the law'[91] requires to constitute the 'human' and the 'environment' as atomised subjects and objects of law. The symbolic violence of this appearance might lie precisely in this modernist moment of separating individualisation. Let us look at how this plays out with regard to the right to life.

The ECHR stipulates that '[e]veryone's right to life shall be protected by law'.[92] What are the contours and boundaries of 'life' that the convention seeks to safeguard, here? In terms of personal scope, the right to life is granted to an abstract 'everyone', which could be interpreted as either a natural or a legal person or subject of law. The ECHR does not explicitly qualify such person or subject as necessarily 'human', and it also does not qualify life as necessarily *human* life. How, then, is the ability to live understood by the ECtHR? A common definition of life would refer to 'the period between birth and death' as the experience or 'state of being alive'.[93] Life is here conceived as a limited period of time comprised between a start (birth) and an end (death) that is experienced by somebody. *Some body*, in other words, experiences a 'state of being alive' between birth and death, and it is this ability to live – this 'live-ability' – that Article 2 of the ECHR protects when qualifying the right to life as safeguarding the physical and mental integrity of human bodies as well as their private and family life.[94] This focus on bodily integrity must be emphasised here, since no consideration is given to spiritual or cosmological dimensions of life, which prevail in animist traditions that reject the life/nonlife binary

90 On this understanding as problematically prevailing in systems theory and its application to ecological processes – and notably Earth System Law – see Petersmann (n. 89).

91 See Franz Kafka, 'Before the Law' in: Franz Kafka, *The Trail* (New York: Vintage Books ed. 1969, first published in 1915), 267-269.

92 ECHR (n. 2), Art. 2 on the Right to life.

93 'Life', at <https://dictionary.cambridge.org/dictionary/english/life>.

94 While a stand-alone 'right to the integrity of the person' does not exist in the ECHR – like it does, for example, in the Charter on Fundamental Rights of the European Union, Art. 3 – the respect for one's physical and mental integrity is interpreted as part of the right to life under the ECHR. Guide on Article 2 – Right to life, at <www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf>. The protection of physical and mental integrity is also guaranteed under Art. 8 of the ECHR, which protects the right to respect for private and family life.

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and attend to 'vital forces' both before and after the birth and death of a physical body.

This 'vitality' – close to what Bergson and later Deleuze described as the *élan vital* of the nonhuman[95] – provides a different perspective on the contours and boundaries of the 'living'. As Davies puts it, 'agency does not only lie on the side of the living'.[96] Agency is not a property attached to a privileged living subject – the autonomous 'human' – but an enactment of relations between living and nonliving entities with varying ontological status and asymmetrical powers.[97] Agency, indeed, also animates nonliving matter that bears 'vital forces'. In biogeochemical cycles, for example, matter and energy circulate and flow from nonliving or abiotic components to living or biotic components and back. For biotic matter in the biosphere to live and survive, all the abiotic chemical matter – such as calcium, carbon, hydrogen, mercury, nitrogen, oxygen, phosphorus, selenium, iron, and sulphur – that makes up the living cells must continuously be recycled. As noted by Péter Szigeti, biogeochemical cycles thereby 'evade and transcend not only property boundaries and national boundaries, but also the boundaries between living organisms, organic matter, and inorganic minerals; and between solid, liquid, and gaseous forms of matter'.[98] The nonliving, then, is also animated by agency. Before the law, however, the right to live is reduced to 'living' organisms, in disregard of the agency of nonliving matter that is vital to sustain life on Earth. Going back to Davies again:

> 'Eurocentric thought has for centuries endeavoured to maintain a boundary around life, insisting on the passivity of nonliving matter. Ontologies that do not accept this division are abundant, but such worlds have been mainly invisible to

95 See Henri Bergson, *Creative Evolution* (1907), taken up in Gilles Deleuze, *Bergsonism* (Mew York: Zone Books 1988). Although not addressed here, the racial and fascist underpinnings of vitalism must also be noted (i. e. the commitment to the vitality of the nation, predicated on the racist destruction of life that is weak). Donna V. Jones, 'The Career of Living Things Is Continuous', Qui Parle 20 (2012), 225-248; and more generally Donna V. Jones, *The Racial Discourses of Life Philosophy: Négritude, Vitalism, and Modernity* (New York Chichester, West Sussex: Columbia University Press, 2012).

96 Davies (n. 80), 78.

97 See Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham, NC: Duke University Press: 2010); Coole and Frost (n. 74); Rosi Braidotti, *The Posthuman* (Cambridge, UK, Oxford, UK and New York: Polity Press 2013); Claire Colebrook, 'Queer Vitalism', New Formations 68 (2009), 77-92. I insist on the *varying* nature of ontologies here to stress the unequal agencies and asymmetrical power relations between entangled living and non-living (human and nonhuman) entities, thereby rejecting a 'flat ontology' that asserts an 'ontological equality' between all entities – a critique often addressed against agnostic posthumanism and new materialism. See Nail (n. 75), 243.

98 Péter Szigeti, 'A Sketch of Ecological Property: Toward a Law of Biogeochemical Cycles', Environmental Law 51 (2021), 41-87 (65).

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Eurocentric thought, especially to its science and philosophy. But, as Jane Bennett comments, "it might be only a small step from the creative agency of a vital force to a materiality conceived as itself this creative agent"'.[99]

Such questions attend to the agency and power of nonliving matter such as air, water, and energy that are key to ensure the (re)production and maintenance of life of any living organism, both human and nonhuman. As Davies elaborates: if life engineers nonlife (for instance, life that produces glucose converts matter into energy), life is equally engineered by nonlife (for instance, life is a consequence of the fact that energy from the sun dissipates, and forms of life that exist are produced by the agency of water).[100] Not only is matter vital, vitality is material too. Could 'everyone's […] life be protected by law', then, if instead of conceptualising the protection of life as a subjective right that splits ecological relations into individualised entitlements, the protection of life was to be conceived as protecting the 'metabolic flows of energy and matter', from which life always unfolds?[101] What legal arrangements would be needed to protect the relational processing of life, without falling back on metaphorical equivalences of the nonhuman with the human subject? Could nonhuman agency appear before the law and be admitted through its gate, without wearing an anthropomorphised guise? Or as Daniela Gandorfer asks: '[c]ould legal subject-ness be determined by the dynamism of its river-ness rather than rivers being included in the exclusive club of legal subjects?'[102] Could we perceive the 'living' not only as environmental elements orbiting around and standing in service of human concerns (be they

99 Davies (n. 80), 35, in reference to Bennett (n. 97), 65.

100 Bennett (n. 97), 78.

101 Here, too, I draw on Davies who (borrowing from Nicholson) contraposes a prevailing 'mechanical concept of the organism' with a 'stream of life concept' that aligns with organisms as 'stable metabolic flows of energy and matter', where 'it is the flow of a nonliving substance that precedes, enables, and regulates the living'. Davies (n. 80), 79. In reference to Daniel J. Nicholson, 'Reconceptualising the Organism: From Complex Machine to Flowing Stream' in: Daniel J. Nicholson and John Dupré (eds), *Everything Flows: Towards a Processual Philosophy of Biology* (Oxford: Oxford University Press 2018), 162. Starting from the materiality of the living, rather than making matter 'life-like', bears political, philosophical, and ethical implications: 'Why is the agency of matter *vital* and *alive like us* and not us who are moving and agentive like matter? Indeed, from a deep historical perspective, it makes vastly more sense to say that living organisms and anything we could mean by "vital" is more *like matter*? Matter in motion created life, not vice versa'. Nail (n. 75), 247.

102 Daniela Gandorfer, 'Down and Dirty in the Field of Play: Startup Societies, Crypto-statecraft, and Critical Complicity', Law and Critique 33 (2022), 1-23 (19). On how in light of the material and semiotic entanglement between human and water bodies, promoting a radically embodied 'hydrocommons' rather than recognising water as a human right, might be better suited for negotiating the 'interbeing of bodies of water on this planet', see also Astrida Neimanis, 'Bodies of Water, Human Rights and the Hydrocommons', TOPIA: Canadian Journal of Cultural Studies 21 (2009), 161-182.

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physical, economic, or aesthetical rights), not only as an extension of legal subjecthood towards natural sites considered to be culturally or ecologically unique or essential, but as a process that is continuously evolving, unfolding, and dispersed across human and nonhuman entities that *together* 'constitute life'? Is it possible to align our legal thinking to these insights from biological theory, feminist new materialism, and decolonial posthumanism, that suggest ways of conceiving '*living otherwise*' without relapsing into representational thinking?[103] If such a view offers a better conception of the living than the 'liberal' and 'critical liberal responses' presented earlier, legal relations – it is clear – struggle with entanglements. Against a relational and compositional conception of the living, the right to life as currently conceived under the ECHR individualises the 'state of being alive'. This inscribes a very narrow mode of thinking about what the 'living' is and how it is constituted.

Indeed, while the ECHR grants a right to life to 'everyone', it actually recognises such a right to *every body*. If a group perspective over affected bodies is not excluded – as illustrated in the 'high profile' climate cases currently pending before the ECtHR – the bodies that matter are those of human victims, as stated earlier. These are not bodies of water. These are not bodies of air. These are the bodies of individuated humans. The right to life, in other words, must be ensured by preventing every human body from having its life deprived and from being 'subjected to torture or to inhuman or degrading treatment or punishment', as articulated in Articles 2 and 3 of the ECHR.[104] As specified by the CoE: an '"[i]nhuman treatment" must reach a minimum level of severity, and "cause either actual bodily harm or intense mental suffering"'.[105] Could exposures to toxicity, then, register before the law as 'inhuman' acts of torture 'causing very serious and cruel suffering'[106] – whether we speak about the toxicity of pesticides, heavy metals, or other poisons that get entangled with the reproductive and regenerative forces of both human and nonhuman bodies;[107] or the toxicity of the suffocating 'total

103 See Lethabo King, Navarro and Smith (n. 44).

104 ECHR (n. 2), Art. 3 on the 'Prohibition of torture'.

105 'Prohibition of torture', at <www.coe.int/en/web/echr-toolkit/interdiction-de-la-torture>.

106 ECHR (n. 2), Art. 3 on the 'Prohibition of torture'.

107 On how enduring and persistent exposures to toxicity of pesticides like chlordecone in postcolonial states and 'overseas territories' like Martinique and Guadeloupe are entangled with inhuman treatments of Black, Brown, Indigenous, and Nonhuman bodies, see Malcom Ferdinand, *Decolonial Ecology: Thinking from the Caribbean World* (Cambridge, UK, Oxford, UK and New York: Polity Press 2022), 109-113, 207. Ecofeminists long observed how the ecological issue is also a reproductive issue, which results from masculinist and patriarchal forms of violence carried out against ecosystems and women's wombs. See Carolyn Merchant, *Ecological Revolutions: Nature, Gender, and Science in New England* (Chapel Hill, NC: University of North Carolina Press 1989), 23; and Françoise d'Eaubonne, *Le Féminisme ou la mort* (Paris: Pierre Horay, 1974), 221.

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climate' of anti-Blackness that capitalist slavery suffused as 'present day environment in an afterlife called the weather', as Black studies and feminist scholar Christina Sharpe puts it?[108] Here, the treatment of nonhumans is as *inhuman* as the one reserved to human beings considered *less-than-* or *sub-*human.[109] What these questions on the overlap of the human, the nonhuman, and the inhuman evoke, is that while the protection of the life of humans is put at the centre of the ECHR, in juxta- or contra-position to what this liberal understanding of human life is constructed and qualified always remains elusive.

If my objective is not to provide a 'solution' to these possible shortcomings or biases about the protection of life as provided in the ECHR, let me conclude this article by returning to Bernhardt, who in 1999 noted how '[s]ometimes old problems need new answers or at least new considerations'.[110] In this article, I contended that a 'more-than-human' perspective on life opens up 'new answers or at least new considerations' to the 'old problem' of how the ECHR addresses ecological issues that entangle human and nonhuman life-forms. It remains to be seen how and to what extent law can be reconfigured to make sense of such entangled life. As it stands, while the 'living' pulls us into entanglements and intra-agency across asymmetrical human and nonhuman forces, law insists on cuts, hierarchies, and erasures.

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108 Sharpe refers to 'anti-Blackness' as a 'total climate': 'the Weather is the totality of Black peoples' environments; the weather is the total climate; and that climate is antiblackness'. Christina Sharpe, 'The Weather', in: Christina Sharpe, *In the Wake: On Blackness and Being* (Durham, NC: Duke University Press, 2016), 102-134, (104). Indeed, living with death is a condition for Black people to understand their lives. As Walcott puts it: 'Black life-forms survive by both mastering the conditions under which life proceeds and simultaneously deforming those conditions so that they might have access to selves beyond the degrading violence of everyday life'. Walcott (n. 6), 34.

109 Yusoff speaks therefore of the 'inhumanities' as a way to 'understand Blackness as a historically constituted and intentionally enacted deformation in the formation of subjectivity, a deformation that presses an inhuman categorization and the inhuman earth into intimacy'. Consequently, for Yusoff, '[i]n the forced alliances with the inhuman, a different mode of subjective relation is forged, where Blackness is a name for nonnormative subjectivity'. Yusoff (n. 38), 11, 28. The inhuman, here, is constitutive of both non- and less- or sub-human beings, or what Walcott refers to as 'Black life-forms', since 'the foundational liberal understandings of human life place Black people outside of the category of the human'. Walcott (n. 6), 16. On how the Black body has historically been thought of as an object, a thing, which complicates traditional accounts of new materialism and opens up a distinct Black feminist new materialism, see also Armond R. Towns, 'Black "Matter" Lives', Women's Studies in Communication 41 (2018), 349-358. To delve into Black feminist materialism, see e. g. Jackson (n. 77).

110 Bernhardt (n. 1), 20.

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V. Conclusion

While the doctrine of the 'living instrument' that Rudolf Bernhardt advocated has become a main tool of interpretation of the ECHR,[111] the 'living' appears only narrowly before the law. What would it mean to analytically shift attention from the 'living constitution' to the 'constitution of the living'? Could attending to the 'constitution of the living' open up 'new answers or at least new considerations' to the 'old problem' of the protection of the 'living'?[112]

The story of rights-based approaches to environmental protection could be told through the perpetual expansion and re-conceptualisation of the 'living' and how it ought to be protected. As the Earth is becoming increasingly 'inhospitable to life' – as Achille Mbembe puts it[113] – environmental human rights scholars are advocating distinct ways of securing life today. On the one hand, the 'liberal response' to ecological threats posed to life urges to recognise a self-standing human right to a healthy environment to ensure a better protection of human life. On the other hand, the 'critical liberal response' to ecological threats posed to life begs to recognise rights of nature to safeguard the protection of nonhuman life. The main contribution of this article was to move beyond the narrow understanding of the 'living' that underpins both the 'liberal' and the 'critical liberal responses' that reify a binary understanding of human and nonhuman life. Thinking with insights drawn from biological theory, feminist new materialism, and cecolonial posthumanism, I reflected on what a 'more-than-human' understanding of the 'living' opens up and forecloses. What does the notion of 'more-than-human life' reflect about our legal thinking and vocabulary? What forms of non- or in-human lives are being written out from the understanding of the 'living' that is being protected by the ECHR?

Against this background, I explored how a distinct conceptualisation of the 'constitution of the living' is deserving our legal attention, one that conceives of ecological care beyond the disciplinary limits of human rights

111 In the words of the ECtHR's President Robert Spano: 'the provisions of the Convention are informed by and become *alive* within the present-day international context through the living instrument doctrine'. 'Interview: P. Sands (PS) in conversation with R. Spano (RS) – 8 July 2021', Journal of Human Rights and Environment 13 (2022), 6-15 (7). President Spano continues by specifying that '[t]he best example is the integration of the environmental law principles'. Spano also concludes by drawing yet again on another metaphor on 'life', when holding that 'there are fields of law where giving life to legal principles can alter a social construct or a social reality' (14).

112 Bernhardt (n. 1), 20.

113 Achille Mbembe, 'How to Develop A Planetary Consciousness', at <www.noemamag.com/how-to-develop-a-planetary-consciousness>.

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law and its enclosure of thought – the enclosure of thinking the 'living' only through a prism of liberal, individualised, and subjective rights. The study of the ECHR and its interpretation as a 'living instrument' call for a need to make visible the properties of life that evade and exceed rights formulations, and to call out entrenched forms of erasure of a 'living *otherwise*' in how the ECHR thinks and produces the human, the nonhuman, and the inhuman.[114] I do not have an answer to the question of how to legally configure a 'more-than-human' life. Yet, life, it is clear, is a 'more-than-human' matter. Thinking legal relations through such prisms will lead towards a radically different legality than the foundations of modern law we are familiar with, and on which the edifice of the ECHR was built. Possible paths are opened for further explorations – such as prioritising obligations over rights,[115] or following 'more-than-human' politics all the way down to distil and describe normativities that differentially affect human and nonhuman life-forms.[116] My intention here was to bring to life different ways of 'constituting the living', by shedding light on what is erased from our current understandings of the protection of life, and invite us to take seriously the potentialities but also the difficulties that a 'living law' would pose – an exercise way more complex than what the 'living instrument' doctrine suggests.[117] Mere correctives to the edifice of modern law by reinforcing the protection of 'humans' and their 'environment' without reconfiguring a need to care for the 'living' differently, risks impeding on *undoing* and *de*-constitutionalising the foundations of our current 'way of living' – a necessary task to *re*-constitutionalise them otherwise. The liberal, capitalist, and anti-Black world upon which our legal categories and 'way of life' are grafted, is and will always be destructive

114 In this sense, I agree with yet also depart from Mignolo's call for a shift from 'human rights' to 'life rights', which according to Mignolo demands that 'we abandon the western distinction and separation between the natural and human order and also the interests of industrialized and developed countries in which the paradigm of human rights originated'. 'Life rights' capture instead how 'the human body and nature are intertwined' and therefore a 'violation of "the rights of nature" amounts to a violation of "human rights" and therefore of "life rights"'. Walter D. Mignolo, 'From "Human Rights" to "Life Rights"', in: Costas Douzinas and Conor Gearty, *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge: Cambridge University Press 2014), 161-180 (168).

115 See Daniel Matthews, 'Law and Aesthetics in the Anthropocene: From the Rights of Nature to the Aesthesis of Obligations', Law, Culture and the Humanities (2019), 1.

116 This is what I am exploring in my project on 'Anthropocene Legalities: Reconfiguring Legal Relations With/in More-Than-Human Worlds', by focusing on practices of 'more-than-human commoning' and 'more-than-human sensing', at <www.tilburguniversity.edu/current/news/more-news/veni-grants-2022>.

117 On a 'living law', see the chapter 'A New Living Law' in Davies (n. 80), 16-36. The difficulties being that any legal relation as currently conceived cuts apart entangled yet differential and asymmetrical agencies between humans and nonhumans (as subjects and objects of law).

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towards 'more-than-human' life by perpetuating the ongoing subjugation of non- or in-human life-forms. Do we then need to stick to ontologies of division, of hierarchy, of supremacy, to salvage modern legal thought and practice? Or, even if the horizon remains fuzzy, should we think beyond and against the liberal structures of modern law to open up – as Professor Bernhardt suggested – 'new answers [to] or at least new considerations' about ecological threats posed to life?

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