

## Feminist Frontiers in Climate Justice

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# Feminist Frontiers in Climate Justice



# Feminist Frontiers in Climate Justice

Gender Equality, Climate Change and Rights

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# Introduction – Feminist Frontiers in Climate Justice: Gender Equality, Climate Change and Rights

**Cathi Albertyn, Helena Alviar García, Meghan Campbell, Sandra Fredman and Marta Rodriguez de Assis Machado**

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Today's ecological crisis is the biggest threat to the future of humanity and the planet. However, its impact is uneven and unequal. As is increasingly obvious, the effects of human-induced climate change are most keenly felt by those who have fewer resources and less power: groups who are poor, vulnerable and disadvantaged, especially in the global south. Intersectional and cascading gender inequalities place women in particular positions of vulnerability as the effects of climate change have the potential to reinforce, reconstruct and reshape gendered inequalities and erode social, economic and legal advances. It is becoming ever more apparent that climate change cannot be addressed without addressing systemic political, social and economic inequalities at local, national and global levels.

In the face of the existential threat posed by climate change, women have been described as vulnerable victims, as active champions of a green and sustainable future, as holders of specialized knowledge, as tokens to be slotted into scientific and technical regimes, as wayward decision makers threatening to destabilize ecosystems, and as stalwart trustees of nature for future generations. These ascriptions run the risk of reproducing familiar gendered tropes that feminists have long resisted, threatening to undermine and even reverse feminist gains in rights, law, policy and practice. In reality, women's relationship to climate change is complex and nuanced, defying generalizations and deserving of deeper engagement from a feminist perspective. It is the need for such engagement in the face of the complex connections between climate change, gender inequalities, and feminist concerns with rights and law that triggered this edited volume. As feminist legal scholars, we have been working collectively on issues relating to substantive gender equality and human rights since 2006. Our aim has been to expand cooperation among feminist legal scholars, from both the north and south, to analyse the effects of global and

local inequalities across different regions, groups and issues. We have focused on a range of critical contemporary topics in the broad field of law, society and human rights, from the meaning of substantive equality, to questions of austerity and precarity, the multiplying effects of intersectional inequalities, the challenge to rights in an increasingly divided and unequal world, and the impacts of culture, religion and neo-conservative movements on gender equality and women's rights.<sup>1</sup> None of us is rooted in the field of climate change, however we are deeply aware of the urgency of this debate for feminist scholars and felt it important to engage it from the perspective of feminist legal theory, doctrine and practice. For us, climate change inevitably and irreversibly affects gender equality, which demands a deeper understanding of its impacts and the role of law in addressing them.

For too long, the fields of environmental and climate change, on the one hand, and women's rights and feminist legal studies, on the other, have failed to explore fully points of overlap and areas of mutual reinforcement. This is not only a missed opportunity, but can cement inequality in international and national policy frameworks, in law and in practice. For example, the minimal engagement of climate change regimes with women's rights can result in mitigation and adaptation efforts unreflectively reproducing existing forms of disadvantage, exclusion and stigmas. At the same time, the relative silence of human rights scholars on the threats of climate crisis for women's human rights means that law and policy are failing to respond to the lived reality of women whose rights are already undermined by climate and environmental degradation. The intention of this collection is to break these silos. By bringing together a wealth of expertise that stretches across disciplines, it queries, from multiple perspectives, whether rights and law contain the radical potential to redress the climate crisis and women's inequality in a synergistic manner. The chapters explore how commitments to women's equality, rights and climate justice can be harnessed in democratic and authoritarian regimes; in international and national law; across generations; in plural legal systems; in the economy and the labour market; and in public policies to address gender-based violence and reproductive justice. The complexity of the current challenges triggered by the climate crisis calls for debates that embrace the intertwining of areas, arenas and strategies, cut across generations, and involve both community and legal

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<sup>1</sup> See (2007) 27(3) *South African Journal on Human Rights* special issue on Substantive Equality, Social Rights and Women; (2014) 10(4) *International Journal of Law in Context* special section on Elusive Equalities: Sex, Gender and Women; FGV Direito LR (2015) 11(2) special issue on Gender, Race and Poverty: The Approach of Multiple Identities by Law (Revista Direito GV (2015) 11 (2) Special Issue. Gênero, Raça e Pobreza: a abordagem de múltiplas identidades pelo Direito); (2019) *Oxford Human Rights Hub Law Journal* 19–98.

struggles at local and international level so that we can transform our futures and achieve gender equality and climate justice.

## 1. A FEMINIST ENGAGEMENT: MAPPING THE IDEAS OF EQUALITY AND CLIMATE JUSTICE

Gender equality, climate change and climate justice are the defining ideas of the book. In different ways, each chapter works with these ideas and the relationships between them, at global, national, local and grassroots levels, and across different feminist approaches. Across the chapters, the authors engage different ideas of equality and diverse theories of feminism – liberal feminism, eco-feminism, socialist or material feminism, critical feminism and so on – to make feminist and gender arguments about gender equality and climate justice.

At its centre, the book is concerned with the achievement of gender equality in the context of climate crisis and struggles for climate justice. However, the idea of equality is differently conceived and expressed in international, national and local spheres, and across different issues, groups and feminist theories. These ideas also have changing normative and practical value. Each chapter engages ideas of equality from different perspectives, with many highlighting the limits of liberal equality in international and national frameworks and suggesting more inclusive and transformative ideas and definitions of equality. From these multiple points of entry, the book makes a strong contribution to how equality is conceptualized, experienced and used in policies, law and practice, and in struggles for rights by different groups of women, as well as how the climate crisis demands a more ambitious equality frame that encompasses transformative substantive equality.

As several chapters point out, international frameworks relating to gender and climate change have tended to remain within traditional liberal prescripts of inclusion, participation and formally equal rights. In her chapter, Shreya Atrey argues that international human rights law has slowly, but surely, appreciated the role that inequality plays as a driver and consequence of climate change. She suggests that gender equality, particularly intersectional gender inequality, has played an important role in revealing the links between climate change and human rights obligations in the UN system, and in building obligations to non-discrimination, access to justice, prioritization, participation and data collection, that prioritize disadvantaged groups. Nevertheless, she argues, the radical potential of an equality-based approach to climate justice has not been realized. There remain fundamental normative and conceptual gaps in how the current international human rights law regime has conceived both the problem of climate change and the solution for climate justice. For Atrey, insofar as inequality in climate change is essentially an intersectional issue, where the worst effects of climate change are felt by those who are severely

and severally disadvantaged already, an accurate understanding of climate change inequality must adopt a conceptual intersectionality lens.

Developing this theme from a different, more ecofeminist perspective, Kate Wilkinson Cross's chapter on intergenerational equity and its application in the climate change context, explores how the concepts of gender equality and intergenerational equity have been recognized in key climate frameworks, albeit in limited terms. Using the UN Framework Convention on Climate Changes's (FCCC)<sup>2</sup> 2017 Gender Action Plan<sup>3</sup> as an entry point, Wilkinson argues that not only are women expected to assimilate into existing structures of dominance, thus ignoring the embodied and embedded labour of women and nonhuman nature, but also the climate regime maintains conceptual divisions between present generations of humans and future generations of the human and nonhuman world. Wilkinson Cross argues that both regimes are dominated by the ecological modernization paradigm, which sees future generations as being able to 'look after themselves' by internalizing environmental damage into existing social, political, and economic institutions and developing technology to mitigate the climate crisis. This means that the FCCC approaches intergenerational equity as an anthropocentric distributive justice issue. Further, the approaches to both gender equality and intergenerational equity conceptualize humans as the master and nature as the object to be mastered/preserved. Wilkinson argues that an approach that recognizes – and seeks to dismantle – the interrelated and structural subordination of women and nonhuman nature is essential to achieving gender equality for present and future generations of women.

Staying in the international regime, Rowena Maguire's chapter provides a feminist critique of how gender-based violence is addressed in a changing climate scenario, in particular how international human rights, disaster law, and climate law frameworks recognize, or fail to recognize, the relationship between the violence of natural events and increased risk and rates of domestic violence, harassment, sexual violence and trafficking for women, girls and LGBTIQ+ people. Maguire applies established feminist tools in critiquing international law to reveal how silos and gaps in the human rights regime, international disaster regime, and the international climate regime mean that these regimes fail to respond adequately, if at all, to gender-based violence. Her chapter illustrates how gender largely remains on the periphery of these regimes and international law currently fails to see, listen and respond to

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<sup>2</sup> United Nations, 'Framework Convention on Climate Change (UNFCCC)' FCCC/INFORMAL/84/Rev.1 (9 May 1992).

<sup>3</sup> UNFCCC, Decision 3/CP.23 'Establishment of a Gender Action Plan' FCCC/CP/2017/11/Add.1 (17 November 2017).

gender-based violence occurring during and after extreme climate events. She concludes that it is critical to address the forces that keep gender on the periphery of international instruments if gender-based violence is to be addressed effectively. Building a more inclusive and effective regime, however, will require structural change to address the patriarchal and colonial influences shaping international regimes. Here, one can build on the footholds created by the inclusion of gender in these regimes. But while moving from inclusion to a more transformed regime can be nudged by legal reforms, it must also be accompanied by deeper social change and the recognition that climate change is a social and an environmental problem.

The chapters by Meghan Campbell and Sandra Fredman both specifically adopt gender equality as a lens of analysis of international frameworks and policies and as a means of developing more transformative policies and practices to achieve gender equality and climate justice. Both work with Fredman's four-dimensional idea of substantive equality to engage the practical realities and radical possibilities in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and International Labour Organization (ILO) policy documents on the green economy.

Starting from the recognition that climate change seriously inhibits women's ability to enjoy their rights and freedoms on an equal basis with men, Campbell notes that legal regimes have struggled to account for the totality and multiplicity of women's gendered experience of climate change. However, she suggests that, through its General Recommendation No. 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change,<sup>4</sup> the CEDAW Committee is breaking new ground by centring the role of women and adopting an intersectional, equality-based approach to the effects of climate change. Working with the four-dimensional model of substantive equality, she suggests that, by acknowledging that climate change operates as an obstacle to women's equality, the CEDAW Committee is able to spotlight how women's disadvantage exacerbates the burdens of climate change and disasters. In doing so, it also demonstrates how attention to women's substantive equality can open new perspectives and viewpoints on how to respond to the climate crisis. Here Campbell's analysis suggests that there is space to engage more fully with the power hierarchies between the human and natural world and how those hierarchies are connected to and reinforce discrimination against women. Overall, she argues that bringing a substantive equality lens to the climate crisis has a rich promise for ambitiously, positively and radically

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<sup>4</sup> CEDAW Committee, 'General Recommendation No. 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change' CEDAW/C/GC/37 (2018).

transforming the systems, values and ideologies that oppress women, other marginalized groups, and the natural environment.

Fredman's chapter reveals how global ideas of the green economy pay inadequate, if any, attention to women's work, thus reproducing deeply gendered labour-force inequalities. She calls for the application of an explicitly feminist and multi-dimensional understanding of substantive gender equality to ensure that the policies for 'greening the labour force' do not simply replicate current, deeply entrenched, gendered labour-force inequalities. Promises for greening the labour force focus on male-dominated sectors, and although the ILO advocates that women be included, there is no discussion of how to address patriarchal power relations that have excluded women from these spheres. Almost entirely ignored is the informal sector, where women predominate, and for whom climate change is an immediate threat. Fredman argues that a feminist perspective would highlight the ways in the ideological commitment to markets and growth obscures the value of caring work, which is simultaneously green and female dominated. At the same time, attention needs to be paid to the stereotyping, lack of voice and structural inequality that lead to women clustering in low-paid, precarious work. Nor should the focus be only on paid work, pointing to the need for structural change both in the division of labour in the home as regards childcare, and the availability of green solutions to domestic drudgery. Behind all of this is the need to address patriarchal power imbalances. In particular, women's unequal access to land and agricultural resources needs to be redressed so that they are able to participate fully in climate-friendly changes. Fredman thus works with her idea of four-dimensional substantive equality to argue that the achievement of green and decent work for women means that future policies and plans on the green economy and the nature of work should simultaneously address all four dimensions of her conception of substantive equality: address the gendered nature of disadvantage; eradicate stereotyping, stigma, prejudice and violence against women; amplify women's voices and facilitate participation; and accommodate difference and achieve structural change.

Focusing on the question of achieving reproductive justice in an era of climate crisis, Cathi Albertyn's chapter responds to growing evidence of neo-populationist arguments in climate change, development and population discourses, especially in relation to women in the global south. Here women's fertility and reproductive rights are instrumentalized in the service of new forms of population control as 'an urgent response to the challenge of climate change'.<sup>5</sup> Albertyn asks how feminists can frame a just and egalitarian

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<sup>5</sup> Anne Hendrixson and others, 'Confronting Populationism: Feminist Challenges to Population Control in an Era of Climate Change' (2020) 27 *Gender, Place and Culture* 307, 308.

approach to women's reproductive rights in an era of climate crisis. Her starting point is to explore a 'radical connectedness' of reproductive and climate justice, within a wider project of social justice. Here, an expanded idea of social reproduction that encompasses care for self, family, community, environment, and the nonhuman world provides an important theoretical lynchpin for this connectedness. Drawing from this, she argues for an understanding of women's reproductive freedom in the context of a transformative substantive equality that takes account of both reproductive and climate justice. This requires a multi-dimensional and multi-layered idea of transformative substantive equality that directs attention to the social and economic conditions and power relations, that operate at all levels, to enable or constrain women's substantive ability to choose whether, when, and how to have and raise children in the context of meaningful family, community, environmental, and planetary well-being. It thus allows a deeper normative, strategic and practical engagement with reproductive rights and their alignment with critical ideas of social justice. Albertyn calls not just for a reconsideration of the basics of reproductive rights, but also for a feminist engagement with how rights, policies and law might nurture a more just and caring world in relation to reproduction, autonomy, relationships, kinship, family, community, and so on, including the nonhuman world.

Shifting from the global to the national, Patricia Kameri-Mbote and Nkatha Kabira's study of the policy and legislative framework for gender equality and climate change in Kenya reveals a familiar picture in which the progressive idea of equality in the Kenyan Constitution is not carried through in the content and implementation of its climate policies. Even though climate change impacts disproportionately on women, women do not participate effectively, or at all, in framing and implementing policies and mitigation and adaptation programmes. The chapter places a particular emphasis on the challenge of climate justice for women in plural legal systems, which, in Kenya's case, encompass formal, informal, living customary and religious law. Many women in Kenya live under informal customary systems. The gendered nature of these systems, together with their colonial legacies, presents particular challenges for gender and climate justice. Not only are there customary ideas of the relationship between people and nature that might enhance or contradict climate change mitigation and adaptation efforts; but gendered customary norms significantly influence women's access to and control over land and land-based resources, as well as their voices in decision making over such resources. This prejudices women's ability to participate and/or engage in mitigation and adaptation efforts. Accordingly, not only must there be greater attention to gender equality and women's participation in formal laws, but there is also a need to engage with informal norms. Here, it is important to isolate aspects that can facilitate gender equality and climate change adaptation and mitigation actions, while



challenging and ousting those that militate against equality and the unsustainable use of resources.

Staying in the global south, Helena Alviar García and María Carolina Olarte Olarte's research combines the global and the local in exploring women-led struggles in the flower industry in Colombia. Their work centres the struggles of women seeking to transit from low-paid wage earners in the flower industry (a development 'success story' that now is affected by climate change and has negative environmental effects) to working at cooperatives to produce food, thus catapulting them into struggles over small-scale agriculture versus free trade zones, land use, climate change and environmental degradation. In the context of weak and erratic government policies on gender and climate change that at best offer forms of liberal inclusion, the particularities of women's struggles in the outskirts of Bogotá show the need for more grounded approaches to the gender-climate nexus. This entails thinking about gender and climate change in the context of the material conditions of women's inequality, including the particularities of the conditions of their labour in a specific place, the connections between work and their bodies, and the effects of local economic development projects upon the territory. This chapter argues that (neo)liberal climate policies that are blind to the causes and effects of gender inequality for women, including the structural forces driving these policies, can offer no solution. Climate change is not solved by liberal feminism, nor by calls for inclusion. Rather, we should look to more material feminist politics that centre climate change, women's work and ways of living in frames that begin to uncover the concrete causes and effects of climate change and its intersection with gendered inequalities. Here we might find new pathways to gender equality and climate justice.

Two South African chapters engage the mining sector in which struggles for climate and environmental justice overlap as mining both contributes to planet-threatening global greenhouse gas emissions and causes deep – and often irreparable – environmental harm. As both chapters show, on the one hand, mining continues to perpetuate gendered inequalities, patriarchy, exclusion and poverty; on the other hand, such injustices catalyse women's activism in intersectional struggles that link gender equality, environmental protection and climate justice.

Lisa Chamberlain's chapter explores the struggles of Black rural and working-class women in mining-affected communities who have formed a network of Women Affected by Mining United in Action, or WAMUA. She focuses on their legal struggles against exclusion from the process of amending South Africa's Mining Charter – a legislatively required instrument aimed at 'transforming' the mining industry. Working with ideas of environmental and climate justice that offer participation, access and inclusion as vital responses to the prevailing inequality, and a typology of litigation effects drawn from

South Africa's rich scholarship on public impact litigation, Chamberlain examines the material, legal and political impact of the litigation on WAMUA and its work, as well as its broader implications for climate justice struggles. Her chapter demonstrates that in the context of the intersectional exclusion of women living in mining-affected communities, tools like litigation can facilitate participation and catalyse activism, as critical first steps, even if future goals are unclear. By fortifying inclusion, one of the central tenets of climate justice, litigation also has the potential to redistribute power by allowing new voices to be heard. For as long as mining continues to exploit and silence those most affected by the environmental harm and climate change it causes, inequality will persist. By allowing those voices to be heard, litigation enhances their potential to confront the environmental injustice of our past and seek new ways to reconcile the relationship between people and planet.

Beth Goldblatt and Shireen Hassim's chapter on community-based struggles against mining in Xolobeni, a traditional rural community in South Africa, explores the role of law and litigation in successfully challenging the mining company and government to secure the consent of the community before commencing mining on their land.<sup>6</sup> They do so in the context of a broader analysis of how the Xolobeni struggle points to important links between efforts to overcome gendered structures of production and reproduction, underpinning capitalism and environmental destruction. They draw on Silvia Federici's gendered framing of the commons to tease out the key tensions in the long drawn-out opposition to mining in Xolobeni, the involvement of women as the main producers of food and custodians of the land, their movement to the centre of the struggle in the context of violence against activists, and their assertion of new forms of temporality that engage the responsibilities of the present generation to the future. Their gendered analysis inspires a re-imagining of the *Baleni* case,<sup>7</sup> a decision centring on the participation of local communities in making a decision on whether the land should be mined, in which a serious consideration of social reproduction could have drawn closer linkages between environmental justice and gender equality. This allows Goldblatt and Hassim to reflect on what Xolobeni means for the uses of law and rights in the gendered struggle for climate justice, which is simultaneously an anti-capitalist and anti-colonial struggle. They conclude that specific legal gains are important in advancing the climate justice movement, but a more transformative and gender egalitarian approach to climate justice requires a focus on social reproduction as well as inclusive governing of common resources. This means not only protecting

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<sup>6</sup> *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).

<sup>7</sup> *Ibid.*

common resources, but also ensuring that they are governed sustainably and with full attention to gender inequalities.

Turning to the struggles of indigenous women in Brazil, the chapter by Marta Rodriguez de Assis Machado, Danielle Rached and Denise Vitale explores the role of the Brazilian indigenous women's movement in climate change politics. They argue that indigenous women are located in the political intersection of Brazilian president Bolsonaro's anti-environment and anti-indigenous rights agendas, two important pillars of Brazil's position towards global climate justice. Importantly, the indigenous women's movement took the lead in indigenous rights mobilization, involving multiple strategies that connected their communities to highly institutionalized fields of activism and disputed national and international arenas. In this way, they became key political actors in climate politics and an important counterpoint to Brazil's right-wing government's vision on climate change and indigenous peoples' rights. The chapter demonstrates that, while the context of contemporary neoliberalism and antidemocratic politics put the movement under severe pressure and attack, it has also been an opportunity for indigenous women to gain voice both in the resistance to the government and in the global activist field for climate justice. Exploring indigenous women's struggles, the chapter highlights their views and collective values as a counterpoint to neoliberal and neoextractivist logics. Through questioning private property and market-based relations with the land, the indigenous women's movement is presented as an alternative path for future imaginations.

## 2. CLIMATE JUSTICE, GENDER EQUALITY AND RIGHTS: THEMES AND INSIGHTS

All contributions, in one way or another, show that climate change is a matter of women's inequality and climate injustice. Here climate justice is understood not just as the right to participate in, and influence, climate change policy development, law and programmes, although this is a crucial first step (Chamberlain; Kameri-Mbote and Kabira; Machado, Vitale and Rached), but as a critical and intersectional approach that links the problem of climate change to questions of social and economic injustice. It is people who are poor and marginalized, often from Black or indigenous communities, especially in the global south, who are least responsible for climate change and environmental degradation, on whom the heaviest burdens fall – both in terms of consequences and mitigation. A critical climate justice approach focuses particularly on ending intertwined political, social and economic systems of production and consumption that drive planet-threatening climate change. It also emphasizes the interdependence of all species and of the human and

natural world, and prioritizes the needs of marginalized communities most affected by climate change.

In understanding the inequality and injustice of gender and climate change, many chapters call for a radically different and transformative approach that contributes to dismantling the linked problems of gender inequality and climate injustice and reconstructing relationships towards a new, more egalitarian world. The nature and complexity of the crisis demand conjoint strategies that link grassroots activism, political participation, national and international rights-based political and legal strategies, and that combine middle range and incremental solutions with more ambitious discussions of structural changes in the system. As such, the book works from specific issues and struggles to begin to develop more transnational understandings of multi-layered struggles for gender equality and climate justice.

This transnational understanding emerges from recurring themes in the chapters. The first concerns the depiction of women. The chapters demonstrate unambiguously that the damage caused by climate change is deeply gendered. While this needs to be clearly understood and illuminated, particularly in relation to violence (Maguire), work (Alviar García and Olarte Olarte, Fredman), reproduction (Albertyn), and land use (Chamberlain, Goldblatt and Hassim, Machado, Vitale and Rached), women should not simply be regarded as victims of the climate crisis. As several of our chapters demonstrate, women have resorted to various legal and political mobilization strategies, in formal and informal arenas, in national and international fora, and in their own communities to shape their own responses. At the same time, women are too frequently seen as providing the solution to issues that are intractable and beyond their power. Women are often simply included in a tokenistic manner on climate change policy-making committees or other spaces and there is no real attempt to grapple with patriarchal power. The key is to move beyond both pure victimhood and exaggerated agency. Instead, women's agency must be facilitated (Chamberlain, Alviar García and Olarte Olarte, Goldblatt and Hassim, Albertyn, Machado, Vitale and Rached).

The second theme is the effect on gendered inequalities of the deep enmeshment of neoliberalism with the climate emergency. The privileging of market solutions favouring wealth and power, with its emphasis on insatiable consumerism and immediate profit, has all too frequently played out in the degradation of the planet simultaneously with the exploitation of women, whether as precarious workers, through domestic drudgery and the devaluing of care-work (Fredman, Alviar García and Olarte Olarte); through maintaining conceptual divisions that reinforce the separation between present generations of humans, and humans and nonhuman nature (Wilkinson Cross); through instrumentalizing reproductive rights (Albertyn); through privileging private property over communal stewardship (Goldblatt and Hassim, Kameri-Mboti and Kabira,

Machado, Vitale and Rached); through destructive mining (Chamberlain, Goldblatt and Hassim) or through violence (Maguire).

The third theme is the crucial importance of applying a global perspective combined with an intensely local engagement, so that the stories and struggles of women in communities everywhere are sharply etched into national and international frameworks. Without the detail of the local, global frameworks have no tether; but without shaping national and international law and policy, these local engagements will be thwarted or run aground. We need to combine the insights from the struggles of the Xolobeni and WAMUA women in South Africa, (Chamberlain, Goldblatt and Hassim) the Colombian flower-pickers (Alviar García and Olarte Olarte) and the indigenous women of Brazil (Machado, Vitale and Rached) with national and global law and policy (Atrey, Campbell, Fredman, Albertyn) to ensure that gendered change can be achieved.

The fourth is the nature of law, the ways it can be mobilized, the hindrances it presents, and the interaction of national and international. While international human rights law is now scrambling to catch up with the climate emergency, a closer examination reveals that the understanding of gender and substantive equality is at best superficial, with little real attention to patriarchal power or structural inequalities. This is true even of the ILO (Fredman), CEDAW (Campbell) and the FCCC (Wilkinson Cross, Maguire). It is even more pronounced in wide-ranging policy pronouncements at national or regional level about a greener future, and even finds traction in areas such as reproductive rights (Albertyn). Several chapters in this book highlight these absences and examine what it means to take seriously a feminist and substantive approach to equality and to insert a full recognition of power inequalities, intersectionality, and the failure of market-led solutions into these critical spaces (Fredman, Campbell, Atrey, Albertyn). The same is true at local level, where Kameri-Mboti and Kabira show the importance of paying attention to gendered customary norms, religion and colonial legacies.

But the book does not only illuminate gendered and patriarchal disadvantage, it also points to ways forward. All the chapters engage directly with the question of how best to respond to the intersection of women's inequality and climate change, based on both the experiences we highlight and the analyses we develop. For example, in thinking about how to overcome the effects of neoliberal exclusion and its inability to recognize or address the structural underpinnings of gender inequality and climate injustice, many chapters work explicitly or implicitly with the feminist ideas of care and social reproduction (Albertyn, Fredman, Alviar García and Olarte Olarte). Attention to ideas of care and social reproduction, for example, not only provides crucial feminist tools for dismantling intersectional gendered inequalities, but also offers a critical theoretical lynchpin for understanding the connections between care

for and reproduction of the self, family, community, environment and nonhuman world (Fredman, Alviar García and Olarte Olarte, Albertyn, Goldblatt and Hassim). Beyond this, several chapters engage the relationship between humans and the nonhuman natural world, both from an explicitly ecofeminist perspective (Wilkinson Cross), but also in ways that seek to build a routine consideration of the natural world in equality analyses (Albertyn), that call for explicit attention by rights bodies, such as CEDAW, to simultaneously dismantling the hierarchies between men and women and between the human and natural world (Campbell), and that draw upon indigenous understandings of this relationship in seeking more transformative responses (Machado, Vitale and Rached, Goldblatt and Hassim). In these ways, new ideas about care and social reproduction, as well as the relation between human and nonhuman world, provide spaces for identifying and re-imagining alternative ways of living and being that advance substantive gender equality and climate justice.

### 3. EXPLORING AN AGENDA FOR FUTURE FEMINIST RESEARCH

This book only begins to explore how the connections between gender (in) equality and climate (in)justice generate new understandings of the role of human rights and law in achieving a more egalitarian and just world. Although the chapters work across different regions, levels and issues, there is a remarkable consensus on the need to imagine and develop new ways of achieving gender equality and climate justice that requires a dismantling of the status quo. Here particular attention has been paid to critique – to deconstructing what is wrong – but also to the way forward, to reconstructing a more just and egalitarian world, and the role and limits of law and institutions in such an endeavour. It is in the latter area that far more work needs to be done to formulate, implement and enforce workable and effective policy, legal and rights-based frameworks at international, national and local levels. A number of themes emerge in the book.

International law has a global remit and focus and is thus seemingly well placed to respond to the global forces that underpin women's inequality and the climate crisis. As the chapters in this collection point out, this potential has not been fully realized. One particular obstacle is the fact that the practice of international human rights law is still deeply bound up with state sovereignty. Human rights duties are traditionally conceived as ending at the state's territorial boundaries. Climate change, however, does not respect borders. There is an urgent need to reframe states obligations to take account of the interconnected and global nature of the climate crisis. The structure of the states' obligations in core UN human rights treaties provides a basis for this radical reframing. The International Covenant on Economic, Social and Cultural

Rights, among other treaties, requires states to cooperate and assist each other to realize rights. Unfortunately, the potential of extraterritorial duties obligations in light of climate change remains woefully underdeveloped. While there have been tepid recommendations to seek assistance to mitigate climate disasters, there is untapped power within extraterritorial duties to strike at the heart of structures and systems that dominate women and the nonhuman world. As so many chapters in the collection observe, inequalities between global north and global south remain obscured in international law and policy making and accountability mechanisms. The development of extraterritorial duties must not be blind to geographic hierarchies, nor to the gendered dimensions of climate change. Extraterritoriality could be a key ingredient in pioneering the legal innovation needed to destabilize and challenge dominant ideologies that underpin the climate crisis.

At the same time, at national level, beyond the need for effective and gendered climate change policies and law, we should pay far more attention to how routine areas of law can and should be infused with climate justice and gender equality concerns, including corporate and tax law, labour law, family law, discrimination law and so on. It is often in the day-to-day practical and normative legal regulation of the economy and society that the most fundamental changes can be made. Particularly important, for example, are the contributions of feminist economists to scrutinizing budgeting from a feminist perspective, so that the externalized costs on women of climate-affecting policies are properly included in cost accounting. Conversely, the cost benefits of policies that are both green and feminist should be constantly calculated and highlighted.<sup>8</sup>

Beyond this, of course, attention needs to be paid to effective national and local avenues of legal remedy and redress for the effects of climate crisis. One notable example is the opinion by the Committee on the Rights of the Child in a case brought by 16 child petitioners<sup>9</sup> from around the world against five of the world's largest emitters (Argentina, Brazil, France, Germany and Turkey), arguing that their respective states were in violation of the Convention on the Rights of the Child for failing to prevent and mitigate the consequences of climate change. This aimed to establish that, by perpetuating climate change, these states had breached their obligations to respect, protect and fulfil the rights to life, health, and culture under the Convention on the Rights of the

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<sup>8</sup> See, e.g., Women's Budget Group (UK), 'Feminist Green New Deal' <https://wbg.org.uk/fgnd/> accessed 14 June 2022. See also Department of Women, Youth and Persons with Disabilities (SA), 'Framework on Gender Responsive Planning, Budgeting, Monitoring, Evaluation and Auditing' (December 2018) <http://www.women.gov.za/images/GRPB-framework-250119A.pdf> accessed 14 June 2022.

<sup>9</sup> *Chiara Sacchi et al. v Argentina et al.* (2021) CRC/C88/D/104/2019.

Child, as well as failing to prioritize the child's best interests. Although the Committee dismissed the claim for failing to exhaust domestic remedies, it issued an important opinion setting out that states bear cross-border responsibilities for the harmful effects of climate change on children's rights, and that the petitioners had established that they had experienced real and significant harm both from states' actions and their inaction.<sup>10</sup> Women should feel empowered to use opinions like this in advocacy and litigation at both local and international levels. On the other hand, it is unfortunate that the Committee placed so much emphasis on the exhaustion of domestic remedies. Margaretha Wewerinke-Singh observes that the Committee's decision requires that children 'experiment with largely untested, highly complex and expensive transnational litigation' before accountability is possible.<sup>11</sup> Moreover, given the impeding risk of permanent damage of climate change, in the case of small island nations, in as short as ten to 15 years, rigid enforcement of procedural rules means that accountability will only be possible 'when it is too late to prevent the most serious violations of ... rights'.<sup>12</sup> The challenge therefore remains to find ways of clearing these procedural obstacles from the path to gender climate justice at international level.

The climate crisis also demands serious considerations of the relationship between humans and the nonhuman natural world in law. Humans have been placed at the centre, and the totality of the nonhuman world is in service of human needs and demands. Much of the climate discourse implicitly adopts this hierarchical relationship and does little to challenge the anthropocentrism that is deeply embedded in political, legal, economic, scientific and cultural thinking. Human rights are similarly anthropocentric. The majority of the world's human rights instruments bestow rights upon humans. There is an unspoken assumption that the nonhuman world is a necessary component for fulfilling rights. The ecological crisis prompts careful consideration of the need for deprivileging the place of humans. Placing the human and the nonhuman world in a relationship of equals recognizes that the nonhuman world does

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<sup>10</sup> See further, 'Historic Ruling by the Un Committee on the Rights of the Child in the Climate Change Case brought by 16 Child Petitioners under the OPIC' (Child Rights Connect, 14 October 2021) <https://childrightsconnect.org/historic-ruling-by-the-un-committee-on-the-rights-of-the-child-in-the-climate-change-case-brought-by-16-child-petitioners-under-the-opic/> accessed 14 June 2022.

<sup>11</sup> Margaretha Wewerinke-Singh 'Between Cross-Border Obligations and Domestic Remedies: The UN Committee on the Convention on the Rights of the Child's Decision on *Sacchi v Argentina (Part 2)*' (OxHRH Blog, 29 October 2021) para 1 <https://ohrh.law.ox.ac.uk/between-cross-border-obligations-and-domestic-remedies-the-un-committee-on-the-rights-of-the-childs-decision-on-sacchi-v-argentina-part-2/> accessed 14 June 2022.

<sup>12</sup> *Ibid.*, para 1.



not exist merely to serve humans, nor are humans stewards of the environment. Rather it acknowledges that humans are dependent on the nonhuman world for survival and sustenance. The impact of de-anthropomorphism on the theory and practice of human rights is just beginning to be explored. The chapters in this collection are at the forefront of reconceptualizing human rights in light of the intersection of women's inequality and the climate crisis.

In the end, any engagement with the intersections of gender inequality and the climate crisis can leave one with a sense of despair and foreboding, of rights and legal victories subverted, of overwhelming odds. However, women's rights activists and feminist legal scholars have always been driven by a sense of a better world, of imagining the law as it ought to be, in formulating new laws and rights, new forms of organization and resistance, and new advocacy strategies. It is through applying these feminist resources, the ability to rethink, re-imagine and innovate, that our project has been inspired to once more harness the law and human rights towards a more radical transformation, infusing climate justice with substantive gender equality.

# 1. The inequality of climate change and the difference it makes

**Shreya Atrey**

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## INTRODUCTION

From supporting sustainable fuels for cooking to help women move away from traditional cook stoves or chulhas in the global south, to supporting subsistence farming relied upon largely by women and girls in rural areas, carbon offsetting often looks like social justice in action. Focusing on women, geography and poverty, climate justice seems to be about climate not just in a physical sense. Rather, climate justice reflects the complexity of a problem that is environmental, gendered, class-based, poverty-related and regional, and often several of these at the same time.

This chapter is about grasping the complex nature of climate change in international human rights law. It sets out the understanding of climate change as an issue of inequality, accurately understood in social terms as compounding of major structural disadvantages and problems faced by disadvantaged groups, and tries to map this understanding on to international human rights law, especially in terms of human rights obligations related to gender inequality and climate change.

To be sure, neither inequality nor human rights need to be the frameworks for understanding climate change. Science and policy may be better candidates, to name only two (although other contributions to this collection question whether science has a monopoly over solutions for climate change). But inequality and human rights capture something salient about our understanding of the issue in social and legal terms respectively. First, that climate change cannot be isolated as merely an issue about the physical environment, but that it is caused by and in turn impacts on how we live and experience the world, in highly variegated experiences of privilege and dis-privilege. Thus, even though climate change does have an impact on the planet as a whole, and thus

arguably on everyone, it does not affect everyone equally or in the same way.<sup>1</sup> It exacerbates pre-existing disadvantages and has a greater effect on social groups that are worse off than others. Its urgency can only truly be appreciated when it is understood that it wreaks havoc for some of the most disadvantaged populations in the world.

Because of this, secondly, climate change becomes a human rights issue for everyone, but especially for those whose human rights are compromised anyway. For example, women, children, disabled persons, indigenous persons and those who belong to several of these groups stand to lose more due to climate change, whether through displacement, health inequity or food scarcity. Inequality thus seems to be both causally implicated in, as well as a consequence of climate change. This chapter shows that international human rights law has slowly, but surely, appreciated the role inequality plays in climate change. It argues that this appreciation has been particularly significant in positing the link between climate change and human rights obligations, especially in reference to gender equality. Recent jurisprudence of the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW Committee), especially General Recommendation No. 37 on gender-related dimensions of disaster risk reduction in the context of climate change, shows the development of a clear set of obligations which apply to gender inequality driven by climate change.<sup>2</sup> These include obligations related to non-discrimination, access to justice, prioritization, participation, and data collection. This chapter thus systematizes the template of extant norms that have been developed in reference to gender equality, but also hints at their limited nature in the larger project of climate justice. It concludes by arguing that although crucial, the human rights obligations currently fall short of requiring radical measures needed to (at a minimum) mitigate and (at best) reverse climate change.

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<sup>1</sup> Edward Cameron, 'Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach' (2010) 38 *Georgia Journal of International and Comparative Law* 673.

<sup>2</sup> CEDAW Committee, 'General Recommendation No. 37: Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change', 69th Sess., CEDAW/C/GC/37 (2018); United Nations General Assembly Official Records (UN GAOR), 'Convention on the Elimination of All Forms of Discrimination Against Women', adopted 18 Dec. 1979, G.A. Res. 34/180, 34th Sess., A/RES/34/180 (1980), 1249 UNT.S. 13 (entered into force 3 Sept. 1981) (hereafter CEDAW).

## 1. THE INEQUALITY OF CLIMATE CHANGE

There is no better place to start examining the implications of climate change than through the work of the Intergovernmental Panel on Climate Change (IPCC).<sup>3</sup> Established in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP), the IPCC has provided an authoritative, impartial and scientific assessment of climate change for the last four decades. IPCC's work is scientific both in terms of the technical detailing of the physical science related both to climate change and to its socioeconomic impact. In its own words: 'The IPCC prepares comprehensive Assessment Reports about the state of scientific, technical and socio-economic knowledge on climate change'.

Two reports are particularly instructive in understanding how scientific data and socioeconomic knowledge interact in the work of the IPCC – the latest Synthesis Report 2014 of the fifth round of assessment (AR5)<sup>4</sup> and the 2018 Special Report on Global Warming of 1.5°C.<sup>5</sup> The Synthesis Report, which is the most comprehensive report on climate change so far (the next one will be released in 2022), describes its scope as analysing 'direct impacts of climate change on natural systems as well as both direct and indirect impacts on human systems, such as human health, food security and security of societal conditions'.<sup>6</sup> Interconnectivity and interrelatedness of systems – both natural and physical, as well as socioeconomic – is thus the pivot on which climate change analysis is mounted.<sup>7</sup> The bottom line of the Synthesis Report is that the decades since 1950s have been successively warmer than temperatures since 1850, and that there is incontrovertible evidence that such change is driven largely by external human activity. That is, atmospheric increases in

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<sup>3</sup> Intergovernmental Panel on Climate Change (IPCC), 'IPCC Factsheet: What is the IPCC?' (30 August 2013) [www.ipcc.ch/site/assets/uploads/2018/02/FS\\_what\\_ipcc.pdf](http://www.ipcc.ch/site/assets/uploads/2018/02/FS_what_ipcc.pdf) accessed 5 April 2021.

<sup>4</sup> Core Writing Team, Rajendra Pachauri and Leo Meyer (eds), 'Climate Change 2014: Synthesis Report' (IPCC 2014) [www.ipcc.ch/site/assets/uploads/2018/05/SYR\\_AR5\\_FINAL\\_full\\_wcover.pdf](http://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf) accessed 5 April 2021.

<sup>5</sup> Valérie Masson-Delmotte and others (eds), 'Global Warming of 1.5 °C: An IPCC Special Report' (IPCC 2018) [www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_Low\\_Res.pdf](http://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf) accessed 21 April 2022.

<sup>6</sup> 'Climate Change 2014: Synthesis Report' (n 4) vii.

<sup>7</sup> *Ibid.*:

nearly all systems on this planet would be affected by the impacts of a changing climate, and ... it is not possible to draw boundaries around climate change, its associated risks and impacts on the one hand and on the other, development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.

greenhouse gas emissions (carbon dioxide, methane and nitrous oxide) are caused by economic and population growth, including factors like lifestyle, energy use, land use patterns, technology and climate policy. The Synthesis Report is also clear that climate change is no leveller. Although it impacts natural and human systems generally, the ‘risks are unevenly distributed and are generally greater for disadvantaged people and communities in countries at all levels of development’.<sup>8</sup> This finding is presented not as a qualification, but as the central finding of the impact of climate change. The idea is that socioeconomic, regional, cultural and political differences affect how climate change is experienced by various groups of people in the world. For example, the health consequences of climate change are projected to be worse for low-income groups in developing countries. Housing risks due to heat stress, storms and extreme precipitation, inland and coastal flooding, landslides, air pollution, drought and water scarcity, sea level rise and storm surges will be ‘amplified for those lacking essential infrastructure’; rural populations are ‘expected to experience major impacts on water availability and supply, food security, infrastructure and agricultural incomes, including shifts in the production areas of food and non-food crops around the world’; food insecurity and hunger is projected to worsen for the urban poor; while low income groups with poor infrastructure and social security will suffer amplified risks of displacement.<sup>9</sup> The impact of climate change is thus far from uniform; rather, the Report recognizes that the impact is intersectional in nature:

Differences in vulnerability and exposure arise from non-climatic factors and from multidimensional inequalities often produced by uneven development processes ... These differences shape differential risks from climate change. People who are socially, economically, culturally, politically, institutionally or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses ... This heightened vulnerability is rarely due to a single cause. Rather, it is the product of intersecting social processes that result in inequalities in socio-economic status and income, as well as in exposure. Such social processes include, for example, discrimination on the basis of gender, class, ethnicity, age and (dis)ability.<sup>10</sup>

Thus, for example, the Report details that climate change leads to water scarcity for both the rural and urban poor, and further exacerbates the plight of those who already lack adequate access because of their gender or geography.<sup>11</sup> This observation is pertinent in that it recognizes that accessing water is often

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<sup>8</sup> Ibid., 13.

<sup>9</sup> Ibid., 15–16.

<sup>10</sup> Ibid., 54 (emphasis added).

<sup>11</sup> Ibid., 71.

a gendered task, especially in the global south. Women are overwhelmingly responsible for fetching water, often contaminated, from wells or taps located miles away, on foot, in overweight and makeshift pots and pitchers, by navigating religious and caste boundaries which render women from minority religions or lower castes not only in a contentious but also dangerous situation. Water scarcity due to climate change only worsens the discrimination they suffer, violating not only their right to water, but also their right to health and the right to life, and the right to education for young girls who take on this role by missing or dropping out of school. The Report notes similar consequences for women in relation to fuel poverty which pushes them to use traditional cook stoves that are both unsustainable and unsafe.<sup>12</sup> Poverty, gender inequality, regionality, age, disability, caste and religion all seem implicated in determining the impact of climate change.

The 2018 Special Report on Global Warming of 1.5°C builds on this and notes that human rights norms play a key role in understanding and addressing the highly differential and intersectional impact of climate change.<sup>13</sup> It acknowledges that while this literature is ‘still new and evolving’, ‘different levels of warming can nevertheless be understood in terms of their different implications for equality – that is, in the comparative distribution of benefits and burdens for specific states, persons or generations, and in terms of their likely impacts on sustainable development and poverty’.<sup>14</sup> It thus recognizes gender, age, level of education and culture as ‘compounding factors’ or ‘drivers of impacts’ in adapting to warmer temperatures.<sup>15</sup> Age and gender are even identified as markers of morbidity and mortality, with women, children and older adults at a higher risk than others, and poverty and rurality further exacerbating these vulnerabilities.<sup>16</sup>

What this shows is that the IPCC has understood the impact of climate change as chiefly intersectional in nature. In fact, both the cause and the effect of climate change seem to be intersectional in that no single cause seems to explain why climate change leads to inequality, and that its impact

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<sup>12</sup> Ibid., 103; Masson-Delmotte (n 5) 460: ‘For example, improved cook stoves make fuel endowments last longer and hence reduce deforestation (SDG 15), support equal opportunity by reducing school absences due to asthma among children (SDGs 3 and 4) and empower rural and indigenous women by reducing drudgery (SDG 5).’

<sup>13</sup> Masson-Delmotte (n 5) 55; See John Knox, ‘Human Rights Principles and Climate Change’ in Cinnamon Carlarne, Kevin Gray and Richard Tarasofsky (eds), *Oxford Handbook of International Climate Change Law* (Oxford University Press 2015) 213–238.

<sup>14</sup> Masson-Delmotte (n 5) 55.

<sup>15</sup> Ibid., 69; Seema Arora-Jonsson, ‘Virtue and Vulnerability: Discourses on Women, Gender and Climate Change’ (2011) 21 *Global Environmental Change* 744.

<sup>16</sup> Masson-Delmotte (n 5) 24.

is experienced by those already disadvantaged by multidimensional inequalities. Intersectionality – or the idea that forms of inequality or disadvantage are co-constituted<sup>17</sup> – thus seems to serve a critical role in climate science as an ‘analytic tool’<sup>18</sup> for establishing the co-constitutive nature of both: (i) the physical and other factors in bringing about climate change; and (ii) the multidimensionality of social factors such as race, class, gender, sexuality, dis/ability, age, and socioeconomic status in producing and exacerbating the unequal impact of climate change.

Does international human rights law understand climate change similarly, and if so, what difference does this understanding of inequality make to human rights obligations of states? The next section explores this.

## 2. THE INEQUALITY OF CLIMATE CHANGE AS A HUMAN RIGHTS ISSUE

This section considers, first, how the appreciation of inequality, especially gender-based and intersectional inequality, has helped posit a link between climate change and human rights; and second, the state obligations that have arisen in appreciation of this link. I argue that inequality, especially intersectional inequality, has provided the missing causal link between climate change and human rights violations, and in turn has helped to indicate five specific human rights obligations on states to address the inequality of climate change impacts in terms of: eliminating pre-existing inequalities and protecting people from exacerbated inequalities; giving priority to the interests of those worse-off in addressing the climate change impact; ensuring participation of disadvantaged groups; providing remedies for the violations of rights of disadvantaged groups due to climate change; and finally, collecting disaggregated data of the human rights impacts of climate change on disadvantaged groups.

### (a) Inequality of Climate Change as a Link to State Obligations

Shortly after the conclusion of the Paris Agreement at the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC),<sup>19</sup> Christiana Figueres, the Executive Secretary who played

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<sup>17</sup> For an explanation of causal complexity of intersectional discrimination, see Shreya Atrey, *Intersectional Discrimination* (Oxford University Press 2019) 81–85; Ange-Marie Hancock, ‘When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm’ (2007) *5 Perspectives on Politics* 63.

<sup>18</sup> Patricia Hill Collins and Sirma Bilge, *Intersectionality* (Polity Press 2016) 1–4.

<sup>19</sup> United Nations Framework Convention on Climate Change (UNFCCC), ‘Adoption of the Paris Agreement’, FCCC/CP/2015/L.9/Rev.1 (21st session, Paris, 30 November–11 December 2015).

a crucial role in the negotiations, was asked why human rights played little role in the Paris Agreement.<sup>20</sup> Other than a preambular nod to human rights, the Paris Agreement does not engage with the language or logic of human rights.<sup>21</sup> Figueres admitted that the relationship between human rights and climate change remained ‘a thorny issue’ around which no consensus could be generated. In fact, human rights had necessarily to be skirted around to generate any consensus on climate policy. She explained that while everyone agreed that climate change is a human rights issue, there was little appetite for fusing the substantive content of climate change policy with the substance of international human rights obligations. Formal human rights norms, it seems, were considered of preambular significance alone.<sup>22</sup>

The UN COP26 follows a similar pattern.<sup>23</sup> The Draft COP decision does not even bring up human rights in the preamble. Human rights are mentioned once, with no particular significance, in urging states to ‘swiftly begin implementing the Glasgow Work Programme on Action for Climate Empowerment, taking into consideration human rights and gender’.<sup>24</sup>

This approach is reminiscent of the early thinking on climate change and human rights. The language of human rights was brought up in describing the ‘impact’ of climate change, but not in shaping climate policy or ‘action’.<sup>25</sup> Climate change was seen as a moral or political, but not necessarily legal, issue of human rights. For example, UNICEF, in its exploration of the links

<sup>20</sup> ‘Why Climate Change Policy is Human Rights Policy – and Vice Versa’, Keynote Speech, NYU School of Law (January 2016) [www.youtube.com/watch?v=Zft48-xia9Q](http://www.youtube.com/watch?v=Zft48-xia9Q) accessed 7 October 2020.

<sup>21</sup> Benoit Mayer, ‘Human Rights in the Paris Agreement’ (2016) 6 *Climate Law* 109, 113–114, 117. See Judith Blau, *The Paris Agreement: Climate Change, Solidarity, and Human Rights* (Palgrave Macmillan 2017).

<sup>22</sup> See Daniel Bodansky, ‘Introduction: Climate Change and Human Rights: Unpacking the Issues’ (2010) 38 *Georgia Journal of International and Comparative Law* 511; Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer 2018); Svitlana Kravchenko, ‘Right to Carbon or Right to Life: Human Rights Approaches to Climate Change’ (2008) 9 *Vermont Journal of Environmental Law* 513; Siobhán McInerney-Lankford, ‘Climate Change and Human Rights: An Introduction to Legal Issues’ (2009) 33 *Harvard Environmental Law Review* 431; Stephen Humphreys, *Human Rights and Climate Change* (Cambridge University Press 2010); Ottavio Quirico and Mouloud Boumghar, *Climate Change and Human Rights: An International Law Perspective* (Routledge 2015).

<sup>23</sup> Conference of the Parties, Decision 1/CP.26 (Version 10/11/2021) (26th Annual Summit, UN Climate Change Conference 2021) [https://unfccc.int/sites/default/files/resource/Overarching\\_decision\\_1-CP-26.pdf](https://unfccc.int/sites/default/files/resource/Overarching_decision_1-CP-26.pdf) accessed 20 November 2021.

<sup>24</sup> *Ibid.*, [62]. The language seems to draw an inexplicable distinction between ‘human rights’ and ‘gender’.

<sup>25</sup> Sherilyn MacGregor, ‘Gender and Climate Change: From Impacts to Discourses’ (2010) 6 *Journal of the Indian Ocean Region* 223.



between climate change and its impact on children, noted that since the impact of climate change may lead to a violation of children's rights enshrined in the Convention on the Rights of the Child (CRC),<sup>26</sup> it 'makes it morally wrong not to act promptly and decisively'.<sup>27</sup> Human rights of children were therefore seen as suggesting a moral obligation to act, but not as imposing a legal obligation to act. Similarly, the Food and Agricultural Organization (FAO) which has done valuable work in linking climate change and gender equality to food production, food availability, accessibility and utilization, did not do this work as a matter of women's human rights, especially the specific rights to life, health and food.<sup>28</sup> The approach has instead been largely programmatic, indicating the kind of policy changes that governments could pursue, but stops short of iterating the issues in the framework of human rights – as a matter of basic interests that must be secured by states who have assumed international obligations to secure those interests.

The approach can be traced back to the Office of the High Commissioner for Human Rights (OHCHR), which although was 'the first international human rights body to examine the relationship between climate change and human rights',<sup>29</sup> had initially denied that that relationship was legal.<sup>30</sup> In its 2009 Report, the OHCHR was categorical that 'While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.'<sup>31</sup> According to the Report, the causality of climate change, especially the difficulty in ascertaining the contribution of specific actions of individual states in causing climate change, made it impossible to say that states were violating their human rights obligations or whether human rights were being violated as a consequence of other actions which were not in them-

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<sup>26</sup> United Nations Commission on Human Rights, Convention on the Rights of the Child E/CN.4/RES/1990/74 (7 March 1990) [www.refworld.org/docid/3b00f03d30.html](http://www.refworld.org/docid/3b00f03d30.html) accessed 18 November 2020.

<sup>27</sup> United Nations Children's Fund (UNICEF), 'Unless We Act Now: The Impact of Climate Change on Children' (November 2015), 11 [www.unicef.org/reports/unless-we-act-now-impact-climate-change-children](http://www.unicef.org/reports/unless-we-act-now-impact-climate-change-children) accessed 22 April 2022.

<sup>28</sup> Food and Agricultural Organization (FAO), 'Rural Households and Sustainability: Integrating Environmental and Gender Concerns into Home Economics Curricula' (1994) <http://www.fao.org/DOCREP/V5406e/V5406e00.htm> accessed 7 October 2020.

<sup>29</sup> John Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477.

<sup>30</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' A/HRC/10/61 (15 January 2009) [3].

<sup>31</sup> *Ibid.*, [70].

selves in breach of obligations assumed by states. This assessment of causality was not entirely bogus. As John Knox, the soon to be first United Nations Special Rapporteur on human rights and the environment had explained in the same year:

A mudslide that results from heavy rains, for example, may well interfere with, or even destroy, the right to life of those harmed by it, but it is not caused by a state acting in violation of its legal obligations and, in that sense, is not a violation of human rights.<sup>32</sup>

Furthermore, the basic principle of jurisdiction – that the responsibility of states in international human rights law is confined ‘within their jurisdiction’ or ‘within their territory’ – also complicated issues of liability when human rights violations occurred beyond national territories and affected populations other than a state’s own population. With lingering doubts about the causal link between climate change and its human rights impact, the Report fell short of saying anything about the content of human rights obligations of states. Knox called this ‘the greatest shortcoming of the OHCHR report’.<sup>33</sup>

Seven years later, the OHCHR went on to address this shortcoming in its 2016 Report ‘on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.<sup>34</sup> It was then that the OHCHR made a substantial link between climate change and human rights, mediated by an explicit recognition of the inequality of climate change in the sense of its impacting social groups within states, especially within vulnerable states.<sup>35</sup> This reckoning was based directly on evidence relating to gender inequality, including intersectional inequality:

[W]hen there are gendered inequalities in access to economic, social and cultural rights, women suffer from higher rates of mortality as a consequence of natural disasters. Further, a direct correlation has been observed between women’s status

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<sup>32</sup> Knox (n 29) 478.

<sup>33</sup> *Ibid.*, 478.

<sup>34</sup> OHCHR, ‘Analytical Study on the Relationship between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health’ A/HRC/32/23 (6 May 2016) (‘Analytical Study Human Right’).

<sup>35</sup> *Ibid.*, [23]:

Negative impacts of climate change are disproportionately felt by the poor, women, children, migrants, persons with disabilities, minorities, indigenous peoples and others in vulnerable situations, particularly those living in geographically vulnerable developing countries. Populations living in small island developing States, on coasts, in high mountains, in deserts, at the poles and in other delicate ecosystems are most vulnerable to climate change.

in society and their likelihood of receiving adequate health care in times of disaster and environmental stress.<sup>36</sup>

At the global level, natural disasters kill more women than men, with younger women being more vulnerable. Evidence suggests that differences are also present in vulnerability to indirect and long-term effects of climate change. For example, during droughts, the health of women and girls suffers disproportionately due to reduced water availability for drinking, cooking and hygiene, and food insecurity. The poorest households in the world typically rely on the most polluting energy sources for household activities such as cooking, which are often performed by women and girls.<sup>37</sup>

Nomadic herders are greatly affected by changes in rainfall that threaten their herds, reduce milk production and cause the premature death of young cattle. Droughts also increase respiratory diseases, diseases related to malnutrition and waterborne diseases such as cholera, particularly affecting women and young children ... health inequities rooted in race and ethnicity can increase vulnerability to climate change. This is especially the case for many indigenous peoples who are at a greater risk of economic hardship, discrimination and poor health and often rely on vulnerable ecosystems for subsistence.<sup>38</sup>

As framed above, gender inequality and intersectional inequality in respect of women and other vulnerable groups such as children, migrants and indigenous peoples provided the justification for a human-rights based approach to climate change, one which placed obligations on states for the first time.<sup>39</sup> The OHCHR expressed this as:

Since climate change directly contributes to the violation of human rights, States have an affirmative obligation to take measures to mitigate climate change; to prevent negative human rights impacts; to ensure that all persons, particularly those

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<sup>36</sup> Ibid., [17].

<sup>37</sup> Ibid., [25].

<sup>38</sup> Ibid., [30].

<sup>39</sup> See also Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 'Understanding Human Rights and Climate Change', 28 [www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf](http://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf) accessed 22 April 2022:

States have an obligation to respect, protect, fulfil and promote all human rights for all persons without discrimination ... climate change negatively affects people's rights to health, housing, water and food. These negative impacts will increase exponentially according to the degree of climate change that ultimately takes place and will disproportionately affect individuals, groups and peoples in vulnerable situations including, women, children, older persons, indigenous peoples, minorities, migrants, rural workers, persons with disabilities and the poor.

in vulnerable situations, have adequate capacity to adapt to changing climactic conditions.<sup>40</sup>

The reason why gender, especially intersectional inequality, became the justification for a human-rights based approach to climate change is that it provided the missing causal link between the two. First, it was because gender inequality in an intersectional sense was considered pre-existing, and that along with other state (in)actions in respect of climate change, it was seen as contributing to the violation of human rights. States were obligated to eliminate such inequality since they were bound to respect, protect, promote, and fulfil the right to equality and non-discrimination in international law. The continuing presence of such inequality thus breached the states' obligations in respect of the right to equality but also contributed to the breach of other human rights obligations such as the right to health, food, water, housing, etc.<sup>41</sup> Second, it was because the pre-existing inequality interacted with climate change that it was further exacerbated in the absence of having been removed or remedied. This exacerbation of pre-existing inequality because of climate change was seen as a breach of obligations in respect of the right to equality as a distinct violation in its own right. It is in these two ways that the inequality of climate change has come to matter in a positivist sense under international human rights law.

In 2018, Knox, as the United Nations Special Rapporteur on human rights and the environment, too found a way to overcome the causation hurdle by linking obligations directly to the unequal impact of climate change on vulnerable populations.<sup>42</sup> While he recognized 'the complications inherent in determining whether contributions to climate change may constitute violations of human rights obligations', he also noted that 'finding a human rights violation is not a prerequisite for addressing the damage suffered by those most vulnerable to climate change'.<sup>43</sup> Since the OHCHR had recognized that 'the effects of climate change are felt most acutely by those who are already in vulnerable situations',<sup>44</sup> the impact of climate change on those whose human rights were

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<sup>40</sup> 'Analytical Study Human Right' (n 34) [54] (emphasis added).

<sup>41</sup> See e.g., UN, International Covenant on Civil and Political Rights 1155 UNTS 331, art (1) (entered into force 27 January 1980).

<sup>42</sup> John Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (Advance Edited Version), Human Rights Council, 31st session, UN Doc A/HRC/31/52 (1 February 2016).

<sup>43</sup> *Ibid.*, 16.

<sup>44</sup> *Ibid.*, 19 (emphasis added).

already compromised because of non-climate related causes was seen as in need of immediate redress.<sup>45</sup>

Evidence in respect of gender, especially intersectional inequality, as outlined in the OHCHR Reports, has thus proven to be a crucial piece in the development of a human-rights based approach to climate change. More recently, inequality in respect of other vulnerable groups such as children or disabled persons has similarly been used to assert the link between human rights and climate change.<sup>46</sup>

We now know the difference inequality makes to the human rights-based approach: it helps establish the causal link between state obligations and human rights violations. But what difference does it make to state obligations under international human rights law precisely? Again, the developments in the last two years show that gender inequality generally, and intersectional inequality specifically, has been crucial in identifying the precise state obligations in respect of climate change. The final two sections turn to delineating these obligations.

### 3. STATE OBLIGATIONS IN RESPECT OF INEQUALITY OF CLIMATE CHANGE

Since the articulation of the human rights-based approach to climate change, the discourse has embodied a set of obligations squarely in relation to the inequality of climate change. The first and most obvious set of obligations are related to the right to equality and non-discrimination. The 2016 OHCHR Report thus implicates state responsibility in both eliminating pre-existing inequalities and addressing their disproportionate impact generated in interaction with climate change, especially impact which worsens inequality:

The human rights principles of equality and non-discrimination require action to address and remedy the disproportionate impacts of climate change on the most

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<sup>45</sup> For the significance generally of equality in a human rights-based approach to climate change, see Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 *Harvard Environmental Law Review* 439.

<sup>46</sup> See, e.g., OHCHR, 'Analytical Study on the Relationship Between Climate Change and the Full and Effective Enjoyment of the Rights of the Child' A/HRC/35/13 (4 May 2017) 9 ('Analytical Study Rights of the Child'): 'A rights-based approach analyses obligations, inequalities and vulnerabilities, and seeks to redress discriminatory practices and unjust distributions of power. It anchors plans, policies and programmes in a system of rights and corresponding obligations established by international law.' See also *Ioane Teitiota v New Zealand*, CCPR/C/127/D/2728/2016 (2020), especially the two dissenting opinions; *Sacchi et al v Argentina et al*, CRC/C/88/D/104/2019 (2019) [10.8] [10.9] [10.13] [10.14].

marginalized; to ensure that climate actions benefit persons, groups and peoples in vulnerable situations; and to reduce inequalities. Efforts to address climate change should not exacerbate inequalities within or between States.<sup>47</sup>

This requires states to take into account the needs of particular disadvantaged groups such as women, children and indigenous peoples.<sup>48</sup> Importantly, this includes intersectionality, that is, inequality as constituted by the interaction of multiple disadvantages that cannot be isolated from one another and affect the realization of all human rights.<sup>49</sup> This is borne out most distinctly in the latest 2020 OHCHR Report, which details a disability-inclusive approach to climate change:

Persons with disabilities are at greater risk from the adverse impacts of climate change owing to a variety of social and economic factors. Poverty, discrimination and stigma are key components that affect the exposure of persons with disabilities to the impacts of climate change. Intersecting factors related to gender, age, ethnicity, geography, migration, religion and sex can subject some persons with disabilities to higher risks of experiencing the adverse effects of climate change.<sup>50</sup>

This means that the obligations in respect of equality and non-discrimination are enforceable intersectionally, that is, in reference to inequalities defined by multiple disadvantages.

Second, breach of obligations in respect of vulnerable populations entails a right to remedy:

The disproportionate impact of climate change on persons in vulnerable situations raises concerns of climate justice, fairness, equity and access to remedy... all persons who suffer human rights harm are entitled to access to effective remedies.<sup>51</sup>

Courts and other legal institutions must also play a role in protecting the most vulnerable, ensuring accountability and providing access to remedy.<sup>52</sup>

Third, there is growing recognition that because the impact of climate change is not the same on everyone, but worse for those already worse-off, there is not only a need to protect those worse-off, but to protect them first as a matter of

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<sup>47</sup> ‘Analytical Study Rights of the Child’, *ibid.*, [37].

<sup>48</sup> *Ibid.*, 37.

<sup>49</sup> For this understanding of intersectional human rights, see Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (Hart 2020).

<sup>50</sup> OHCHR, ‘Analytical Study on the Promotion and the Protection of the Rights of Persons with Disabilities in the Context of Climate Change’ A/HRC/44/30 (22 April 2020) [58] (‘Analytical Study Persons with Disabilities’).

<sup>51</sup> ‘Analytical Study Human Right’ (n 34) [38].

<sup>52</sup> *Ibid.*, [62].

priority and equity.<sup>53</sup> Essentially, this means focusing on the needs of vulnerable groups with some urgency.

While climate change affects people everywhere, those who have contributed the least to greenhouse gas emissions (that is, the poor, children and future generations) are often those most affected. Equity in climate action requires that efforts to address climate change benefit people in developing countries, indigenous peoples, future generations and others in vulnerable situations.<sup>54</sup>

For example, in the context of climate displacement, the right to health requires that States enact and implement transparent and socially inclusive public health strategies that give priority to the needs of vulnerable and marginalized groups, including migrants.<sup>55</sup>

Human rights principles articulated in the Declaration on the Right to Development and other instruments call for such climate action to be both individual and collective and for it to benefit all persons, particularly the most marginalized.<sup>56</sup>

This prioritarian approach is posited particularly in relation to situations of emergency or disasters, such that rapid measures take into account the needs of disadvantaged groups whose capacity to adapt and respond to climate change is diminished because of their pre-existing socioeconomic, cultural and political vulnerabilities.<sup>57</sup> This approach is developed most distinctly in the Convention on the Elimination of All Forms of Discrimination against Women's (CEDAW) General Recommendation No. 37 on disaster risk and climate change which repeatedly recognizes the obligations of states to attend to the interests of women and girls who are worse-off than others, so as to prevent further exacerbating their conditions due to climate change.<sup>58</sup>

Fourth, a very clear right to participation has developed in relation to the inequality of climate change.

The International Covenant on Civil and Political Rights and other human rights instruments, such as the Declaration on the Right to Development, guarantee all persons the right to free, active, meaningful and informed participation in public affairs. Particular care should be taken to comply with relevant human rights obligations relating to participation of persons, groups and peoples in vulnerable situations

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<sup>53</sup> See this argument developed in Shreya Atrey, 'A Prioritarian Account of Gender Equality' in Rebecca Cook (ed), *Engaging Across Borders on Gender Equality* (University of Pennsylvania Press, forthcoming).

<sup>54</sup> 'Analytical Study Human Right' (n 34) [39].

<sup>55</sup> *Ibid.*, [45].

<sup>56</sup> *Ibid.*, [36].

<sup>57</sup> See, e.g., 'Analytical Study Persons with Disabilities' (n 50) 29.

<sup>58</sup> 'General Recommendation No. 37' (n 2) [19], [26], [31], [72].

in decision-making processes and to ensure that adaptation and mitigation efforts do not adversely affect those that they should be benefiting.<sup>59</sup>

The right to participation is both instrumental in the sense that the respect for it is meant to prevent violations of further rights of disadvantaged groups and to prevent any adverse impact on them; and intrinsic in the sense that it is valuable in and of itself for disadvantaged groups to participate in decisions affecting them. The right to participation is even recognized in the Paris Agreement<sup>60</sup> and is generally the most widely recognized aspect of the rights-based approach,<sup>61</sup> one with particular implications for disadvantaged groups such as women<sup>62</sup> and disabled persons,<sup>63</sup> and one which encompasses a host of interests such as access to information, awareness-raising and capacity-building.<sup>64</sup> Again, what is distinct about the obligations of states to ensure participation in the context of climate change is that those obligations are attached to disadvantaged groups such as women and disabled persons in particular, and are thus fundamentally linked to inequality as a human rights issue.

Finally, a clear mandate on collecting disaggregated data on climate change impact has emerged. The 2020 OHCHR report on disability shows this commitment strongly:

Disaggregated data on persons with disabilities is so far lacking in most countries. Goals, indicators, targets and reports relating to climate change must explicitly address persons with disabilities, and include disaggregated data by disability.<sup>65</sup>

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<sup>59</sup> ‘Analytical Study Human Right’ (n 34) [41], [59].

<sup>60</sup> Knox (n 42) 14, quoting from General Assembly resolution 67/210, para 12: Article 6 (a) of the United Nations Framework Convention on Climate Change requires its parties to promote and facilitate public participation, and the General Assembly has recognized ‘the need to engage a broad range of stakeholders at the global, regional, national and local levels, including national, subnational and local governments, private businesses and civil society, and including youth and persons with disabilities, and that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change’. Similarly, article 12 of the Paris Agreement requires its parties to cooperate in taking appropriate measures to enhance public participation.

<sup>61</sup> Knox (n 42) [58]–[59].

<sup>62</sup> OHCHR, ‘Analytical Study on Gender-Responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women’ A/HRC/41/26 (1 May 2019).

<sup>63</sup> ‘Analytical Study Persons with Disabilities’ (n 50) [40]–[42].

<sup>64</sup> *Ibid.*, [42]–[43].

<sup>65</sup> *Ibid.*, [45].



It is important not to overstate the development of these state obligations because they are neither broad-based, i.e., adopted across all treaty bodies, nor themselves binding, i.e., immediately enforceable on their own. These are expansive and evolutionary interpretations of existing human rights obligations. They are also recent and need to be adopted and implemented across international and national contexts to be cemented in fact. But they contribute to discerning the trajectory of development of state obligations in respect of climate change, having travelled far from being of a moral or political character alone, and towards developing a legal dimension in international human rights law. This has been made possible by the recognition of gender inequality, especially intersectional gender inequality related to climate change. But are the obligations sufficient? The next section reflects on this question.

#### 4. STATE OBLIGATIONS IN RESPECT OF GENDER INEQUALITY AND CLIMATE CHANGE

Shortly after the OHCHR's first report in 2009 which missed the mark in drawing a real link between climate change and human rights obligations, the lack of a human rights-based approach – especially from a gender perspective – was criticized by the CEDAW Committee.<sup>66</sup> Ten years later in 2018, the CEDAW Committee formally recognized and addressed climate change in its General Recommendation No. 37 by focusing on the gender-related dimensions of disaster risk reduction in the context of climate change.<sup>67</sup> In its opening paragraphs, like other soft law documents on international human rights law described earlier, the Committee reiterates the received wisdom that ‘while climate change affects everyone, those countries and populations, including people living in poverty, young people and future generations, who have contributed least to climate change are most vulnerable to its impact’<sup>68</sup> and that ‘women, girls, men and boys are affected differently by climate change and disasters, with many women and girls experiencing greater risks,

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<sup>66</sup> CEDAW Committee, ‘Statement of the CEDAW Committee on Gender and Climate Change’ (44th session, New York, 20 July – 7 August 2009) [https://www2.ohchr.org/english/bodies/cedaw/docs/Gender\\_and\\_climate\\_change.pdf](https://www2.ohchr.org/english/bodies/cedaw/docs/Gender_and_climate_change.pdf) accessed 7 June 2020.

<sup>67</sup> See Christine Chinkin and Keina Yoshida, ‘Women’s Human Rights and Climate Change: State Obligations and Standards’ (July 2020) LSE Law Policy Briefing 43.

<sup>68</sup> ‘General Recommendation No. 37’ (n 2) [1].

burdens and impacts'.<sup>69</sup> The Committee is unequivocal in its message that climate crises:

exacerbate pre-existing gender inequalities and also compound intersecting forms of discrimination against, inter alia, women living in poverty, indigenous women, women belonging to ethnic, racial, religious and sexual minorities, women with disabilities, women refugees and asylum seekers, internally displaced, stateless and migrant women, rural women, single women, adolescents and older women, who are often affected disproportionately compared to men or other women.<sup>70</sup>

This perspective on intersectional inequality frames the detailed mapping of the disaster-induced risks faced by women and girls in the rest of the document. The general recommendation then sets out 'the obligations of States parties and non-State actors to take effective measures to prevent, mitigate and respond to disasters and climate change'.<sup>71</sup> It confirms the five key obligations identified above. It states that, (i) state parties have an obligation to 'ensure that all policies, legislation, plans, programmes, budgets and other activities related to disaster risk reduction and climate change are gender responsive and grounded in human-rights based principles'<sup>72</sup> including the principle of equality and non-discrimination; (ii) that there is a right to remedy for all women and girls whose rights have been directly and indirectly affected by disasters and climate change;<sup>73</sup> (iii) that there is priority to be given to the most marginalized groups of women and girls;<sup>74</sup> (iv) that there is a right to participate for diverse groups of women;<sup>75</sup> and (v) that there is an obligation to collect disaggregated data on the inequality of climate change.<sup>76</sup> The Committee calls these the 'key general principles' for a gender-responsive approach to climate change in line with CEDAW.

The UN General Assembly General Recommendation No. 37 is, however, more detailed than any of the previous iterations on state obligations. For example, the general recommendation is specifically centred around substantive equality.<sup>77</sup> To achieve this, the general recommendation provides that 'priority should be accorded to addressing discrimination in relation to

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<sup>69</sup> Ibid., [2].

<sup>70</sup> Ibid., [2] (emphasis added).

<sup>71</sup> Ibid., [15].

<sup>72</sup> Ibid., [7].

<sup>73</sup> Ibid., [23].

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid., [39]–[40].

<sup>77</sup> See Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712; Meghan Campbell, *Women, Poverty, Equality: The Role of Equality* (Hart 2018) ch 4.

the ownership, access, use, disposal, control, governance and inheritance of property, land and natural resources',<sup>78</sup> showing a keen appreciation of economic inequality and broader issues of political economy. The general recommendation is therefore not simply concerned with the 'status' of women, but with their material conditions, especially since these contribute to further inequality and discrimination. In the same vein, the general recommendation obligates states to expend resources 'to ensure that quality infrastructure and critical services are available, accessible and culturally acceptable, for all women and girls on a basis of equality',<sup>79</sup> thus creating positive duties to fulfil the right to equality and not limiting itself to the negative duties on states to not discriminate in respect of climate change policy. Regarding the right to participation, the general recommendation reminds us that this should include incorporating traditional and sustainable practices that women have developed. Identification of these adaptive strategies from local communities is considered vital for developing effective responses to disasters and climate change. Likewise, in relation to access to justice, the general recommendation asks not only for mainstream measures like free legal aid and access to informal mechanisms like mediation, but also, in particular, gender impact analysis of existing laws to assess their impact on women in the context of disasters and climate change. Right to information is read into this context as building women's legal literacy to be able to pursue justice on their own terms.

Beyond this detailed iteration of general principles, the general recommendation develops context-specific principles applicable to disaster risk and climate change, including developing disaggregated and gender-responsive indicators and monitoring mechanisms,<sup>80</sup> and gender-sensitive budgets which allocate adequate resources for gender-responsive disaster and climate change prevention, mitigation and adaption,<sup>81</sup> and even touches on the responsibility of non-state actors and extraterritorial obligations of states. It also reiterates the obligations relating to prohibition of gender-based violence, right to education, right to work, right to health, right to adequate standard of living and freedom of movement, considering the particular ways in which these interests are compromised in situations of disaster and climate change. These are helpful elaborations on existing obligations which apply in ordinary situations as well as those of disaster and climate change. The fact that they are specifically imagined in relation to the latter events is significant because they help tailor state responses to those particular situations and ultimately makes the existing

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<sup>78</sup> 'General Recommendation No. 37' (n 2) [9].

<sup>79</sup> *Ibid.*, [9].

<sup>80</sup> *Ibid.*, [42].

<sup>81</sup> *Ibid.*, [45]–[46].

obligations relevant and effective in those situations. If left at a general level, state obligations to do with women's equality would make little difference in pressing situations that require elaborate but rapid responses.

The CEDAW Committee has thus done some field-defining work to become the first human rights treaty body that 'directly and authoritatively interprets how states must integrate international human rights obligations into climate action'.<sup>82</sup> It would still be wise to take General Recommendation No. 37 as a fairly rudimentary template of state obligations which must continue to evolve. After all, there are several fundamental gaps that remain.<sup>83</sup> It is useful to mention a few of these which are conceptual in nature and relate particularly to how we conceive of the relationship between inequality and climate change. Ultimately, it is useful to appreciate why the current template of obligations, though a helpful start, will need to be updated further to grapple sufficiently with the complex character of climate change inequality.

First, the CEDAW Committee seems to have set the gender-responsive/equality-based approach to climate change in the mould of disaster management. This ex-post approach trumps prevention and instead focuses on mitigation and adaptation. This approach gives in to the inevitability of climate change and thus foregoes a more radical or transformative approach climate scientists and activists advocate to at least stall or at best reverse the worst risks of climate change.<sup>84</sup> A big part of this radical approach is the unequivocal advocacy of considerable reduction or an end to carbon emissions.<sup>85</sup> Although states' net carbon emissions have been linked to climate change and therefore to human rights violations, no ensuing human rights obligations seem to have been posited in relation to carbon emissions. The focus on disaster risk and disaster management instead may be seen as too conservative against climate

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<sup>82</sup> Olivia Bonner, 'Tackling Gender Disparity at the Intersection of Human Rights and Climate Change', Business and Human Rights Resource Centre (14 March 2008) para 1. <https://www.business-humanrights.org/en/latest-news/tackling-gender-disparity-at-the-intersection-of-human-rights-and-climate-change/> accessed 7 October 2020.

<sup>83</sup> See Monika Mayrhofer, 'Gender (In)equality, Disaster and Human Rights: The CEDAW Committee and General Recommendation No. 37' (2019) *Yearbook of International Disaster Law* 233.

<sup>84</sup> Mark Pelling, *Adaptation to Climate Change: From Resilience to Transformation* (Routledge 2011); Jesse Ribot, 'Vulnerability before Adaptation: Toward Transformative Climate Action' (2011) 21 *Global Environmental Change* 1160.

<sup>85</sup> Mary Robinson and Tara Shine, 'Achieving a Climate Justice Pathway to 1.5 °C' (2018) 8 *Nature Climate Change* 564.

science and policy that hopes for a radical solution to a complex and challenging problem.<sup>86</sup>

Second, the disaster management approach ironically fails to take a more robust approach to ‘build back better’.<sup>87</sup> This means not stopping at the risk situation and instead reimagining rebuilding from a carbon-neutral perspective and reversing the very patterns that have led to climate change disasters. State obligations in respect of building back from disasters seem to be largely lacking in this transformative spirit, having little to say about the template of future development and structural change that is climate positive.

Third, and even more ironically, although General Recommendation No. 37 concerns disaster risk management, it steers clear of some glaring and immediate climate disasters and their consequences to do with displacement and migration.<sup>88</sup> This affects those deeply compromised, such as the entire population of Bangladesh and most small island nations, for whom constant flooding in recent years has meant an erosion, and eventual disappearance of, habitable state territory. A disaster management approach to a situation of such scale not only seems too little too late, but also seems to evade what disaster management may truly entail at that scale, namely claims of resettlement via asylum and refugee law. Such claims of lawful and permissible migration, which accord priority to disadvantaged groups like women, children and disabled person, have already been brought before the Human Rights Committee, but dismissed.<sup>89</sup> Treaty body jurisprudence is in need of moving away from a remedial approach and towards a more proactive approach to migration as ‘a normal human adaptation strategy’<sup>90</sup> in the toolkit of human rights law. For this, linkages between inequality and discrimination on the one hand, and

<sup>86</sup> See Gabrielle Simm, ‘Gender, Disasters and International Law’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Routledge 2019).

<sup>87</sup> OHCHR has touched on this in light of the current pandemic: ‘Human Rights, the Environment and Covid-19: Key Messages’ [www.ohchr.org/Documents/Issues/ClimateChange/HR-environment-COVID19.pdf](http://www.ohchr.org/Documents/Issues/ClimateChange/HR-environment-COVID19.pdf) accessed 5 April 2021. See also Sandra Fredman, ‘The World of Work: A Green and Feminist Future?’ in this volume, which further develops the idea of building back better from a gendered perspective.

<sup>88</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) ch 5.

<sup>89</sup> *Ioane Teitiota v New Zealand*, Human Rights Committee, CCPR/C/127/D/2728/2016 (7 January 2020).

<sup>90</sup> UN, ‘Statement on Human Rights and Climate Change’, Joint Statement by the Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities (16 September 2019) 4. <https://digitallibrary.un.org/record/3871313?ln=en> accessed 24 April 2022.

issues surrounding climate migration and refugee law on the other, would need to be made for a human rights-based approach to climate change to be meaningful. Instead, what we currently have is a template that is progressive to the extent that it is a break from the past, but is ultimately rather piecemeal in grasping what inequality of human rights entails and demands, even in disasters, which are squarely the subject of General Recommendation No. 37.

Fourth, this piecemeal nature of state obligations is also apparent in the lack of a goal or results-oriented perspective which conceives state obligations as not only taking account of inequality but also ameliorating it. This means making a firm connection with the rest of the women's rights jurisprudence which is committed to the achievement of gender equality, including intersectional equality.<sup>91</sup> Incremental progress, though positive, may be deemed too slow and ultimately insufficient in achieving both substantive gender equality as well as averting and addressing climate disasters. A more targeted approach such as that adopted in the Sustainable Development Goals (SDGs), which connect state obligations to very specific and firm objectives, would be preferable, even though the SDGs themselves are not legally binding.<sup>92</sup> General Recommendation No. 37 refers to SDGs, but does little about actually gearing obligations in respect of gender-related dimensions of climate disasters towards achievement of the specific targets set out in the SDGs, such as ending poverty.<sup>93</sup>

Fifth, although the CEDAW Committee's work is squarely focused on 'women' in framing its human rights-based approach to climate change, women's studies or feminist theory, in particular ecofeminism, is not the key interlocutor in this framing.<sup>94</sup> Feminist approaches, such as ecofeminism,

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<sup>91</sup> CEDAW, 'General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures' (2004) para 4; CEDAW, 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (16 December 2010) para 16.

<sup>92</sup> See Sandra Fredman, 'Measure for Measure: The Challenges of Measuring Continuous Improvement and Lessons from the Sustainable Development Goals' in Jessie Hohmann and Beth Goldblatt (eds), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (Hart 2021).

<sup>93</sup> Anne Jerneck, 'What about Gender in Climate Change? Twelve Feminist Lessons from Development' (2018) 10 *Sustainability* 627. See also Steve Rayner, 'How to Eat an Elephant: A Bottom-up Approach to Climate Policy' (2011) 10 *Climate Policy* 615.

<sup>94</sup> See Christina Shaheen Moosa and Nancy Tuana, 'Mapping a Research Agenda Concerning Gender and Climate Change: A Review of the Literature' (2014) 29 *Hypatia* 677; Nancy Tuana, 'Gendering Climate Knowledge for Justice: Catalyzing a New Research Agenda' in Margaret Alston and Kerri Whittenbury (eds), *Research,*

which use women's perspectives as key in shaping the relationship between humans and the environment are hardly centred in international human rights law.<sup>95</sup> An ecofeminist perspective is different from framing women either as vulnerable 'recipients' of or all powerful 'agents of change' in the climate debate.<sup>96</sup> It is therefore not simply about how we conceive of women as subjects in international human rights law. It is about the central role of women and in fact all minorities in framing climate change as a human rights issue, in other words, how capitalist patriarchy and other related forms of oppression (ableism, homophobia, ageism, racism, etc.) have fundamentally shaped our relationship with nature, especially as one that places humanity above or before nature.<sup>97</sup> A fundamental and rather obvious dimension of the ecofeminist critique is thus the centring of women's voices which in turn centre nature and ecology in our social construction of the world.<sup>98</sup> The human right-based approach to climate change has not yet realigned the climate change debate to this perspective, which construes human rights as flowing from or even secondary to nature.

In sum, the extant template of state obligations in relation to gender inequality and climate change has some very fundamental gaps both in its conceptual framing and normative vision. The template seems too narrow and remedial in nature, which is not simply an issue with its scale or the extent to which it can make a difference, but an issue with how the current international human rights law regime has conceived both the problem of climate change and the solution for climate justice. In other words, while the last decade has seen climate change being linked to human rights frequently, the substantive human rights obligations that have been conceived to respond to them have not entirely grappled with the problem of or the solution for inequality of climate change in an ambitious way. More rudimentary but visionary conceptual work will

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Action, and Policy: Addressing the Gendered Impacts of Climate Change (Springer 2013); Sherilyn MacGregor, 'A Stranger Silence Still: The Need for Feminist Social Research on Climate Change' in Bob Carter and Nickie Charles (eds), *Nature, Society, and Environmental Crisis* (Wiley-Blackwell 2010).

<sup>95</sup> Karen Morrow, 'Integrating Gender Issues into the Global Climate Change Regime' in Susan Buckingham and Virginie Le Masson (eds), *Understanding Climate Change through Gender Relations* (Routledge 2017); Geraldine Terry, 'No Climate Justice Without Gender Justice: An Overview of the Issues' (2009) 17 *Gender and Development* 5.

<sup>96</sup> Petra Tschakert and Mario Machado, 'Gender Justice and Rights in Climate Change Adaptation: Opportunities and Pitfalls' (2012) 6 *Ethics and Social Welfare* 275.

<sup>97</sup> Maris Mies and Vandana Shiva, *Ecofeminism* (Zed 1993).

<sup>98</sup> Val Plumwood, 'Ecofeminism: An Overview and Discussion of Positions and Arguments' (1986) 64 *Australasian Journal of Philosophy* 120.

need to be undertaken to compel the international human rights law regime to engage seriously with climate change inequality in international law.

## CONCLUSION

This chapter has traced the trajectory of the development of thinking about the inequality of climate change in international human rights law, and especially the difference gender equality and intersectionality have made to this. While the human rights discourse has been slow in addressing climate change, the legal implications of the discourse in terms of positing human rights obligations on states has been slower still. That said, inequality of climate change has played a significant role in activating the human rights obligations and this chapter has traced how that has been made possible and what these obligations are. Yet, even though the development of these obligations has been significant, it may be insufficient in addressing climate change.



## 2. A critical evaluation of inter-generational equity and its application in the climate change context

**Kate Wilkinson Cross**

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### INTRODUCTION

The idea that present generations should be concerned with the welfare of future generations is evident in human societies throughout history.<sup>1</sup> African customary law includes the concept of collective land stewardship, in which the collective also includes future generations,<sup>2</sup> while the Haudenosaunee (or Iroquois) required decision makers to consider the impact of present decisions on ‘coming generations, even those whose faces are yet beneath the surface of the ground’.<sup>3</sup> Other communities and traditional cultures use conscience keepers in their decision making to ‘ensure that the consideration of past, present and future, as well as the protection of [the] environment is always taken into account’.<sup>4</sup> In international law, this relationship between present and future generations is articulated in the principle of inter-generational equity

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<sup>1</sup> Edith Brown Weiss, ‘In Fairness to Future Generations and Sustainable Development’ (1992) 8 *American University Journal of International Law and Policy* 19, 20.

<sup>2</sup> Lynda Collins, ‘Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance’ (2007) 30(1) *Dalhousie Law Journal* 79.

<sup>3</sup> Arthur Parker *The Constitution of the Five Nations or the Iroquois Book of the Great Law* (The University of the State of New York 1916) 38–39; see also Ka-Hon-Hes Deganawide and John Fadden, *The Great Law of Peace of the Longhouse People = Kaianerekowa Hotinonsionne* (1973, Akwesasne Notes 1975), part 28 <https://archive.org/details/greatlawofpeaceo00dega/mode/2up> accessed 19 April 2021.

<sup>4</sup> Catherine Pearce, ‘Guardians for Future Generations: Bringing Intergenerational Justice into the Heart of Policy-Making’ in Thomas Cottier, Shaheez Lalani and Clarence Siziba (eds), *Intergenerational Equity: Environmental and Cultural Concerns* (Brill Nijhoff 2019) 55.

(IGE), which seeks to balance the rights and responsibilities of present generations to ‘use and enjoy ecological resources and ... its obligation to adequately conserve such resources for the future’.<sup>5</sup>

Climate change is an issue of IGE and justice because it affects the well-being of future generations. Activities by previous generations have already contributed to global warming and atmospheric degradation, while activities by present generations accelerate the effects and impacts of historical activities. Because of this, future generations will have the dubious honour of living on an ecologically degraded planet with increasingly difficult choices to make about how to live in such a situation. Even now, present generations experience the impact of environmental degradation differently, according to their geographic location, socioeconomic status, and other aspects of their lives. Therefore, without serious engagement with the obligations of present generations towards future generations in policy development and decision making, humanity is creating an increasingly precarious and unliveable world for future generations of all species.

At its core, the dominant understanding of IGE encapsulates the idea that current (human) generations should leave future (human) generations with a standard of living no worse than the one they enjoy.<sup>6</sup> Edith Brown Weiss states that ‘each generation is entitled to inherit a planet and cultural resource base at least as good as that of previous generations’.<sup>7</sup> Therefore, the core principle of IGE affirms that we need to leave future generations no worse off than ours.<sup>8</sup> In this way, IGE is concerned with distributive justice between present and future generations.<sup>9</sup> This is open to a variety of interpretations and suggestions for how it can be achieved. As a result, the existing articulation of IGE in international environmental law has become weakly expressed because it is informed and shaped by ecomodernist and industrialist discourses that dominate current responses to environmental problems.

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<sup>5</sup> Collins (n 2) 93, citing Brown Weiss (n 1).

<sup>6</sup> Simon Caney, ‘Justice and Posterity’ in Ravi Kanbur and Henry Shue (eds), *Climate Justice: Integrating Economics and Philosophy* (Oxford University Press 2018) 157.

<sup>7</sup> Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations University; Transnational Publishers 1988) 25.

<sup>8</sup> Robert Solow, ‘An Almost Practical Step toward Sustainability’ in National Research Council and others (eds), *Assigning Economic Value to Natural Resources* (National Academies Press 1994) 25.

<sup>9</sup> Karen Cook and Karen Hegtvedt, ‘Distributive Justice, Equity, and Equality’ (1983) 9 *Annual Review of Sociology* 217; David Miller, ‘Distributive Justice: What the People Think’ (1992) 102(3) *Ethics* 555.

While most scholars focus on IGE in the context of environmental issues, gender inequality is also an issue of both intra-generational and inter-generational equity and is closely connected to global responses to climate change. This is because intra-generational equity is generally understood as a principle of distributive justice between present generations, whereas inter-generational equity refers to a principle of distributive justice between present and future generations.<sup>10</sup> In distributive justice models, justice is conceived as the ‘morally proper distribution of benefits and burdens among society’s members’.<sup>11</sup> Therefore, generational equity concerns the just allocation of benefits and burdens between present generations, and between present and future generations.<sup>12</sup> In the context of gender equality, these benefits could be equality of access to material goods such as resources, income, jobs, and access to decision-making institutions.<sup>13</sup> As problems caused by climate change interact with existing global power structures,<sup>14</sup> resulting environmental, political, social and economic decisions have had a disproportionate impact on marginalized and disadvantaged women who have historically had less access to power than other members of society. In this way gender inequality is both an IGE issue and a climate change issue.

Over past decades, the 1992 UN Framework Convention on Climate Change (FCCC) has begun to recognize that gender, inequality, and climate change are interrelated.<sup>15</sup> In 2017, the Conference of the Parties (COP) adopted a Gender Action Plan which seeks to achieve gender equality for present generations, with the assumption that achieving this will result in women’s gender equality between present and future generations.<sup>16</sup> However, a close analysis of the Climate Change Regime’s Gender Action Plan indicates that it continues to maintain underlying conceptual divisions that reinforce the separation between

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<sup>10</sup> Brown Weiss, ‘In Fairness to Future Generations’ (n 1); Collins (n 2).

<sup>11</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 15; Alison Jaggar, ‘The Philosophical Challenges of Global Gender Justice’ (2009) 37(2) *Philosophical Topics* 1, 2.

<sup>12</sup> Jaggar (n 11).

<sup>13</sup> Lena Bendlin, ‘Women’s Human Rights in a Changing Climate: Highlighting the Distributive Effects of Climate Policies’ (2014) 27(4) *Cambridge Review of International Affairs* 680.

<sup>14</sup> Stephen Gardiner, ‘A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption’ (2006) 15(3) *Environmental Values* 397, 402.

<sup>15</sup> United Nations Framework Convention on Climate Change (UNFCCC), ‘Introduction to Gender and Climate Change’ [http://unfccc.int/gender\\_and\\_climate\\_change/items/7516.php](http://unfccc.int/gender_and_climate_change/items/7516.php) accessed 9 February 2018.

<sup>16</sup> UNFCCC, Decision 3/CP.23 ‘Establishment of a Gender Action Plan’ (17 November 2017) FCCC/CP/2017/11/Add.1.

present generations of humans, and humans and nonhuman nature. These divisions are also replicated between present and future generations of humans and nonhuman nature.

For ecofeminists, the maintenance of these divisions in policies seeking to achieve gender equality for present and future generations is highly problematic because they argue that the marginalization of women and the exploitation of the environment are conceptually and ideologically related.<sup>17</sup> Ecofeminists share the basic premise that the ideology authorizing oppressions based upon species, race, gender, sexuality or class is the same as that which sanctions the oppression of nature.<sup>18</sup> Therefore, they call for an end to all oppressions and argue that ‘no attempt to liberate women (or any other oppressed group) will be successful without an equal attempt to liberate nature’.<sup>19</sup>

This chapter argues that without recognizing the interrelated subordination of women and nonhuman nature, attempts to achieve gender equality for present and future generations of women will be limited. This is because the IGE principle and gender equality policies in the Climate Change Regime (CCR) are informed by dominant environmental paradigms of ecological modernization which are inherently anthropocentric (humans are of central significance) and androcentric (men are of central significance). To demonstrate the limitations of the CCR’s gender equality policies and their ability to achieve IGE for women, I first problematize the discourse of ecological modernization, before examining how the IGE principle is articulated in the FCCC is based on this problematic discourse. Second, I introduce ecofeminist philosophy to explain why it is necessary to reconceive IGE so that it encompasses both human and nonhuman nature. I then consider the Gender Action Plan as an inherently limited strategy of IGE, before proposing how the principle could be revised to encompass equity considerations for human and nonhuman

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<sup>17</sup> For an overview of ecofeminist theory and its evolution, see Maria Mies and Vandana Shiva, *Ecofeminism* (Zed Books 1993); Mary Mellor *Feminism & Ecology* (Polity Press 1997); Carolyn Merchant *Earthcare: Women and the Environment* (Routledge 1996); Noël Sturgeon *Ecofeminist Natures: Race, Gender, Feminist Theory, and Political Action* (Routledge 1997); Karen Warren, ‘Feminist Environmental Philosophy’ in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition) <http://plato.stanford.edu/archives/sum2015/entries/feminism-environmental/> accessed 22 November 2015; Charis Thompson and Sheryl MacGregor, ‘The Death of Nature: Foundations of Ecological Feminist Thought’ in Sheryl MacGregor (ed), *Routledge Handbook of Gender and Environment* (Taylor & Francis 2017).

<sup>18</sup> Val Plumwood *Feminism and the Mastery of Nature* (Routledge 1993) 36.

<sup>19</sup> Greta Gaard, ‘Living Interconnections with Animals and Nature’ in Greta Gaard (ed), *Ecofeminism: Women, Animals, Nature* (Temple University Press 1993) 1.

species and therefore achieve justice for present and future generations of all beings on earth.

## 1. INTER-GENERATIONAL EQUITY IN THE FCCC: DOMINANT DISCOURSES OF ECOLOGICAL MODERNIZATION AND SUSTAINABLE DEVELOPMENT

The FCCC recognizes the intertemporal nature of climate change and explicitly connects inter-generational equity with the principle of common but differentiated responsibility and respective capacities (CBDRRC). CBDRRC acknowledges the equity concerns raised by climate change and provides that states' commitments should be differentiated based on their different responsibilities and capabilities.<sup>20</sup> In Article 3.1, the FCCC seeks to balance past and present in terms of states' responsibilities for mitigation and adaptation to climate change and acknowledges the ethical responsibility that Parties have to protect the climate for the benefit of present and future generations.<sup>21</sup> Therefore this Article recognizes that historic anthropogenic activities have had an unequal and inequitable impact on present and future generations.

However, by connecting these two principles in Article 3.1, the FCCC also introduces a tension between meeting the immediate needs of present generations as well as potential needs of unborn future generations. The relationship between inter- and intra-generational equity indicates that the international community approaches considerations of equity from an ecological modernization perspective, which in turn shapes the IGE principle and the FCCC's approach to gender equality.

Ecological modernization, which has been the dominant conceptualization of environmental law and policy since the 1980s, posits that care for nonhuman nature can be internalized into existing political, social and economic institutions.<sup>22</sup> This discourse prioritizes 'reconfiguring capitalist political economies to enable economic development and environmental protection to proceed

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<sup>20</sup> Daniel Bodansky and others, *International Climate Change Law* (Oxford University Press 2017) 27.

<sup>21</sup> United Nations, 'Framework Convention on Climate Change' (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, Article 3.1. This article states: 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities' [1].

<sup>22</sup> Maarten Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Oxford University Press 1997) 25.

simultaneously and reinforce one another'.<sup>23</sup> This means environmental policies are considered 'instruments of economic policy' that can solve environmental problems through technological innovation.<sup>24</sup> Therefore, this approach situates the economy as the saviour of the environment.

By contrast, early articulations of the sustainable development concept assumed that ecological sustainability would be at the core of the concept, rather than the periphery.<sup>25</sup> For example, the 1987 World Commission on Environment and Development defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>26</sup> In this definition, the preservation of the planet's ecological integrity is the prerequisite for development and creates a bottom line against which 'to assess and temper economic prosperity and social development'.<sup>27</sup> It is closely related to the concepts of inter-generational and intra-generational equity, also present in the definition of sustainable development. Therefore, IGE and ecological sustainability were conceptually connected in early sustainable development.

However, over time, ecological modernization and sustainable development have been conflated. For example, the 2002 Johannesburg Declaration on Sustainable Development refers to the 'interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection'.<sup>28</sup>

This interpretation of sustainable development reflects ecological modernization discourses because it 'assumes equal importance of the three social, economic and ecological sectors as three "interlocking circles"'<sup>29</sup> and that 'sustainable development occurs "where social, economic and ecological interests

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<sup>23</sup> Kate Wilkinson Cross, 'Technological Innovations Tackling Biodiversity Loss: Solutions or Misdirection?' (2019) 1(1) *Law, Technology & Humans* 100, 104 <http://dx.doi.org/10.5204/lthj.v1i1.1220> accessed 13 September 2019.

<sup>24</sup> Hajer (n 22) 95–103.

<sup>25</sup> Klaus Bosselmann, 'Strong and Weak Sustainable Development: Making Differences in the Design of Law' (2006) 13(1) *South African Journal of Environmental Law and Policy* 39, 44.

<sup>26</sup> World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) 43.

<sup>27</sup> Peter Lawrence, 'Justice for Future Generations: Environment Discourses, International Law and Climate Change' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press 2012) 26.

<sup>28</sup> United Nations, 'Johannesburg Declaration on Sustainable Development' (4 September 2002) UN Doc A/CONF.199/20\* Resolution I Annex [https://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POI\\_PD.htm](https://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm) 31 March 2021 [5].

<sup>29</sup> Bosselmann (n 25) 43.

overlap”.<sup>30</sup> In this interpretation, the primary aim of decision makers is to find ‘common ground between social, economic and environmental objectives’ and ‘allow for trade-offs in one sector for improvements in another’.<sup>31</sup> Therefore, under this definition of sustainable development, the traditional economic paradigm remains unchanged.

The FCCC is built upon the discourse of ecological modernization. It relies on existing traditional economic paradigms to achieve its objectives and asserts that economic growth, ‘development’ and environmental protection can occur simultaneously.<sup>32</sup> This continued affirmation of traditional economic paradigms has implications for the IGE principle. Ecological modernization rests on short-term anthropocentric and exploitative economic and political assumptions in which the idea that future generations have interests is problematic.<sup>33</sup> Therefore, the FCCC internalizes an understanding of IGE that assumes that future generations are able to look after themselves, as long as the environmental damage can be internalized into existing economic models, and with the support of technological innovation and strong governance.<sup>34</sup>

Therefore, while the FCCC states that parties should consider the interests of future generations when undertaking activities to achieve the objectives of the Convention, the current approach increasingly prioritizes responding to the inequitable impact of climate change on present generations. This is demonstrated by the separation of intra- and inter-generational equity in the evolution of the CCR. For example, the 1997 Kyoto Protocol and 2015 Paris Agreement refer to IGE in their Preambles<sup>35</sup> and to CBDRRC (intra-generational equity)

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., 44.

<sup>32</sup> See e.g., ‘Framework Convention on Climate Change’ (n 21) Preamble [6], [21], Article 2, Article 3.4, Article 3.5; United Nations, ‘Convention on Biological Diversity’ (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, Preamble, [19], Article 8, Article 20.4.

<sup>33</sup> Martin Weitzman, ‘Gamma Discounting’ (2001) 91(1) *American Economic Review* 260; Christian Traeger, ‘Sustainability, Limited Substitutability, and Non-Constant Social Discount Rates’ (2011) 62(2) *Journal of Environmental Economics and Management* 215; Laurie Johnson and Chris Hope, ‘The Social Cost of Carbon in U.S. Regulatory Impact Analyses: An Introduction and Critique’ (2012) 2(3) *Journal of Environmental Studies and Sciences* 205; Mark Freeman and Ben Groom, ‘How Certain Are We About the Certainty-Equivalent Long Term Social Discount Rate?’ (2016) 79 *Journal of Environmental Economics and Management* 152.

<sup>34</sup> Hajer (n 22) 25; Arthur Mol and Gert Spaargaren, ‘Ecological Modernisation Theory in Debate: A Review’ (2000) 9(1) *Environmental Politics* 17, 27; Michael Howes and others, ‘Adapting Ecological Modernisation to the Australian Context’ (2010) 7(1) *Journal of Integrative Environmental Sciences* 5, 6.

<sup>35</sup> United Nations, ‘Kyoto Protocol to the United Nations Framework Convention on Climate Change’ (adopted 11 December 1997, entered into force 6 February 2005)

in the operative provisions.<sup>36</sup> Similarly, early COP Decisions refer to present and future generations in their recitals<sup>37</sup> and more recent Decisions either omit any reference to IGE<sup>38</sup> or refer to it in their recital and focus on intra-generational considerations, such as CBDRRC, in their operative provisions.<sup>39</sup> Therefore, while the international community acknowledges that both IGE and intra-generational equity are concerned with achieving distributive justice in the context of climate change, intra-generational equity considerations are prioritized in the CCR.

The overview above highlights how current climate change policies are addressing the tensions between present and future generations by prioritizing a certain form of intra-generational equity, which is informed by discourses of ecological modernization. Ecofeminists find this prioritization problematic because ecological modernization makes little effort to reconcile the needs of present and future generations in a way that addresses the disadvantages experienced by those who will be impacted disproportionately by the effects of climate change. This is because ecological modernization maintains underlying conceptual, structural and institutional barriers that reinforce the marginalization of women, nonhuman nature and other disadvantaged groups. These barriers have significant intertemporal impact, meaning that any policies that do not account for future generations are likely to reinforce the disadvantages experienced in the future by marginalized communities, including women and nonhuman nature. The way in which these policies may unintentionally reinforce these disadvantages and the marginalization of women and nonhuman nature will be discussed in the following section.

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2303 UNTS 162, Preamble [4]; UNFCCC, 'Paris Agreement' (signed 12 December 2015, entered into force 4 November 2016) FCCC/CP/2015/10/Add.1 Annex (12 December 2015), Preamble [11].

<sup>36</sup> 'Kyoto Protocol' (n 35) Article 2.3; 'Paris Agreement' (n 35) Article 2.2, Article 4.1.

<sup>37</sup> UNFCCC, Decision 5/CP.7 'Implementation of Article 4, paragraphs 8 and 9, of the Convention (Decision 3/CP3 and Article 2, paragraph 3, and Article 3, paragraph 14, of the Kyoto Protocol)' (10 November 2001) FCCC/CP/2001/13/Add.1 recital [1]; UNFCCC, Decision 31/CMP.1 'Matters relating to Article 3, paragraph 14, of the Kyoto Protocol' FCCC/KP/CMP/2005/8/Add.4 recital [1].

<sup>38</sup> UNFCCC, Decision 1/CP.13 'Bali Action Plan' (14–15 December 2007) FCCC/CP/2007/6/Add.1; UNFCCC, Decision 1/CP.16 'The Cancún Agreements' (10–11 December 2010) FCCC/CP/2010/7/Add.1; UNFCCC, Decision 2/CP.15 'Copenhagen Accord' (18 December 2009) FCCC/CP/2009/11/Add.1.

<sup>39</sup> 'Paris Agreement' (n 35) Preamble [11]; UNFCCC, Decision 1/CP.21 'Adoption of the Paris Agreement' (12 December 2015) FCCC/CP/2015/10/Add.1 recital [7]; UNFCCC, Decision 1/CMA.2 'Chile Madrid Time for Action' (15 December 2019) FCCC/PA/CMA/2019/6/Add.1 recital [6], Annex II 25.



## 2. ECOFEMINIST PHILOSOPHY: DECONSTRUCTING THE CONNECTIONS BETWEEN THE DOMINATION OF WOMEN AND THE DOMINATION OF NATURE

Ecofeminist critiques of western canonical philosophical views and their male bias inform the subsequent ‘layers’ of ecofeminist analysis. In particular, ecofeminists are critical of Cartesian dualisms that function to hyper-separate humanity from nonhuman nature. These dualisms are interrelated and mutually reinforcing, and are in the form of contrasting pairs such as reason/nature, human/nature, male/female, subject/object, self/other, and master/slave. They naturalize nature, race, gender and class oppressions and ‘reflect the major forms of oppression in Western culture’.<sup>40</sup> These dualisms are a:

relation of separation and domination inscribed and naturalised in culture and characterised by radical exclusion, distancing and opposition between orders constructed as systematically higher and lower, as inferior and superior, as ruler and ruled, which treats the division as part of the natures of beings construed not merely as different but as belonging to radically different orders or kinds, and hence not open to change.<sup>41</sup>

The human/nature and mind/body dualisms are some of the most pervasive in dominant philosophical traditions. They conceive humans as outside of nature, but inside culture, and nonhuman nature as outside of culture and ethics.<sup>42</sup>

Women, other subordinated humans and nature are considered a resource for exploitation as a result of being classed as outside culture and rationality. Women are naturalized, essentialized and ‘condemned’ by their association with the body, and, in gendered societies, symbolically and materially embody nature.<sup>43</sup>

This is known as ‘embodiment’. Nonhuman nature is similarly alienated because it is unable to fulfil the ethical requirement of rationality. This human/nature dualism has historically enabled and justified the unconstrained exploitation of nature. It also creates a dangerous illusion that we are outside, disembedded and independent of nature, which in turn shapes our response to the ecological crisis.<sup>44</sup>

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<sup>40</sup> Plumwood (n 18) 43.

<sup>41</sup> *Ibid.*, 47–48.

<sup>42</sup> Val Plumwood *Eye of the Crocodile* (Lorraine Shannon ed, ANU Press 2012) 78.

<sup>43</sup> Mary Mellor, ‘Feminism and Environmental Ethics: A Materialist Perspective’ (2000) 5(1) *Ethics and the Environment* 107.

<sup>44</sup> Val Plumwood ‘Animals and Ecology: Towards a Better Integration’ ANU Open Access Research <http://hdl.handle.net/1885/41767> accessed 22 August 2013, 3;

These dualistic constructions have enabled Western culture to achieve its position of dominance in modern time because it maximizes the number of other beings classified as available resources for exploitation without constraint.<sup>45</sup> They have underpinned European colonialism and its brutal, enduring transformation of the world, as well as the unconstrained exploitation of nature, particularly in colonized spaces.<sup>46</sup> For example, contemporary economic rationalism is mapped on to human/nature, reason/emotion dualisms, demonstrated by its portrayal as ‘detached, disengaged, supremely rational mechanism, free from ‘irrational interference’ and radically separate from ‘female-coded spheres of the body and emotions’.<sup>47</sup> As a result, it minimizes the ethical recognition of the nonhuman world, which in turn minimizes the ‘class of beings subject to ethical treatment’ while also maximizing the ‘class of other beings that are available to be treated without ethical constraint as resources or commodities’.<sup>48</sup> This results in the world’s wealth and resources, including ecological wealth, being channelled for the benefit of fewer and fewer organisms.

Therefore, ecofeminist critiques of western canonical philosophy demonstrates how the foundations of western culture and political thought are shaped by conceptual frameworks that ‘[function] to maintain, perpetuate, and “justify” the dominations of women, other subordinated humans and nonhuman nature’.<sup>49</sup> Ecofeminism argues for an ethical perspective that challenges the dualized conception of human identity and develops an alternative culture that fully recognizes human identity as continuous with nature. Ecofeminists put forward an alternative vision in which women are not viewed as solely part of nature any more than men, and instead, both men and women are recognized as part of both nature and culture. This means that both men and women can ‘stand with nature’ and work to break down the dualistic construction of culture.

Another strand of ecofeminism examines the impact of these dualisms on social construction of women/nature relationships. Drawing on socialist

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see also Carolyn Merchant *The Death of Nature: Women Ecology and the Scientific Revolution* (Harper 1980).

<sup>45</sup> Val Plumwood, ‘Ecological Ethics from Rights to Recognition: Multiple Spheres of Justice for Humans, Animals and Nature’ in Nicholas Low (ed), *Global Ethics and Environment* (Routledge 1999) 190.

<sup>46</sup> Mies and Shiva (n 17); Plumwood, *Feminism and Mastery* (n 18), 51; Asoka Bandarage *Women, Population and Global Crisis* (Zed Books 1997) 126–128.

<sup>47</sup> Val Plumwood *Environmental Culture: The Ecological Crisis of Reason* (Routledge 2002) 22, 22.

<sup>48</sup> Plumwood, ‘Ecological Ethics’ (n 45) 189.

<sup>49</sup> Karen Warren *Ecofeminist Philosophy: A Western Perspective on What It Is and Why It Matters* (Rowman & Littlefield 2000) 46.

feminism, these scholars view environmental problems as ‘rooted in the rise of capitalist patriarchy and the ideology that the earth and nature can be exploited for human progress through technology’.<sup>50</sup> Extending socialist critiques of production and reproduction, ecofeminists examine the intersections between sustainable development, globalization and capitalism and the role of reproductive labour in supporting and enabling other forms of valued economic activity.<sup>51</sup> They demonstrate how ‘oppressive conceptual frameworks’ devalue, ignore and exclude the reproductive labour performed by women, other subordinated humans and nonhuman nature which enables other forms of valued economic activity. They argue that the exclusion and denial of the necessity of such labour enables social institutions to ignore the material relations and connections between humans and nonhuman nature.

Focusing on the position of women at the boundaries of economic systems, ecofeminist political economy provides an analysis of the destructive relationship between humanity and nonhuman nature. While they acknowledge that all humans will be affected by environmental degradation, ecofeminist political economists argue that women and nonhuman nature will be disproportionately affected because of the embedded and embodied reproductive labour that they perform, which in turn makes other forms of ‘valued’ economic activity possible by securing the human body and community.<sup>52</sup> By examining the complexity of women’s position in relation to the economy, this line of enquiry can demonstrate how the gendered construction of economic systems ‘does not relate to the totality of human active labour and natural resources’.<sup>53</sup> Instead, it ‘represents a boundary around limited activities and functions in which the process of valuing and male-ness are connected’.<sup>54</sup> When that work is valued, it becomes more male dominated, and when the work is necessary and unremitting, it becomes more female-dominated.

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<sup>50</sup> Carolyn Merchant, ‘Ecofeminism and Feminist Theory’ in Irene Diamond and Gloria Orenstein (eds), *Reweaving the World: The Emergence of Ecofeminism* (Sierra Club Books 1990) 103; see also ‘Special Issue on Women, Ecology and Economics’ (1997) 20(2) *Ecological Economics* 105; Merchant, *Death of Nature* (n 44); Mary Mellor, ‘Ecofeminist Political Economy: A Green and Feminist Agenda’ in Sherilyn MacGregor (ed), *Routledge Handbook of Gender and Environment* (Earthscan 2017); Ariel Salleh *Ecofeminism as Politics: Nature, Marx and the Post Modern* (2nd edn, Zed Books 2017).

<sup>51</sup> Mary Mellor, ‘Ecofeminist Political Economy’ (2006) 1(1/2) *International Journal of Green Economics* 139, 140.

<sup>52</sup> *Ibid.*; United Nations Population Fund, ‘Resource Kit: Climate Change Connections – Gender and Population’ (UNFPA, WEDO, 2009) <https://www.refworld.org/docid/4adc31192.html> accessed 18 March 2021.

<sup>53</sup> Mellor, ‘Ecofeminist Political Economy’ (n 51) 140.

<sup>54</sup> *Ibid.*

Because of this, women are positioned on the margins of male-dominated and male-defined economic systems and political systems.<sup>55</sup> If women wish to enter the valued/male economy, they must either leave their 'woman-life' behind, signifying the need to transcend the embedded and embodied reproductive labour that women have historically performed. This work is 'embodied' because it is concerned with the 'maintenance and sustenance of the human body through the cycle of the day and the cycle of life (birth to death), in sickness and in health'.<sup>56</sup> It is embedded because it is by necessity repetitive and local, often centred around the home. Much of the work centres on a woman's presence: of being available, dependable and on call. Most of the tasks are repetitive and once complete, must start over. The endlessly cyclical nature of this work requires women to stay near the home in order to remain close to their responsibilities. The cyclical and repetitive nature of this work inhibits the opportunities for women to enter the valued economy.

The modern economy excludes the 'wider life of the body and the human and natural life-cycles' in its entirety.<sup>57</sup> It ignores the intertemporal, cyclical and relational nature of this reproductive labour, which is in turn marginalized in the valued economy. Thus, it disregards the unlimited nature of women's work, and the fact that it never ends.

This analysis can be extended to nonhuman nature. Some ecofeminists argue that Western industrialized farming relies on the exploitation of nonhuman females, such as cows, sows and hens.<sup>58</sup> Highlighting the role of reproductive technologies, this critique demonstrates how 'factory farming' controls female fertility for food farming by manipulating female bodies across species.<sup>59</sup> While human women are able to transcend this embodied and embedded work, by moving into the 'valued' economy (often at great economic and personal cost), nonhuman females are unable to do so. They are by their very nature relegated to the sphere of nature, discounted and dismissed from ethical consideration, thus enabling the continued exploitation of nonhuman nature.<sup>60</sup>

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<sup>55</sup> Mellor, *Feminism & Ecology* (n 17); Salleh (n 50).

<sup>56</sup> Mellor, 'Ecofeminist Political Economy' (n 50) 141.

<sup>57</sup> *Ibid.*

<sup>58</sup> Josephine Donovan, 'Animal Rights and Feminist Theory' (1990) 15(2) *Signs* 350; Josephine Donovan, 'Feminism and the Treatment of Animals: From Care to Dialogue' (2006) 31(2) *Signs* 305; Carol Adams and Lori Gruen, 'Introduction' in Carol Adams and Lori Gruen (eds), *Ecofeminism: Feminist Intersections with Other Animals and the Earth* (Bloomsbury Academic 2014).

<sup>59</sup> Greta Gaard, 'Vegetarian Ecofeminism: A Review Essay' (2002) 23(3) *Frontiers: A Journal of Women Studies* 117.

<sup>60</sup> Carol Adams, 'Ecofeminism and the Eating of Animals' 6(1) *Hypatia* 125, 131.

Extending this analysis, other research highlights how agribusiness is a form of ‘ecological imperialism’<sup>61</sup> that describes the appropriation of indigenous land and the violation of indigenous women and animals, as well as the introduction of ‘exotic’ livestock and European agricultural practices.<sup>62</sup> Scholars like Vandana Shiva and Val Plumwood have highlighted how instrumental reasoning has constructed nonhuman nature, the indigenous and animals as ‘other’ to in order to meet elite male needs.<sup>63</sup> At the same time, globalization reinforces contemporary colonial practices by continuing to expropriate ‘natural’ resources and transferring environmental wastes to poor, rural, marginalized communities of colour around the world.<sup>64</sup> These practices demonstrate the connections between environmental racism, classism, and the continued exploitation of nature.

Further, these practices deny the reality and necessity of inter-generational reproduction, and the role of time and place in this. Both human and nonhuman species rely on repetitive nurturing through feeding and shelter. These requirements are augmented by social reproduction in human and some nonhuman species. According to Carolyn Merchant, ‘reproduction over time exists in a dialectical interaction with production. If production systems result in waste products that threaten biological reproduction and social problems that weaken the social whole, an ecological and social crisis occurs’.<sup>65</sup>

Therefore, failing to consider human embodiment enables social, political and economic institutions constructed on an idealized male experience to ignore the broader implications of humanity’s biological and ecological embeddedness. Instead, these institutions perpetuate a false premise of the independently functioning individual, existing outside of time and place.

In reality, few men and fewer women are able to achieve the power to ‘function independently, socially, political or economically, but that does not prevent the public world from being constructed on that basis’<sup>66</sup> and for power to be defined by ‘the ability of certain individuals and groups to free them-

<sup>61</sup> Alfred Crosby *Ecological Imperialism: The Biological Expansion of Europe, 900–1900* (Cambridge University Press 2015).

<sup>62</sup> Greta Gaard, ‘Toward a Feminist Postcolonial Milk Studies’ (2013) 65(3) *American Quarterly* 595.

<sup>63</sup> Vandana Shiva, *Staying Alive: Women, Ecology and Development* (Zed Books 1988); Vandana Shiva, ‘Development as a New Project of Western Patriarchy’ in Irene Diamond and Gloria Orenstein (eds), *Reweaving the World: The Emergence of Ecofeminism* (Sierra Club Books 1990); Plumwood, *Feminism and Mastery* (n 18); Val Plumwood, ‘Androcentrism and Anthropocentrism: Parallels and Politics’ in Karen Warren (ed), *Ecofeminism: Women, Culture, Nature* (Indiana University Press 1997).

<sup>64</sup> Bandarage (n 46) 234–269.

<sup>65</sup> Merchant, *Earthcare* (n 17) 193.

<sup>66</sup> Mellor, *Feminism & Ecology* (n 17) 173.

selves from embodiedness and embeddedness, from ecological time and biological time'.<sup>67</sup> These critiques can be extended to the treatment of nonhuman nature which is unable to transcend the natural world. This analysis reveals that existing political, social and economic institutions ignore and operate outside the biological realities of ecological time. As such, they fail to account for the environment in their understanding of inter-generational equity.

Therefore, ecofeminism deconstructs the way in which social institutions incorporate oppressive conceptual frameworks that reinforce the subordination of women and exploitation of nonhuman nature. It highlights that without recognizing humans as embedded in and embodying nature, policies and practices seeking to address gender equality and achieve IGE will be partial at best. In most instances, such policies and practices will simply reinforce and maintain existing oppressive conceptual frameworks that deny and ignore the biological and ecological realities of our lived experiences. As a result, these policies continue to ignore the realities of women's lives, which inhibits opportunities to achieve substantive equality. At the same time, these policies also limit moral consideration to present human generations over future human and non-human generations, thus maintaining the exploitative and extractive processes causing environmental degradation. These limitations are reflected in the most common theories of IGE.

### 3. LIMITATIONS OF EXISTING THEORIES OF INTER-GENERATIONAL EQUITY

Perhaps the most well-known theory of inter-generational equity is that developed by Edith Brown Weiss. Brown Weiss argues that present generations have certain obligations to future generations and these must guide the strategies adopted to address climate change.<sup>68</sup> She adapts Rawls' theory of justice to argue that any generation along a spectrum of time would 'want to receive the planet in at least as good condition as every other generation receives it and to be able to use it for its own benefit'.<sup>69</sup> She theorizes IGE along the lines of a trust that includes the earth, cultural and natural resources and argues that this 'planetary trust obligates each generation to preserve the diversity of the resource base and to pass the planet to future generations in no worse

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<sup>67</sup> Ibid., 189.

<sup>68</sup> Edith Brown Weiss, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9(3) *Vermont Journal of Environmental Law* 615, 620.

<sup>69</sup> Ibid., 622; John Rawls *A Theory of Justice: Original Edition* (Harvard University Press 1971).

condition than it receives it'.<sup>70</sup> Therefore, her theory has three interrelated elements: the idea of a planetary trust, wherein the present generation(s) hold the earth, cultural and natural resources in trust for future generations; the idea that future generations are rights holders; and an extension of the Rawlsian theory of justice.<sup>71</sup> This can be written as three normative principles that each generation should follow. These are to conserve options; conserve quality; and conserve access.<sup>72</sup>

Peter Lawrence has also attempted to develop a theory of IGE in relation to climate change. He argues that present generations have an 'ethical obligation to take climate change mitigation measures for the protection of future generations'.<sup>73</sup> This obligation rests on a 'harm avoidance principle, core human rights to ensure human dignity – to which persons are entitled regardless of when and where they are born – and a transgenerational community extending into the future'.<sup>74</sup> Lawrence argues that every individual as a human being 'is entitled to minimum standards of treatment regardless of where and when they live'.<sup>75</sup> Therefore, the present generation have an obligation to ensure that future generations' basic rights of life, health, and subsistence are protected, because without them, individuals are unable to enjoy other human rights.<sup>76</sup>

Both leading theories of IGE retain underlying conceptual frameworks that maintain the centrality of the master human subject as the starting point for ethical reasoning, and as the focus of their approach. They both include dualistic structures that form interconnected frameworks that maintain the master human subject. For example, the concept of trust is based on property law, which in turn approaches nonhuman nature as an inert object which can be divided up into parcels that can be 'owned'. This maintains the subject/object and human/nature structures that legitimize the subordination and exploitation of women and nature. By placing the earth in trust, Brown Weiss' theory frames the earth as an object to be used for human enjoyment.

Lawrence defends this approach by arguing that because humanity depends on the global ecological system for their survival, implementing such an obligation towards future generations would ensure that the transboundary

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<sup>70</sup> Edith Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11(4) *Ecology Law Quarterly* 495, 499.

<sup>71</sup> *Ibid.*; Brown Weiss, 'In Fairness to Future Generations' (n 1); Lawrence (n 27) 37.

<sup>72</sup> Brown Weiss, *ibid.*, 23.

<sup>73</sup> Peter Lawrence, *Justice for Future Generations: Climate Change and International Law* (Edward Elgar Publishing 2014) 67.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*, 30.

<sup>76</sup> *Ibid.*, 39.

climatic systems are retained intact for future generations. Therefore, because the climate system and other ecological systems are interrelated, all global ecological systems would be kept intact for future human generations to enjoy.<sup>77</sup> These arguments do not address the underlying conceptual assumptions that inform current political, legal and economic institutions and how they legitimize the exploitation of women, nonhuman nature and marginalized communities.

Both theories similarly integrate traditional notions of distributive justice in order to resolve the claims between present and future generations to nonhuman nature. Distributive justice models are often made on the basis of a series of ethical considerations relating to fairness and equity. While there are many strengths of these models, there are also limitations because they generally focus on the allocation of material goods, such as income, resources, or wealth.<sup>78</sup> Where the model is widened to include non-material goods, such as opportunity, power, or respect, it treats them as ‘as though they were static things rather than functions of social relations and processes’.<sup>79</sup> However, material or non-material goods are not always ‘things’, which means that they are not always able to be distributed in accordance with distributive justice models.<sup>80</sup> Examples of such non-material goods include the definition of labour, culture, and ‘social decision making structures of power that help determine patterns of distribution’.<sup>81</sup> These non-material goods shape how we interact with the nonhuman world, as well as our understanding of social relations. However, as will be explored below, existing approaches to distributive justice incorporated in the FCCC’s Gender Action Plan fail to account for these non-material goods, which has an impact on how successful they will be in enabling inter-generational equity.

#### 4. UNDERSTANDING GENDER EQUALITY AS A STRATEGY OF INTER-GENERATIONAL EQUITY

Inter-generational equity is a powerful normative principle to guide gender equality activities in the CCR. This is because it focuses attention on the future as well as the present, and therefore encourages consideration of the

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<sup>77</sup> *Ibid.*, 33.

<sup>78</sup> Karen Warren, ‘Environmental Justice: Some Ecofeminist Worries About a Distributive Model’ (Twentieth World Congress of Philosophy, Boston MA, August 1998) 99 <https://www.bu.edu/wcp/Papers/Gend/GendWarr.htm> accessed 5 April 2020.

<sup>79</sup> Young (n 11) 16.

<sup>80</sup> Warren, *Ecofeminist Philosophy* (n 49) 181.

<sup>81</sup> *Ibid.*, 99.



long-term sustainability of our politics and actions focused on achieving gender equality. However, without incorporating consideration of present and future generations nonhuman nature, attempts to achieve gender equality will be conceptually stunted and likely reinforce the problematic discourse of ecological modernization.

The CCR's gender and climate change workstream can be understood as one of the strands towards achieving both intra-generational and inter-generational equity. In line with other international organizations, the CCR acknowledges that climate change affects men and women differently.<sup>82</sup> Therefore, the international community should take into account gender in all climate change policies.<sup>83</sup> As gender equality is an issue of IGE, how it is conceived in the CCR is interconnected with the success of achieving gender equality in the context of climate change.

### **(a) Gender Equality as a Strategy of Ecological Modernization**

Statements around inter-generational equity and gender equality in the CCR demonstrate a cultural expression of hierarchical relationships that 'construct central cultural concepts and identities so as to make equality and mutuality literally unthinkable'.<sup>84</sup> These structures create 'a false universalism in culture in which the experiences of the dominant "centre" are represented as universal, and the experiences of those subordinated in the structure are rendered secondary or "irrational"'.<sup>85</sup> Therefore, the only possible way to confer moral consideration or value to an entity in this framework is if the entity is somewhat similar, or the 'same' as humans.

This way of thinking is highly problematic because the logic of sameness universalizes the experiences of the dominant 'centre' and discounts or ignores the experiences of subordinated others. This means that as humans (specifically, Western, white, middle class, male humans), the international

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<sup>82</sup> 'Resource Kit: Climate Change Connections – Gender and Population' (n 52); UNFCCC, Decision 1/CP.16 'The Cancún Agreements' (n 38) recital [7]; Lennart Olsson and others, 'Climate Change 2014: Impacts, Adaptation, and Vulnerability' in Christopher Field and others (eds), Part A: Global and Sectoral Aspects Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2014) 796; UNFCCC Secretariat, 'Achieving the Goal of Gender Balance: Technical Paper by the Secretariat' (26 October 2017) FCCC/TP/2017/8, [9(b)]; UNFCCC, Decision 3/CP.25 'Enhanced Lima Work Programme on Gender and its Gender Action Plan' (15 December 2019) FCCC/CP/2019/13/Add.1 recital [5].

<sup>83</sup> 'Introduction to Gender and Climate Change' (n 15).

<sup>84</sup> Plumwood, *Feminism and Mastery* (n 18) 47.

<sup>85</sup> Plumwood, *Environmental Culture* (n 47) 99.

community does not have to extend any moral or ethical consideration to nonhuman ‘others’ or women ‘others’ when reflecting the interests and needs of future generations. Instead, humans and specifically those of the dominant centre, are given primacy when contemplating the needs of future generations and the extent to which present generations should bear the costs. This is because humans (specifically, Western, white, middle class, male humans) are regarded as ‘universal’, against which the interests, experiences and characteristics of the subordinated are measured. This has significant implications for the policies adopted to achieve gender equality and the ability they have in achieving equality for present and future generations of women and girls.

This human-centred structure is embedded in the objective and principles of the FCCC. The objective of the FCCC is to stabilize greenhouse gas concentrations at a level that prevents ‘dangerous anthropogenic interference with the climate system’ in a timeframe that ‘allows ecosystems to adapt naturally ... [and] ... to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner’.<sup>86</sup> The references to food production and economic development indicate that Article 2 is constructed as a human/nature dualism whereby the interests of the human-centre are universalized. This human-centred understanding of present and future generations is further reinforced in Article 3.1 which explicitly refers to the ‘benefit of present and future generations of humankind’. Therefore, present and future generations of nonhuman nature are only considered to the extent that they serve a useful purpose for humans.

In this way, Articles 2 and 3 of the FCCC integrate discourses of ecological modernization and its logic of economic rationalism, which are based upon the interconnected human/nature, male/female, reason/nature, and mind/body dualisms. Ecological modernization enables rational market mechanisms and processes to be privileged over complex social and political domains and processes, based on the argument that the ‘methods and mechanisms of the market will create a maximally rational and “efficient society”’.<sup>87</sup> Economic rationalism maps onto ‘pre-existing narratives of the supremacy of male-coded reason and its radical separation from female-coded spheres of the body, emotions and nature’.<sup>88</sup> Therefore, it ‘privileges the abstract over the contextual and experiential, imposes the universal formula over the local, and everywhere exhibits the rationalist desire for the permanence and purity of abstraction and mathematisation’.<sup>89</sup> This results in a market that disregards the environmental

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<sup>86</sup> UNFCCC (n 21) Article 2.

<sup>87</sup> Plumwood, *Environmental Culture* (n 47) 23.

<sup>88</sup> *Ibid.*, 22.

<sup>89</sup> *Ibid.*, 23.

preconditions of all life, and whose rules are free from social responsibility or any recognition of humanity's embedment in a containing and constrained ecological order.<sup>90</sup>

A close reading of CCR documents indicate that the motivation for achieving gender equality remains framed in the established discourse of ecological modernization. Some submissions propose increasing investment in women's access to renewable energies and ensuring that women benefit from transitioning to a green economy.<sup>91</sup> Other participants emphasize the importance of integrating gender considerations into technology needs assessment, technology transfer and development and note the potential that gender-responsive climate policy could create new possibilities for women's economic participation and empowerment.<sup>92</sup> The Gender Action Plan and the 2019 Enhanced Lima Work Programme on Gender similarly incorporate technical solutions which prioritize integrating women into existing markets and facilitating their participation in existing social decision-making institutions.<sup>93</sup> These areas prioritize investing in female agency and development and increasing their economic opportunities.<sup>94</sup> In this way, they approach gender equality from a liberal feminist perspective and focus on integrating women and gender considerations in the existing capitalist political economies.<sup>95</sup>

These documents reveal underlying assumptions that gender equality is achieved by incorporating women into existing social, political and economic structures. The connection between gender equality, climate change and the economy is contained in the Enhanced Lima Work Programme on Gender which notes that gender-responsive implementation of climate policy can enhance 'gender equality and just transition of the workforce and the creation

<sup>90</sup> Ibid., 24.

<sup>91</sup> UNFCCC Subsidiary Body for Implementation, 'Possible Elements and Guiding Principles for Continuing and Enhancing the Lima Work Programme on Gender: Submissions from Parties and Observer Organizations. Addendum' (7 November 2016) FCCC/SBI/2016/MISC.2/Add. 1, 2.

<sup>92</sup> UNFCCC Subsidiary Body for Implementation, 'Possible Elements and Guiding Principles for Continuing and Enhancing the Lima Work Programme on Gender: Submissions from Parties and Observer Organizations' (26 October 2016) FCCC/SBI/2016/MISC.2, 16, 18, 26; UNFCCC, Decision 3/CP.23 'Establishment of a Gender Action Plan' Annex, priority area D.2; 'Possible Elements and Guiding Principles Lima. Addendum' (n 91) 6.

<sup>93</sup> Decision 3/CP.23 'Establishment of a Gender Action Plan' (n 92), e.g., Annex [9]–[10].

<sup>94</sup> Jane Briant Carant, 'Unheard Voices: A Critical Discourse Analysis of the Millennium Development Goals' Evolution into the Sustainable Development Goals' (2017) 38(1) *Third World Quarterly* 16, 19–20.

<sup>95</sup> Wilkinson Cross (n 23), 104.

of decent work and quality jobs'.<sup>96</sup> The language and focus used in these documents reflects the continued belief that addressing climate change requires a 'paradigm shift towards building a low-carbon society that offers substantial opportunities and ensures continued high growth and sustainable development'.<sup>97</sup> In this shift, women are defined as 'agents and leaders of change'<sup>98</sup> who can contribute to the economy while also supporting inclusive climate change adaptation activities. However, this means that women are assimilated into existing structures of dominance and oppression rather than questioning whether it is the institutions and conceptual apparatus which are gendered and inequitable.

### **(b) Gender Equality as a Process of Assimilation**

The approach outlined above is problematic for both gender equality and enabling IGE because it fails to consider human embodiment in social, political and economic institutions. Therefore, such institutions continue to act on the basis of an idealized male experience which ignores the biological and ecological embedment of humanity in nature. By doing so, they ignore the important inter-generational labour performed by women which is overlooked and excluded from the economy. Instead, these documents reflect an uncritical examination of the causes of gender inequality and its impacts on women and girls. Rather than exploring the conceptual and structural barriers to inequality and how the entire foundation of social institutions is inherently gendered, the international community approaches the problem as an issue of assimilation, in which women are considered 'equal' when they can participate in social institutions traditionally considered the realm of men.

In the context of climate change, ignoring the reproductive labour performed by women and nonhuman nature limits the extent to which the CCR can develop IGE policies that will account for the interests of future human and nonhuman generations in an inclusive and considered way. This is because women and nature roles have traditionally been conceived as instrumental. Women have been valued in terms of their usefulness to men, and nature in terms of its usefulness to humans. There have been some attempts to challenge the exclusion of women's reproductive labour; however, very little has been done to challenge the separation between humans and nonhuman nature. As ecofeminists argue that the subordination of women and the exploitation of

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<sup>96</sup> Decision 3/CP.25 'Enhanced Lima Work Programme' (n 82) [9].

<sup>97</sup> Decision 1/CP.16 'The Cancún Agreements' (n 38) [10].

<sup>98</sup> Subsidiary Body for Implementation, 'Possible Elements and Guiding Principles' (n 92) 17, 35.

nonhuman nature are conceptually interconnected, without identifying and challenging these interconnections, policy responses will be inherently limited.

A common approach towards addressing inequality between groups of individuals is through distributive justice models. As discussed earlier, ‘justice’ is conceived as the distribution and allocation of material goods, such as resources and wealth, or the distribution of social positions, such as jobs. This understanding of distributive justice is problematic because it tends to ‘ignore the social structure and institutional context that often help determine distributive patterns’.<sup>99</sup> It also fails to consider issues of decision-making power and procedures, the division of labour, and how culture may shape understandings of justice. Therefore, such models inadequately address issues of ‘difference, dominance, and dependency’<sup>100</sup> which go to the heart of feminist critiques of social justice.

Decision-making issues, including the social structures and institutional contexts that shape decisions, are also closely related to issues of IGE and gender equality. This is because these issues relate to who has the authority to make decisions by virtue of their position as well as the rules and procedures according to which decisions are made.<sup>101</sup> In the context of climate change (which incorporates economic, political, environmental and social considerations), decision-making structures are crucial determinants of climate change relations. Because of the complexity of issues relating to climate change, power derives from the legal and governance structures and procedures that give some individuals, organizations and entities the power to make decisions about emissions, production, consumption, and behavioural change for society that affect millions of other people. As with other forms of domination, not all who make those decisions are wealthy or privileged, but the decision-making structure operates to reproduce distributive inequality and the unjust considerations on people’s lives.<sup>102</sup> Therefore, if future generations of women and non-human nature are marginalized or invisible in dominant economic and social discourse, it is likely that this inequality will be reproduced in decision-making structures, and the decisions themselves, thus reaffirming existing inequalities.

The CCR has recognized this and has pushed to increase the participation by women in climate change institutions at the international, national and local level by affirming that women’s participation is ‘vital for achieving long-term climate goals’.<sup>103</sup> To enable this, the Gender Action Plan and Enhanced Lima

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<sup>99</sup> Young (n 11) 16.

<sup>100</sup> Warren, *Ecofeminist Philosophy* (n 49) 188.

<sup>101</sup> Young (n 11) 22–23.

<sup>102</sup> *Ibid.*

<sup>103</sup> Decision 3/CP.25 ‘Enhanced Lima Work Programme’ (n 82) [7]; see also Decision 3/CP.23 ‘Establishment of a Gender Action Plan’ (n 16) recital [6];

Work Programme have introduced a number of mechanisms to support such participation, including travel funds for women, capacity building in leadership and negotiation training for women delegates, and nursing facilities are available at conferences and meetings for delegates travelling with babies.<sup>104</sup>

The CCR has also introduced a ‘gender balance goal’, which occurs when ‘there is approximately an equal number of men and women present or participating’.<sup>105</sup> However, ‘gender balance’ only attends to whether or not there are equal numbers of men and women participating in a given forum.<sup>106</sup> Therefore, these activities merely facilitate the presence of women in ‘halls’ of power. They do not engage with underlying structures, practices, rules and norms, and language and symbols that mediate social interaction within these institutions. Nor do they engage with the non-distributive issues such as decision-making structure and procedures that affect how decisions are made and who makes them.<sup>107</sup>

This focus on the presence of women is problematic. First, it assumes that achieving a gender balance results in better decision making for women. However, feedback from participants in the CCR indicates that this does not occur because women are pigeon-holed into focusing on ‘women’s issues’, limiting opportunities to challenge dominant structures and institutions that reinforce the gendered impact of climate change.<sup>108</sup> Rather than speaking the

‘Achieving the Goal of Gender Balance’ (n 82) [34]; Decision 3/CP.25 ‘Enhanced Lima Work Programme’ (n 82) Annex [5].

<sup>104</sup> Decision 3/CP.23 ‘Establishment of a Gender Action Plan’ (n 16) Annex priority area B.1; Decision 3/CP.25 ‘Enhanced Lima Work Programme’ (n 82) Annex priority area B1 and B.2; UNFCCC Secretariat, ‘Implementation of the Lima Work Programme on Gender and its Gender Action Plan: Report by the Secretariat. Executive Summary’ (8 October 2019) FCCC/SBI/2019/15 [25].

<sup>105</sup> UNFCCC Secretariat, ‘Report on the In-Session Workshop on Gender-Responsive Climate Policy with a Focus on Mitigation Action and Technology Development and Transfer. Note by the Secretariat’ (11 September 2015) FCCC/SBI/2015/12, Annex [3]; Decision 21/CP.22 ‘Gender and Climate Change’ (17 November 2016) FCCC/CP/2016/10/Add.2 [7]–[8], [10].

<sup>106</sup> Bridget Burns and others, *Pocket Guide to Gender Equality under the UNFCCC* (Anju Sharma (ed), Oxford Climate Policy 2020) <https://wedo.org/2020-pocket-guide-to-gender-equality-under-the-unfccc/> accessed 4 February 2021; UNFCCC Secretariat, ‘Gender Composition: Report by the Secretariat’ (7 October 2020) FCCC/CP/2020/3. The trend towards more gender-balanced bodies reported in 2018 was reversed in 2019 and 2020.

<sup>107</sup> Young (n 11) 23.

<sup>108</sup> UNFCCC Subsidiary Body for Implementation, ‘Informal Summary Report on the Subsidiary Body for Implementation In-Session Workshop on Gender to Assess the Impact of the Lima Work Programme on Gender and Its Gender Action Plan’ (2019) [16] [https://unfccc.int/sites/default/files/resource/SBI50\\_Informal%20Report\\_Gender%20Workshop.pdf](https://unfccc.int/sites/default/files/resource/SBI50_Informal%20Report_Gender%20Workshop.pdf) accessed 3 February 2021.

‘women’ position, female delegates or chairs may instead be absorbed into the dominant model wherein they are deemed ‘equal in a now wider dominating class, without questioning the structure of or the necessity for domination’.<sup>109</sup> At the same time, this approach suggests that women are considered as a universalized category in which female participants will be able to speak for all women and have their interests in mind.<sup>110</sup> This fails to attend to the context and situated experiences that differ between women.<sup>111</sup> In this way, gender stereotypes may still flourish unless the underlying conceptual frameworks that define women in relation to men are overcome.

The CCR has begun to identify some of these limitations and that addressing stereotypes, perceptions and roles should be incorporated in its gender policies.<sup>112</sup> However, recent reviews indicate that there has been little progress in overcoming these structural barriers.<sup>113</sup> Therefore, it must be recognized that many of the actions and approaches set out above seek to integrate and assimilate women into the existing social institutions that exploit the environment and reinforce inequality. As a result, they fail to account for a ‘structural understanding of power and domination as a process rather than patterns of distribution’<sup>114</sup> which shape the distribution of non-material goods such as decision-making processes, the division of labour and culture.

Gender equality is a powerful normative principle through which to guide IGE activities in the CCR. However, analysis of the gender equality documents indicates that little attention has been paid to present generations’ obligations to future generations of women and nonhuman nature. This is because the documents have been informed by ecological modernization discourses that reinforce the instrumentalization of nonhuman nature and seek to assimilate

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<sup>109</sup> Plumwood, *Feminism and Mastery* (n 18) 29.

<sup>110</sup> UNFCCC Secretariat, ‘Entry Points for Integrating Gender Considerations into UNFCCC Workstreams: Technical Paper by the Secretariat’ (26 April 2018) FCCC/TP/2018/1; UNFCCC Secretariat, ‘Implementation of the Lima Work Programme on Gender and Its Gender Action Plan: Report by the Secretariat. Addendum. Synthesis Report’ (18 October 2019) FCCC/SBI/2019/15/Add.1; ‘Informal Summary Report’ (n 108).

<sup>111</sup> UNFCCC Subsidiary Body for Implementation, ‘Informal Summary Report on the Gender Dialogue: Constituted Bodies and the Integration of Gender Considerations’ (5 May 2018) [30] [https://unfccc.int/sites/default/files/resource/sb48\\_gender\\_dialogue.pdf](https://unfccc.int/sites/default/files/resource/sb48_gender_dialogue.pdf) accessed 2 February 2021; UNFCCC Secretariat, ‘Differentiated Impacts of Climate Change and Gender-Responsive Climate Policy and Action, and Policies, Plans and Progress in Enhancing Gender Balance in National Delegations: Workshop Report by the Secretariat’. (6 November 2018) FCCC/SBI/2018/INF.15 [36], [67].

<sup>112</sup> ‘Differentiated Impacts of Climate Change’ (n 111) [74]–[75].

<sup>113</sup> ‘Implementation of the Lima Work Programme. Executive Summary’ (n 104) Annex I, 10, 19–20.

<sup>114</sup> Young (n 11) 33.

women into the current global economy. This approach is highly problematic because it does not extend any consideration to future generations of women, and completely excludes future generations of nonhuman nature.

Instead, these policies maintain and reinforce logical structures of dominance that instrumentalize women and nonhuman nature. They do this by focusing on assimilating women into the economy and existing CCR institutions rather than exploring how such institutions could be reshaped to enable situated, contextual and embedded policy development that recognizes humanity as part of nature. While there are significant attempts to support the participation of women in decision making, thus far, the CCR has not considered whether it is possible to include the interests of nonhuman nature in discussions of climate change.

Therefore, the FCCC fails to extend moral consideration to present and future generations of nonhuman nature. As a result, it excludes any consideration of the important reproductive labour performed by nonhuman nature, particularly the inter-generational cycles of biological and ecological life. As the exploitation and instrumentalization of nonhuman nature and the subordination of women are conceptually interconnected, the exclusion of nonhuman nature may reinforce gender inequality of women and girls in the future. This is because they are more likely to rely on nonhuman nature in light of their gendered roles and the repetitive labour that women and girls perform.

## 5. ACHIEVING INTER-GENERATIONAL EQUITY FOR WOMEN AND NONHUMAN NATURE

In order to achieve inter-generational equity for human and nonhuman nature, the international community should develop policies that move beyond the paradigm of economizing ecology and adopting technocratic conditions of ecological modernization, and instead re-embed society into ecology.<sup>115</sup> Rather than focusing on how to take women away from the biological realm, policies should focus on how to reconnect men to it and reorient gender equality policies towards this aim. This would address both intra- and inter-generational equity because it reconnects humanity with nonhuman nature, thus enabling a re-embedding of social institutions, such as the economy, within the ecological parameters set by ecological (nonhuman) and biological (human) time. Re-orienting the economy and other human institutions in this way takes account of the inter- and intra-generational responsibilities we have as a species towards all entities who are affected by climate change.

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<sup>115</sup> John Barry, 'The Emergence of Ecofeminist Political Economy' (1998) 7(3) *Environmental Politics* 150, 154.



Similarly, adopting a perspective that removes rights from the centre of the moral stage allows for more space to be given to other less dualistic moral concepts, such as care, respect and responsibility. Rather than basing justifications for thinking about future generations in terms of rights and duties, this perspective understands the 'self' as 'relational, embedded, partial, attached, interdependent, and historically situated'.<sup>116</sup> This expands our understanding of equity and integrates concepts that enable the consideration of other moral entities traditionally excluded. These can be nonhuman nature, peoples in the future and other communities yet unknown.

Incorporating this perspective into the IGE principle would oblige present generations to consider the well-being and needs of future generations of humanity and nonhuman nature. Expanding the basis of our obligations to future generations beyond traditional dualistic moral concepts of rights and duties, which are only available to those subjects considered 'like' humans, opens up the possibility of including other moral entities, like nonhuman nature as worthy of consideration. As a result, the notion of justice reflected in the IGE principle would be based in an alternative ethical basis that acknowledges humanity as part of an ecological community. Therefore, the IGE principle could overcome 'isms' of domination and embed ecological values in a way that that provides lasting and fundamental change for present and future generations of humans and nonhuman nature.

As discussed previously, the IGE principle has traditionally been viewed as a form of distributive justice that accounts for future generations. Therefore, any reconceived IGE principle must move beyond the traditional distributive model in order to realize justice for women and for nonhuman nature. One way to achieve this is to draw on the boundary conditions of an ecofeminist ethic and develop a model of distributive justice that is inclusive, situated in context and location, and recognizes and respects the differences among humans and between humans and nonhuman nature.<sup>117</sup> Starting from these boundary conditions, this model can start to recognize that individuals (whether human or nonhuman nature) are both 'discrete objects and beings-in-relation'.<sup>118</sup> This shifts the basis for our obligations towards future generations away from the rational, dispassionate and anthropocentric ethics currently adopted and integrates social and ecological contexts into the consideration of issues of justice for humans and nonhuman nature.

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<sup>116</sup> Warren, *Ecofeminist Philosophy* (n 49) 106.

<sup>117</sup> Karen Warren, 'The Power and the Promise of Ecological Feminism' (1990) 12(2) *Environmental Ethics* 125; Warren, *Ecofeminist Philosophy* (n 49).

<sup>118</sup> Warren, *ibid.*, 189.

Reconceptualizing IGE in this way would support the development of gender equality policies that reject the dominant discourse of ecological modernization. This would enable an understanding of gender equality that moves beyond assumptions of 'justice as sameness' which function to deny or ignore issues of difference, dominance and dependency.<sup>119</sup> Instead, the CCR could start to explore how 'social decision-making structures of power and privilege'<sup>120</sup> may reinforce inequalities between men and women and between human and nonhuman.

Addressing these inequalities as interrelated would significantly enhance the effectiveness of any Gender Action Plan. This is because it would require the international community to dismantle the underlying conceptual apparatus within which the exploitation and instrumentalization of nonhuman nature and the subordination of women are conceptually interrelated. Such an approach gives room to develop alternative ethical foundations for achieving gender equality that start from a position that is sensitive to situation, meaning that justice can 'only be understood through the particular situations and social structures that give them meaning in a dynamic, integrative, interactive way'.<sup>121</sup> This does not mean that traditional ethical principles are ignored, but are recognized as 'morally salient ... if not overriding features of ethical situations'.<sup>122</sup> In the context of climate change, this ethical perspective recognizes 'our vulnerability to dependency and to the vulnerability of those who attend to dependents',<sup>123</sup> and therefore pays attention to issues of difference, dominance, and dependence in the context of climate change policy.

Approaching gender equality in a way that challenges existing societal structures and the underlying structural and conceptual frameworks that maintain and obfuscate these inequalities will do more to achieve IGE than existing policies. This is because without changing the societal structures that enable and justify the power and privilege of certain social groups and individuals, it will be extremely difficult to achieve the changes necessary to ensure the equitable sharing of the planet between present and future generations, and between all species who call the earth home. Approaching gender inequality as conceptually connected to the instrumentalization of nonhuman nature means that both must be included in any solutions. Recognizing this in gender

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<sup>119</sup> Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press 1984) 45–50; Plumwood, *Environmental Culture* (n 47) 100–110.

<sup>120</sup> Young (n 11) 15.

<sup>121</sup> Warren, *Ecofeminist Philosophy* (n 49) 187.

<sup>122</sup> *Ibid.*, 108, see in general 107–121.

<sup>123</sup> Anthony Weston, *Toward Better Problems: New Perspectives on Abortion, Animal Rights, the Environment, and Justice* (Temple University Press 1992), 24–25, cited in Warren, *Ecofeminist Philosophy* (n 49) 186.

equality policies could achieve substantive equity for present and future generations of women and nonhuman nature and significantly contribute to reducing climate change for all. This could lead to long-term positive changes that integrate considerations of present and future generations in a way that overcomes the exploitative, value-based system presently adopted.

## CONCLUSION

Gender equality and climate change are interrelated issues of inter-generational equity and justice. We, as a global society, must incorporate the needs and interests all present and future generations in order to equitably address climate change and achieve justice for all. However, while the Climate Change Regime has started to engage with the immediate and long-term climate impacts on women, there is no such ethical consideration of present and future generations of nonhuman nature.

Drawing on ecofeminist theory, this chapter examined the interrelationships between IGE, gender equality and climate change. It argued that the FCCC is based on discourses of ecological modernization. This has shaped the CCR's response to gender equality and its understanding of IGE. Ecological modernization is an explicitly anthropocentric discourse which seeks to maintain the existing economic, social and political structures that devalue and instrumentalize women and nonhuman nature. This is highly problematic for IGE for women, because women and nonhuman nature are conceptually interconnected in the dualisms that are embedded in patriarchal worldviews and social structures. Existing theories of IGE are similarly limited as they fail to extend any moral consideration to present and future generations of nonhuman nature. Therefore, as such, they are limited in their ability to fully articulate our relationships with nonhuman nature, or to form the basis for our responsibilities to present and future generations of nonhuman nature.

The CCR has adopted an approach to gender equality that prioritizes intra-generational equity considerations based in ecological modernization discourses. This means the Gender Action Plan and the Enhanced Lima Work Programme on Gender seek to achieve gender equality by incorporating present-day women into existing social, political and economic structures. This approach continues to overlook the embodied and embedded work performed by women and nonhuman nature and excludes any consideration of the labour of women and nonhuman nature, particularly the inter-generational cycles of biological and ecological life. As a result, women are assimilated into existing structures of dominance and oppression, rather than questioning whether it is the institutions themselves that are gendered and inequitable, and nonhuman nature continues to be instrumentalized for the benefit of humanity.

In short, the CCR's gender equality policies are inherently limited by its continued commitment to ecological modernization that prioritize maintaining the status quo. By doing so, it fails to engage fully with the needs and interests of future generations of both humanity and nonhuman nature, and with how the continued exploitation and instrumentalization of nonhuman nature will disproportionately affect women in the future. This is because women and girls are more likely to rely on nonhuman nature in light of their gendered roles and the repetitive labour that women and girls perform.

Without changing the societal structures that enable and justify the power and privilege of certain social groups and individuals, it will be extremely difficult to achieve the changes necessary to ensure the equitable sharing of the planet between present and future generations, and between all species who call the earth home. Therefore, to adopt policies that are truly inter-generational and move beyond the approach embedded in Article 2 and Article 3 of the FCCC, the international community must also address inequality and the underlying structural and conceptual frameworks that function to maintain the institutions and practices contributing to climate change and reinforcing gender inequality. Embedding this approach to IGE in the CCR could lead to long-term positive changes that integrate considerations of present and future generations in a way that overcomes the dualized and hierarchical value-based system presently adopted.

### 3. A feminist critique on gender based violence in a changing climate: Seeing, listening and responding

**Rowena Maguire**

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#### INTRODUCTION

This chapter explores the linkages between violence against women and violence against nature, occurring during a time of global environmental distress and degradation. Climate change is increasing the frequency, intensity, and duration of natural disasters. Yet not all disasters arise as a result of climate change.<sup>1</sup> Evidence to date suggests that around two-thirds of extreme weather events are made more likely, or more severe, by human-induced climate change. Whether a disaster is caused by climate change, is amplified by climate change, or is unrelated to climate change should not have an impact on the types of legal frameworks put in place to prevent gender based violence (GBV) arising from a disaster. As such, while this chapter acknowledges that not every disaster is driven by climate change, it argues that sufficient evidence exists to show a link between increased rates of GBV against women, girls and LGBTIQI communities and disasters, and argues that irrespective of whether the disaster was amplified or caused by climate change, victims of GBV following a disaster require greater legal recognition, protection and support services. As the title of this chapter suggests, those experiencing violence following a disaster must be seen, listened to and then supported by an appropriate response. International law plays an important role in nudging states to improve the protection of their people and their natural environment, and this chapter explores how the international human rights, disaster and climate regimes see, listen and respond to issues of GBV arising in a changing climate.

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<sup>1</sup> Simon Allen and others, 'IPCC, 2012: Summary for Policymakers' in Christopher Field and others (eds) *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2012).

The impact of disasters on human populations is profound. The United Nations Office for Disaster Risk Reduction (UNDRR) found that in the period from 2000 to 2019, 7,348 major disasters occurred globally, claiming the lives of 1.23 million people, and further affecting 4.2 billion individuals.<sup>2</sup> In respect of GBV, the Sixth Assessment Report of the Intergovernmental Panel on Climate Change: Working Group 2 finds that during and after extreme weather events, women, girls and LGBTQI people are at increased risk of domestic violence, harassment, sexual violence and trafficking. The report finds that early marriage is used as a coping strategy for managing the effects of extreme weather events, and that women are exposed to increased risk of harassment and sexual assault as scarcity and gender-based roles cause them to walk longer distances to fetch water and fuel. At the household level, violent backlash or heightened tensions following a disaster can increase men's use of negative coping mechanisms such as alcohol which can increase domestic violence rates. Rates of intimate partner violence have been found to increase with higher temperatures.<sup>3</sup>

This chapter provides an examination of how international human rights, disaster law, and climate law frameworks recognize, or fail to recognize, the relationship between the violence of natural events and increased rates of violence against women following these events. The chapter starts by examining the evidence base of the links between increased rates of violence against women in connection with disasters, and advocates for the adoption of Dianne Otto's feminist practice of the 'politics of listening' as a tool to ensure that the voices of women suffering violence following a disaster are utilized to inform future responses and interventions. The chapter then moves on to discuss two feminist tools for critiquing international law. The work of Gina Heathcote on fragmentation is used to discuss how legal rules on 'gender' remain largely within 'the ghetto' of international law. This is followed by looking at the work of Hilary Charlesworth, who conceptualizes international law as a field of crisis, and shows how crisis thinking undermines the development and implementation of international law. These feminist tools are used to critique the human rights regime, international disaster regime, and the international

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<sup>2</sup> Centre for Research on the Epidemiology of Disasters and UNDRR, 'The Human Cost of Disasters: An Overview of the Last 20 Years 2000–2019' <https://www.undrr.org/publication/human-cost-disasters-overview-last-20-years-2000-2019> accessed 18 May 2022.

<sup>3</sup> Guéladio Cissé and Robert McLeman, 'Health, Wellbeing, and the Changing Structure of Communities' in UN Intergovernmental Panel on Climate Change, 'WGII Sixth Assessment Report' (1 October 2021) 62 [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_FinalDraft\\_Chapter07.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_Chapter07.pdf) accessed 18 May 2022.

climate regime, taking GBV as an example to show gendered blind spots within these regimes. Gender largely remains on the periphery of these regimes, and international law currently fails to provide adequate recognition of GBV rates occurring following disasters.<sup>4</sup>

## 1. EMERGING EVIDENCE ON GENDER BASED VIOLENCE AGAINST WOMEN, DISASTERS AND CLIMATE CHANGE

A range of evidence is growing that indicates that disasters and climate change are associated with an increase in GBV against women and girls. This chapter focuses primarily upon GBV against women and girls, however, it is acknowledged that gender minorities and men also suffer GBV. The analysis below includes data on GBV suffered by women. UN Women defines GBV as ‘an umbrella term for any harmful act that is perpetrated against a person’s will and that is based on socially ascribed (gender) differences between females and males’.<sup>5</sup> The UN Women definition of GBV identifies five forms of violence, including physical, verbal, sexual, psychological and socioeconomic violence. International legal frameworks remain largely silent on the issue of GBV’s connection disasters, with the understanding of the relationship between increased rates of GBV against women following a disaster remaining largely within the knowledge sets of those responsible for helping women with disaster recovery, such as women’s shelters, women’s legal services, and researchers with an interest in feminism and violence. Research shows that women suffering GBV following a disaster experience complex and conflicting feelings about the experience. While the victims recognize the violence and want it to end, they do not necessarily identify as victims of GBV.<sup>6</sup>

It is inherently difficult to quantify GBV against women following disasters. This is because GBV against women remains largely unseen by external eyes and takes on many forms, including domestic violence, sexual violence, sexual

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<sup>4</sup> Bharat Desai and Moumita Mandal, ‘Role of Climate Change in Exacerbating Sexual and Gender-Based Violence against Women: A New Challenge for International Law’ (2021) 51 *Environmental Policy and Law* 137; Kate Ogg and Susan Harris Rimmer, ‘Introduction’ in Susan Harris Rimmer and Kate Ogg (eds) *Research Handbook on Feminist Engagement with International Law* (Routledge 2019) 1.

<sup>5</sup> UN Women, Gender Equality Glossary <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=search&hook=gender-based+violence&fullsearch=1> accessed 16 May 2022, para 3.

<sup>6</sup> Kerri Whittenbury, ‘Climate Change, Women’s Health, Wellbeing and Experiences of Gender Based Violence in Australia’ in Margaret Alston and Kerri Whittenbury (eds) *Research, Action and Policy: Addressing the Gendered Impacts of Climate Change* (Springer 2013).

exploitation and abuse, child/early marriage and trafficking.<sup>7</sup> A systematic review of existing research on GBV and disasters published in 2021 found that disasters caused by climate-related or other natural hazards can increase violence. In this study, eight of the 20 case studies showed an association between disaster exposure and increased GBV.<sup>8</sup> The review found three pathways to explain the increase in GBV following a disaster:

1. Disaster exposure increased stressors that trigger GBV, such as poor mental health, loss of housing, and economic impacts on livelihoods.
2. Disaster exposure increased enabling environments for GBV, including poor law enforcement and risky post-disaster housing environments.
3. Disaster exposure exacerbated underlying drivers of GBV, for example, gender inequalities and worsened social norms.

Studies from the global south, examining increased violence and disaster, have tended to focus on forced or underage marriage and the occurrence of GBV of those displaced within evacuation or temporary accommodation sites following a disaster. In 2015, the International Federation of Red Cross Societies conducted a global study across nine countries: Bangladesh, Bosnia-Herzegovina, El Salvador, Haiti, Malawi, Myanmar, Namibia, Romania and Samoa. In this study, the Red Cross interviewed communities impacted by disasters, NGOs, and government representatives, in order to explore the links between GBV and disasters.<sup>9</sup> The study found evidence that both domestic and sexual violence increased following a disaster, but found it difficult to attribute the occurrence of violence to the disaster in regions where GBV was always high. The study found that displacement did increase the incidence of violence, both in temporary shelters and also in instances of protracted displacement. Disasters cause impoverishment, which can induce some people to adopt negative coping strategies, including transactional sex. The study found that those responsible for responding to disasters were not aware that GBV may increase following a disaster, and were neither looking for it, nor preparing for it. The name of this report, 'Unseen, Unheard: Gender-based Violence in Disasters' has been drawn upon in this chapter to argue that we must start to look for, expect and see GBV occurring post disasters.

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<sup>7</sup> International Federation of Red Cross and Red Crescent Societies, 'Unseen, Unheard: Gender-based Violence in Disasters: Global Study' (2015) <https://www.ifrc.org/sites/default/files/2021-08/1297700-Gender-based%20Violence%20in%20Disasters-EN.pdf> accessed 26 November 2021.

<sup>8</sup> Alyssa Mari Thurston, Heidi Stöckl and Meghna Ranganathan, 'Natural Hazards, Disasters and Violence against Women and Girls: A Global Mixed-Methods Systematic Review' (2021) 6 *BMJ Global Health* 4377.

<sup>9</sup> 'Unseen, Unheard: Gender-based Violence in Disasters' (n 7).



In India, the tsunami of 2004 led to an increase in early and forced marriages.<sup>10</sup> These marriages were referred to as ‘tsunami marriage’, and involved forced marriage arrangements motivated by men either seeking access to compensation given to young women for losing parents, or wanting a replacement wife to take care of themselves and other dependents.<sup>11</sup> Young girls forced into marriage following periods of prolonged drought have been called ‘famine brides’ in Kenya,<sup>12</sup> with underage marriage associated with increased risk of pregnancy complications and increased rates of domestic violence within the marriage.<sup>13</sup> Following the 2010 Floods in Pakistan, second wives, older women and widowed women were more vulnerable to intra-family violence triggered by frustrations about living conditions and collective trauma. The violence was associated with increased alcoholism, gambling and drug use, all socially acceptable coping strategies for men within those societies. Compounding these statistics was a lack of housing options post-flood, which forced many women to stay with or return to abusive partners.<sup>14</sup>

Displacement arising as a result of disaster is also a known risk factor for increased violence. Instances of GBV increased sharply following the Haiti earthquake in 2010, which displaced 1.5 million people of a population of 10 million.<sup>15</sup> In September 2010, the UN reported on the vulnerability of children and women and the scale of sexual violence occurring in camps neighbouring the large Port-au-Prince slums of Cité Soleil and Martissant. The report acknowledged that the lack of accurate and aggregated data in relation to GBV made it difficult to assess the true extent of the increase of violence since the

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<sup>10</sup> See Gabrielle Simm, ‘Gender, Disasters and International Law’ in Sue Harris Rimmer and Kate Ogg (eds) *Research Handbook on Feminist Engagement with International Law* (Routledge 2019) 118.

<sup>11</sup> Sarah Shteir, ‘Gendered Crises, Gendered Responses: the Necessity and Utility of Gender Perspective in Armed Conflicts and Natural Disasters: An Introductory Overview’, Australian Civil-Military Centre Occasional Paper 1/2013, 32 <https://nla.gov.au/nla.obj-747636316/view> accessed 16 May 2022.

<sup>12</sup> Ajwang’ Warria, ‘Child Marriages, Child Protection and Sustainable Development in Kenya: Is Legislation Sufficient?’ (2019) 23(2) *African Journal of Reproductive Health* 121, 122.

<sup>13</sup> International Centre for Research on Women, ‘Child Marriage and Domestic Violence’ (2006) <https://www.icrw.org/files/images/Child-Marriage-Fact-Sheet-Domestic-Violence.pdf> accessed 26 November 2021.

<sup>14</sup> Shteir (n 11) 33. See also Sidsel Hansson and Catarina Kinnvall, ‘Disasters and Gendered Violence in Pakistan: Religion, Nationalism and Masculinity’ in Catarina Kinnvall and Helle Rydström (eds) *Climate Hazards, Disasters and Gender Ramifications* (Routledge 2019).

<sup>15</sup> Benedetta Faedi Duramy, ‘Women in the Aftermath of the 2010 Haitian Earthquake’ (2011) 25 *Emory International Law Review* 1193.

earthquake.<sup>16</sup> Amnesty International published a report sharing the stories of victims following the earthquake. One of the documented stories reads:

My mother is dead, my father is dead. I made a small shelter on Place Pétion [in Champ-de-Mars] to live in ... I'm living alone. I had a tarpaulin but it was torn down and M. gave me a small tent to live in ... On 16 February, I went out to buy some water at around 8 pm. When I came back to my home, I lay down. A man came in. He removed the sheets covering me and when I tried to cry he put his hand over my mouth ... He tore off my underwear and raped me. He kicked me and punched me before leaving. When I was able to call for help, he cut through the tarpaulin and fled.<sup>17</sup>

Studies from the global north exploring the risk of GBV against women following a disaster, have tended to focus on the increased rates of domestic violence.<sup>18</sup> Elaine Enarson's 2012 book, *Women Confronting Natural Disaster*, sought to examine the 'conspicuous silence' that exists around gender within disasters.<sup>19</sup> Enarson found that gender relations in disaster put the majority of women in the United States at increased risk of GBV, 'whether through poverty, physical challenges, racial or ethnic marginalization, insecure housing, language barriers, violence or lack of voice, or some combination of these interwoven factors'.<sup>20</sup> Other case studies from the global north documenting an increase in GBV following a disaster include:

- Hurricane Andrew, which affected the Bahamas, Florida and Louisiana in 1992, showed that domestic violence helpline statistics increased by 50 per cent following the hurricane.<sup>21</sup>

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<sup>16</sup> UN Secretary-General, Rep. of the Secretary-General on the United Nations Stabilization Mission in Haiti, para. 8, U.N. Doc. 2/2010/446 (Sept. 1, 2010).

<sup>17</sup> Amnesty International, 'Haiti: Aftershocks: Women Speak Out Against Sexual Violence in Haiti's Camps' (6 January 2011) <https://www.amnesty.org/en/documents/amr36/001/2011/en/> accessed 26 November 2021.

<sup>18</sup> See Amnesty International (n 17) for an overview of research looking at gender and disasters from a US perspective. See also Elaine Enarson and Prabodh Dhar Chakrabarti (eds) *Women, Gender and Disasters: Global Issues and Initiatives* (Sage 2009).

<sup>19</sup> Elaine Enarson, *Women Confronting Natural Disaster: From Vulnerability to Resilience* (Lynne Rienner Publishers 2012).

<sup>20</sup> *Ibid.*

<sup>21</sup> Alice Fothergill, 'The Neglect of Gender in Disaster Work: An Overview of the Literature' in Elaine Enarson and Betty Morrow (eds) *The Gendered Terrain of Disaster: Through Women's Eyes* (Praeger 1998).

- An earthquake in Dale County, Alabama in 1997, resulted in a 98 per cent increase for injunctions, and reports of domestic violence increased by 600 per cent.<sup>22</sup>
- Hurricane Katrina, which caused over 1,800 deaths in 2005, predominately in the city of New Orleans in the US, saw an increase in GBV following the hurricane. A study comparing GBV statistics before and after the storm found a 35 per cent increase in the prevalence of psychological victimization, and a 98 per cent increase in physical victimization rates against women following the hurricane.<sup>23</sup>
- In the period following the Whakatane flood in New Zealand in 2004, there was a doubling of police callouts related to domestic violence matters, and a tripling of workload for domestic violence agencies.<sup>24</sup>
- The Black Saturday bushfires in Australia in 2009, which caused the death of 173 people, also led to an increase in domestic violence. Interviews were undertaken with 30 women affected by the fires. Of these 30 women, 17 reported having personally suffered violence, nine indicated that violence only emerged following the fires, and for the remaining eight, violence suffered was reported to have escalated sharply compared to the pre-fire period.<sup>25</sup>
- Research from the Murray-Darling Basin in Australia (agricultural farming communities) found that GBV increased during severe drought years. This violence can include emotional abuse, financial control/abuse, and isolation of women from social networks.<sup>26</sup> Service providers reported that women often initially presented with symptoms of depression or anxiety during these periods, with many not perceiving themselves as being victims of GBV.<sup>27</sup>

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<sup>22</sup> Jennifer Wilson and Arthur Oyola-Yemaiel, 'Emergent Coordinative Groups and Women's Response Roles in the Central Florida Tornado Disaster' (Quick Response Report no 110, University of Colorado Natural Hazards Centre 1998) <https://hazards.colorado.edu/uploads/basicpage/QR110.pdf> accessed 26 November 2021.

<sup>23</sup> Julie Schumacher and others, 'Intimate Partner Violence and Hurricane Katrina: Predictors and Associated Mental Health Outcomes' (2010) 25(5) *Violence and Victims* 588.

<sup>24</sup> Rosalind Houghton, "'Everything Became a Struggle, Absolute Struggle': Post Flood Increases in Domestic Violence in New Zealand' in Elaine Enarson and Prabodh Dhar Chakrabarti (ed), *Women, Gender and Disasters: Global Issues and Initiatives* (Sage 2009) 99.

<sup>25</sup> Debra Parkinson, 'Women's Experience of Violence in the Aftermath of the Black Saturday Bushfires' (DPhil thesis, Monash University 2015).

<sup>26</sup> Whittenbury (n 6) 2.

<sup>27</sup> *Ibid.*, 218.

The International Red Cross has stated that sufficient evidence exists to show a correlation between increased rates of GBV against women following a disaster.<sup>28</sup> As such, laws and responding agencies need to operate on the basis that violence will be occurring, and build suitable support and protection mechanisms into disaster response plans. Dianne Otto's feminist method of a 'politics of listening' calls for institutions to listen to victims, to really hear their account of the trauma they have undergone.<sup>29</sup> A politics of listening creates a space for gaining recognition of lived experiences, and provides a space for deep listening. It also provides an opportunity for the victim to articulate the ongoing impacts violence has had and continue to have on their current lives. A politics of listening contributes to enhancing justice by creating formal places for institutions to become educated 'about the complex causes of conflict and violence that prompts acknowledgement of the political responsibility of those who are listening, and encourages solidarity and action towards change'.<sup>30</sup>

In implementing a politics of listening, Heathcote argues that gender experts in the global north need to:

recognise their own political responsibilities to act and to change when listening to the accounts of those living with the impact of climate change. This would require not the production of new gendered victims to save, but the use of feminist methodologies to ask about the privileges attendant to those who shape and speak dominant discourses on climate change while simultaneously creating spaces for peripheral subjects to speak and inform the contours of climate change law. This would require attention to who is permitted to be expert on gender.<sup>31</sup>

This chapter argues that feminist practice of listening has much to offer when conceptualizing how international and domestic legal systems respond to human suffering arising in a changing climate. International human rights, disaster, and climate law can pave the way for the creation of such spaces by creating obligations upon states to listen, respond, and assist those recovering from disaster, not only economically, but also emotionally. In practice, this might initially require funding women's organizations to provide additional

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<sup>28</sup> 'Unseen, Unheard: Gender-based Violence in Disasters' (n 7).

<sup>29</sup> The concept of the politics of listening was created by Otto after reflecting on her time serving on women's tribunals in Phnom Penh and Sarajevo, where she listened to the testimonies of survivors of sexual violence occurring during armed conflict. See Dianne Otto, 'Beyond Legal Justice: Some Personal Reflections on People's Tribunals, Listening and Responsibility' (2017) 5(2) *London Review of International Law* 225.

<sup>30</sup> *Ibid.*, 244.

<sup>31</sup> Gina Heathcote, *Feminist Dialogues on International Law: Success, Tensions, Futures* (Oxford University Press 2019) 67–68.

services during disaster recovery, and increasing the availability of social workers and psychologists to assist people recovering after a disaster. At a later period, the creation of safe spaces for communities to gather and share the ongoing impacts of the disaster should also be created, with the dual purpose of providing a formal place for listening and for planning how to avoid or prepare communities for future disasters.

## 2. WHICH INTERNATIONAL LAWS GOVERN GBV AGAINST WOMEN IN THE ANTHROPOCENE?

### (a) Feminist Tools for Critiquing International Law

This section utilizes two key feminist critiques of international law – fragmentation and crisis thinking – to explain the current ineffective international regulation of GBV in changing climate. These two critiques are briefly explained, and then applied to critique international human rights, the United Nations Framework Convention on Climate Change, and the Sendai Framework.

Gina Heathcote’s work examines how feminist dialogues have influenced international law.<sup>32</sup> Heathcote suggests that fragmentation has led to the creation of pockets of isolated feminist reform that tend to be directed at improving women’s issues, rather than improving the discipline of international law.<sup>33</sup> Heathcote argues that the work of gender has been ‘ghettoized’ within UN Women, where work on ‘gender is carried out by gender experts which means that individuals, institutions and laws not directly focused on gender and or women continue to operate in a gender blind or gender neutral way’.<sup>34</sup> As climate change and disaster laws focus primarily on natural systems, this means that such regimes are largely immune from engaging in critical gender work. The result is that gender issues appear as special interest topics, rather than being viewed as part of the structure of international law. Hilary Charlesworth sums up the situation aptly, by stating that ‘despite talk of women’s rights and gender mainstreaming, women’s lives remain on the periphery of international institutions’.<sup>35</sup>

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<sup>32</sup> Heathcote (n 31).

<sup>33</sup> *Ibid.*, 83.

<sup>34</sup> *Ibid.*

<sup>35</sup> Hilary Charlesworth, ‘Talking to Ourselves? Feminist Scholarship in International Law’ in Sari Kuovo and Zoe Pearson (eds) *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart Publishing 2014) 17.

A second feminist critique of international law, articulated by Hilary Charlesworth, conceptualizes international law as a discipline of crisis.<sup>36</sup> Charlesworth's critique shows that the development of international law has largely occurred in response to a crisis, which fundamentally limits the scope and effectiveness of the international law. Charlesworth identifies three points of critique that demonstrates how crisis thinking impedes the development and operation of international law:

- (a) an assumption about the essential 'facts' of a crisis and the privileging of certain facts;
- (b) constant rediscovery of an issue and failure to build upon past scholarship and knowledge; and
- (c) concentration on a single event or series of events, which often results in overlooking the broader structural problems and issues.

Charlesworth advocates that international law should evolve from being a field of crisis and instead adopt a feminist recovery, which requires a focus of international law on the everyday.<sup>37</sup> In the context of disasters and climate adaptation, this means far greater emphasis on proactive legal reforms in the areas of disaster preparedness and climate adaptation, rather than reactive measures of disaster response and compensation mechanisms. Otto argues that feminist counter-crisis thinking is needed, which embraces rich and complex facts, promotes critical analysis, resists the politics of inevitability, and refuses false promises.<sup>38</sup> In order to implement 'un-crisis' thinking, Otto encourages engagement with the activists and civil society organizations who are 'othered' within mainstream institutions, in addition to carving out spaces within international legal institutions to challenge crisis legal responses.<sup>39</sup>

## **(b) International Human Rights Regime Recognition**

While a range of international human rights instruments acknowledge the link between disasters, climate change, and increased rates of GBV against women, this recognition largely exists within a ghetto of specialized studies and reports. Fragmented recognition of the issue exists within the Human Rights Council study on 'Gender Responsive Climate Action'; 'Special Rapporteur of Violence

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<sup>36</sup> Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377.

<sup>37</sup> *Ibid.*

<sup>38</sup> Dianne Otto, 'Remapping Crisis through a Feminist Lens' in Sari Kuovo and Zoe Pearson (eds) *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart Publishing 2014) 78.

<sup>39</sup> *Ibid.*

against Women Report on COVID’; CEDAW ‘General Recommendation No. 37’; and various ‘soft’ law Displacement Guidelines. These instruments tend to recognize that a disaster changes how a society or community functions and warns of the increased risks of GBV when institutions are disrupted and when household level dynamics are placed under increased stress. Mostly, recognition is limited to acknowledging the existence of the problem, rather than creating a mandate for action. For example, the Human Rights Council ‘Analytical Study on Gender-Responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women’ recognizes that poverty and precarious economic conditions caused by disasters as factors associated with an increase in GBV:

The adverse effects of climate change increase the risks of sexual and gender-based violence. There are clear links between poverty, which climate change deepens, and sexual and gender-based violence. Child, early and forced marriages can occur as a harmful coping strategy among those who suffer from economic stress due to disasters and the slow-onset adverse effects of climate change.<sup>40</sup>

The Human Rights Council has also recognized the intersection between the Covid-19 pandemic and the increase in domestic violence within households.<sup>41</sup> While health pandemics and natural disasters arise from different causes, the impact of pandemics and disasters both produce greater risks of GBV. In the ‘Report by the Special Rapporteur on Violence against Women, its Causes and Consequences’, Dubravka Simonovic noted:

[T]he combination of lockdown measures, financial constraints, and generalized uncertainty, is exacerbating patriarchal norms and emboldening perpetrators to use additional power and control. Physical distancing measures are also being used by some perpetrators to continue or scale their abuse and to prevent victims from reporting the abuse in many States.<sup>42</sup>

Both the Covid-19 pandemic and natural disasters change social structures, weakening access to places of support, which in turn generates stress, anxiety

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<sup>40</sup> Office of the United Nations High Commissioner for Human Rights, ‘Analytical Study on Gender-Responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women (1 May 2019) A/HRC/41/26 [16].

<sup>41</sup> For a feminist critique on the Security Council Resolution on the pandemic. see Catherine O’Rourke, ‘International Law, COVID-19 and Feminist Engagement with the United Nations Security Council: The End of the Affair? (2020) 28 *Feminist Legal Studies* 321. Resolution 2532 gives a brief mention of gender, but does not specifically recognize GBV.

<sup>42</sup> UN General Assembly, ‘Report by the Special Rapporteur on Violence against Women, its Causes and Consequences’ (24 July 2020) A/75/144 [42].

and tension at the household level. While acknowledging that the Covid-19 pandemic placed stress on families and relationships, the report states that the pandemic itself is not the cause of violence. The increase in GBV must be understood 'as a cause and consequence of women's inequality, and abuse remains a choice by the abuser and cannot be excused by external factors, no matter what those circumstances may be'.<sup>43</sup> As Alice Fothergill writes, perpetrators are very much in control, and crisis conditions do not cause the abuse, nor do they cause men to lose control.<sup>44</sup> Rather, some perpetrators use the crisis to justify or excuse their behaviour.<sup>45</sup> While a health or disaster crisis may generate highly unusual and stressful circumstances, GBV remains unlawful before, during, and after the crisis, and its occurrence must not be legitimized as an acceptable means of coping with challenging circumstances. Debra Parkinson, who examined increased rates of GBV arising from the Black Saturday bushfires in Australia, found that some support agency practitioners resisted linking GBV against women with disasters, due to the perception that these perpetrators were normally 'good men' who themselves were suffering disaster trauma. Parkinson argues that a failure to recognize the link between disasters and GBV results in a culture of denial and will prevent victims coming forward to seek help.<sup>46</sup>

The most useful mandate of action to address GBV within the Anthropocene comes from the international human rights instrument focused on women's rights. The Committee on the Elimination of All Forms of Discrimination against Women's (CEDAW) 'General Recommendation No. 37: Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change' recognizes 'that women and girls face a heightened risk of gender-based violence during and following disasters'.<sup>47</sup> It notes that the women's human rights, recognized under CEDAW, must be promoted and protected under all stages of climate change, disaster prevention, mitigation, response, recovery and

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<sup>43</sup> Ibid., [29].

<sup>44</sup> Alice Fothergill, 'An Exploratory Study of Women Battering in the Grand Forks Flood Disaster: Implications for Community Responses and Policies' (1999) 17(1) *International Journal of Mass Emergencies and Disasters* 79.

<sup>45</sup> Alice Fothergill, 'Domestic Violence after Disaster: Voices from the 1997 Grand Forks Flood' in Brenda Phillips and Betty Morrow (ed) *Women and Disasters: From Theory to Practice* (Xlibris 2008).

<sup>46</sup> Debra Parkinson, 'Investigating the Increase in Domestic Violence Post Disaster: An Australian Case Study' (2019) 34 (11) *Journal of Interpersonal Violence* 2333, 2354.

<sup>47</sup> Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), 'General Recommendation No. 37: Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change' (13 March 2018) CEDAW/C/GC/37 [5].



adaptation.<sup>48</sup> The Recommendation sets forth a framework for state parties to use to mitigate the risk of GBV arising in connection with climate change and disasters. Paragraph 57 states:

In accordance with the Convention and general recommendation No. 35, States parties should:

- (a) Develop policies and programmes to address existing, and new risk factors for gender-based violence against women – including domestic violence, sexual violence, economic violence, human trafficking, and forced marriage – within the context of disaster risk reduction and climate change and promote women’s participation and leadership in their development;
- (b) Ensure that the minimum legal age for marriage is 18 years, for both women and men. States should include training on the prevalence of child and forced marriage for all personnel involved in disaster response activities. In partnership with women’s associations and other stakeholders, mechanisms should be established within local and regional disaster management plans to prevent, monitor and address the issue of child and forced marriage;
- (c) Provide accessible, confidential, supportive, and effective mechanisms for all women wishing to report gender-based violence;
- (d) Develop, in partnership with a wide range of stakeholders including women’s associations, a system of regular monitoring, and evaluation of interventions designed to prevent and respond to gender-based violence against women within disaster risk reduction and climate change programmes;
- (e) Provide training, sensitization, and awareness-raising for authorities, emergency services workers, and other groups, on the different forms of gender-based violence that are prevalent in situations of disaster and how to prevent and address these. This training should include the rights and needs of women and girls, including those from Indigenous and minority groups, women with disabilities, and lesbian, bisexual, transgender and intersex women and girls, and information on how they might be affected differently by gender-based violence;
- (f) Adopt long-term policies and strategies to address the root causes of gender-based violence against women in disasters, including by engaging with men and boys, the media, traditional and religious leaders and educational institutions, to identify and eliminate social and cultural stereotypes concerning the status of women.<sup>49</sup>

While these obligations clearly articulate responsibilities for state parties to address the risk of GBV arising in connection with climate change and disasters, the effects of fragmentation mean that state environmental and disaster departments remain largely unaware of this CEDAW General Recommendation. State level environmental and disaster law frameworks vary significantly, with the better frameworks recognizing the links between

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<sup>48</sup> *Ibid.*, [16].

<sup>49</sup> *Ibid.*, [57].

human rights and a healthy environment, but most state level climate and disasters laws remaining largely gender-blind and disconnected from the lived experience of individuals in a changing climate. For example, the International Federation of the Red Cross Society examined the disaster policies of nine countries,<sup>50</sup> finding that only a few of these countries' disaster policies referenced gender, and none of these policies referenced increased risk of GBV following a disaster.<sup>51</sup> The creation of Gender Focal Point Positions within the United Nations Framework Convention on Climate Change (UNFCCC) may in the future provide a link for drawing on knowledge from the human rights regime within environmental/disaster policy, but those in these roles will need political support and resourcing to draw such connections. Another practical limitation is that significant knowledge and responsibility for assisting those impacted by disasters and GBV lies with non-state actors. State actors need to be encouraged to value and include knowledge from civil society and other actors to work on designing policy responses to GBV arising in a changing climate.

An area of human rights law on GBV and disasters that is relatively well developed, but poorly implemented, is contained within soft law guidelines dealing with disaster displacement. Populations displaced by disasters and living in temporary accommodation have been recognized by humanitarian bodies as populations at particular risk of increased rates of GBV. Lack of accessible safe spaces for women, children and adolescent girls; overcrowding, lack of doors and partitions for sleeping/changing clothes; poor lighting; inadequate access to water, sanitation and hygiene areas; and unsafe distribution of shelter-related non-food items such as fuel and water, which force women to leave shelter, are recognized as the material conditions that increase exposure to GBV.<sup>52</sup> The Human Rights Council study on gender responsive climate action notes:

Women are also at a higher risk of sexual and gender-based violence during and after extreme weather events. Disaster displacement can push survivors into evacuation centres. Women in these centres, including relief workers, may feel unsafe, be subjected to sexual and gender-based violence, harassment and discrimination, and/or have limited access to reproductive and other health services ... Lesbian,

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<sup>50</sup> Bangladesh, Bosnia-Herzegovina, El Salvador, Haiti, Malawi, Myanmar, Namibia, Romania and Samoa.

<sup>51</sup> 'Unseen, Unheard: Gender-based Violence in Disasters' (n 7).

<sup>52</sup> Global Protection Cluster and Inter-Agency Standing Committee, 'Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action: Reducing Risk, Promoting Resilience and Aiding Recovery' (2015) <https://gbvguidelines.org/en/> accessed 17 May 2022.

gay, bisexual, transgender and intersex persons are uniquely vulnerable, due to stigmatization and discrimination.<sup>53</sup>

Fragmentation of international law is further evidenced by the reproduction of soft law guidelines for agencies and humanitarian actors responding to disasters. Soft law instruments on GBV and displacement include:

- Inter-Agency Standing Committee Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action (2015);
- UN Population Fund Minimum Standards for Prevention and Response to Gender-Based Violence in Emergencies;
- The MEND Guide Comprehensive Guide for Planning Mass Evacuations in Natural Disasters (2014).

These soft law guidelines recommend that it is assumed that GBV is occurring, and provide guidance for governments and humanitarian actors on the processes that should be put in place and followed to protect vulnerable individuals. For example, the Inter-Agency Standing Committee guidelines create a comprehensive programme cycle framework encompassing: (a) assessment analysis and planning; (b) resourcing; (c) implementation; (d) coordination and (e) monitoring and evaluation. Practical guidance on how to screen those vulnerable to GBV is provided, as well as guidance on how to manage camps to avoid GBV, such as placing single women and children in separate areas, increasing lighting around hygiene, water and sanitation services, and ensuring equitable food access for all within the camps. While these guidelines contain valuable strategies for reducing GBV among displaced populations, a gaping hole looms between policy and practice. These types of instruments provide no defence against the fallout arising from an economic ordering, which sees vast numbers of people living in geographical areas prone to disasters. As such, while these guidelines contain practical advice on how to prevent GBV in displacement camps, these principles have been created in the ghetto, with the actors tasked with implementing these frameworks lacking adequate resources and/or power to implement these guidelines.

A case demonstrating the structural issues enabling violence against women in displacement camps is illustrated by the case *Women and Girls Victims of Sexual Violence Living in 22 Internally Displaced Persons Camps, Port-au-Prince, Haiti*.<sup>54</sup> This case involved a claim against the Haitian government

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<sup>53</sup> ‘Analytical Study on Gender-Responsive Climate Action’ (n 40) [17].

<sup>54</sup> Inter-American Commission on Human Rights, *Women and Girls Victims of Sexual Violence Living in 22 Internally Displaced Persons Camps: Precautionary Measures* no. MC-340-10 Haiti (22 December 2010).

for failing to prevent sexual abuse within the IDP camps. The Inter-American Court of Human Rights ordered the Haitian government to take five specific steps to improve camp safety, including:

1. the provision of appropriate medical assistance;
2. the implementation of effective security measures;
3. empowerment of public authorities charged to respond to incidents of sexual violence in the camps;
4. creation of specialized units within the police, and other relevant authorities, for the investigation of sexual violence;
5. guarantees for the active participation of women in the design of measures to address sexual violence in the camps.

While the court recognized the links between the disaster and violence against women, structural factors meant that the recommendations contained in the judgment were not subsequently implemented. As Matthew Scott writes, this litigation appears ‘to have minimal impact upon the lives of women living in the 22 camps, as the matter was subsequently brought before the Human Rights Council in 2011’.<sup>55</sup> Otto writes that it is important to remember that legal change by itself is never enough. It remains essential to consider the relationship between politics (life), and law, with fundamental change needed not only in law, but also within social customs and beliefs.<sup>56</sup> As such, violence against both nature and women will require changes in law, but also changes in social customs and practices that legitimize violence.

### **(c) International Disaster Risk Reduction Laws and Frameworks**

Disasters are commonly perceived as sudden, unusual and isolated events, and as distinct from ‘normal’ life.<sup>57</sup> Disaster law frameworks, premised upon the discourse of preparedness, rescue, relief, rehabilitation and recovery, are created upon the assumption that both people and their environment can be managed or manipulated to minimize disaster impact.<sup>58</sup> In reality, history shows that natural disasters are part of normal life, and the vulnerability of

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<sup>55</sup> Matthew Scott, ‘Accountability for State Failures to Prevent Sexual Assault in Evacuation Centres and Temporary Shelters: A Human Rights Based Approach’ in Catarina Kinnvall and Helle Rydstrom (eds) *Climate Hazards, Disasters and Gender Ramifications* (Routledge 2021) 265.

<sup>56</sup> Otto, ‘Remapping Crisis’ (n 38).

<sup>57</sup> Janki Andharia, ‘Blurred Boundaries, Shared Practices: Disaster Studies as an Emerging Discipline and Disaster Management as a Field of Practice’ in Janki Andharia (ed) *Disaster Studies* (Springer 2020).

<sup>58</sup> *Ibid.*, 50.

some communities flowing from a disaster is reflective of the social and economic structures of society, involving an unequal distribution of power and privilege.<sup>59</sup>

International disaster law is based upon crisis governance. Applying Charlesworth's crisis criteria, the central knowledge valued by the international climate regime is data codifying the economic loss arising from the disasters and the number of human lives lost. Disaster frameworks constantly identify the need to improve disaster data, but no mention is made of how this data should be used to decrease vulnerability outside of disaster periods. With respect to gender and disasters, assisting 'the vulnerable women' discourse features strongly within policy and scholarly literature.<sup>60</sup> The 'Sendai Framework for Disaster Risk Reduction 2015–2030' is a soft law international legal instrument that creates seven targets and four priorities to guide the development of national and local level disaster frameworks. The framework includes gender consideration via a preambular reference, requiring gender consideration as a principle underlying implementation. However, only one of the four priorities references gender specifically, with Priority 4 calling upon states to empower women in disaster preparedness and 'build back better' actions. Gender-based violence is not specifically recognized by the regime.<sup>61</sup>

The Hanoi Recommendation for Action on Gender and Disaster Risk Reduction, adopted in May 2016 at the Regional Asia Pacific Conference on Gender and Disaster Risk Reduction, was created to ensure that gender is incorporated across the four priorities of the Sendai regime. In terms of fragmentation, international disaster law provides a masterclass example of how to ensure that gender remains in the ghetto. First, the Sendai framework itself is soft law, and as such is viewed as aspirational as opposed to obligatory by states. Second, incorporation of gender within Sendai is inconsistent, and provides minimal guidance on what gendered implementation should entail. Third, consistent incorporation of gender across the platform is carried out by a separate soft law instrument (the Hanoi Recommendation), which remains largely on the periphery of the disaster law regime. As such, state level disaster law remains largely limited to specifying how actors such as the army, police and emergency services should respond to disasters, with an assumption that

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<sup>59</sup> Ibid.

<sup>60</sup> Seema Arora-Jonsson, 'Virtue and Vulnerability: Discourses on Women, Gender and Climate Change' (2011) 21 *Global Environmental Change* 744.

<sup>61</sup> See Zehra Zaidi and Maureen Fordham, 'The Missing Half of the Sendai Framework: Gender and Women in the Implementation of Global Disaster Risk Reduction Policy' (2021) 10 *Progress in Disaster Science* 1.

civil society actors and volunteers will mobilize to assist those affected by the disaster.<sup>62</sup>

### 3. INTERNATIONAL CLIMATE LAW

The UNFCCC, reflecting a 1950s mindset, was the only Convention to emerge from the 1992 Rio Earth Summit that failed to recognize gender in any form whatsoever.<sup>63</sup> The Kyoto Protocol, 1997, that created legally binding emission reduction commitments to operate from 1997 to 2020, also failed to recognize gender. Gender was not recognized within the ‘hard’ instruments of the international climate regime until the Paris Agreement of 2015. Yet the inclusion of gender remained on the periphery, with a preambular reference, and two weakly worded provisions requiring consideration of gender in climate adaptation and capacity building initiatives. The preamble asks ‘Parties to consider the human rights implications of climate policy for indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, and the right to development, as well as gender equality, empowerment of women and intergenerational equity.’ Parties are also called upon in Article 7(5) to ‘acknowledge’ that adaptation action should follow a ‘country driven, gender responsive approach’, while Article 11(2), requires capacity building initiatives to be gender-responsive.

The language of inclusion is important to note here, with ‘consider’ and ‘acknowledge’ effectively signalling gender considerations to be optional, not mandatory, and certainly not something of critical importance to the regime. Furthermore, gender is only seen as relevant in respect of adaptation and capacity building, topics considered of secondary importance compared to mitigation, showing that gender in the climate context is very much understood as being relevant in helping ‘vulnerable’ women.<sup>64</sup> Vulnerability in the context of climate regime is largely understood as geographical vulnerability, and gendered vulnerability is largely based upon an imagined character of a poor women living in a rural area in the global south, dependent upon rain-fed agriculture and living through a period of prolonged drought. More complex

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<sup>62</sup> Rowena Maguire and others, ‘Governments Love to Talk about “Shared Responsibility” in a Disaster: But Does Anyone Know What it Means?’ The Conversation (Melbourne, 21 March 2022).

<sup>63</sup> For further on this point see: Rowena Maguire, ‘Feminist Perspectives’ in Lavanya Rajamani and Jacqueline Peel (eds), *Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021).

<sup>64</sup> For further on this point see Rowena Maguire, ‘Gender’ in Sue Harris Rimmer and Kate Ogg (eds), *Feminist Engagement with International Law* (Edward Elgar Publishing 2019).

gendered vulnerabilities, associated with the impacts of colonization and patriarchal systems of domination, are not issues recognized by the regime. As such, GBV occurring as a result of climate change is not an issue currently recognized by the international climate regime.

One particular challenge of generating solutions to address GBV within the climate change regime will be to avoid creating the assumption that gendered climate considerations are about helping vulnerable women suffering violence who are in need of rescuing. As this volume demonstrates, there are a wide range of gendered implications of climate change, but women's issues are often understood as being about the prevention of violence. As Otto writes, the existence of the feminist paradox threatens progress in this area, with calls for new laws that recognize women's particular concerns running the risk of continuing to position women in a 'special protective' category that reinforces rather than challenges gender hierarchy.<sup>65</sup> Lessons from international human rights law shows that initiatives seeking to address violence often have the 'unintended effect of reinforcing traditional gender stereotypes by casting women, especially poor women, as helpless victims in need of rescue which has attracted paternalistic and imperial, rather than rights-based responses'.<sup>66</sup> While this chapter may want to shed light on the connection between violence against nature and women, it does not wish to present violence as the only gendered consequence of climate change, nor does it want to see feminist solutions to climate change being limited to helping 'vulnerable' women. Rather, this chapter has sought to show how international institutions enact violence by not seeing certain acts, not listening to those with lived experience, and not taking action to value certain knowledges.

The Gender Action Plan (GAP), a soft law framework adopted at the 2017 UN Climate Conference, COP23, exists:

to advance women's full, equal and meaningful participation, and promote gender-responsive climate policy and the mainstreaming of a gender perspective in the implementation of the Convention and the work of the Parties, the secretariat, United Nations entities and all stakeholders at all levels.<sup>67</sup>

The GAP acknowledges that gender responsive climate policy requires 'strengthening in all activities concerning adaptation, mitigation, and related

<sup>65</sup> Diane Otto, 'Feminist Approaches to International Law' in Anne Orford and Florian Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 488.

<sup>66</sup> *Ibid.*

<sup>67</sup> UNFCCC, 'Draft decision -/CP.23: Establishment of a gender action plan' (13 November 2017) FCCC/SBI/2017/L.29 Annex [2] <https://unfccc.int/resource/docs/2017/sbi/eng/l29.pdf> accessed 17 May 2022.

means of implementation (finance, technology development and transfer and capacity building)<sup>68</sup>. The GAP lists five priority areas for action, each of which details individual activities and targets. The five areas are:

- A. Capacity-building, knowledge sharing and communication;
- B. Gender balance, participation and women's leadership;
- C. Coherence;
- D. Gender-responsive implementation and means of implementation;
- E. Monitoring and reporting.

The GAP to date has largely been used to measure the percentage of women involved in international climate negotiations (gender balance) and has been used to mainstream gender considerations into climate finance institutions.<sup>69</sup>

Otto warns that 'feminist contributions to international law can end up facilitating the same imperial projects that they set out to oppose in the name of advancing women's participation and rights'.<sup>70</sup> With respect to the GAP, merely increasing gender representation does not automatically mean that feminist solutions or approaches will become embedded within the UNFCCC. Instead, the more likely outcome is that a number of women, who do not necessarily have an understanding of feminist method or critique, are included in state's negotiating teams in order to increase gender representation. Monitoring of the GAP will be carried out by gender experts, who will largely operate in entirely different spheres from those in which the actual power lies within the regime. As Heathcote writes, that means that the work of gender experts, despite its quality and relevance, becomes largely tokenistic, and the structures of governance being designed to respond to climate change remain largely immune from gender considerations.<sup>71</sup>

The international climate regime shows clear signs of crisis thinking and problem solving. Climate change is presented as an urgent crisis with the knowledges and facts privileged by the regime being from economic, technology and scientific disciplines. Discourses around the costs of mitigation have been legitimized by the regime, with Parties justifying failure to curb emissions on economic grounds. Technology-based solutions are considered to be necessary and preferable to changes in consumption. And there seems to be an assumption within the regime that once accurate data on greenhouse gas

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<sup>68</sup> Ibid., [3].

<sup>69</sup> Rowena Maguire, Sangeeta Mangubhai, George Carter, Bridget Lewis and Susan Harris-Rimmer, *UNFCCC@30 Climate Change: Reposition Gender: Past, Present and Future, Environmental Policy and Law* (2023), forthcoming.

<sup>70</sup> Otto, 'Feminist Approaches to International Law' (n 65) ch 24, 7.

<sup>71</sup> Heathcote (n 31) 49.



emissions are obtained, this will somehow magically translate into emission reductions in practice. Most of research funding is directed towards scientific climate mitigation projects, which means that the discourse surrounding climate governance reforms remains largely focused on the cost of emission reductions and on ensuring the integrity of emission reduction data. Knowledge from lived experience, from civil society and from the social sciences is largely side-lined within UNFCCC processes. Scientific knowledge is not immune to rebuke, being either embraced or ignored by governments in accordance with opinion polling or industry lobbying interests.

It is relevant to include lived everyday experience of the climate crisis in COP sessions when a break is needed from the more important discussions on finance and reporting methodology, but this is not seen as something that should shape responses to climate change.<sup>72</sup> The impact of colonization is swept under the rug through incorporation of the ‘common but differentiated responsibility’ principle, which ensures that all nations must play a role in responding to climate change, and which has been framed to make the global north look like climate leaders for accepting increased emission reduction obligations. Efforts to make the global north liable for climate harms, such as the loss and damage mechanism, are kept on the periphery of the regime with limited airtime during negotiations, and the wording of COP decisions are heavily negotiated to the point of being almost meaningless. This ensures that any obligations hinting at liability, compensation and responsibility are kept out of the decisions.

The jurisdiction of the international climate regime is ever expanding, which results in the regime constantly rediscovering issues and generally failing to build upon past institutional knowledge and scholarship on issues. For example, the Reduced Emissions from Deforestation and Degradation (REDD+) mechanism focused on reducing emissions from deforestation in the global south, and set forth a flurry of investments and projects focused on deforestation and emissions. Yet, these projects failed to build on the many existing international initiatives run by the Food and Agricultural Organization, the World Bank, the United Nations Forum on Forestry, the Forest Stewardship Council, and most importantly, lessons from Community/Joint Forestry schemes in operation across Asia and Africa.<sup>73</sup> Similarly, with respect to gender, the knowledge of

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<sup>72</sup> Minu Hemmati and Ulrike Röhr, ‘Engendering the Climate-Change Negotiations: Experiences, Challenges, and Steps Forward’ (2009) 17(1) *Gender and Development* 19, 26.

<sup>73</sup> Rowena Maguire, *Global Forest Governance: Legal Concepts and Policy Trends* (Edward Elgar 2012); Constance McDermott, ‘REDDuced: From Sustainability to Legality to Units of Carbon – The Search for Common Interests in International Forest Governance’ (2014) 35 *Environmental Science and Policy* 12.

the CEDAW, UN Women and UN Human Rights regime remains siloed from the climate regime. As such, gender is being largely interpreted as requiring gender representation, or is interpreted to recognize, but not provide any protection for, 'vulnerable' populations. Given this framing of gender, it is not surprising that GBV occurring as a result of structural domination of women and nature remains unseen by the regime.

## CONCLUSION

This chapter has explored how the international human rights, disaster and climate law regimes recognize, or fail to recognize, the relationship between disasters, climate change, and increased rates of GBV. While the human rights regime recognizes the relationship between GBV against women following a disaster, knowledge of this problem remains siloed within the UN Human Rights regime, and is, therefore, not part of the conversation at the international disaster or climate law negotiations. The implications of this is that state-level disaster and climate legal frameworks are generally gender-blind, and provide no recognition of the increased risk of GBV following a disaster. Practically, this means that response policies and recovery mechanisms provide no support for those experiencing GBV following a disaster. This lack of recognition is compounded by victims feeling conflicted about reporting GBV, with the trauma of disaster providing a cover for the perpetrators unlawful conduct. As such, recognition of the increased risk of GBV following a disasters remains 'unseen and unheard'.<sup>74</sup>

This chapter has explored the forces at play that keep gender on the periphery of international instruments. Understanding these forces is an important first step in thinking through strategies to enhance feminist interventions within international law. Much of the knowledge needed to incorporate feminist responses to disaster and climate adaptation lies with actors 'othered' by the regime. Enhancing and creating opportunities for these groups within international negotiations and enhancing their legitimacy at national levels will require pushing for structural change to address the patriarchal and colonial influences shaping international regimes. Changes to this dynamic can be nudged by legal reform, but must be accompanied by social change and the recognition that climate change is a social and environmental problem.

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<sup>74</sup> 'Unseen, Unheard: Gender-based Violence in Disasters' (n 7).

## 4. A greener CEDAW: Adopting a women's substantive equality approach to climate change

**Meghan Campbell**

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### INTRODUCTION

Climate change seriously inhibits women's ability to enjoy their rights and freedoms on a basis of equality with men. This repurposes the powerful opening sentence in the Committee on the Elimination of All Forms of Discrimination Against Women's (CEDAW Committee) landmark General Recommendation No. 19 on violence against women.<sup>1</sup> All peoples experience and are at risk of violence, but the great insight from General Recommendation No. 19 is that violence against women is entwined around their status as women. Similarly, women's experiences of climate change is deeply intermeshed with being a woman. There is an intuitive appeal to framing climate change in terms of a right to equality. The responsibility for climate change is not equally distributed. Nor are the consequences equally borne. The causes and effects of climate change inequalities fracture and intersect across multiple axes including sex, gender, race, disability, geography, socioeconomic status and generations. Due to gendered power relations and structures, the impacts of and responses (or lack thereof) to climate change are borne differently by women.<sup>2</sup> The shared conceptual roots and overlaps between the domination

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<sup>1</sup> Committee of the Convention on the Elimination of All Forms of Discrimination Against Women (hereafter CEDAW Committee), 'General Recommendation No. 19 on Violence against Women' (1992) CEDAW/C/GC/19 [1]; CEDAW Committee, 'General Recommendation No. 35 on Gender-Based Violence Against Women' (2017) CEDAW/C/GC/35.

<sup>2</sup> Rowena Maguire and Bridget Lewis, 'The Influence of Justice Theories on International Climate Policies and Measures' (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 16; Terry Geraldine, 'No Climate Justice Without Gender Justice: An Overview of the Issues' (2009) 17(1) *Gender and Development* 5.

of women and the domination of the environment further point towards approaching climate change as a matter of women's equality.<sup>3</sup> Legal regimes have struggled to account fully for the totality of and multiplicity of women's gendered experience of climate change.<sup>4</sup> In General Recommendation No. 37 on the gender dimensions of disaster risk reduction in the context of climate change,<sup>5</sup> the CEDAW Committee is breaking new ground by centring the role of women and adopting an intersectional, equality-based approach to the effects of climate change.<sup>6</sup> But what does this approach entail? Does addressing climate change require addressing women's inequality? Is eliminating women's inequality the key to tackling climate change? This chapter explores what it means to take seriously the relationship between climate change and discrimination against women.

Over the past years, the CEDAW Committee, the body that monitors the implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>7</sup> has examined how women's right to equality can be conceptualized in response to the human rights violations perpetuated by climate change and disasters.<sup>8</sup> This culminated in General Recommendation No. 37. It is broad in scope, as it 'does not differentiate between disasters related to climate change and other disasters'.<sup>9</sup> General Recommendation No. 37 investigates the linkages between women's rights, human induced climatic changes and 'hazards, risks and disasters that do not appear to be directly linked to climate change'.<sup>10</sup> Although there are a range

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<sup>3</sup> Karen Warren, *Ecofeminism: Women, Culture, Nature* (Indiana University Press 1997); Karen Morrow, 'Tackling Climate Change and Gender Justice-Integral; Not Optional' (2021) 11(1) *Oñati Socio-Legal Series* 207, 214.

<sup>4</sup> Rowena Maguire, 'Gender, Climate and the UN Framework Convention on Climate Change' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019).

<sup>5</sup> CEDAW Committee, 'General Recommendation No. 37: Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change' (2018) CEDAW/C/GC/37.

<sup>6</sup> The other treaty bodies have released a short four-page joint statement on climate change and human rights broadly understood, see CEDAW Committee, Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, 'Human Rights and Climate Change' (2019) HRI/2019/1.

<sup>7</sup> 1249 UNTS 13 (adopted 18 December 1979, entry into force 3 September 1981).

<sup>8</sup> See e.g., 'Statement of the CEDAW Committee on Gender and Climate Change' (2009) [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_STA\\_44\\_19855\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_STA_44_19855_E.pdf) accessed 9 November 2021.

<sup>9</sup> 'General Recommendation No. 37' (n 5) [13].

<sup>10</sup> *Ibid.*

of UN human rights treaty body accountability mechanisms that have engaged with the relationship between human rights and climate change,<sup>11</sup> the CEDAW Committee is the only one to release a General Recommendation on climate change. This is an important development as General Recommendations are authoritative, definitive and influential statements that signal to the human rights community the significance of women's equality in the context of climate change.<sup>12</sup> Furthermore, the CEDAW Committee consistently engages with states on women's equality, disasters and climate change in its Concluding Observations. Using the four-dimensional model of substantive equality,<sup>13</sup> this chapter analyses climate change as a matter of women's substantive equality under CEDAW. This analytical framework is enriched by drawing on a range of environmental, climate change and ecofeminist insights.<sup>14</sup> By acknowledging that climate change already has and will continue to operate as an obstacle to women's equality, the CEDAW Committee is able to spotlight how women's disadvantage exacerbates the burdens of climate change and disasters and clarify how attention to women's substantive equality can open new perspectives and viewpoints on how to respond to the climate crisis. The analysis in this chapter also reveals that there is space to engage more fully with the power hierarchies between humans and the natural world, and how those hierarchies are connected to and reinforce discrimination against women.

## 1. SHIPS IN THE NIGHT: CEDAW AND CLIMATE CHANGE

There are no references to the environment, disasters or climate in the text of CEDAW. This is not surprising, as the connections between the natural world and women's equality had not been established at the time of drafting and it would have been inconceivable to address environmental issues in a treaty on eliminating discrimination against women. This initial conceptual division has

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<sup>11</sup> Office of the High Commissioner of Human Rights, 'Human Rights Mechanisms Addressing Climate Change' <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HumanRightsMechanisms.aspx> accessed 10 November 2021.

<sup>12</sup> Philip Alston, 'The Historical Origins of the Concept of "General Comments" in Human Rights Law' in Laurence Boisson de Chazournes and Vera Gowland Debbas (eds), *The International Legal System in Quest of Equity and Universality* (Martinus Nijhoff 2001) 763.

<sup>13</sup> Sandra Fredman, *Discrimination Law* (2nd edn, Clarendon 2011).

<sup>14</sup> There is a rich body of literature defining ecofeminism; see Chaone Mallory, 'What's in a Name? In Defense of Ecofeminism' (2018) 23(2) *Ethics & Environment* 11. For this chapter, ecofeminism is defined as a theoretical frame that sees the oppression of women, other marginalized groups, and the natural environment as deeply entangled.

now given way to a more sustained and integrated engagement. This section briefly sketches how the CEDAW Committee has brought the gender dimensions of climate change and disasters within the rubric of CEDAW, and how it defines these concepts.

### (a) The Legal Basis

Equality within CEDAW acts a bridge to permit the CEDAW Committee to address women's rights in the context of disasters and climate change. The starting point is to consider how the treaty understands discrimination and equality. Article 1 of CEDAW defines discrimination against woman as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

There are three key elements to this definition. First, the phrase 'purpose or effect' indicates that CEDAW prohibits both direct (explicit differential treatment) and indirect (neutral laws, policies or programmes that in application disadvantage women) discrimination.<sup>15</sup> Second, the CEDAW Committee has interpreted 'on the basis of sex' to include intersectional sex (biological) and gender (socioculturally constructed differences) discrimination.<sup>16</sup> And third, 'on a basis of equality' clarifies that equality is the evaluative frame for analysing whether a distinction on the basis of sex amounts to discrimination against women.<sup>17</sup> Beyond clarifying that CEDAW is premised on substantive equality, the CEDAW Committee has never offered a comprehensive or coherent definition of the concept. At various points, it has held that substantive equality requires differential treatment; an equal start; an enabling environment; redistribution of power and resources; the elimination of stereotypes, rigid gender roles and prejudices; and a 'real transformation of opportunities, institutions

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<sup>15</sup> CEDAW Committee, 'General Recommendation No. 28 on Core Obligations' (2010) CEDAW/C/GC/28 [16].

<sup>16</sup> *Ibid.*, [5]; Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination' (2015) 11(2) *Revista Direito GV* 459.

<sup>17</sup> Andrew Byrnes and Pujja Kapai, 'Article 1' in Patricia Schulz, Ruth Halperin-Kaddari, Marsha Freeman and Beate Rudolf (eds), *CEDAW: Commentary* (2nd edn, Oxford University Press forthcoming).

and systems so they are no longer grounded in historically determined male paradigms of power and life patterns'.<sup>18</sup>

Drawing these three elements together, CEDAW seeks to ensure that all women are able to enjoy their human rights on a basis of *de jure* and *de facto* equality. To achieve this goal, it is imperative that equality and non-discrimination not remain static but evolve over time. As new understandings emerge on how gendered stereotypes, relations and structures are connected to the realization of women's rights, the open-textured concepts of equality and discrimination can be responsively employed. As the CEDAW Committee explains, these norms are meant to anticipate 'the emergence of new forms of discrimination that had not been identified at the time of drafting'.<sup>19</sup> CEDAW is a dynamic and living instrument.<sup>20</sup> The evolutionary approach to equality and non-discrimination has been used by the CEDAW Committee to address a range of issues that are not mentioned in the text of the treaty, most notably gender-based violence against women.<sup>21</sup>

In General Recommendation No. 37, the CEDAW Committee continues in this interpretative tradition, explaining that realities of climate change will negatively affect the realization of women's equal rights. At the outset, it observes that 'women, girls, men and boys are affected differently by climate change and disaster, with many women and girls experiencing greater risks, burdens and impacts'.<sup>22</sup> It then paints a vivid portrait noting, *inter alia*, women's increased risks of mortality, morbidity, and gender-based violence in situations of climate change and disasters. This vulnerability is not innate but connected to patterns of gender disadvantage that are 'economically, socially and culturally constructed'.<sup>23</sup> Gender stereotypes and structures mean that women have limited autonomy and less access to food, water, health care, employment opportunities, land, social protection, and other forms of economic resources. Women and girls are thus 'more likely to be exposed to disaster-induced risks' and they are 'less able to adapt to changes in climatic conditions'.<sup>24</sup> Discrimination against women can increase the likelihood and severity of climate change. A cluster of rights, including the rights to live

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<sup>18</sup> CEDAW Committee, 'General Recommendation No. 25 on Special Temporary Measures' (2004) CEDAW/C/GC/25 [8]–[9]; 'General Recommendation No. 28' (n 15) [16]–[22].

<sup>19</sup> 'General Recommendation No. 28' (n 15) [8].

<sup>20</sup> 'General Recommendation No. 25' (n 18) [3].

<sup>21</sup> 'General Recommendation No. 19 on Violence against Women' (n 1); 'General Recommendation No. 35 on Gender-Based Violence Against Women' (n 1).

<sup>22</sup> 'General Recommendation No. 37' (n 5) [2].

<sup>23</sup> *Ibid.*, [6].

<sup>24</sup> *Ibid.*, [3].

free from violence, and to education, work, social protection, health, adequate standard of living and freedom of movement, are undermined by the synergies between gender discrimination and the outcomes of disasters and climate change. The CEDAW Committee also warns that efforts to mitigate and adapt to climate change may unthinkingly replicate and exacerbate gender inequalities.<sup>25</sup> Although climate change may *prima facie* appear to be a great leveller, to grapple with the consequences of climate change it is necessary to appreciate women's disadvantaged position, and climate change must be conceptualized as an obstacle to women's equal enjoyment of rights. This gives the CEDAW Committee the legal basis to use the concepts of equality and non-discrimination to explore how the rights in the treaty need to be understood in light of climate change and disasters.

### (b) Defining Disasters and Climate Change

Before turning to evaluate how an equality-based approach to disasters and climate change plays out in the CEDAW Committee's monitoring work, it is helpful to consider how General Recommendation No. 37 defines these concepts. It takes a fluid approach that does not draw an analytical distinction between climate change and disasters.<sup>26</sup> Climate change is not explicitly defined, but General Recommendation No. 37 recognizes that human behaviour is changing the climate and is 'responsible for a large proportion of extreme weather events'.<sup>27</sup> Disasters, however, are defined. The CEDAW Committee draws on the UN Sendai Framework<sup>28</sup> and explains that disasters are 'small-scale and large-scale, frequent and infrequent, sudden and slow' hazards and risks.<sup>29</sup> The scale, speed, and regularity of the disaster are analytically irrelevant. This concept of disaster also moves beyond natural or weather-related disaster. General Recommendation No. 37 holds that disasters include 'environmental, technological and biological hazards ... as well as any other chemical, nuclear and biological hazards ... include[ing] testing and use

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<sup>25</sup> Ibid.

<sup>26</sup> 'General Recommendation No. 37' (n 5) [13].

<sup>27</sup> Ibid., [1].

<sup>28</sup> UN General Assembly, 'Sendai Framework for Disaster Risk Reduction 2015–2030' (2015) A/RES/69/283.

<sup>29</sup> Ibid.; see also UN Office for Disaster Risk Reduction, 'Disaster' <https://www.undrr.org/terminology/disaster> accessed 14 June 2021; Gabrielle Simm, 'Disaster and Gender: Sexing International Disaster Law' (2019) 2(1) *Yearbook of International Disaster Law Online* 144.



of all types of weapons'.<sup>30</sup> This chapter primarily focuses on climate change, but where relevant also considers disasters.

It is possible to detect how an equality framing shapes the definition of climate change and disasters in General Recommendation No. 37. Similarly to indirect discrimination, where the analytical fulcrum centres on the gendered effects of laws, policies or practices, and not on the motives or intentions of the discriminator,<sup>31</sup> General Recommendation No. 37 centres on impacts.<sup>32</sup> The CEDAW Committee does not seek to pin down a single causal element of the disaster or climate event. This has important consequences. Under CEDAW, states cannot avoid addressing women's inequalities by arguing that a disaster or climate event is natural or a force majeure.<sup>33</sup> States' obligations are not contingent on the origin of the disaster or climate events.<sup>34</sup> Simm worries that the refusal to typologize disasters and to include non-environmental disasters, such as weapon testing, is arbitrary and may weaken the normative force of General Recommendation No. 37.<sup>35</sup> However, eschewing definitional boundary drawing on the origins of the disaster or climate event and focusing on the effects on women's rights is consistent with an equality framing. Indirect discrimination focuses on the effects of systems, structures, biases and the status quo on disadvantaged groups.<sup>36</sup> Similarly, General Recommendation No. 37's analytical focus is on the effects of climate change and disaster, and their relationship to women's equality. This approach does not dilute the analytical precision of General Recommendation No. 37, nor open the flood-gates to include other rights-impinging events, such as war or poverty, under the umbrella of disaster, as these events would not meet the definition per the Sendai Framework. It also serves a strategic purpose. Given the continuing denial of climate change by powerful actors within the international community, the focus on the consequences bypasses this debate and clarifies that accountability under CEDAW is triggered when disaster or climate change

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<sup>30</sup> 'General Recommendation No. 37' (n 5) [13].

<sup>31</sup> Denise Réaume, 'Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination' (2001) 2 *Theoretical Inquiries in Law* 349; Sandra Fredman, 'Is There Still a Divide?' in Tarunabh Khaitan and Hugh Collins (eds), *Foundations of Indirect Discrimination* (Hart 2018).

<sup>32</sup> 'General Recommendation No. 37' (n 5) [12].

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, [13].

<sup>35</sup> Gabrielle Simm, 'Gender, Disasters and International Law' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019).

<sup>36</sup> *Essop v Home Office* [2017] UKSC 27 (UK Supreme Court); *Fraser v Canada* (Attorney General) (2020) SCC 28 (Canadian Supreme Court); *Nitisha v Union of India* (2021) Writ Petition (Civil) No 1109 of 2020 (Indian Supreme Court).

impedes on women's substantive equality. While General Recommendation No. 37 is unequivocal that the precise cause of the disaster or climate event is irrelevant, there is a clear acknowledgement of the role of human activity in precipitating extreme weather.<sup>37</sup> There is specific reference to human-induced floods, hurricanes, melting polar ice caps and glaciers, droughts and rising sea levels. The CEDAW Committee is not ignorant of the underpinning structural causes at stake in the context of climate change. The next section explores the steps the CEDAW Committee is recommending on modifications of human behaviours in light of climate change and disaster risks.

## 2. CLIMATE CHANGE AS A FORM OF WOMEN'S INEQUALITY

This section develops a more granular understanding of what it means to conceptualize the impacts of and responses (or lack thereof) to climate change as an obstacle to women's equality by analysing the monitoring practice of the CEDAW Committee. It specifically evaluates General Recommendation No. 37 which was released in 2018, and the Concluding Observations from the 63rd session in February 2016 to the 75th session in February 2020. The aim is to provide a nuanced and in-depth assessment of the CEDAW Committee's current approach to conceptualizing the repercussions of climate change as a matter of women's equality. Given the CEDAW Committee's fluidity with respect to climate change and disasters, this section also pays attention to how both of these phenomena impede women's equality. As mentioned above, the CEDAW Committee has not yet articulated an evaluative framework for assessing whether the state has failed to ensure women's human rights on the basis of equality. This section employs Fredman's four-dimensional model of substantive equality.<sup>38</sup>

The first dimension, redressing disadvantage, recognizes that equality cannot be achieved solely through identical treatment, but disadvantage must be fully accounted for, and differential treatment may be required. The second dimension, tackling misrecognition, seeks to eliminate stigma, stereotyping and prejudice, and promote the dignity and worth of women. The third dimension, accommodating difference and structural change, seeks to dismantle structures that have been constructed on dominant male norms and transform institutions so that gendered differences are not only accommodated but valorized. And the fourth dimension, participation, is directed towards enhancing social inclusion and political voice, and seeks to amplify women's voices in all

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<sup>37</sup> 'General Recommendation No. 37' (n 5) [13].

<sup>38</sup> Fredman (n 13).

decision-making spaces. Applying this framework reveals how women's substantive equality can not only enrich climate change discourse, but also how taking the consequences of climate change as a serious obstacle to women's rights positively contributes to the evolution of CEDAW, and ultimately open up new pathways for radical gender and ecological transformations. The CEDAW Committee is just in the beginning phases of creating a 'greener CEDAW', and this section marks out areas where a deeper engagement with the synergies between climate change and women's equality is required.

### **(a) Disadvantage**

All people are negatively affected by climate change and disasters. These burdens, however, are not equal. Women and girls are 'experiencing greater risks, burden and impacts'.<sup>39</sup> The realities of climate change are not neutral, they are gendered. Women are disproportionately affected by carbon emissions, drought, rising sea levels, storms, floods, avalanches, fires, and other weather-related disasters.<sup>40</sup> The reasons for the disproportionate effects on women are not inherent or inevitable, but are rooted in gendered norms, power relations and structures. Discrimination against women operates to heighten the negative repercussions of climate change.<sup>41</sup> The CEDAW Committee observes that 'the gender dimensions of disaster risk reduction and the impacts of climate change are often not well understood'.<sup>42</sup> It is seeking to correct this oversight by consistently drawing to states' attention, with a remarkable degree of detail, how gender inequalities interact with the effects of climate change to further disadvantage women and girls.

The gendered disadvantage of climate change can be extreme. General Recommendation No. 37 observes that 'women and girls have higher levels of mortality and morbidity in disaster situations'.<sup>43</sup> Beyond severe risks of death and injury, a range of natural, human or weather-related events also

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<sup>39</sup> 'General Recommendation No. 37' (n 5) [2].

<sup>40</sup> CEDAW Committee, 'Concluding Observations: Cook Island' (2018) CEDAW/C/COK/CO/2-3[45]; CEDAW Committee, 'Concluding Observations: Republic of Korea' (2018) CEDAW/C/KOR/CO/8 [14]; Karen Morrow, 'Changing the Climate of Participation: The Development of the Gender Constituency in Global Climate Change Regime' in Sherilyn MacGregor (ed), *Gender and Environment Handbook* (Routledge 2016).

<sup>41</sup> Elaine Enarson, 'Through Women's Eyes: A Gendered Research Agenda for Disaster Social Science' (1998) 22(2) *Disasters* 157.

<sup>42</sup> 'General Recommendation No. 37' (n 5) [39].

<sup>43</sup> *Ibid.*, [4]; Simm observes that this is generally true, but there are situations where men are at greater risk due to gendered masculine stereotypes ('Disaster and Gender' (n 29) 165).

negatively affect the livelihood of women. In focusing on the livelihood of women, the CEDAW Committee is continuing to develop socioeconomic rights as a crucial element of women's substantive equality, including rights that are not expressly protected in the treaty, nor well-developed within the UN treaty body system.<sup>44</sup> In Zimbabwe and Mozambique, Cyclone Idai increased women's food insecurity.<sup>45</sup> The 2015 earthquake also exacerbated the 'food insecurity and the ... housing, safe water and credit facilities for' Indigenous, Dalit, Madhesi, Tharu women, women of 'oppressed classes' and widows in the Hindu community in Nepal.<sup>46</sup> Due to gender norms within the family, in times of food scarcity, 'women are more likely to suffer from undernourishment and malnutrition'.<sup>47</sup> In assessing the gendered impact of climate change in Nauru, the CEDAW Committee notes that environmental challenges for 'future prospects for local food production' will have a negative impact on the health and well-being of women and girls (Art 12 of CEDAW).<sup>48</sup> Similarly, rural women in Haiti and Honduras have been devastated by intense droughts and resulting lost crops.<sup>49</sup> Making explicit connections between women, climate change and food is evidence of a future evolution of women's substantive equality in CEDAW that is starting to bubble to the surface.<sup>50</sup> As the CEDAW Committee continues to develop the links between women's equal right to food and climate change, it can positively draw on the works of the UN

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<sup>44</sup> Beate Rudolf, 'Article 13' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *CEDAW: Commentary* (Oxford University Press 2012) 342–343; Meghan Campbell, 'Like Birds of a Feather? ICESCR and Women's Socio-Economic Equality' in Rebecca Cook (ed), *The Frontiers of Gender Equality* (PUP Forthcoming).

<sup>45</sup> CEDAW Committee, 'Concluding Observations: Zimbabwe' (2020) CEDAW/C/ZWE/CO/6 [47]; CEDAW Committee, 'Concluding Observations: Mozambique' (2019) CEDAW/C/MOZ/CO/3-5 [43].

<sup>46</sup> CEDAW Committee, 'Concluding Observations: Nepal' (2018) CEDAW/C/NPL/CO/6 [40(c)].

<sup>47</sup> 'General Recommendation No. 37' (n 5) [69].

<sup>48</sup> CEDAW Committee, 'Concluding Observations: Nauru' (2017) CEDAW/C/NRU/CO/1-2 [34]; 'General Recommendation No. 37' (n 5) [66].

<sup>49</sup> CEDAW Committee, 'Concluding Observations: Haiti' (2016) CEDAW/C/HTI/CO/8-9 [37]; CEDAW Committee, 'Concluding Observations: Honduras' (2016) CEDAW/C/HND/CO/7-8 [42].

<sup>50</sup> The right to food in the context of climate change is anchored in a cluster of rights including core obligations (Art 2), the duty to modify discriminatory cultural patterns and stereotypes (Art 5), health (Art 12), rural women (Art 14) equality before the law (Art 15) and equality within marriage (Art 16); 'General Recommendation No. 37' (n 5) [71].

Special Rapporteurs, who have, for instance, identified the gendered climate change fallouts of large-scale agricultural practices and insecure land tenure.<sup>51</sup>

Oddly, in comparison with food, less attention has been paid to climate change, equality and water in CEDAW. There are only two examples in the Concluding Observations, both focusing on rural women. In Kiribati, seawater flooding has polluted wells, limiting rural women's access to water as well as food, firewood and medicinal plants.<sup>52</sup> The water sources for rural and Amerindian women in Guyana have been polluted by mining activities.<sup>53</sup> Going forward, the CEDAW Committee could consider more fully women's right to water under CEDAW in light of changing climate conditions.<sup>54</sup> The work of the UN Special Rapporteur on human rights and the environment, again, can prove instructive to the CEDAW Committee. The Special Rapporteur observes that women are excluded from water management, and the lack of access to clean water increases women's caring burdens and risk of violence.<sup>55</sup>

The CEDAW Committee also unearths the gendered health disadvantages precipitated by climate change and disasters. Carbon emissions particularly affect pregnant women and are connected to rising rates of maternal mortality in South Korea.<sup>56</sup> The CEDAW Committee pays specific attention to the health and the environmental impacts of nuclear power, reflecting its broad definition of disasters as including weapons testing. In the 1940–50s, the US conducted a series of nuclear testing programmes on the Marshall Islands. To this day, the CEDAW Committee observes that Marshallese women disproportionately 'suffer from thyroid and other cancers as well as other reproductive health problems that are a cause of the large number of stillbirths and congenital birth defects'.<sup>57</sup> Following the Fukushima accident in Japan, the CEDAW

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<sup>51</sup> UN Special Rapporteur on human rights and the environment, 'Healthy and Sustainable Food' (2021) A/76/179 [67], [80]; UN Special Rapporteur on the right to food, 'Integrating a Gender Perspective' (2016) A/HRC/31/51 [56]–[85].

<sup>52</sup> CEDAW Committee, 'Concluding Observations: Kiribati' (2020) CEDAW/C/KIR/CO/1-3 [45(b)].

<sup>53</sup> CEDAW Committee, 'Concluding Observations: Guyana' (2019) CEDAW/C/GUY/CO/9 [43(c)].

<sup>54</sup> Stephanie Buechler and Anne-Marie Hanson (eds), *A Political Ecology of Women, Water and Global Environmental Change* (Routledge 2015); Bernadette Resurrección, 'Water Insecurity in Disaster and Climate Change Contexts' in Lisa Mason and Jonathan Rigg (eds), *People and Climate Change: Vulnerability, Adaption and Social Justice* (Oxford University Press 2019).

<sup>55</sup> UN Special Rapporteur on human rights and the environment, 'Human Rights and the Global Water Crisis' (2021) A/HRC/46/28 [48].

<sup>56</sup> 'Concluding Observations: Republic of Korea' (n 40) [14].

<sup>57</sup> CEDAW Committee, 'Concluding Observations: Marshall Islands' (2018) CEDAW/C/MHL/CO/1-3 [8].

Committee is critical of the decision to lift the evacuation zone designation as women are more sensitive to radiation than men.<sup>58</sup>

The consequences of climate change and disasters further increase the risk of gender-based violence, especially for women with disabilities.<sup>59</sup> There are higher incidences of domestic violence, early forced marriage, trafficking and forced prostitution in the wake of extreme weather events. The CEDAW Committee also demonstrates a sophisticated understanding of how gendered forms of disadvantage amplify each other. In General Recommendation No. 37, it observes that violations of socioeconomic rights – the restricted availability of food and water – exposes women and girls to sexual violence and exploitation.<sup>60</sup>

The impacts of climate change can also increase the gendered burdens of care. The damage to livelihoods coupled with the decimation of public health services resulting from extreme weather events and other disasters means the burden of providing basic necessities and care is borne by women.<sup>61</sup> In the Concluding Observations for Fiji, the CEDAW Committee observes there is an ‘increase of women’s engagement in unpaid work, [they] carry a particularly high care burden by being in charge of finding resources to sustain their family’.<sup>62</sup> This burden has multiple negative knock-on consequences. First, these disaster and climate-related caring burdens ‘leave less time [for women] to engage in economic activity or access ... information and education ... necessary for recovery and adaption’.<sup>63</sup> Second, these gendered responsibilities coupled with stereotypes, discriminatory laws and limited access to economic resources and social capital make it more difficult for women to ‘leave regions at high risk of disaster or to migrate in order to re-establish their lives in the wake of extreme climate events’.<sup>64</sup> The comparative ease with which men are able to migrate means that the women left behind are forced to take non-traditional economic and community leadership roles, roles for which they are often ill-prepared.<sup>65</sup> Along with increased survival burdens, women also tend to shoulder the responsibility for mitigation, recovery and adaption

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<sup>58</sup> CEDAW Committee, ‘Concluding Observations: Japan’ (2016) CEDAW/C/JPN/CO/7-8 [37].

<sup>59</sup> ‘General Recommendation No. 37’ (n 5) [5]; CEDAW Committee, ‘Concluding Observations: Fiji’ (2018) CEDAW/C/FJI/CO/5 [53].

<sup>60</sup> ‘General Recommendation No. 37’ (n 5) [5].

<sup>61</sup> *Ibid.*, [62].

<sup>62</sup> ‘Concluding Observations: Fiji’ (n 59) [53(a)].

<sup>63</sup> ‘General Recommendation No. 37’ (n 5) [62].

<sup>64</sup> *Ibid.*, [76].

<sup>65</sup> *Ibid.*, [77].

efforts while men continue to be ‘let off the hook’.<sup>66</sup> MacGregor refers to this additional burden as the ‘feminization of environmental responsibility’ which in practice amounts ‘to more unpaid work for women’.<sup>67</sup>

General Recommendation No. 37 adopts an intersectional perspective to the gendered disadvantage of climate change. It recognizes that burdens ‘may vary with different disasters and across geographical and socio-cultural contexts’.<sup>68</sup> While it flags a wide range of identities, the CEDAW Committee primarily focuses on three characteristics that are often ignored or perceived as controversial in many domestic discrimination frameworks: poverty, rurality and Indigenesness. Rural and Indigenous women and women who live in poverty are all signalled out as being particularly burdened by climate change.<sup>69</sup> Some of the examples above are also evidence of the Committee’s specific focus on rural women. These three identities or experiences often bleed into each other in the CEDAW Committee’s analysis. For example, it is concerned that the scarcity of arable land undermines the survival of poor, rural women and that the increase in droughts has affected harvests which in turn reduces the income of rural women.<sup>70</sup> This is also another example of the CEDAW Committee using climate change to pursue an evolutionary interpretation of CEDAW. Although Article 14 of the Convention explicitly protects the rights of rural women,<sup>71</sup> there is only a brief reference to race or poverty in the preamble of CEDAW. The increased attention to the vulnerability of Indigenous women and women in poverty to climate change and disasters is a welcome sign and indicates the CEDAW Committee’s ever-increasing awareness of how race and poverty act as obstacles to women’s equality. The narrow focus though on poor, rural and Indigenous women, however, does make the CEDAW

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<sup>66</sup> Bernadette Resurrección, ‘Persistent Women and Environmental Linkages in Climate Change and Sustainable Development Agendas’ (2013) 33 *Women’s Studies International Forum* 41.

<sup>67</sup> Sherilyn MacGregor, ‘Only Resist: Feminist Ecological Citizenship and Post-Politics of Climate Change’ (2014) 29(3) *Hypatia* 617.

<sup>68</sup> ‘General Recommendation No. 37’ (n 5) [6].

<sup>69</sup> *Ibid.*, [61], [70]; CEDAW Committee, ‘Concluding Observations: Cambodia’ (2019) CEDAW/C/KHM/CO/6 [42]; ‘Concluding Observations: Guyana’ (n 53) [41]; ‘Concluding Observations: Mozambique’ (n 45) [37]; CEDAW Committee, ‘Concluding Observations: Côte d’Ivoire’ (2019) CEDAW/C/CIV/CO/4 [47]; CEDAW Committee, ‘Concluding Observations: Norway’ (2017) CEDAW/C/NOR/CO/9 [14].

<sup>70</sup> ‘Concluding Observations: Haiti’ (n 49) [37]; CEDAW Committee, ‘Concluding Observations: Bhutan’ (2016) CEDAW/C/BHU/CO/8-9 [42].

<sup>71</sup> CEDAW Committee, ‘General Recommendation No 34 on the Rights of Rural Women’ (2016) CEDAW/C/GC/34.

Committee vulnerable to the critique that the ‘woman’ of climate change is collapsing into the poor, rural women of the Global South.<sup>72</sup>

The disadvantage dimension of the substantive equality approach demands remedial measures that fully account for the differential effects of disaster and climate change on women. Measures to mitigate and respond to the effects of disaster and climate change cannot be gender neutral. Building on its awareness of how gendered disadvantage can heighten the risks of disaster and climate change and how these phenomena can entrench gendered disadvantage, the CEDAW Committee recommends a series of remedial measures that states can pursue to address these synergies. As a central guiding principle, it holds that all measures that respond to disaster and climate change must give primary consideration to women’s rights and the needs of women, especially women with intersecting identities, must be prioritized.<sup>73</sup> It consistently advocates that states integrate an intersectional gender perspective into legislation, programmes, plans and policies on climate change.<sup>74</sup> The CEDAW Committee even goes a step further and pinpoints priority areas to eliminate gender discrimination: legal ownership, access and use of property, and land and natural resources. It also requires states to redress long-standing barriers to women’s equality in food, health, work and social protection that exacerbate the risks to which women are exposed from disaster and climate change.<sup>75</sup>

The CEDAW Committee is also building up a fine-grained best practice guide on the appropriate measures states can adopt. For instance, relief funding must be directed towards women’s economic empowerment.<sup>76</sup> It should be available and accessible to all women, including women in industries most affected by climate change, such as agricultural and fisheries.<sup>77</sup> In response to the multi-fold burdens that fall upon women, they should have access to training and opportunities that seek to mitigate and adapt to climate change.<sup>78</sup> The CEDAW Committee could consider stronger recommendations that emphasize that climate change and disasters should not increase the gendered burdens of care on women or add new environmental responsibilities or chores for

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<sup>72</sup> Geraldine (n 2).

<sup>73</sup> CEDAW Committee, ‘Concluding Observations: Antigua and Barbuda’ (2019) CEDAW/C/ATG/CO/4-7 [51].

<sup>74</sup> *Ibid.*, [25]–[26].

<sup>75</sup> ‘General Recommendation No. 37’ (n 5) [44], [57], [60], [64], [68], [72], [78].

<sup>76</sup> Maguire and Lewis (n 2) critique relief funds for failing to redress structures that underpin environmental degradation.

<sup>77</sup> ‘General Recommendation No. 37’ (n 5) [10]; ‘Concluding Observations: Marshall Islands’ (n 57) [45(c)].

<sup>78</sup> ‘General Recommendation No. 37’ (n 5) [57]; ‘Concluding Observations: Marshall Islands’ (n 57) [45(c)].



women.<sup>79</sup> For example, the CEDAW Committee recommends that Samoa use temporary special measures to encourage women to take courses ‘in the fields of disaster risk management and climate change, including in climatology, fishery and water management’.<sup>80</sup> Japan is encouraged to intensify medical services to women and girls affected by radiation, especially pregnant women in the Fukushima prefecture.<sup>81</sup> Nauru is recommended to take ‘special measures to address the health concerns of women resulting from phosphate mining’.<sup>82</sup> The disaster preparedness plans in Fiji should include ‘provision for setting up women-only shelters, where women can report cases of gender-based violence and obtain access to redress and rehabilitation’.<sup>83</sup> And lastly, Kiribati and Eritrea are urged to take measures ‘to address hunger and ensure food security for rural women in light of the effects of climate change’.<sup>84</sup>

## **(b) Recognition**

The CEDAW Committee carefully considers how the role of women should be conceptualized in grappling with climate change so as to avoid replicating gendered stereotypes. Efforts to mitigate and adapt to the realities of climate change can inadvertently perpetuate gender-based stereotypes that essentialize women as helpless, disempowered victims or as nurturing carers of the environment. This has been framed in the ecofeminist literature as the vulnerability or virtuousness of women.<sup>85</sup> The challenge is to recognize the gendered consequences of climate change without reducing women to stereotypical roles. The CEDAW Committee both avoids and falls into this trap. On the positive side, it uses the recognition dimension to champion women’s agency to redress climate change. It observes in General Recommendation No. 37 that categorizing women as ‘passive “vulnerable groups” in need of protection

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<sup>79</sup> Resurrección (n 66).

<sup>80</sup> CEDAW Committee, ‘Concluding Observations: Samoa’ (2018) CEDAW/C/WSM/CO/6 [42].

<sup>81</sup> ‘Concluding Observations: Japan’ (n 58) [37].

<sup>82</sup> ‘Concluding Observations: Nauru’ (n 48) [35].

<sup>83</sup> ‘Concluding Observations: Fiji’ (n 59) [54(b)].

<sup>84</sup> CEDAW Committee, ‘Concluding Observations: Eritrea’ (2020) CEDAW/C/ERI/CO/6 [50]; ‘Concluding Observations: Kiribati’ (n 52) [46(b)].

<sup>85</sup> Seema Arora-Jonsson, ‘Virtue and Vulnerability: Discourses on Women, Gender and Climate Change’ (2011) 21 *Global Environmental Change* 744; Rowena Maguire, ‘Feminist Approaches’ in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2020). Resurrección (n 66) argues that to ensure gender is on the climate change agenda, these stereotypes may have been strategically deployed.

from disaster is a negative gender stereotype'.<sup>86</sup> However, in the Concluding Observations, there are a few instances where the CEDAW Committee slips into the language of vulnerability, and it could bring the insight from General Recommendation No. 37 on women's vulnerability and stereotyping more consistently to the periodic reporting process.<sup>87</sup>

Although women face a unique constellation of risks in the face of climate change, it is crucial to recognize that women are not powerless in the face of climate change. The victim narrative denies the important contribution that women can make and already are making to mitigating and adapting to climate change.<sup>88</sup> In moving away from seeing women exclusively as hapless victims, the CEDAW Committee does not extrapolate stereotypes of women's caring roles or loving natures in the home onto disaster and climate change policies. When crafting responsive measures, the state must engage with women as 'agents of change'<sup>89</sup> and recognize that women are a 'valuable source of community knowledge on climate change'.<sup>90</sup> In the Concluding Observation for Australia, the CEDAW Committee holds that the state must 'make women the central force for the development and implementation of activities in relation to climate change'.<sup>91</sup> Framing women as change-makers has the potential to be a transformative approach to climate change that simultaneously seeks to undo the legacies of patriarchy and the misuse, abuse and neglect of the environment.

At the same time, it is possible to conceptualize women's role in climate change with a higher degree of precision using the insights from ecofeminism and the recognition and other dimensions of substantive equality. Learning from the vulnerable-virtuous stereotypes, the CEDAW Committee could bring depth to women as 'agents of change'. It could caution against falling into essentialism and recognize that women may have competing perspectives on how best to be 'agents of change', and respond to the climate crisis depending on a constellation of intersecting factors including race, geography, disability and so on.<sup>92</sup> It is also important not to romanticize women's agency or place

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<sup>86</sup> 'General Recommendation No. 37' (n 5) [7].

<sup>87</sup> CEDAW Committee, 'Concluding Observations: Bahamas' (2018) CEDAW/C/BHS/CO/6 [47]–[48].

<sup>88</sup> Rebecca Pearse, 'Gender and Climate Change' (2017) 8 (2) *WIREs Clim Change* 1, 5–7.

<sup>89</sup> CEDAW Committee, 'Concluding Observations: Mauritius' (2018) CEDAW/C/MUS/CO/8 [35]; 'Concluding Observations: Cambodia' (n 69) [43].

<sup>90</sup> 'General Recommendation No. 37' (n 5) [40(d)].

<sup>91</sup> CEDAW Committee, 'Concluding Observations: Australia' (2018) CEDAW/C/AUS/CO/8 [31].

<sup>92</sup> Kate Wilkinson Cross, 'Comparing the Transformative Potential of FCCC and the CCD: An Ecofeminist Exploration' (2018) 30(1) *Denning Law Journal* 5, 18.

the burden of solving the climate crisis solely on women. Framing women as ‘agents of change’ must recognize the gendered power constraints on women’s autonomy. Neither should women as change-makers be used to deflect attention away from the exploitation and domination of the natural environment by humans.<sup>93</sup> At times, the CEDAW Committee subtly slips into the language that places on women the responsibility to solve the climate crisis.<sup>94</sup> In General Recommendation No. 37, the Committee holds that women’s equality ‘will reinforce the resilience of individuals and communities globally in the context of climate change and disasters’.<sup>95</sup> In the Concluding Observation for Fiji, women are described as ‘the best agents of change’.<sup>96</sup> These examples implicitly perpetuate ‘the feminization of responsibility’ and place saving the planet on the list of women’s chores.<sup>97</sup> However, these are isolated incidents and by-and-large the CEDAW Committee seeks to recognize women’s agency in response to climate change. Nevertheless, these slippages point towards the need for a more multidimensional application of substantive equality to the role of women in climate change. The recognition dimension must be aligned with the disadvantage dimension to ensure that the understanding of the role of women in climate change does not increase burdens on women, and aligned with the structural dimension so that women are not considered the band-aid solution, and attention is directed towards the root causes of the climate crisis.

There is one further element of the recognition dimension worth discussing. The CEDAW Committee is using it to carefully consider the role of women and knowledge on climate change. There is a perception that high-level scientific or technical expertise offers the keys to mitigating and adapting to climate change.<sup>98</sup> This operates to denigrate other forms of knowledge. However, in the 1990s and 2000s, ecofeminists pointed out that holding that women have ‘special’ forms of knowledge of the natural world only creates another essentialist pitfall. Portraying women as more sensitive, aware or connected to

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<sup>93</sup> Mary Mellor, ‘Feminism and Environmental Ethics: A Materialist Perspective’ (2000) 5(1) *Ethics and the Environment* 107.

<sup>94</sup> *Ibid.*

<sup>95</sup> ‘General Recommendation No. 37’ (n 5) [12].

<sup>96</sup> ‘Concluding Observations: Fiji’ (n 59) [53]; CEDAW Committee, ‘Concluding Observations: Suriname’ (2018) CEDAW/C/SUR/CO/4-6 [42]–[43].

<sup>97</sup> Seema Arora-Jonsson, ‘Forty Years of Gender Research and Environmental Policy: Where Do We Stand?’ (2014) 47 *Women’s Studies International Forum* 295, 301.

<sup>98</sup> Wilkinson Cross, ‘Comparing the Transformative Potential’ (n 92) 41; Greta Gaard, ‘Ecofeminism and Climate Change’ (2015) 49 *Women’s Studies International Forum* 20.

nature is replicating gendered caring stereotypes.<sup>99</sup> The CEDAW Committee does an exemplary job of navigating this essentialist precipice. It does so by stressing that women's knowledge is not innate but is a result of their geographic, social, political, cultural and economic positionality. It holds that:

local knowledge held by women in agricultural regions is particularly important ... as these women are well positioned to observe changes in the environment and to respond to these through different adaptive practices in crop selection, planting, harvesting, land conservations techniques and careful management of water resources.<sup>100</sup>

This seeks to bring to the fore and legitimize women's experiential sources of environmental knowledge and, in doing so, emphasizes the traditional and non-traditional skills that women hold to confront climate change. This also reflects Morrow's view that integrating gender into climate governance shifts from the 'current productive, economic and technical-fix dominated track, to a mixed approach that also looks to harnessing lived experience ... and to those activities that perpetuate and support life'.<sup>101</sup>

### (c) The Structural Dimension

There are two limbs to the structural dimension of women's equality in the context of climate change, each limb having a different starting point. First, the substantive gender equality limb seeks to redress long-standing gendered structural barriers that increase women's risks in the context of climate change and disasters. Drawing on its long history of engaging with these barriers, the CEDAW Committee consistently directs state parties to address structural inequalities that exacerbate the negative burdens of climate change through, inter alia, facilitating access to social goods and redistributing caring burdens.<sup>102</sup>

Second, the climate change limb seeks to transform structural power imbalances between the human and natural environment that operate to undermine women's equality. Ecofeminists have argued that this requires de-privileging the role of humans, recognizing that humans are only one part of the natural world and rejecting economic systems that exploit women, other marginalized

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<sup>99</sup> Val Plumwood, *Feminism and the Mastery of Nature* (Routledge 1993); Bonnie Mann, *Women's Liberation and the Sublime: Feminism, Postmodernism, Environment* (Oxford University Press 2006).

<sup>100</sup> 'General Recommendation No. 37' (n 5) [33].

<sup>101</sup> Morrow, 'Tackling Climate Change' (n 3) 215.

<sup>102</sup> 'General Recommendation No. 37' [64].

groups and the natural environment.<sup>103</sup> Adaptive measures such as ‘green economy’ or sustainable development have been critiqued for failing to transform patriarchal, neoliberal ideological patterns of unlimited growth, over-consumption and domination.<sup>104</sup> Perhaps reflecting the CEDAW Committee’s comparatively recent engagement with climate change, its approach oscillates between undoing all forms of environmental power hierarchies that trap women in oppressive structures and a more modest approach that does not challenge the underlying causes of the climate crisis. The following section homes in on pertinent themes that emerge from the CEDAW Committee’s monitoring work – energy policies, the private sector, and extraterritoriality – to understand how it addresses the structural factors that have precipitated the climate crisis and their interaction with women’s equality.

### (i) Energy policies

The CEDAW Committee is critical of environmentally degrading energy policies. In General Recommendation No. 37, states are encouraged to ‘limit fossil fuel use and greenhouse gas emissions and the harmful environmental effects of extractive industries such as mining and fracking’.<sup>105</sup> In the Concluding Observations, the CEDAW Committee is even more censorious of energy policies. It draws attention to the fact that Australia and Qatar have some of the highest per capita carbon emissions in the world.<sup>106</sup> Fracking in the UK, South Korea’s fuel and coal-based energy policies, and the expansion of the extraction of oil and gas in the Arctic by Norway are critiqued for resulting greenhouse gas and other emissions.<sup>107</sup> Drawing together the disadvantage and structural dimensions, all of these energy policies are identified as having a negative effect on women’s rights. For South Korea and Norway, the CEDAW Committee urges the state to review climate change and energy policies to ensure due weight is given to women’s substantive equality.<sup>108</sup>

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<sup>103</sup> Carolyn Merchant, ‘Ecofeminism and Feminist Theory’ in Irene Diamond and Gloria Orenstein (eds), *Reweaving the World* (Sierra Club Books 1990).

<sup>104</sup> Kate Wilkinson, ‘Payment for Ecosystem Service and the Green Economy’ (2014) 5(2) *Journal of Human Rights and the Environment* 168, 169; Martha Pskowski, ‘Is This the Future We Want? The Green Economy vs Climate Justice’ (2013) 78 *DifferenTakes* 1.

<sup>105</sup> ‘General Recommendation No. 37’ (n 5) [14].

<sup>106</sup> CEDAW Committee, ‘Concluding Observations: Qatar’ (2019) CEDAW/C/QAT/CO/2 [43]; ‘Concluding Observations: Australia’ (n 91) [29].

<sup>107</sup> ‘Concluding Observations: Republic of Korea’ (n 40) [14]; ‘Concluding Observations: Norway’ (n 69) [14]; CEDAW Committee, ‘Concluding Observations: UK’ (2019) CEDAW/C/GBR/CO/8 [53].

<sup>108</sup> ‘Concluding Observations: Republic of Korea’ (n 40) [15]; ‘Concluding Observations: Norway’ (n 69) [15].

For the UK, the CEDAW Committee takes a bold step and calls on the state to ‘consider introducing a comprehensive and complete ban on fracking’.<sup>109</sup> These recommendations are consistent with a transformative approach that challenges existing practices that have caused climate change to exceed the planetary boundary<sup>110</sup> and brought the world to an ecological threshold.<sup>111</sup>

**(ii) The role of private actors**

The due diligence obligations under CEDAW have largely been developed in the context of gender-based violence against women, but the CEDAW Committee is now developing a new perspective in regard to non-state corporate actors.<sup>112</sup> However, its understanding of corporate actors is ambiguous. General Recommendation No. 37 seems to welcome private actors as partners in combatting climate change. It holds that the private sector ‘can play an important role in disaster risk reduction, climate resilience and the promotion of gender equality’.<sup>113</sup> Public-private partnerships, it explains, ‘may provide necessary financial and technical resources’ to create new infrastructure and resilient livelihoods.<sup>114</sup> The CEDAW Committee recommends that states create environments for gender responsive investment in disaster and climate change, including through renewable energies, and encourage women’s entrepreneurship in these areas.<sup>115</sup> This endorsement of the private sector and advocacy for a sustainable or green economy assumes that climate change can be solved by science, technology or finance ‘without substantially transforming ideologies and economies of domination, exploitation and colonialism’.<sup>116</sup> The human behaviours and patterns of overproduction and overconsumption prevalent in the Global North remain intact. Moreover, advocating for corporate actors to develop climate resilient measures continues to see the natural environment as being in the service of humanity, and does not challenge ‘destructive human-nature relations’.<sup>117</sup>

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<sup>109</sup> ‘Concluding Observations: UK’ (n 107) [54].

<sup>110</sup> Stockholm Resilience Centre, ‘The Nine Planetary Boundaries’ <https://www.stockholmresilience.org/research/planetary-boundaries/the-nine-planetary-boundaries.html> accessed 9 November 2021.

<sup>111</sup> Maguire, ‘Gender, Climate and the UNFCCC’ (n 4).

<sup>112</sup> Andrew Byrnes and Eleanor Bath, ‘Violence Against Women, the Obligation of Due Diligence and the OP-CEDAW: Recent Developments’ (2008) 8(3) *Human Rights Law Review* 517.

<sup>113</sup> ‘General Recommendation No. 37’ (n 5) [47].

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, [51].

<sup>116</sup> Gaard (n 98) 24.

<sup>117</sup> MacGregor, ‘Only Resist’ (n 67) 621.

On the other hand, in the Concluding Observations, the CEDAW Committee is much more critical of corporate actors. In Australia, Eritrea, Ethiopia and Guyana, it is concerned about the continuation and expansion of extraction industries: mining, oil and gas.<sup>118</sup> The CEDAW Committee is also worried that corporations, registered or domiciled within Australia and receiving public subsidies, are carrying out projects in Papua New Guinea and South Africa that perpetuate negative gendered and environmental impacts.<sup>119</sup> It urges that the state establish legal frameworks and monitoring mechanisms to ensure that agro-industrial projects and extractive industries do not undermine women's rights, even when the private actor operates outside the territory of the state.<sup>120</sup> It also recommends that free, prior and informed consent be obtained from local women whose land or resources will be affected by any project, that there be adequate benefit sharing arrangements and provision of adequate alternative lifestyles.<sup>121</sup> Arguably, there is space to focus the insights into the structural dimension of women's substantive equality more to bear on reconfiguring the role of private actors.<sup>122</sup> It may be strategic on the part of the CEDAW Committee to build buy-in and legitimacy by focusing on regulating or managing economic activity. The structural dimension of an equality approach to climate change, however, can be used to question assumptions on the sustainability of constant growth.<sup>123</sup> For instance, the CEDAW Committee could consider recommendations that eliminate and prohibit commercial activity that undermines women's equality and does serious damage to the natural environment.

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<sup>118</sup> 'Concluding Observations: Eritrea' (n 84) [43]; 'Concluding Observations: Australia' (n 91) [29]; CEDAW Committee, 'Concluding Observations: Ethiopia' (2019) CEDAW/C/ETH/CO/8 [45].

<sup>119</sup> 'Concluding Observations: Australia' (n 89) [29].

<sup>120</sup> *Ibid.*, [30]; 'Concluding Observations: Eritrea' (n 84) [44], 'Concluding Observations: Mozambique' (n 45) [40(b)]; 'Concluding Observations: Suriname' (n 96) [20]–[21].

<sup>121</sup> 'Concluding Observations: Australia' (n 91) [30]; 'Concluding Observations: Guyana' (n 53) [44]; Beth Goldblatt and Shireen Hassim, "'Grass in the Cracks": Lessons from Xolobeni for Gender Struggles for Climate Justice' in this volume; Lisa Chamberlain, 'The Value of Litigation to Women Environmental Human Rights Defenders in South Africa' in this volume.

<sup>122</sup> UN Special Rapporteur on extreme poverty and human rights, 'Privatization and Human Rights' (2018) A/73/396.

<sup>123</sup> Richard Douthwaite, *The Growth Illusion* (Green Books 1992) 286.

### (iii) Extraterritoriality

There are no textual provisions on the jurisdictional scope of CEDAW, and the exact extent of its extraterritorial reach is uncertain.<sup>124</sup> The CEDAW Committee is using climate change to explore the boundaries of the state's obligations. General Recommendation No. 37 observes that 'States have obligations both within and outside of their territories'.<sup>125</sup> States are urged to ensure that actions in their own territory do not cause gendered environmental damage in another state. They should 'limit fossil fuel, reduce transboundary pollution and greenhouse gas emissions and promote the transition to renewable energy'.<sup>126</sup> In the Concluding Observations, the CEDAW Committee is pinpointing specific states and actions. The US nuclear testing programme from the 1940s to 1950s is identified as causing ongoing gendered health problems in the Marshall Islands, and Saudi Arabia is brought to task for inflicting environmental damage in Yemen.<sup>127</sup>

The CEDAW Committee also draws attention to the global inequalities that underpin climate change. General Recommendation No. 37 observes that 'low-income, climate vulnerable countries face particular challenges' and do not have the resources to 'develop, implement, and monitor gender-responsive disaster risk and climate change policies'.<sup>128</sup> States that are particularly vulnerable to climate change such as Antigua and Barbuda are encouraged to 'continue to seek technical and financial assistance from the international community for post-disaster recovery programmes'.<sup>129</sup> While the CEDAW Committee acknowledges the global unequal consequences of climate change and their relation to women's rights, there is little discussion of the responsibility of states for climate change.<sup>130</sup> There is only one instance where the CEDAW Committee singles out a state from the Global North, Australia, for providing limited humanitarian assistance to surrounding small islands.<sup>131</sup> It

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<sup>124</sup> Andrew Byrnes and Meghan Campbell, 'Article 2' in Patricia Schulz, Ruth Halperin-Kaddari, Marsha Freeman and Beate Rudolf (eds), *CEDAW: Commentary* (2nd edn, Oxford University Press forthcoming).

<sup>125</sup> 'General Recommendation No. 37' (n 5) [43].

<sup>126</sup> *Ibid.*

<sup>127</sup> 'Concluding Observations: Marshall Islands' (n 57) [8]–[9]; CEDAW Committee, 'Concluding Observations: Saudi Arabia' (2018) CEDAW/C/SAU/CO/3-4 [53]–[54].

<sup>128</sup> 'General Recommendation No. 37' (n 5) [44].

<sup>129</sup> 'Concluding Observations: Antigua and Barbuda' (n 73) [10(d)].

<sup>130</sup> Sarah Mason-Case and Julia Dehn 'Redressing Historical Responsibility for Unjust Precarities of Climate Change in the Present' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021); OxHRH, 'Litigating for Climate Justice: Views from the Frontlines' <https://ohrh.law.ox.ac.uk/litigating-for-climate-justice-views-from-the-frontline/> (accessed 8 September 2021).

<sup>131</sup> 'Concluding Observations: Australia' (n 91) [29]–[30].



could go further and assess ‘differing contributions to global degradation’ and shine the spotlight on the ‘historic and moral responsibility of States’.<sup>132</sup> For instance, the CEDAW Committee could encourage developed states to contribute their fair share of aid to low-income countries to mitigate the gendered dimensions of climate change.<sup>133</sup>

#### **(iv) Participation**

Although there has been some progress, the global climate regime continues to be dominated by ‘white, wealthy, males’ and women are ‘ignored, silenced and excluded’.<sup>134</sup> The CEDAW Committee’s primary remedial approach to climate change is through enhancing women’s participation in decision making. The overwhelming impression from evaluating the General Recommendation No. 37 is that women must participate in all decision making on climate change and disaster risk reduction and must be active in ‘conceptualizing, developing and using disaster risk reduction and climate science technologies’.<sup>135</sup> In every Concluding Observation where the CEDAW Committee engages with climate change, it advocates for women’s participation. While this may appear simplistic, it is of vital importance as women’s voices are still excluded and marginalized in climate discourse.<sup>136</sup> For instance, Laos and Kiribati are critiqued for the limited participation of women in programmes and mitigation policies on climate change and disaster risk reduction.<sup>137</sup>

The CEDAW Committee is fleshing out the nuances of women’s equal participation. It requires that women’s participation be full, effective, influential active and meaningful.<sup>138</sup> Women’s participation must be guaranteed at all stages of formulation, preparation and implementation, at all levels of decision making, including in leadership positions and at the community, local,

<sup>132</sup> Wilkinson Cross, ‘Comparing the Transformative Potential’ (n 92) 46–47.

<sup>133</sup> UN Special Rapporteur on human rights and the environment, ‘Safe Climate’ (2019) A/74/61 [68].

<sup>134</sup> Morrow, ‘Tackling Climate Change’ (n 3) 218.

<sup>135</sup> ‘General Recommendation No. 37’ (n 5) [54(f)].

<sup>136</sup> Maguire, ‘Gender, Climate Change and UNFCC’ (n 4); Karen Morrow, ‘Gender in the Global Climate Governance Regime: A Day Late and a Dollar Short?’ in Gunnhildur Lily Magnúsdóttir and Annica Kronsell (eds), *Gender, Intersectionality and Climate Institutions in Industrialised States* (Routledge 2021); UN Frameworks for Climate Change, ‘Gender Composition’ (2019) FCCC/CP/2019/9.

<sup>137</sup> ‘Concluding Observations: Kiribati’ (n 52) [45]; CEDAW Committee, ‘Concluding Observations: Laos’ (2018) CEDAW/C/LAO/CO/8-9 [51].

<sup>138</sup> ‘General Recommendation No. 37’ (n 5) [7]; ‘Concluding Observations: Eritrea’ (n 84) [49]; CEDAW Committee, ‘Concluding Observations: Mexico’ (2018) CEDAW/C/MEX/CO/9 [44]; CEDAW Committee, ‘Concluding Observations: Chile’ (2018) CEDAW/C/CHL/CO/7 [43].

national, regional and international level.<sup>139</sup> The recognition dimension is used to strengthen the participation dimension of substantive equality. It is vital to emphasize that women are heterogeneous and their different experiences and identities will shape their views on how to respond to the climate crisis. States must ensure that women living in rural communities,<sup>140</sup> Indigenous women,<sup>141</sup> disabled and migrant women can participate.<sup>142</sup> Building upon the disadvantage and participation dimension, states must allocate sufficient resources to overcome barriers to women's participation.<sup>143</sup> States should develop programmes to build and facilitate women's leadership and support women's civil society organizations working in climate change with adequate resources, skills and authority.<sup>144</sup> The CEDAW Committee encourages states to use temporary special measures 'as one element of a coordinated and continuously monitored strategy to achieve women's equal participation'.<sup>145</sup>

Women's participation in climate discourse must not be tokenistic but meaningful in that it creates space for women to make changes and influence outcomes.<sup>146</sup> One of the current tools to redress the structural and participation elements of substantive equality is an entwined environmental-gendered impact assessment (EGIA).<sup>147</sup> All environmental impact assessments, climate and disaster policies must include a gender assessment.<sup>148</sup> These can be tools for women to participate and voice their concerns and ideas on women's equality and the natural environment. EGIA should be transparent, independent, recognize the leadership of women, particularly rural and Indigenous women, and be widely disseminated.<sup>149</sup> The CEDAW Committee warns states that EGIA should not be collapsed into a performative tick-box exercise, but should have a substantive influence on law and policy. It urges Guyana to amend its legislation to include a gender analysis in all environmental impact assessments

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<sup>139</sup> 'Concluding Observations: Zimbabwe' (n 45) [47]; 'Concluding Observations: Mexico' (n 138) [43]; 'Concluding Observations: Japan' (n 58) [44]; 'General Recommendation No. 37' (n 5) [36].

<sup>140</sup> 'Concluding Observations: Cambodia' (n 69) [42].

<sup>141</sup> CEDAW Committee, 'Concluding Observations: Congo' (2018) CEDAW/C/COG/CO/7 [45]; 'Concluding Observations: Antigua and Barbuda' (n 73) [51(b)]; 'Concluding Observations: Suriname' (n 96) [43].

<sup>142</sup> 'General Recommendation No. 37' (n 5) [78]

<sup>143</sup> *Ibid.*, [26].

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*, [36].

<sup>146</sup> Pearse (n 88); Ulrike Rohr, 'Gender Carbon Footprints: Gendered Mitigation Policy' (2012) UN Climate Change Conference (COP 18) cited in Gaard (n 98).

<sup>147</sup> 'General Recommendation No. 37' (n 5) [42(c)].

<sup>148</sup> *Ibid.*; 'Concluding Observations: Guyana' (n 53) [44].

<sup>149</sup> 'Concluding Observations: Ethiopia' (n 118) [46]; 'Concluding Observations: Australia' (n 91) [30].

and ‘to monitor the implementation of those assessments’.<sup>150</sup> The Concluding Observations on Belarus and the Bahamas urge the states to ‘ensure that the results of the gender assessment undertaken following the recent hurricanes are used in development and implementation of future policies and programmes on disaster risk reduction and climate change’.<sup>151</sup>

## CONCLUSION

Climate change and disasters precipitate and cement women’s inequality. The CEDAW Committee advocates that measures to respond to the climate crisis take account of women’s unequal position and structural gender barriers. Accounting for the synergies between climate change and discrimination against women also clarifies that the role of women in climate discourse is neither as vulnerable victims nor virtuous saviours. General Recommendation No. 37 frames women as agents of change who should participate in all decision making and can bring a wide range of valuable and experiential knowledge to the table. Climate change is also pushing forward the boundaries of CEDAW, prompting the CEDAW Committee to focus on aspects of women’s equality that it has previously ignored in its monitoring work, including the role of race and poverty, the right to food and water, corporate actors and extraterritoriality.<sup>152</sup> Going forward, as the CEDAW Committee continues to develop further an equality approach to climate change, it can, among other matters, examine stigma against migrant, lesbian, bisexual, trans, younger, older, and Global South women in climate change policies and discourse.<sup>153</sup> It can also interrogate the underlying root causes of ecological degradation. The CEDAW Committee can challenge dominant ideologies on endless economic growth and probe whether the climate crisis can be solved solely through technocratic solutions. It can emphasize the need to dismantle hierarchies between men and women and the human and natural world. The role of the state in leading these efforts should be centred, as well as the need for greater cooperation across territorial boundaries.

Climate change already acts as an obstacle to women’s equal human rights, and unless drastic action is taken, it will continue to perpetuate and reinforce

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<sup>150</sup> ‘Concluding Observations: Guyana’ (n 53) [44].

<sup>151</sup> ‘Concluding Observations: Bahamas’ (n 87) [48]; CEDAW Committee, ‘Concluding Observations: Belarus’ (2016) CEDAW/C/BLR/CO/8 [35].

<sup>152</sup> Campbell, ‘Birds of a Feather’ (n 44).

<sup>153</sup> Simm, ‘Disaster and Gender’ (n 29), critiques the lack of attention to sexual orientation and gender identity in General Recommendation No. 37; Cathi Albertyn, ‘Radical Connectedness? Reproductive Rights, Climate Justice and Gender Equality’ in this volume.

discrimination against women. Bringing a substantive equality lens to the climate crisis has a rich promise for ambitiously, positively and radically transforming the systems, value and ideologies that oppress women, other marginalized-groups, and the natural environment.

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# 5. The world of work: A green and feminist future?

**Sandra Fredman**

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## INTRODUCTION

The Covid-19 pandemic has exposed and exacerbated the deep fissures of inequality in the world of work, patterned as ever along gender lines. Caring work has been thrust into the frontlines. But the widespread social appreciation of the value of care has not translated into improving terms and conditions of work. Underinvestment by the state in key services such as health, and a neo-liberal commitment to privatization, however inefficient, has eroded terms and conditions of workers in these sectors. According to World Health Organization (WHO) estimates, there is a shortage of 18 million health workers,<sup>1</sup> and those who are employed are under severe stress as well as being poorly rewarded. Without access to sick pay or social protection, many workers have to risk their health to retain their livelihood. At the same time, large numbers of workers have lost their jobs, and billions have been thrust into insecurity. Women have been affected more than men because they are over-represented in the sectors most at risk, such as wholesale and retail trade, food services and care work.<sup>2</sup> Meanwhile, as work, school and childcare devolved on homes, women's primary responsibility for childcare and domestic work has intensified. Although the disproportionate impact on women's employment is likely to narrow globally over the coming years, projections show that a sizable gap will remain. As underlying structural inequalities amplify the negative effect of the crisis and prolong its impact, the global unemployment rate is projected

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<sup>1</sup> World Health Organization (WHO), 'Health Workforce' [https://www.who.int/health-topics/health-workforce#tab=tab\\_1.a](https://www.who.int/health-topics/health-workforce#tab=tab_1.a) accessed 6 April 2022.

<sup>2</sup> International Labour Organization (ILO), 'ILO Monitor: COVID-19 and the World of Work: Updated Estimates and Analysis: Fifth Edition' (30 June 2020) [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms\\_749399.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_749399.pdf) accessed 6 April 2022.

to remain well above its pre-pandemic level into 2023.<sup>3</sup> The risk is that some of these changes will become structural, threatening to impair the quality of working conditions going forward.<sup>4</sup>

But can the ruptures of the pandemic nevertheless become an opportunity to ‘build back better’?<sup>5</sup> Can we envisage a feminist future world of work which is both green and just? Against the bleak background of the pandemic, there are slivers of optimism. Governments in many parts of the world have committed huge budgets to protect economies. Public gestures have been made to the central importance of care and care workers. The global shutdown led to reduced carbon emissions and, albeit temporarily, cleaner air in some of the most heavily polluted parts of the world.<sup>6</sup> In a notable admission from a leading economic policymaker, the previous governor of the Bank of England, Mark Carney, has declared that the Covid crisis has revealed the importance of the state and the cost of its failure.<sup>7</sup> Reflecting arguments long familiar to feminists, Carney acknowledged that the pandemic has demonstrated the need to act as an interdependent community, not as independent individuals. In addition, it has brought the values of solidarity, fairness, responsibility and compassion to the fore. Climate change, according to Carney, will be the test of these values.

Can we build on these slivers of hope to work towards a world in which the links between a greener future and decent work can be established?<sup>8</sup> Amid the mounting damage caused by the pandemic, we have seen the emergence of several key policy documents on the importance of rebuilding for a green future, setting out a route to ‘building back better’.<sup>9</sup> These proposals complement several earlier policy statements on decent work, the care economy and a green new world. These documents emphasize the interrelatedness of

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<sup>3</sup> ILO, *World Employment and Social Outlook: Trends 2022* (17 January 2022) [https://www.ilo.org/global/research/global-reports/weso/trends2022/WCMS\\_834081/lang--en/index.htm](https://www.ilo.org/global/research/global-reports/weso/trends2022/WCMS_834081/lang--en/index.htm) accessed 6 April 2022.

<sup>4</sup> Ibid.

<sup>5</sup> See Navraj Ghaleigh and Louise Burrows, ‘Reset or Revert in the New Climate Normal’ in Victor Ramraj (ed), *Covid-19 in Asia: Law and Policy Contexts* (Oxford University Press 2021); Cameron Hepburn and others, ‘Will COVID-19 Fiscal Recovery Packages Accelerate or Retard Progress on Climate Change?’ (2020) 36 *Oxford Review of Economic Policy* S359.

<sup>6</sup> ILO, ‘COVID-19 and the World of Work’ (n 2).

<sup>7</sup> Mark Carney, *Value(s)* (Penguin Random House 2021).

<sup>8</sup> For an earlier legal analysis, see Navraj Ghaleigh, ‘Just Transitions for Workers: When Climate Change Met Labour Justice’ in Alan Bogg, Jacob Rowbottom and Alison Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Bloomsbury 2020).

<sup>9</sup> ILO, ‘COVID-19 and the World of Work’ (n 2).

a green economy and decent work, rejecting the view that economic growth and climate action are necessarily in opposition.<sup>10</sup> However, the fragility of the coalition between economic growth and climate action is all too apparent. This is tellingly demonstrated by Carney himself, whose neoliberal instincts are not far below the surface. He argues that the key is to make the market part of the solution to climate change: ‘Both the climate and Covid crises demonstrate the value of society forging a consensus around common goals, and then letting market dynamism determine how to achieve them...’.<sup>11</sup> Since the market has repeatedly failed both women in the workforce and the environment, feminists must exercise constant vigilance.

This chapter therefore aims to examine these promises of decent work in a greener world through a feminist lens. I focus primarily on the policy statements of the ILO, as the major international organization responsible for setting labour standards. I also examine some of the aspirational contributions from independent think tanks. The objective is to use these documents to consider the extent to which feminist insights are incorporated into the vision they offer for green decent work, and to consider how the right to substantive gender equality should be included. I am particularly interested in the extent to which these policy statements and critical analyses incorporate commitments to (a) address the challenges; (b) redress occupational segregation; (c) prioritize the role of the state and public provision as against private; (d) address global connectedness while also recognizing that women in different locations face different challenges; (e) revalue care as central to a green and feminist economy; (f) recognize both paid and unpaid work; and (g) require participation of women in different locations in decision-making.

Section 1 critically analyses key policy documents from the ILO and assessments from independent sources. Section 2 sets out my vision for a future labour force which is both green and advances substantive gender equality. I argue that it is not sufficient to include women and work simply as an embellishment. We need to have a holistic vision, accounting for the power of patriarchy that continues to drive inequality and the climate crisis. As a start, all the factors suggested here need to be considered together. ILO policy documents tend to emphasize job segregation, pointing to the need to ensure that women are able to participate fully in new green jobs in science,

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<sup>10</sup> For ecofeminist critiques of attempts to ally climate justice to economic growth, see Christine Bauhardt, ‘Solutions to the Crisis? The Green New Deal, Degrowth, and the Solidarity Economy: Alternatives to the Capitalist Growth Economy from an Ecofeminist Economics Perspective’ (2014) 102 *Ecological Economics* 60; and Kate Wilkinson, ‘Gender And Intergenerational Justice In The Climate Change Regime’ in this volume.

<sup>11</sup> Carney (n 7) 9.

technology, construction and agriculture. Feminist analyses focus on the need to value care work, demonstrating the synergies between decent work for carers and a greener economy. Both present only partial visions. The ILO's focus on improving women's participation in new green jobs in science and green technology tends to miss the crucial role of unpaid care in perpetuating gendered working patterns. The emphasis on caring work risks reinforcing the notion of 'women's work' and missing out on new avenues for women in the workforce. Both are crucial in taking forward the project towards a green and feminist future. Even more fundamentally, I argue, a holistic vision should not focus only on work. It should embrace the whole range of forces that need to be changed to achieve green and decent work for women, including the right to education and to reproductive justice, the end of child marriage, the reduction of domestic burdens, the proper valuing of care, paid and unpaid, as well as rights to access to capital and property, social protection, sick leave, maternity leave, equal pay for work of equal value, job security, pensions and old-age protection.

## 1. PRESENTS, FUTURES AND ABSENCES

The pandemic has prompted multiple calls from policymakers for a green recovery, including the UN Secretary-General, the IMF, the European Commission, the African Union Commission and leaders of many countries.<sup>12</sup> IMF Chief Kristalina Georgieva stated in April 2020:

We are about to deploy enormous, gigantic fiscal stimulus and we can do it in a way that we tackle both crises at the same time... If our world is to come out of this [coronavirus] crisis more resilient, we must do everything in our power to make it a green recovery.<sup>13</sup>

Crucially, she called for the scrapping of subsidies on fossil fuels.<sup>14</sup> These documents generally make a brief reference to employment-creating opportunities. In particular, building clean energy infrastructure is regarded as a labour-intensive opportunity.<sup>15</sup> But they do not pay attention to the need to be sure that this work is provided on decent terms, nor to gendered and other inequalities. More focused on decent work is the ILO briefing 'COVID-19

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<sup>12</sup> ILO, 'COVID-19 and the World of Work' (n 2).

<sup>13</sup> Climate Home News, 'IMF Chief: \$1 Trillion Post-Coronavirus Stimulus Must Tackle Climate Crisis' (29 April 2020) para 5 <https://www.climatechangenews.com/2020/04/29/imf-chief-1-trillion-post-coronavirus-stimulus-must-tackle-climate-crisis/> accessed 6 April 2022.

<sup>14</sup> *Ibid.*, para 3.

<sup>15</sup> Hepburn and others (n 5) 9.



and the World of Work', which is optimistic about prospects of building back better in the post-Covid world of work.<sup>16</sup> There have also been some important contributions setting out a route to a green recovery from think tanks and academics.<sup>17</sup>

This post-pandemic set of documents can be put together with pre-pandemic ILO contributions, particularly its important document, *Greening with Jobs*, issued in 2018.<sup>18</sup> The overall aim of *Greening with Jobs* is to demonstrate that there is no need to see a contradiction between environmental sustainability on the one hand, and economic growth and jobs on the other.<sup>19</sup> Instead, achieving environmental sustainability can create jobs. However, to promote green industries while ensuring decent work requires the right policies and an integrated legal framework, with environmental standards in labour laws, and labour standards in environmental regulations. *Greening with Jobs* identifies three elements that are key to this transition: the provision of appropriate skills to workers; social protection systems to support incomes; and social dialogue to find innovative solutions and make sure that workers' voice is heard. *Greening with Jobs* can be read together with the major ILO report on *Care Work and Care Jobs*, which also appeared in 2018, and which investigated paid and unpaid care work and its relationship with the changing world of work. Its aim was to focus on the persistent gender inequalities in households and the labour market, and to show how these are inextricably linked with care work.<sup>20</sup>

This section of the chapter analyses these key policy documents. In particular, it considers the extent to which the ILO has brought together its vision of a green economy, decent work, and the post-Covid response from a feminist standpoint. I show that while there are important gestures made to addressing decent work for women in a green future, there is often a lack of appreciation of the underlying patriarchal structures which will continue to drive inequality unless they are directly confronted. The risk is that even the greener future envisaged for the world of work will simply replicate the inequalities in the current labour force. I start with a brief sketch of some of the challenges in the world of work for women in the context of climate change, and then turn

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<sup>16</sup> ILO, 'COVID-19 and the World of Work' (n 2).

<sup>17</sup> For example, Hepburn and others (n 5); Yvonne Bartmann and Salome Lienert, *Building Back Better: A Call for Courage* (Friedrich Ebert Stiftung 2020).

<sup>18</sup> ILO, *Greening with Jobs: World Employment Social Outlook 2018* (14 May 2018) <https://www.ilo.org/global/research/global-reports/weso/greening-with-jobs/lang--en/index.htm> accessed 6 April 2022.

<sup>19</sup> See footnote 10.

<sup>20</sup> ILO, *Care Work and Care Jobs for the Future of Decent Work* (28 June 2018) [https://www.ilo.org/global/publications/books/WCMS\\_633135/lang--en/index.htm](https://www.ilo.org/global/publications/books/WCMS_633135/lang--en/index.htm) accessed 6 April 2022.

to address each of the six main issues identified in the introduction as key to a substantive equality analysis.

### **(a) Challenges**

Employment remains the site of major inequalities for women world-wide. Although women have increasingly entered the paid workforce, they do so under vastly inferior conditions to men. Job segregation persists, women's work is undervalued, and there remains a stubborn gender pay gap. Women congregate at the margins of the labour force, predominating among precarious work and in the informal sector, with less access to credit facilities and frequently subject to harassment and violence. Behind this is the tenacity of the public–private divide, leaving women primarily responsible for childcare, domestic work and other caring responsibilities.<sup>21</sup> Climate change therefore brings specific challenges for women and work.

This is true for both unpaid and paid work, and any analysis must keep this crucial interaction in focus. So far as unpaid work is concerned, women's primary responsibility for caring and housework exposes them to particular risks from climate-related issues. It is well known that women spend more time than men on unpaid work. This is exacerbated after floods or other disasters, when women spend increasing time collecting water, cleaning and maintaining their houses and caring for their families. Household drudgery is particularly pronounced when households do not have access to electricity or piped water. The use of traditional fuels, and the consequential indoor pollution, have a disproportionate effect on the health of women and children, who spend more time at home, increasing both the arduousness of domestic work and the rate of women's absenteeism from work.<sup>22</sup> According to the International Energy Agency (IEA), more than 2.5 billion people lack access to clean cooking facilities, with solid biomass, kerosene or coal continuing to be their primary cooking fuel.<sup>23</sup> This is particularly pronounced in in sub-Saharan Africa, where as many as 940 million people lacked access to clean cooking in 2020. The consequent household air pollution is linked to almost 490,000 premature deaths per year. Women and children are the worst affected. Moreover, harvesting of wood for fuel contributes to deforestation.<sup>24</sup> This has been aggravated by the Covid-19 pandemic: the IEA estimates that due to

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<sup>21</sup> Sandra Fredman, *Discrimination Law* (3rd edn, Clarendon Series, Oxford University Press 2022) ch 2.

<sup>22</sup> ILO, *Greening with Jobs* (n 18) 23.

<sup>23</sup> IEA, *SDG7: Data and Projections*, (Paris: IEA, 2022 <https://www.iea.org/reports/sdg7-data-and-projections> accessed 10 April 2022).

<sup>24</sup> *Ibid.*

increased poverty induced by the crisis, about 50 million people switched back to using charcoal, kerosene or fuelwood, all harmful cooking options.<sup>25</sup> This suggests not only that clean energy is a top priority, but also that it should be distributed fairly and widely. It also suggests potential synergies between the creation of jobs in constructing clean energy networks and relieving some of women's unpaid domestic drudgery and its related health risks. Provided these jobs are created with decent conditions and are equally available for men and women, the interaction between paid and unpaid work can yield a virtuous circle of rewards.

In terms of paid work, global and local environmental degradations threaten many jobs and working conditions, especially in developing countries. Risks and hazards tend to affect women and vulnerable workers the most.<sup>26</sup> For example, women perform 50–100 per cent of waste collection, living and working in extremely dangerous conditions despite their contribution to urban waste management. Within the waste-picking sector, women do even worse than men, often earning only a fraction of what male waste-pickers earn.<sup>27</sup> This is only one manifestation of women's disproportionate presence among precarious, low-paid workers, who are intensely vulnerable to climate change. Women are over-represented among workers excluded from social protection, decision-making bodies, training and access to technology, particularly the internet. This is exacerbated for women in the informal economy.<sup>28</sup>

Gendered risks of climate change are particularly pronounced among women agricultural workers. Women predominate in agricultural work in some parts of the world, with over 60 per cent of working women in South Asia and sub-Saharan Africa concentrated in agriculture, which is often rain fed.<sup>29</sup> This exposes them directly to the economic consequences of changes in climatic systems, including falling into extreme poverty or, in water-scarce areas, displacement. Because of the existing inequalities between men and women in the division of labour in the home and in the workforce, women have less access than men to resources to adapt to climate change, including land, credit, and agricultural inputs. Women constitute more than 40 per cent of the overall agricultural labour force in the developing world, but they own only 10–20 per cent of the land.<sup>30</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> ILO, *Greening with Jobs* (n 18) 7, 17.

<sup>27</sup> WIEGO, 'Waste Pickers' <https://www.wiego.org/informal-economy/occupational-groups/waste-pickers> accessed 6 April 2022.

<sup>28</sup> ILO, *Greening with Jobs* (n 18) 25.

<sup>29</sup> Ibid., 20.

<sup>30</sup> Ibid., 25.

Having set out some of the challenges facing women, I now consider the response of the ILO and other contributions in terms of the six broad themes identified above.

## **(b) Occupational Segregation**

Greening with Jobs gives particular attention to the issue of occupational segregation. It acknowledges that most employment gains associated with green technology and keeping global warming below 2°C are likely to be in currently male-dominated industries, such as renewables, manufacturing and construction. For example, one of the main sectors for employment generation is the renewable energy sector, where women are seriously under-represented. Figures from the US put the share of women in solar employment as low as 28 per cent in 2016, and in France, women working in the production and distribution of energy and water was only 21 per cent in 2012.<sup>31</sup> Also of key importance in the generation of new jobs is the field of science, technology, engineering and mathematics (STEM), where again women are under-represented.<sup>32</sup> At the other end of the spectrum, as we have seen, women are over-represented in recycling and waste collection, where the pay is dismal, and the working conditions are dangerous and exploitative. Measures to mitigate climate change could therefore diminish the share of women in total employment unless action is taken to reduce occupational segregation.<sup>33</sup>

What solutions, then, is the ILO proposing? Greening with Jobs briefly mentions the importance of stepping up measures to promote decent working conditions in waste management sectors. For higher skilled jobs, it stresses the importance of skills development programmes. However, there is clearly a long way to go on this score. In 27 countries, the report finds that key policy documents on skills development for the green transition did not mainstream gender equality. The report concludes several times that ‘without a clear recognition of and efforts to narrow the gender gap in terms of sectoral/occupational segregation and access to training, there is a high risk that the transition to a green economy will only perpetuate the existing situation’.<sup>34</sup> It also acknowledges that most of the policies and programmes identified in the report are targeted at semi-skilled and skilled jobs, especially in the energy sector and other environmental protection sectors. There are hardly any systematic active

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<sup>31</sup> *Ibid.*, 147.

<sup>32</sup> *Ibid.*, 151.

<sup>33</sup> *Ibid.*, 44.

<sup>34</sup> *Ibid.*, 151; see also *ibid.*, 146, citing Von Hagen and Willems 2012.

labour market policies to support disadvantaged groups in the development of appropriate skills.<sup>35</sup>

As well as jobs in renewable energy, particular emphasis has been placed on digital solutions. According to the EU document *A Roadmap to Recovery*, issued in 2020:

The Green transition and the Digital transformation will play a central and priority role in relaunching and modernising our economy. Investing in clean and digital technologies and capacities, together with a circular economy, will help create jobs and growth and allow Europe to make the most of the first-mover advantage in the global race to recovery. It will also help make us more resilient and less dependent by diversifying our key supply chains.<sup>36</sup>

However, this document does not mention gender at all. More depth on gender and the digital revolution is supplied by UN Women.<sup>37</sup> In their policy document on the digital revolution and gender, UN Women set out some of the foundational issues which need to be addressed if women are to be truly part of this future. Even though Sustainable Development Goal (SDG) 5b pledges to enhance the use of information and communications technology (ICT) to promote the empowerment of women, women's access to the internet and mobile phones is about 85 per cent of men's, on average. UN Women's figures show that as many as 1.7 billion women in the global south are unconnected, and 327 million fewer women than men have a smartphone and can access mobile internet.<sup>38</sup>

But, as this document demonstrates, this is not just about access. It is also crucial to take account of the power that sustains this gendered inequality. A key example, highlighted by UN Women, is the concentration of economic and political power in the tech sector and its resistance to regulation. According to the report, 'gendered practices' mediate the digital revolution: 'The stereotype of technology and engineering as male domains is pervasive across educational contexts, affecting girls' confidence in their technical skills, shaping their perception of their own identity and discouraging them to become involved.'<sup>39</sup> Gender biases in relation to technology start with cultural

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<sup>35</sup> *Ibid.*, 151.

<sup>36</sup> European Commission, *A Roadmap for Recovery: Towards a more Resilient, Sustainable and Fair Europe* (2020) <https://www.consilium.europa.eu/media/43384/roadmap-for-recovery-final-21-04-2020.pdf> accessed 7 April 2022, 3.

<sup>37</sup> Judy Wajcman, Erin Young and Anna Fitzmaurice, 'The Digital Revolution: Implications for Gender Equality and Women's Rights 25 Years after Beijing' (2020) UN Women Discussion Paper No. 36.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, 9.

stereotypes, are perpetuated in schools, and entrenched through the ‘masculine culture of tech workplaces’.<sup>40</sup> Women, who are less fleet-footed in the labour market due to higher burdens of domestic responsibility, will be less able to capture new jobs in the digital economy than men. Already, women in the platform work economy (doing work that is outsourced via platforms or apps<sup>41</sup>) are underpaid and undervalued. Yet technology, artificial intelligence (AI) and algorithms affect women in many parts of their lives, especially in their access to capital and to social welfare.

This demonstrates that a key missing element in the ILO’s analysis is the background question of why there is such severe job segregation within the labour market, and what the obstacles are to change. Simply stating the need for more policies is unlikely to achieve real change unless the systemic nature of gender inequalities in the labour market is recognized. Inequalities in education at school, gender stereotypes in relation to appropriate jobs, women’s prime responsibility for domestic and caring work, and women’s lack of participation in decision-making are well known to feminists as contributing factors to women’s labour market inequalities and the resulting job segregation.<sup>42</sup> Behind this is the structural entrenchment of patriarchal power imbalances. To be sure that women can participate on equal terms in the new green economy, it is not enough to propose sticking plaster solutions. It is not simply a careless omission that skills training for women is not mainstreamed or that decent work for the poorest women is not prioritized. To ensure the green economy is also a feminist one, these feminist insights need to be applied.

### **(c) The Role of the State and Public Provision**

Greening with Jobs pays some attention to the role of the state and public provision. Its focus, however, is primarily on social protection, which it regards as part of the solution to contexts in which job losses occur due to the green transition. Three types of measures are proposed: unemployment benefits; cash transfers; and public employment programmes.<sup>43</sup> Missing from this document is a much more thoroughgoing macroeconomic assessment, which would require a fundamental reorientation of economic goals away from growth for

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<sup>40</sup> *Ibid.*, 11.

<sup>41</sup> Fairwork, About <https://fair.work/en/fw/about/> accessed 10 April 2022; Mark Graham and others, ‘The Fairwork Foundation: Strategies for Improving Platform Work’, in *Challenges of Digital Inequality: Digital Education, Digital Work, Digital Life* (Proceedings of the Weizenbaum Conference, 2019).

<sup>42</sup> See, e.g., Fredman (n 21) chs 2, 4 and 5.

<sup>43</sup> ILO, *Greening with Jobs* (n 18) ch 4. It also refers to payments for ecosystem services, but these are as much private-sector as public-sector led.

its own sake to objectives that have equality, well-being and environmental protection at their heart. These broader themes are considered below. First, I turn to a gendered assessment of these three social protection systems.

So far as unemployment benefits is concerned, Greening with Jobs acknowledges that the potential of unemployment protection policies to support the transition to greener economies is severely limited by its restricted coverage. While unemployment benefits might ease the transition to new forms of sustainable work, they will exclude women with interrupted work histories (particularly where they are based on a contributions record), and those in the precarious and informal sector. Only approximately one-third (38.6 per cent) of the global workforce is covered by unemployment protection under national legislation, but this is highly unequal, with over 80 per cent coverage in Europe, Oceania and North America, and as little as 4.2 per cent in sub-Saharan Africa. Most coverage is based on mandatory contributions and women are less likely to be legally covered in many regions.<sup>44</sup> The report concludes that a gender sensitive approach is needed to compensate for existing disparities and prevent their emergence,<sup>45</sup> but it does not give detail on how. Here too, only a holistic approach will do more than dent the surface. For women in the formal sector, it is crucial that interruptions due to childcare or elder care are not penalized in relation to access to unemployment benefits. More fundamentally, all parents should be expected to take time for childcare, so that unemployment benefit schemes are fully redrawn to ensure they extend to all.

The second type of state intervention identified by the ILO are cash transfer programmes. Cash transfers are clearly necessary to complement unemployment protection,<sup>46</sup> but their gendered effect depends on their design, eligibility criteria and levels of payment. Conditional cash transfers, although very popular with the World Bank, are stigmatic and place unnecessary burdens on women.<sup>47</sup> Instead, cash transfers should be unconditional. In this form, cash transfers aimed at mitigating effects of drought and other climate changes can assist in protecting people from possible loss of income due to implementation of environmental policies, thus redressing disadvantage in a non-stigmatic manner. But the level of payment, while increasing women's purchasing power, is inevitably too small to truly transform structures. Real structural change, instead, comes with a full recognition of the state's role in providing quality public services, including health and education, for everyone. Employment in such services can also be green.

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<sup>44</sup> *Ibid.*, 107.

<sup>45</sup> *Ibid.*

<sup>46</sup> ILO, *Greening with Jobs* (n 18) 108.

<sup>47</sup> Magdalena Sepúlveda Carmona, Report of the Special Rapporteur on Extreme Poverty and Human Rights (Human Rights Council, 22 May 2014).

The ILO's third proposed measure of state contribution to greening of jobs consists of public employment programmes. While these have the potential to be ambitious and a key to a far more fundamental redirecting of the economy, the Greening with Jobs document acknowledges that most public employment programmes are social protection tools, which aim to provide temporary employment in labour-intensive infrastructure.<sup>48</sup> Particularly problematically, many existing programmes are aimed at substituting for a proper social protection floor where coverage is insufficient or non-existent. The Greening with Jobs document's primary suggestion is to use such schemes to include jobs necessary for climate change mitigation and adaptation, for example in reforestation, water and soil conservation, flood control and erosion reduction. It predicts that their use is likely to increase over the coming years.

One of the illustrations given by the report is the Indian Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA). According to government figures, 60 per cent of the work hours provided through the programme in 2012 involved water conservation, and a further 12 per cent were related to irrigation facilities.<sup>49</sup> The Greening with Jobs report gives a positive spin on MGNREGA. However, recent research suggests that it may not be providing the transformative changes hoped for.<sup>50</sup> There have certainly been some notable positive outcomes, such as providing some food security and giving short-term income relief. There are also data suggesting that women have been given access to work. However, Breitzkreuz's study suggests that beneath the surface, the prevailing gender and other hierarchies were not interrupted. For example, work was only available to women or other low-status social groups if men had other sources of employment.<sup>51</sup> Work was generally in short supply too. Athreya and others found that only 10 per cent of household in India were able to get the full 100 days of work, and the majority of users of MGNREGA were in fact men.<sup>52</sup> Moreover, the focus groups conducted by Breitzkreuz showed clear cases of gender-and class-based inequalities in the implementation of the programme. In particular, because women's domestic responsibilities reduced their ability to work the same number of hours as

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<sup>48</sup> ILO, Greening with Jobs (n 18) 110.

<sup>49</sup> ILO, Greening with Jobs (n 18) 111. See also GIZ, 'Environmental Benefits of the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA-EB)' <https://www.giz.de/en/worldwide/29773.html> accessed 6 April 2022.

<sup>50</sup> Rhonda Breitzkreuz and others, 'The Mahatma Gandhi National Rural Employment Guarantee Scheme: A Policy Solution to Rural Poverty in India?' (2017) 35 *Development Policy Review* 397, 414.

<sup>51</sup> *Ibid.*

<sup>52</sup> Venkatesh Athreya, Arunachalam Rajagopal and Narayanan Jayakumar, Report on Some Aspects of Food Security Policy Interventions (Chennai: MSSRF 2014).



men, and because they did not have the same physical strength as men, they tended to earn lower wages.<sup>53</sup> To fully realize MGNREGA's potential would need a greater appreciation of these gendered realities. Agrawal goes further and shows that the architecture of the programme is centrally flawed because it aims to achieve too many conflicting objectives. Despite ballooning costs, it has only provided an average of 50 days' employment on average per household, only half of what is promised. In particular, women's participation is low in several states, due to poor governance, as well as cultural norms. Moreover, gender empowerment is not achieved as women are excluded from planning.<sup>54</sup>

Other documents aiming to influence policy direction in the future take a wider view of the key role of the state, including in relation to macroeconomic policy. Writing in the Friedrich Ebert Stiftung collection, *Building Back Better: A Call for Courage*, Olivier de Schutter, the UN Special Rapporteur for extreme poverty and human rights, emphasizes the importance of moving away from the notion of 'growth' as a policy aim.<sup>55</sup> It cannot be assumed, he argues, that more wealth creation will lead to the adoption of redistributive social policies and the financing of environmental measures. We need a development model that incorporates poverty eradication and environmental sustainability, rather than seeing them as a hoped-for by-product. The key, he suggests, is to aim for 'triple dividend' actions, which simultaneously contribute towards low-carbon and biodiverse societies, and create employment opportunities for people in poverty while improving their access to the goods and services essential to the enjoyment of human rights.<sup>56</sup> In his short piece, he does not, however, expressly deal with how his recommendations impact on the gendered nature of work. For example, his triple dividend recommendation for the agri-food sector is to reduce external inputs and enhance soil health, thereby increasing incomes of small-scale farmers and guaranteeing adequate nutrition for local communities. What he does not factor in are the gendered hierarchies in the agri-food sector, driven by patriarchal restraints on women's right to own property, access to credit, and ability to make independent decisions.

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<sup>53</sup> Breitzkreuz and others (n 50), 412.

<sup>54</sup> Girish Agrawal, 'Mahatma Gandhi Rural Employment Guarantee Act: Design Failure, Implementation Failure or Both?' (2019) 44 *Management and Labour Studies* 349, 351.

<sup>55</sup> Olivier de Schutter, 'Combating Poverty in a World with Limited Resources' in Yvonne Bartmann and Salome Lienert (eds), *Building Back Better: A Call for Courage* (Friedrich Ebert Stiftung 2020).

<sup>56</sup> *Ibid.*, 9.

**(d) Global Interconnectedness**

The Greening with Jobs report does pay some attention to global interconnectedness, and the different needs of women in different locations in relation to climate change and decent work. One of its key recommendations is that the adoption of more sustainable agricultural policies can create wage employment in large organic farms and allow smallholders to diversify their sources of income through conservation. It also calls for a circular economy based on the reuse, recycling, remanufacture and repair of goods in place of the traditional model of ‘extract, make, use and dispose’, predicting that this will create about six million new employment opportunities across the world. However, while it acknowledges that rural women have lower access than men to land, credit, agricultural inputs, decision-making bodies, social insurance and training,<sup>57</sup> it does not make direct recommendations in this respect. The report also emphasizes social dialogue, but again does not consider women’s role in that dialogue.

**(e) Revaluing Care and Care Work**

The Greening with Jobs report notably does not engage with carers, either as paid workers or as unpaid workers. The question of care is, instead, dealt with in detail and with sensitivity in its separate publication *Care Work and Care Jobs for the Future of Decent Work*. This document ‘charts a new road map of quality care work – one in which unpaid carers can enjoy the rewards of care provision without paying social and economic penalties; and care workers have access to decent jobs that will set the foundation of quality care services’.<sup>58</sup> This report is enthusiastic about the vital importance of ‘green enterprises, waste management and recycling and renewable energies ... to realizing rural and indigenous women’s and men’s potential as key agents of change’.<sup>59</sup> However, apart from calling for gender-equal opportunity, it does not confront the job segregation problem above.

More promising are documents without the official stamp of the ILO, especially those produced in the wake of the pandemic. Particularly interesting are feminist economists’ approaches to the care economy. Using the catchphrase ‘the Purple Economy’, purple being the symbolic colour of women’s movements in many countries, this approach sets out a vision of a gender egalitarian economic order which justifies care as a priority economic issue. Its

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<sup>57</sup> ILO, *Greening with Jobs* (n 18) 25.

<sup>58</sup> ILO, *Care Work* (n 20) vi.

<sup>59</sup> *Ibid.*, 293.

main organizing principle is to recognize, reduce and redistribute unpaid care work, a formulation that was endorsed at the UN Commission on the Status of Women in 2014, and is also the organizing principle of the ILO Care Work report. Interestingly, it draws parallels between the Purple Economy and the Green Economy, counterposing ‘purple jobs’ to ‘green jobs’. Just as environmental costs should be internalized, so should the costs of caring labour. The purple economy is based on four pillars: universal social care, which provides quality care services for all; labour market regulation for work-life balance; ecologically sound physical infrastructure providing rural communities with access to clean water, sanitation, energy, transport and communication; and an enabling macroeconomic environment, which sets fiscal and monetary policies for decent employment.<sup>60</sup>

Particularly exciting and insightful is the 2020 report of the Women’s Budget Commission in the UK. Entitled ‘Creating a Caring Economy: A Call to Action’, the report argues persuasively for a caring economy, which, it demonstrates, simultaneously ensures the achievement of gender equality, environmental sustainability and well-being. Investment in paid care services improves well-being by meeting people’s care needs. It improves gender equality by requiring decent work for care workers. And care is a relatively clean industry. According to the report, investing in care is three times less polluting per job created overall than the equivalent investment in the construction industry.<sup>61</sup> De Henau and Himmelweit have calculated that investment in care also produces more jobs, and therefore more revenue for the government than construction.<sup>62</sup> Crucial to this is an increase in wages of care workers to match the real living wage, as well as the provision of training. Since a large number of these jobs would go to women, such investment would also decrease the gender gap. Most importantly, it will lead to a healthier population living in a healthier environment. The virtuous circle of public investment in care work which ensures decent pay and working conditions is also beneficial for the green economy.

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<sup>60</sup> Özlem Onaran, Cem Oyvat and Eurydice Fotopoulou, ‘The Effects of Income, Gender and Wealth Inequality and Economic Policies on Macroeconomic Performance in the UK’ (2019) Greenwich Papers in Political Economy No. 71.

<sup>61</sup> Commission on a Gender-Equal Economy, ‘Creating a Caring Economy: A Call to Action’ (2020) Women’s Budget Group 5.

<sup>62</sup> Jerome de Henau and Susan Himmelweit, ‘A Care-Led Recovery from Coronavirus’ (2020) Women’s Budget Group.

## **(f) The Interaction Between Paid and Unpaid Work**

Care Work and Care Jobs for the Future of Decent Work makes the link between the reductions in domestic drudgery which can be achieved by greater access to electricity, water and sanitation and the creation of green jobs.<sup>63</sup> The African Development Bank also sees an opportunity to find a green response to both household drudgery for women and the need for jobs. It suggests that sub-Saharan Africa could generate 67 per cent of its power from renewable resources by 2030, which could create two million additional green jobs by 2050.<sup>64</sup> Nevertheless, the positive synergies between investing in cleaner energy and wider distribution of energy need to be more clearly incorporated into policy. This would have a hugely important effect both on reducing indoor pollution and diminishing the arduousness of domestic work for women.

Post-pandemic, for urban women, one key new development has been the move to working from home for those whose work is appropriate. There are clearly benefits in that less time is spent on travel, with the associated decrease in levels of pollution. However, not enough emphasis has been placed on the need to address gendered effects. In particular, there is a greater need for home energy efficiency and high-speed internet connections. There has certainly been a greater effect on women's work-life balance. Although there might be somewhat more sharing in principle, in fact it has been shown that women are doing significantly more caring work, including assisting with online teaching, than men.<sup>65</sup>

## **(g) Women's Participation**

While feminists have stressed the centrality of participation by women in decisions relating to the environment, this aspect is surprisingly underplayed in the ILO documents on the future of work and climate change. Greening with Jobs has a section on social dialogue, but while acknowledging that it has a role to play, it makes no mention of women or other disadvantaged groups. This contrasts with the UN Climate Change website (UNFCCC) and UN WomenWatch,

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<sup>63</sup> ILO, Care Work (n 20) 293.

<sup>64</sup> African Development Bank, 'IRENA and African Development Bank Partner to Scale Up Renewable Energy Investments in Africa' (2020) para 5 <https://www.afdb.org/en/news-and-events/press-releases/irena-and-african-development-bank-partner-scale-renewable-energy-investments-africa-39798> accessed 6 April 2022.

<sup>65</sup> OECD, 'Caregiving in Crisis: Gender Inequality in Paid and Unpaid Work During COVID-19', OECD Policy Responses to Coronavirus (13 December 2021) <https://www.oecd.org/coronavirus/policy-responses/caregiving-in-crisis-gender-inequality-in-paid-and-unpaid-work-during-covid-19-3555d164/> accessed 10 April 2022.

both of whom emphasize participation and consultation. UNFCCC acknowledges that women's unequal participation in decision-making compounds inequalities, preventing women from fully contributing to climate-related planning, policy making and implementation. However, this document errs too far towards depicting women as agents of change. It states:

... women can (and do) play a critical role in response to climate change due to their local knowledge of and leadership in e.g. sustainable resource management and/or leading sustainable practices at the household and community level. Women's participation at the political level has resulted in greater responsiveness to citizen's needs, often increasing cooperation across party and ethnic lines and delivering more sustainable peace. At the local level, women's inclusion at the leadership level has led to improved outcomes of climate related projects and policies. On the contrary, if policies or projects are implemented without women's meaningful participation it can increase existing inequalities and decrease effectiveness.<sup>66</sup>

This is repeated in more strident terms by the World Economic Forum, under the headline 'We Can Solve Climate Change – If We Involve Women'. Not only does it place the responsibility for change on women's agency, this piece, written in 2019, essentializes women with stereotypically 'feminine' attributes. Thus, it is stated: 'Women bring more empathy and inclusiveness in their advocacy and problem-solving, which enhances their efficacy as sustainability leaders.'<sup>67</sup>

UN WomenWatch, under the heading 'Incorporating Gender Perspectives and Involving Women as Agents of Change in Responses', highlights the importance of including gender perspectives, and particularly gender budgeting, in relation to climate change.<sup>68</sup> The importance of gender perspectives is certainly to be welcomed, as is the recommendation on consultation and participation of women in climate change initiatives. However, even this document feels the need to justify women's participation on the basis that:

Women can make substantive contributions through their knowledge and experience on issues related to the management of natural resources. For example, women in leadership positions – at national, local and community levels – have made a visible

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<sup>66</sup> UNFCCC, 'Introduction to Gender and Climate Change', United Nations Climate Change para 2 <https://unfccc.int/gender> accessed 7 April 2022.

<sup>67</sup> Vaishali Sinha, 'We Can Solve Climate Change – If We Involve Women' (2019) *World Economic Forum* <https://www.weforum.org/agenda/2019/09/why-women-cannot-be-spectators-in-the-climate-change-battle/> accessed 6 April 2022.

<sup>68</sup> WomenWatch, 'Incorporating Gender Perspectives and Involving Women as Agents of Change in Responses' in *Women, Gender Equality and Climate Change: Fact Sheet* [https://www.un.org/womenwatch/feature/climate\\_change/factsheet.html#change](https://www.un.org/womenwatch/feature/climate_change/factsheet.html#change) accessed 7 April 2022.

difference in natural disaster responses, both in emergency rescue and evacuation efforts and in post-disaster reconstruction, as well as in the management of essential natural resources, such as fresh water.<sup>69</sup>

While women's voice at the table is crucial, it should not be necessary to justify it on the basis of its utility. It should be a right, to be respected in itself, and regardless of instrumental value.

## 2. GREEN AND FEMINIST

The Covid-19 pandemic has wrought havoc with both global health and global employment. Women workers, already precarious, have been particularly vulnerable, whether through added burdens of paid and unpaid caring work, unemployment, domestic violence or lack of access to social protection. This comes on top of women workers' particular vulnerabilities to climate change. With unprecedented public spending, and a belated recognition of the importance of interdependence, there is nevertheless an opportunity to build back better. This chapter has critically analysed the extent to which gender perspectives have been incorporated into the vision of the ILO for a new, green economy, which combines sustainability with decent work. It is clear that its vision is at best partial when it comes to the future of women within the green economy.

How then should we envisage a green and feminist future for the world of work? As demonstrated, a much clearer feminist perspective is needed to ensure that the green economy does not simply replicate current highly gendered labour force inequalities. Feminism clearly has many facets, many of which are canvassed in other chapters in this book. For the purposes of this chapter, I argue that the right to substantive gender equality entails simultaneously addressing four dimensions:<sup>70</sup> redressing gendered disadvantage (the redistributive dimension); addressing stigma, stereotyping, prejudice and violence (the recognition dimension); facilitating women's voice and participation (the participative dimension); and accommodating difference and achieving structural change (the transformative dimension).<sup>71</sup>

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<sup>69</sup> Ibid., para 6.

<sup>70</sup> Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712; Fredman (n 21) chap 1; S Fredman and B Goldblatt, 'Gender Equality and Human Rights' (2015) UN Women Discussion Paper No. 4.

<sup>71</sup> See also Maeve Cohen and Sherilyn MacGregor, 'Towards a Feminist New Deal for the UK: A Paper for the Women's Budget Commission on a Gender-Equal Economy' (2020) Women's Budget Group, which drew on this four-dimensional framework.

The first dimension requires any future plan for greening the labour force to expressly address the gendered nature of disadvantage in the workforce. An ostensibly gender-neutral approach will simply favour existing distributions of power and wealth. The predominant focus of current policymaking for a just transition in the labour market is on workers in fossil fuel industries, whose jobs are threatened by the move to clean energy. While this is clearly an important issue, the fact that the paradigm is a heavily male-dominated industry has meant that policy proposals are fashioned for male working patterns, leaving out of account responsibility for childcare and domestic work. It is therefore not an accident that, as we have seen, the ILO's proposals for unemployment benefits are based on a male model of full-time working which disadvantages women. Specific measures are required to address the ways in which gender patterns disadvantage in the workforce.

Gendered disadvantage contributes to and is reinforced by stereotyping, stigma, prejudice and violence against women. In particular, stereotyping of women as carers and domestic workers, and of care as being possible to do for free at home, has consistently depressed the value of care in the paid workforce. Both the influence of unpaid care on women's paid work, in whatever occupation, and the low value of paid care work in the workforce, have meant that women disproportionately congregate in precarious and poorly paid jobs. The second dimension of the right to substantive gender equality therefore requires any future policy on greening the workforce to address stigma, stereotyping, prejudice and violence.

The third dimension of the right to substantive equality is to amplify women's voice and facilitate participation. Women have consistently been marginalized in policymaking over climate change. When they have been included, as we have seen, their role is often fashioned in a manner which is itself based on stereotypical perceptions. Women's participation plays a central role in the engendering of climate change. Participation is particularly important to avoid characterizing women simply as victims. The specificity of women's experience of climate change and the particular burdens arising from the gendered structure of the workforce should be recognized without casting women as passive victims. At the same time, in stressing the key role of participation and voice, women should not be attributed with agency which they frequently do not have. In particular, women should not be regarded as agents of change, as they frequently are in the development field. This burdens and essentializes women. This is true both of assumptions that because women do the housework, they should take the lead in recycling and reduction of

waste,<sup>72</sup> and of assumptions that women are more interested in behavioural change, whereas men are more taken with technical change.<sup>73</sup> The challenge is to achieve participation and voice without regarding women as possessing exaggerated agency, or as being simply victims. Moreover, participation is crucial, but it should not be seen as a reason not to pay attention to substantive issues. In other words, what can and should women be arguing for in the climate change arena?

Fourth, the right to substantive gendered equality should accommodate difference and achieve structural change. Simply attempting to slot women into existing structures may change the gender composition at some levels. But it will not change the underlying gendered division of labour in any thoroughgoing way. At most, better-paid women will hire low-paid women to take on their childcare and domestic work. Importantly, all four dimensions need to be optimized simultaneously.

This framework of the right to gendered substantive equality points a way towards a future reconstruction of the labour force that can incorporate values that are both green and feminist. Revaluing caring work, and redistributing domestic work, whether paid or unpaid, is at its centre. This arises directly from paying simultaneous attention to redressing gendered disadvantage, addressing stereotyping, and changing underlying gendered power structures. Care is an essential contribution to the social fabric. It is also green. As we have seen, investing in care is three times less polluting per job created overall than the equivalent investment in the construction industry. A green and feminist future will therefore provide care workers with decent work conditions, decent pay, proper training and job security. As feminist economists have shown, this makes good economic sense. Onaran, and others have shown that a 1 per cent increase in public social spending on education, childcare, health and social care ('purple social infrastructure'), a 1 per cent increase in the female hourly wage rate, and a 1 per cent increase in the male wage rate, can have very positive impacts on GDP, if accompanied by a 1 per cent increase in the tax rate on wealth and profit income and a 1 per cent decrease in the tax rate on wage income.<sup>74</sup>

However, focusing only on care to create a green and feminist labour force itself risks stereotyping women. The importance of reducing stereotyping in

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<sup>72</sup> Rowena Maguire, 'Gender, Climate Change and the United Nations Framework Convention on Climate Change' in Susan Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019).

<sup>73</sup> GenderCC Women for Climate Justice 'Shifting the Narratives: Climate Justice and Gender Justice' (2021) [https://www.gendercc.net/fileadmin/inhalte/dokumente/8\\_Resources/Publications/GenderCC\\_ShiftingTheNarratives.pdf](https://www.gendercc.net/fileadmin/inhalte/dokumente/8_Resources/Publications/GenderCC_ShiftingTheNarratives.pdf) accessed 7 April 2022.

<sup>74</sup> Onaran and others (n 60).



order to redress disadvantage and increase participation also points to paying close attention to job segregation, and particularly to women's uneven access to the green jobs of the future, including STEM, digital and green infrastructure, and green construction projects. This brings into play the structural dimension, which recognizes the deep-seated forces maintaining these stereotypes and requires transformative change. As we have seen, paying lip-service to including women in training programmes for future STEM jobs has not changed the background structures that obstruct women from entering such jobs. A far more thoroughgoing transformation of underlying institutional forces is required. As well as changing the division of labour in the home, it is necessary to change stereotypes of 'women's work' that shape the options available to girls and women from the beginning of their school years.

Redressing women's disadvantage in the workforce further requires structural change both in the division of labour in the home as regards childcare, and the availability of green solutions to domestic drudgery. As we have seen, there is much talk of the distribution of clean energy, but not enough about ensuring that this reaches disadvantaged women, in particular, those facing high levels of indoor pollution due to cooking smoke. Nor should the unpaid work required as part of greening the domestic space be regarded as essentially women's responsibility, invisible within the private sphere. As Farbotko shows, 'domestic environmental labour' is time-consuming process and labour intensive, often requiring mundane and repetitive chores such as recycling domestic waste, sourcing local agricultural products or installing and using grey-water systems.<sup>75</sup> Behind all of this is the need to address patriarchal power imbalances. Structural change must recognize the ways in which stereotyping of women is sustained and fuelled by patriarchal structures. Most importantly, women's unequal access to land and agricultural resources needs to be redressed so that they are able to fully participate in climate-friendly changes.

To be serious about a green and feminist future in the world of work, including both paid and unpaid work, requires further a central role for the state. Leaving it to the marketplace will not provide good quality work, with care at its core, as demonstrated by current conditions in so many countries. Similarly, left to itself, a green transition driven by free enterprise, to the extent that this is possible, will replicate gendered hierarchies in the workforce. Building back better necessitates robust investment in public services available to all and not just to the poor or worst off. It also requires green and sustainable infrastructure. In carrying out these projects, workers should be directly employed under employment contracts, fulfilling ILO standards of decent work especially in

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<sup>75</sup> Carol Farbotko, *Domestic Environmental Labour* (Routledge 2018).

respect of decent wages. Rather than the sporadic and largely unskilled work provided under current public employment projects, social protection should be complemented with guaranteed work on decent terms for the unemployed, together with relevant training to provide high quality public services.<sup>76</sup> This is both environmentally friendly, and advances substantive gender equality, as well as increasing social capital for all. For example, publicly funded elder care reduces unpaid care work and provides dignity for older people, and is environmentally friendly while promoting substantive gender equality.

## CONCLUSION

The UN Climate Change Conference held in the UK in 2021, known as COP26, included a day devoted to gender. The outcome was, however, full of well-meaning generalizations. Nothing was said about achieving substantive gender equality in a green and sustainable future workforce. To build back better for a green and feminist workforce, we need to be sure that feminist perspectives are included. We need to work together not just to get our voices heard, but also on the substantive ingredients of how a green and feminist future for all women and work should be achieved.

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<sup>76</sup> Abhijit Banerjee and Esther Duflo, *Good Economics for Hard Times* (Allen Lane 2019) 317–318; Richard Layard, ‘How to Save Pandemic Survivors from The Scourge of Unemployment’ *Financial Times* (8 May 2020) <https://www.ft.com/content/bc513b58-8ef2-11ea-af59-5283fc4c0cb0> accessed 7 April 2022.

# 6. Radical connectedness: Reproductive rights, climate justice and gender equality

**Cathi Albertyn**

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## INTRODUCTION

The 1994 International Conference on Population Development in Cairo (ICPD) represented a seismic shift in the conceptualization of women's reproductive lives as it moved from population control policies to place human rights, equality and freedom at the centre of women's sexual and reproductive health.<sup>1</sup> Underlying this was a movement away from Malthusian ideas that population growth would inevitably outstrip resources, requiring women's fertility to be controlled, to the idea that giving women autonomy over their reproductive choices would enhance their ability to make decisions that take account of individual, household and community needs and well-being. Yet as the effects of climate change on sustainable life and livelihoods become ever more apparent, attention has returned to the relationship between population size and women's fertility, both in climate change thinking and in development and reproductive health academic writings, policies and programmes. This has raised concerns that women's fertility and reproductive rights are being instrumentalized in the service of new forms of population control as 'an urgent response to the challenge of climate change'.<sup>2</sup>

How should feminists address these apparent clashes between women's reproductive autonomy and protecting the planet? Should feminists be concerned with population numbers? Is there any value in instrumentalizing climate change to secure wider access to reproductive health-care services for

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<sup>1</sup> United Nations, 'Report of the International Conference on Population Development' A/CONF.171/13 (1994).

<sup>2</sup> Anne Hendrixson and others, 'Confronting Populationism: Feminist Challenges to Population Control in an Era of Climate Change' (2020) 27 *Gender, Place and Culture* 307, 308.

millions of women who currently have little or no access? Or is this merely a reprise of the shameful history of race, class and gender injustice in population control programmes? If so, how can we frame a just and egalitarian approach to women's reproductive rights in an era of planetary crisis?

This chapter argues that a concern with reproductive rights in the context of climate change and environmental degradation compels us to think more deeply about a radical connectedness of reproductive justice and climate justice, as part of a wider project of social justice. Here 'radical' is used in its routine, rather than political, sense to mean fundamental and comprehensive connectedness. I suggest that an expanded idea of social reproduction that encompasses care for self, family, community, the environment, and the planet provides an important theoretical lynchpin for this connectedness. However, the idea of reproductive rights is best nested in mutually reinforcing ideas of equality and freedom, that avoid more abstract and instrumental uses of reproductive autonomy divorced from women's actual conditions and needs. Drawing from the connectedness indicated by social reproduction, I argue for an understanding of women's substantive reproductive freedom in the context of a transformative substantive equality that takes account of both reproductive and climate justice. This multidimensional and multilayered idea of equality directs attention to the social and economic conditions and power relations that operate at all levels to enable or constrain women's substantive ability to choose whether, when, and how to have and raise children in the context of meaningful family, community, environmental, and planetary well-being. It thus allows for a deeper normative, strategic and practical engagement with reproductive rights and their alignment with critical ideas of social justice, represented by reproductive and climate justice.

This chapter develops these arguments as follows. The first section discusses the new populationist approaches that have come to permeate some climate change, development and reproductive health discourses and programmes. It illustrates how, despite their emphasis on autonomy and empowerment, reproductive rights can still be caught up with ideas that place the burden of saving the planet on managing the fertility of women of colour in the global south. Accordingly, even an ostensibly progressive language of reproductive rights can limit women's reproductive freedom at local and global scales; reproduce racialized and gendered scripts; enable forms of direct and indirect violence and coercion; obfuscate underlying inequalities at all levels; and even divert attention from more systemic causes of climate change. These are some of the normative, practical and strategic risks associated with the instrumentalization of reproductive rights to reduce population numbers and manage climate change. This section ends by considering the possibilities of a feminist concern with population numbers, and concludes that this is best understood through a social justice lens.

I turn to how we might develop a more just and egalitarian approach based on social justice in the second section. Here I use the idea of social reproduction (of self, family, community and planet) to develop the idea of reproductive justice and its relationship with climate justice. Finally, I turn to a discussion of an expanded and transformative substantive equality as a basis for more transformative understandings of reproductive rights in the context of climate crisis. I argue that reproductive rights should be located in a multilayered context of relational (in)equalities that connects reproductive and climate justice with transformative substantive equality and freedom. This allows us to identify better the range of systemic measures required to create reproductive justice in a more just and sustainable world, including the strategic use of law and reproductive rights.

## 1. REPRODUCTIVE RIGHTS AND CLIMATE CHANGE

### (a) **Population Control and Reproductive Rights: Women Still in Service to the Planet?**

There is a rich feminist history of population control.<sup>3</sup> This section can only provide broad historical brushstrokes as a context to the chapter. However, it is widely recognized that, in the past, forms of coercive population control, sustained initially by eugenic thinking and later by Malthusian rationalizations,<sup>4</sup> played out on the bodies of poor, black, working class, and migrant women in the global north and south. From forced sterilization to routine coercive practices of contraception provision, these women bore the brunt of policies which, after 1960, placed population control at the centre of development policies to avoid overpopulation and environmental degradation.<sup>5</sup> Paul Erlich's 1968 bestseller, *The Population Bomb*,<sup>6</sup> painted an apocalyptic future of overpop-

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<sup>3</sup> See, e.g., Alison Bashford, *Global Population, History, Geopolitics and Life of Earth* (Columbia University Press 2013); Ian Angus and Simon Butler, *Too Many People? Population, Immigration and the Environmental Crisis* (Haymarket Books 2011); all articles in (2020) 27(3) *Gender, Place and Culture*; Betsy Hartmann *Reproductive Rights and Wrongs. The Global Politics of Population Control* (South End Press 1995).

<sup>4</sup> Thomas Malthus (1766–1834) argued that, left unchecked, the human population would outgrow its capacity to feed itself, leading to hunger, poverty, disease, war and death. (*An Essay on the Principle of Population*, J Johnson 1798).

<sup>5</sup> Betsy Hartmann, Anne Hendrixson and Jade Susser, 'Population, Sustainable Development and Gender Equality' in Melissa Leach (ed), *Gender Equality and Sustainable Development* (Routledge 2016).

<sup>6</sup> Paul Erlich, *The Population Bomb* (Stanford University Press 1968).

ulation leading to planetary crisis. It was typical of the neo-Malthusian environmentalists who influenced development policies to focus on top-down rural development and targeted population control programmes in the global south.<sup>7</sup> The shift to sustainable development, after the 1987 Brundtland Report, recognized the role of global inequalities in producing poverty in the global south and high levels of consumption and production in the north.<sup>8</sup> Although this Report recognized the connections between economic growth, environmental protection and social equality, it nevertheless continued to perpetuate the idea of overpopulation as a primary cause of environmental problems, and women's fertility control as a key solution. According to feminist criticisms by Betsy Hartmann and others, the Report drew heavily on 'overpopulation paradigms' to position women 'as agents of degradation, victims of environmental stress, potential contributors to environmental restoration and culpable for alarming population growth rates'.<sup>9</sup> It accordingly called for 'direct measures to reduce fertility, to avoid going radically beyond the productive potential to support the population'.<sup>10</sup>

Framing population issues in environmental terms historically led to widespread and coercive practices of forced sterilization and high-risk contraceptives, largely on poor women in the global south and from racial and ethnic minorities in the north.<sup>11</sup> The challenges by feminist activism in the late 1980s and early 1990s saw potentially radical conceptual and policy shifts in reproductive health from population control to reproductive rights.<sup>12</sup> Indeed, despite its own population control tendencies, the Brundtland Report acknowledged that 'providing people with facilities and education that allow them to choose the size of their families is a way of assuring – especially for women – the basic human right of self-determination'.<sup>13</sup>

<sup>7</sup> Hartmann and others (n 5).

<sup>8</sup> Brundtland Commission, 'Our Common Future: Report of the World Commission on Environment and Development' (1987) (Brundtland Report).

<sup>9</sup> Hartman and others (n 5) 60.

<sup>10</sup> 'Brundtland Report' (n 8) ch 2 [51]; generally, see also ch 2 [48]–[52]. This explicitly called for family planning as a direct measure, over and above indirect measures such as health-care, education and improving livelihoods.

<sup>11</sup> There is a significant literature on the long-term and racialized harm of these practices, especially injectable contraceptives. See, e.g., Nicole Jackson 'A Black Woman's Choice: Depo-Provera and Reproductive Rights' (2011) 2(2) *Journal of Research on Women and Gender* 24; Emily Callaci "'Injectable Development": Depo-Provera and the Creation of the Global South' (2018) 131 *Radical History Review* 82.

<sup>12</sup> This is well documented in contemporary literature. See, e.g., Marge Berer 'Whatever Happened to "a Woman's Right to Choose"?' (1988) 29 *Feminist Review* 24; Sonia Corrêa with Rebecca Reichmann, *Population and Reproductive Rights: Feminist Perspectives from the South* (Zed Books 1994); Hartmann (n 3).

<sup>13</sup> 'Brundtland Report' (n 8) [43].

In Cairo in 1994, the ICPD placed human rights, autonomy and gender equality at the centre of women's sexual and reproductive health, affirming:

the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health ... [as well as] the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.<sup>14</sup>

The 1995 Fourth World Conference on Women in Beijing reaffirmed the Cairo commitments and women's rights 'to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence'.<sup>15</sup> Reproductive rights constitute a bundle of human rights recognized in national and international law<sup>16</sup> and re-interpreted to support and enhance women's reproductive freedom and health: rights to privacy, freedom and security of the person, dignity, non-discrimination and equality, and life and social rights, particularly the right to health. Over time, these have created international commitments to comprehensive reproductive health services for women, including safe, effective, affordable and acceptable contraception of their choice, safe abortion services, and services for the prevention, management and treatment of infertility.<sup>17</sup>

This idea of reproductive rights suggests that women's individual reproductive choices should never be coerced or stigmatized,<sup>18</sup> nor instrumentalized in service to population size and the future of the planet. Accordingly, after 1994, a commitment to rights-based frameworks for women's sexual and reproductive health, empowerment and social justice has generally characterized global and regional policies and programmes on reproductive health and development. However, the idea that 'rapid population growth is a major cause of poverty and environmental degradation and that reduced fertility rates are necessary for sustainable development' has retained powerful global force.<sup>19</sup>

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<sup>14</sup> International Conference on Population Development, 'Programme of Action' (1994) Note 1 [7.3].

<sup>15</sup> United Nations, 'Report of the Fourth World Conference on Women' (1995) A/CONF.177/20 [96].

<sup>16</sup> *Ibid.*, [95], [223].

<sup>17</sup> Ann Stars and others, 'Accelerate Progress – Sexual and Reproductive Health and Rights for All: Report of the Guttmacher-Lancet Commission' (2018) 391(10140) *Lancet* 2642, 2645.

<sup>18</sup> On the relationship between reproductive choice and stigma, see Rebecca Cook and Bernard Dickens, 'Reducing Stigma in Reproductive Health' (2014) 125 *International Journal of Gynecology and Obstetrics* 89.

<sup>19</sup> Hartmann and others (n 5) 60. Angus and Butler (n 3) 25–30.

As discussed in more detail in the next section, as the effects of climate change and environmental degradation have become ever more apparent, concerns about controlling population numbers have re-emerged in both the climate change and the reproductive health and development fields. This has meant that reproductive rights have, in different ways, become subject to reconfigured ideas of population control, defined as populationism.<sup>20</sup> This re-framing of reproductive rights has seen new, more complex and racialized targeting of women's bodies and fertility, especially those of women of the global south.

### **(b) Populationism: Reproductive Rights or Obligations?**

Scholars have identified persistent ideas of populationism that suggest population control survived the discursive shift of the Cairo Declaration, albeit in new ways.<sup>21</sup> Generally defined as 'ideologies that attribute social and ecological ills to human numbers',<sup>22</sup> populationism appears across the ideological spectrum, and gives rise to policies that demonstrate '[m]ultiple manifestations of population control that restrict bodies, reinforce boundaries, and create spaces of exclusion and violence'.<sup>23</sup> Significantly, these policies 'dismiss social justice and human rights goals and agendas or instrumentalize them'.<sup>24</sup> Of particular interest for this chapter are those ideas that focus on population numbers to produce optimal population size and which seek, in different ways, 'to suppress the fertility of women in service of population'.<sup>25</sup>

Indeed, some of the increased global attention to access to contraception in the past two decades has been triggered directly by concerns with sustainable development and population growth in the context of climate change.<sup>26</sup> This is particularly apparent in climate change, development and health academic papers, as well as in policies and programmes of transnational organizations focusing on population policy and reproductive health. For example, a 2016

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<sup>20</sup> A term coined by Angus and Butler (n 3) xxi.

<sup>21</sup> *Ibid.* See also the special issue of *Gender, Place and Culture* (2020) where these issues are addressed.

<sup>22</sup> Angus and Butler (n 3) xxi.

<sup>23</sup> Hendrixson and others (n 2) 312. They identify three forms of populationism: Demopopulationism (focusing on population numbers); Geopopulationism (looking at the production of spaces that result in the contamination, exclusion, surveillance and regulation of particular bodies) and Biopopulationism (concerned with the production of valued [and discarded] life) (310–311).

<sup>24</sup> *Ibid.*, 312.

<sup>25</sup> Rajani Bhatia and others, 'A Feminist Exploration of "Populationism": Engaging Contemporary Forms of Population Control' (2020) 27 *Gender, Place and Culture* 333, 337.

<sup>26</sup> Angus and Butler (n 3); Hartmann and others (n 5).



scientific paper on meeting the Sustainable Development Goals (SDGs) directly links family planning and reproductive rights to population growth.<sup>27</sup> Guy Abel and his co-authors argue that ‘expected world population growth can be lowered by successfully implementing the ... Sustainable Development Goals’, in particular ‘advances in female education and reproductive health can contribute greatly to reducing world population growth’.<sup>28</sup> This is but one example of the use of SDGs to instrumentalize women’s fertility in reducing population growth.<sup>29</sup>

More recently, in a 2021 scientific paper aimed at shocking the global community out of its climate complacency, Corey Bradshaw, Paul Erlich (author of *The Population Bomb*) and others argue that scientific evidence on the scale of threats to the biosphere and all its life forms, occasioned by biodiversity loss and climate crisis, requires urgent action.<sup>30</sup> They suggest that the combined problems of ‘biodiversity decline, climate disruption, and human consumption and population growth’ and ‘the consequent decline in ecosystems ... will deepen in scale and impact unless arrested’.<sup>31</sup> They state further that ‘the global human population has doubled since 1970, with particular and projected increases in fertility in the developing world – sub-Saharan Africa and poorest countries’.<sup>32</sup> These countries are expected to bear the greatest inequality burdens of climate change.<sup>33</sup> They acknowledge that this reflects deep global socioeconomic inequalities and that overconsumption, a ‘massive ecological overshoot’, is largely enabled by consumption of fossil fuels, particularly in and by the north.<sup>34</sup> Despite this recognition, ‘population growth’ still justifies instrumentalizing the rights of women in the south to lower their fertility:

Although population-connected climate change will worsen human mortality, morbidity, development, cognition, agricultural yields, and conflicts, there is no

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<sup>27</sup> Guy Abel and others, ‘Meeting the Sustainable Development Goals Leads to Lower World Population Growth’ (2016) 113(50) *Proceedings of the National Academy of Sciences of the United States of America* 14294.

<sup>28</sup> *Ibid.*, 14294.

<sup>29</sup> But see J Kenneth Smal who points to the political and ideological difficulties of managing fertility rates: ‘Remembering Malthus III: Implementing a Global Population Reduction’ (2003) 122(3) *American Journal of Physical Anthropology* 287, 295.

<sup>30</sup> Corey Bradshaw and others, ‘Understanding the Challenges of Avoiding a Ghastly Future’ (2021) 1 *Frontiers in Conservation Science* 1.

<sup>31</sup> *Ibid.*, 2 (emphasis added).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 2–3. These include massive food insecurity, soil degradation and biodiversity loss, greater use of synthetic compounds and plastics, enhanced risk of pandemics, as well as social ills of crowding, joblessness, deteriorating infrastructure, bad governance and greater probabilities of conflict.

<sup>34</sup> *Ibid.*, 4.

way – ethically or otherwise (barring extreme and unprecedented increases in human mortality) – to avoid rising human numbers and the accompanying overconsumption. That said instituting human-rights policies to lower fertility and reining in consumption patterns could diminish the impacts of these phenomena.<sup>35</sup>

There are further examples of policies and programmes by national and international agencies and organizations that identify the provision of ‘family planning as key to addressing poverty and environmental ills’.<sup>36</sup> Ian Angus and Simon Butler argue that the Cairo Consensus has been utilized by powerful US and UK population organizations to expand access to birth control in order to slow population growth among the ‘world’s poorest women’, using the language of reproductive choice.<sup>37</sup> The instrumentalization of poor women of colour is even more graphically illustrated in Daniel Bendix and others’ account of the mass provision of contraceptive services, via long-acting reversible contraception (LARC), by organizations such as the Gates Foundation and the UK Department for International Development<sup>38</sup> (DFID).<sup>39</sup> Prioritizing a target-driven, mass dissemination of contraception in 69 of the world’s poorest countries, these programmes not only represent a huge expansion of economically profitable contraceptive markets into the global south, and a return to managerial, top-down, target-driven population programmes, but, shockingly, re-introduce controversial, harmful long-term contraceptives as ‘innovative solutions’ for poor women.<sup>40</sup> This is cast in the language of improving women’s rights ‘by giving [women] power to limit their fertility, relieve population pressure on environmental resources, and feed their children within their limited means’.<sup>41</sup> In fact, this replaces the Cairo idea of women-centred empowerment and reproductive autonomy with a global approach that ‘perpetuates populationist ideology and knowledge in service of reducing population growth and manipulating population composition’ for

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<sup>35</sup> Ibid. (emphasis added).

<sup>36</sup> Kalpana Wilson, ‘Re-centring “Race” in Development: Population Policies and Global Capital Accumulation in the Era of the SDGs’ (2017) 14(3) *Globalizations* 432, 434.

<sup>37</sup> Angus and Butler (n 3) 25–28.

<sup>38</sup> Now the Foreign, Commonwealth and Development Office.

<sup>39</sup> Daniel Bendix and others, ‘Targets and Technologies: Sayana Press and Jadelle in Contemporary Population Policies’ (2020) 27 *Gender, Place and Culture* 351, 353.

<sup>40</sup> Ibid., 352–353. Sayana Press, discussed in Bendix and others, is a repackaging of Depo-Provera, which has a long history of coercive testing, harm to women and population control. See note 11 and Matthew Connelly, *Fatal Misconceptions: The Struggle to Control World Population* (Harvard University Press 2008).

<sup>41</sup> Bendix and others (n 39) 365.

ostensibly progressive goals.<sup>42</sup> In its targeting of poor women in the global south, it also has undeniably racial implications.

Finally, Jade Sasser's research on transnational reproductive rights non-government organizations (NGOs) reveals strong tendencies among women's rights advocates to advocate for reproductive rights in the context of population growth. This is based on arguments that 'human rights and international development solutions are the right strategies to slow [population] growth', constituting a 'win-win for women, population and environment'.<sup>43</sup> As Sasser argues, the language of rights is used to soften the coercive edges of population control and demographic targets, as international agencies and transnational organizations 'support rights-based solutions, including voluntary access to contraception, access to education and income generating opportunities for women and girls worldwide' to slow population growth.<sup>44</sup>

In the end, it is difficult to escape the idea that twinning reproductive choice with population arguments inevitably turns reproductive rights into reproductive obligations – not in the more familiar sense of obligations to continue unwanted pregnancies, but in the sense of an obligation to avoid pregnancy to save the planet. Significantly, it is mostly women living at the intersections of race, class and geographic location who bear these obligations.

**(c) Does the End Justify the Means: In the Context of Climate Change should we Instrumentalize Reproductive Rights to Secure Access for Marginalized Women?**

The huge social, cultural and religious barriers to reproductive rights in many parts of the world<sup>45</sup> mean that strategies that use environmental and climate change concerns to secure women's reproductive freedom, via comprehensive reproductive health services, are unquestionably attractive and seemingly widely used. At the same time, many concerned with population numbers see controlling women's fertility via 'reproductive rights' to be a quick fix. However, regardless of whether reproductive rights are instrumentalized by reproductive health advocates, population or development practitioners, or those working on climate change, the evidence suggests that there are signifi-

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<sup>42</sup> *Ibid.*, 353.

<sup>43</sup> Jade Sasser, *On Infertile Ground. Population Control in the Era of Climate Change* (New York University Press 1918).

<sup>44</sup> *Ibid.*, 3.

<sup>45</sup> See, e.g., UN Working Group on the Issue of Discrimination against Women in Law and in Practice, 'Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends' Discussion Paper (October 2017).

cant normative, strategic and practical dangers that require careful navigation and consideration.

As many scholars have demonstrated, these arguments can easily slide into alarmist population claims in which the fertility of poor women of colour, particularly women of the global south, is identified as a primary ecological threat to the planet. This pivots the responsibility for addressing climate change from the consumption and production patterns of the north to women of colour and their bodies.<sup>46</sup> In other words, the problem of population growth is seen to relate only to countries with higher fertility rates, thus falling disproportionately on women of the global south, despite evidence that northern consumption patterns are the key driver of the problem. And as Rajani Bhatia and others point out, populationism conveys ‘a particular pattern of injustices that benefits elites and harms specific targeted groups of people, often in the name of “all Humans” or “The good of all”’.<sup>47</sup>

Fertility is declining across the world (despite ongoing and unmet contraception needs). In Africa it is also declining, although Africa still has the highest fertility rates, lowest contraception coverage and lowest marriage ages.<sup>48</sup> As such it is a particular target of intervention – but in ways that perpetuate universalized and essentialized ideas about gendered poverty, women and fertility control.<sup>49</sup> Africa becomes, in Sasser’s words, ‘a place of crisis and rescue’, rhetorically locked into high fertility and unending explosive growth, which, in turn, justify western intervention. She argues that the narratives that ‘simultaneously address climate change and empower women around the world to use contraceptives’ via reproductive rights are, in effect, ‘neo-colonial mediations ... veiled through global sustainability goals and responsible parenthood’.<sup>50</sup>

Linked to the above, advocacy for reproductive rights within a population discourse fails utterly to take account of women’s reasons for having children. As Sherilyn MacGregor notes, these include:

crippling poverty, the cultural preference for sons, male sexual violence, and the fact that the more women are devalued in a society, the more their only social capital is their ability to bear children. These are cultural and social problems that access to

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<sup>46</sup> Giovanna Di Chiro, ‘Living Environmentalisms: Coalition Politics, Social Reproduction, and Environmental Justice’ (2008) 17 *Environmental Politics* 276, 283.

<sup>47</sup> Bhatia and others (n 25) 335.

<sup>48</sup> Sasser (n 43) 12.

<sup>49</sup> Generally on this point, see Seema Arora-Jonsson, ‘Virtue and Vulnerability: Discourses on Women, Gender and Climate Change’ (2011) 21 *Global Environmental Change* 744.

<sup>50</sup> Sasser (n 43) 12; Sherilyn MacGregor, ‘“Gender and Climate Change”: From Impacts to Discourses’ (2010) 6 *Journal of the Indian Ocean Region* 223.

all the family planning education and reproductive technologies in the world will not address.<sup>51</sup>

By placing too much emphasis on controlling women's fertility, these discourses on reproductive rights sidestep the complex political, economic, social and cultural inequalities that shape women's reproduction choices.

As a result, there is no real recognition and enhancement of women's actual agency and self-management of reproduction in their particular contexts. Instead, the idea of rights is one that tends to reproduce an abstract, liberal individualism, based on the ideal woman that reproductive justice advocates protested against 25 years ago. This posits a responsible, heterosexual, fertile, sexually active, moral agent who is able to make the correct choices about the spacing, number and timing of her children, and who enjoys unfettered choice and control over her body, free from violence and coercion. Sasser suggests that this ideal woman is located in:

the logics of private, individual decision-making and choice, ... adopts a modicum of embodied environmental responsibility, in the service of global development goals, and ... helps advocates weave together narratives of the urgency of simultaneously addressing climate change and empowering women around the world to use contraceptives.<sup>52</sup>

Sasser's work reveals how 'countless reports and articles that link population to climate change and social justice' produce the idea that women are 'sexual stewards' of their own fertility, vital to the future of international family planning, but 'never free from the weight of potential environmental catastrophe – and thus never free from the duty to reproduce responsibly'.<sup>53</sup> And as Hartmann argued earlier, this particular use of reproductive rights assumes 'a win-win world where there is no fundamental power imbalance between the rich and the poor or contradiction between placing disproportionate blame for the world's problems on poor women's fertility and advocating for reproductive rights and health'.<sup>54</sup>

In fact, and as noted above, these arguments have justified the reintroduction of harmful contraception across the global south. As Giovanna Di Chiro argues, 'alarmist population arguments' centred on the fertility of poor women have paved the way for greater control of women's reproductive autonomy and

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<sup>51</sup> MacGregor, *ibid.*, 235.

<sup>52</sup> Sasser (n 43) 4.

<sup>53</sup> *Ibid.*, 4–5.

<sup>54</sup> Betsy Hartmann, 'The Population Bomb is Back with a Global Warming Twist' (2009) 2 *Women in Action* 70, 71.

enabled ‘aggressive and coercive population control mechanisms that restrict women’s reproductive rights [and] consequently, endanger their health’.<sup>55</sup>

Finally, approaches based on population growth also emphasize science and data, whether on fertility rates or in linking population growth to greenhouse gas emissions, in ways that obfuscate deeper underlying causes. These data claim to identify the effects of human numbers, but in fact these cannot be separated from a complex mix of biological and social factors. In reality, a focus of numbers alone diverts attention from the destructive production processes of capitalism, as well as their unequal effects across develop and developing countries, by pointing to problematic bodies elsewhere.<sup>56</sup>

In summary, the different instrumentalizations of reproductive rights to address population size, and/or ostensibly to enhance access to reproductive health, especially contraception, are both bad for women and of questionable value in addressing climate change. While there might be short-term gains in providing reproductive health services for poor, black women, this carries huge personal and health-related disadvantages for these women, as well as wider political, strategic and conceptual costs for advancing women’s rights and gender equality. Moreover, there are also costs for the planet. At its core, the deployment of rights in service of population numbers serves to obscure the social, economic and political inequalities at the root of current global crises, including climate change, and inhibits our ability to address these in any meaningful way, or at all.

#### **(d) Feminism, Population Numbers and Multispecies Reproductive Justice**

Before turning to develop alternate frames based on social (reproductive) justice, it is worth pausing to ask the question of whether one can be a feminist populationist. In the midst of overwhelming evidence that human life is destroying our earthly home, should feminists find new, even transformative, ways of thinking about human numbers within our concerns with reproductive justice? These questions were given impetus by Donna Haraway’s recent call for ‘making kin, not babies’, which identified growing human numbers as a central problem for the sustainability of all life and suggested that feminists should be concerned with developing the idea of a multispecies reproductive justice that always takes account of the human and nonhuman world.<sup>57</sup> con-

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<sup>55</sup> Di Chico (n 46) 283.

<sup>56</sup> See MacGregor (n 50); Sasser (n 43).

<sup>57</sup> Donna Haraway, ‘Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin’ (2015) 6 *Environmental Humanities* 159.

cerned with both human procreation and sustaining multispecies life.<sup>58</sup> For her, ‘making kin’ means recognizing that ‘all critters’ and ‘earthlings’ are kin in the deepest sense,<sup>59</sup> and requires reproductive freedom to go well beyond question of the right to have, or not have children, indeed even to dislodge children from the centre of reproduction.<sup>60</sup>

Haraway is well aware of ‘the muck of racism, classism, nationalism, modernism and imperialism’ that has driven population control policies.<sup>61</sup> And she does not seek to question the ‘inalienable right to reproductive freedom’.<sup>62</sup> At the same time, she argues that it is not enough to blame capitalism, neoliberalism, modernization and imperialism for growing human numbers and their consequences for the human and nonhuman world.<sup>63</sup> In calling on human, and specifically feminist, agency and activism, she argues for a paradigm shift in imagining, for example, ‘what is a decolonial feminist reproductive freedom in a dangerously troubled multispecies world’.<sup>64</sup> How can feminists rethink and re-imagine relationships, families, communities to nurture and value all species, human and nonhuman life?

Haraway’s work is strongly contested by those feminist scholars who argue that population numbers cannot be separated from their racist, colonial, nationalist, hetero-patriarchal and capitalist origins and connections.<sup>65</sup> As argued above, it is correct that a focus on population numbers has diverted attention away from the systemic causes, consequences and inequalities of climate and environmental injustice, generally at the expense of the autonomy and livelihoods of poor communities in the global south, especially women. Thus the focus of feminist concern should not be on ‘reducing numbers’. Rather, as I suggest in more detail below, its focus should be on addressing the effects of climate change combined with, or as part of, securing social justice. This means recognizing that reproductive justice is inextricably connected to economic, ecological and environmental justice, and that reproductive freedom

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<sup>58</sup> Adele Clarke, ‘Introducing Making Kin not Population’ in Clarke and Haraway (eds), *Making Kin not Population: Reconceiving Generations* (Prickly Paradigm Press 2018).

<sup>59</sup> Haraway (n 57) 162.

<sup>60</sup> Donna Haraway, ‘Making Kin in the Chthulucene: Reproducing Multispecies Justice’ in Adele Clarke and Donna Haraway (eds), *Making Kin, not Population: Reconceiving Generations* (Prickly Paradigm Press 2018).

<sup>61</sup> Donna Haraway, *Staying with the Trouble. Making Kin in the Chthulucene* (Duke University Press 2016) 6.

<sup>62</sup> *Ibid.*, 209.

<sup>63</sup> *Ibid.*, 208.

<sup>64</sup> *Ibid.*, 6.

<sup>65</sup> Marilyn Strathern and others, ‘Forum on Making Kin Not Population: Reconceiving Generations’ (2019) 45 *Feminist Studies* 159, 164.

can only be fully nurtured and exercised with due regard to individual, family, community, environment and the planet. It is through this lens – justice rather than numbers – that feminists can engage with Haraway’s call to re-imagine reproductive justice and to sustain multiple species (the human and the non-human world). Such an engagement has the potential to be transformative and allow new ideas to take hold and flourish.<sup>66</sup>

**(e) Towards Alternative Frames and Politics Based on Reproductive and Climate Justice**

Hartmann noted some years ago that ‘mounting concern about climate change ... provided a new opportunity for the population control lobby to blame the poor and target women’s fertility’,<sup>67</sup> despite evidence that patterns of northern production and consumption far outweigh questions of southern population growth.<sup>68</sup> As seen above, this has extended to mainstream international and national agencies and organizations, including some committed to women’s rights. Overcoming populationism, therefore, not only entails a challenge to the racist, classist, modernist and imperialist narratives of population control, but also to those rights narratives, which directly and indirectly reproduce these. Here the problem lies not so much in the concern with women’s reproductive rights, sustainability and the environment, which should worry all of us; but in how they are conceptualized, the links drawn between them, the issues prioritized, and the subsequent emphasis on solving these by increasing (often harmful) contraceptive provision for poor women of colour. Yet the intersections of climate change, environmental degradation and reproductive rights do not constitute a single-issue problem whose answer is to manage fertility. They entail a far more complex set of questions around the manner in which climate change exacerbates intersectional race, class and gender inequalities, limits women’s access to and provision of sexual and reproductive health services, further constrains reproductive agency, increases reproductive harm and injury, undermines social reproduction, and affects livelihoods.

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<sup>66</sup> See *ibid.*

<sup>67</sup> Hartmann (n 54) 71.

<sup>68</sup> *Ibid.*, 72. Here Hartmann cites Fred Pearce, ‘Consumption Dwarfs Population as Main Environmental Threat’ [2009] Yale *Environment* 360 [https://e360.yale.edu/features/consumption\\_dwarfs\\_population\\_as\\_main\\_environmental\\_threat](https://e360.yale.edu/features/consumption_dwarfs_population_as_main_environmental_threat) accessed 25 May 2022; David Satterthwaite, ‘The Implications of Population Growth and Urbanization for Climate Change’ (2009) 21(2) *Environment and Urbanization* 545 <https://journals.sagepub.com/doi/pdf/10.1177/0956247809344361> accessed 25 May 2022. See also Angus and Butler (n 3).



In the following sections, I suggest that, in their best interpretation, reproductive rights should be broadly understood within the framework of reproductive justice and its relationship to climate justice, as critical ideas of social justice. This should, in turn, inform our idea of reproductive freedom understood within an idea of transformative substantive equality. This linking of freedom and equality (informed by reproductive and climate justice) allows us to think about how to create the conditions needed for women's substantive ability to choose to have and raise children in the context of meaningful individual, family, economic, climate and environmental well-being. I develop this in the next sections, first by discussing how social reproduction reveals the connectedness of reproductive and climate justice as part of social justice in section 2; then by expanding my argument to locate reproductive rights within an expanded idea of transformative substantive equality in section 3.

## 2. CONNECTING REPRODUCTIVE JUSTICE, CLIMATE JUSTICE AND SOCIAL JUSTICE VIA SOCIAL REPRODUCTION

How do we move beyond criticizing the wrong links to make the right ones? I suggest that the starting point for this is an idea of connectedness. I use this not in an essentialist sense of gender and nature, but in the idea that systemic and relational social, political and economic inequalities exist at local, national and global levels and affect gendered systems and ecosystems simultaneously. The pursuit of reproductive justice is connected to climate justice, requiring a world that sustains both humanity, multiple species, and the natural environment. In seeking reproductive justice in the context of climate justice, we need to work with both simultaneously, within wider, critical understandings of social justice and substantive equality. In this section, I draw out the interconnectedness of critical understandings of reproductive and climate justice, as part of social justice. I suggest that the feminist concept of social reproduction is a crucial linking idea that allows us to think about care for, and reproduction of, self, family and community, as well as the nonhuman world and the planet. In section 3 I draw out the importance of this connectedness for an expanded idea of substantive gender equality and women's reproductive rights and freedom.

### (a) Connecting Reproductive Justice and Climate Justice

#### (i) Reproductive justice

Starting from a deep concern with racial inequality and injustice, and originating in the struggles of women of colour, reproductive justice advocates have long reminded us that we cannot remove questions of women's fertility and

reproduction from their social and economic contexts of racialized poverty, inequality and inadequate access to comprehensive health care, education services, social security and employment opportunities. They criticize the idea of free, individual reproductive choice to understand how women's actual choices are limited by historical and contextual inequalities: colonialism and structural racism, capitalism, classism, heterosexism, language and culture, xenophobia and environmental injustice.<sup>69</sup> This includes attention to the legacies of, and the manner in which, contemporary forms of neoliberal capitalism reproduce gendered, global and local economic inequalities.

The core aspiration of reproductive justice is to ensure that everyone, especially those who are poor, black and marginalized, have the social, political and economic power and resources to make meaningful decisions about their bodies, gender and sexuality. As I illustrate later, this resonates with the idea of transformative substantive equality. To achieve reproductive justice, women must have substantive rights to have, or not have, children, and to be afforded the means and information to do so (as stipulated in the Cairo Declaration),<sup>70</sup> as well as the substantive ability to decide to parent children in safe and healthy environments. This requires eradicating the barriers to child-bearing experienced by marginalized women, such as the criminalization of reproduction, coerced sterilization, the stigmatizing of adolescent mothers, the effect of environmental degradation on fertility and reproduction, access to reproductive technology and population control. It emphasizes that women's reproductive choices can only be understood within 'a broader analysis of the racial, economic, cultural and structural constraints on [women's] power',<sup>71</sup> and that women's 'ability to control what happens to [their] bodies is constantly challenged by poverty, racism, environmental degradation, sexism, homophobia and injustice'.<sup>72</sup> Unsurprisingly, reproductive justice is linked to broader struggles for social and economic justice. Overall, the idea of reproductive justice is a plea for social justice that has powerful conceptual and practical resonance with ideas of climate justice, to which I now turn.

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<sup>69</sup> Jael Silliman and others, *Undivided Rights: Women of Color Organize for Reproductive Justice* (South End Press 2004).

<sup>70</sup> 'Report of the International Conference on Population Development' (n 1).

<sup>71</sup> SisterSong 'What is Reproductive Justice?' 1–2. [http://sistersong.net/index.php?Option=com\\_content&view=article&id=141&Itemid=8](http://sistersong.net/index.php?Option=com_content&view=article&id=141&Itemid=8) accessed 15 November 2020. For an overview by its founders, see Loretta Ross 'Understanding Reproductive Justice: Transforming the Pro-Choice Movement' (2006) 36(4) *Off Our Backs* 14 [https://www.researchgate.net/publication/259857714\\_Understanding\\_Reproductive\\_Justice\\_Transforming\\_the\\_Pro-Choice\\_Movement](https://www.researchgate.net/publication/259857714_Understanding_Reproductive_Justice_Transforming_the_Pro-Choice_Movement) accessed 25 May 2022.

<sup>72</sup> Loretta Ross, as cited in Silliman and others (n 69) 4.

**(ii) Climate justice**

Ideas of climate justice and environmental justice are separate, but closely related. Both emanate from social movements and activism against the deep social, environmental and political injustices and inequalities wrought by climate change and environmental degradation. Both thus have roots in the anti-racist, anti-colonial and anti-capitalist struggles by people of colour against the private and public perpetrators and the systems of power that have produce environmental and climate injustice.<sup>73</sup> Both understand that it is poor and marginalized communities of colour, socially in the global south, who are least responsible for climate change and environmental degradation, but on whom the heaviest burdens fall – both in terms of consequences and mitigation.<sup>74</sup> Both emphasize the interdependence of all species and of the human and natural world, and prioritize the needs of marginalized communities most affected by climate change.<sup>75</sup>

Climate justice focuses particularly on ending intertwined political, social and economic systems of production and consumption that drive planet-threatening climate change. As is increasingly recognized in academic literature, a central cause of climate injustice lies in capitalism per se, at least in its current forms. A critical climate justice approach, in Farhana Sultana's words, calls for 'dismantling fossil fuel dependency, defetishization of endless capitalist growth on a finite planet, challenging non-participatory democracy, resisting extractive exploitation of natural resources, confronting racial capitalism and indigenous erasure among others'.<sup>76</sup>

In 2010, MacGregor argued that, while climate justice correctly emphasized the role of capitalist and colonial relations of inequality, there was little on its gendered causes and effects.<sup>77</sup> The research that existed emanated largely from gender, environment and development work by the UN and transnational NGOs seeking to understand the measurable effects of climate change on

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<sup>73</sup> See, e.g., Phaedra Pezzullo and Ronald Sandler (eds), *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environment Movements* (MIT Press 2007); Dorothy Guerrero, 'The Global Climate Justice Movement' in Helmut Anheier and others (eds), *Global Civil Society 2011: Global Civil Society Yearbook* (Palgrave Macmillan 2011) 120.

<sup>74</sup> Here it is useful to compare the very similar language of the principles of these overlapping movements. See 'Principles of Environmental Justice' adopted at the First National People of Color Environmental Leadership Summit, Washington DC (24–27 October 1991) and International Climate Justice Network, 'The Bali Principles of Climate Justice' (2002).

<sup>75</sup> Ibid.

<sup>76</sup> Farhana Sultana, 'Critical Climate Justice' (2021) 188 *The Geographic Journal* 118, 119.

<sup>77</sup> MacGregor (n 50).

women of the global south. Lamenting its focus on women as vulnerable victims of ecological crisis, she called attention to the need for a deeper gender analysis, not only of climate politics and science, but of the way in which gendered power relations shape the causes and consequence of climate change.<sup>78</sup> A decade later, there is considerably more work on gender and climate justice centring the role of structural gendered inequalities and power relations.<sup>79</sup> These critical ideas of climate justice also have important intellectual roots in socialist, critical race and postcolonial feminism, as well as ecofeminism and environmental feminism. All focus, in one way or another, on the plight of marginal communities, defined by multiple and intersectional inequalities of class, race, gender and so on.<sup>80</sup> It is in this feminist work that the theorization of the connectedness between reproductive justice and climate justice emerges.

### (iii) Intersections and social reproduction

At the particular intersections of reproductive and climate injustice is considerable evidence of how interrelated social, economic and political relations of inequality and injustice have resulted in climate change, environmental degradation, and reproductive harm. In all instances, these demonstrate how interlocking systems and matrices of inequality and oppression place the heaviest burdens on women living at multiple intersections of race, gender, class, ethnicity, location, and so on.<sup>81</sup> In the first section of this chapter, I illustrated this in relation to how climate change has increased the use of population control arguments to control women's fertility. Beyond this, there is increasing evidence of the effects of climate change and environmental degradation, such as contamination of land, air and water, on women's ability to conceive, carry children safely to term, give birth and raise healthy children.<sup>82</sup> Linked to this

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<sup>78</sup> Ibid.

<sup>79</sup> See, e.g., Peter Newell and others, 'Towards Transformative Climate Justice: An Emerging Research Agenda' (2021) 12(6) *WIREs Climate Change* e733 <https://doi.org/10.1002/wcc.733>; Sultana (n 76).

<sup>80</sup> See, e.g., Catalina de Onís, 'Reproductive Justice as Environmental Justice: Contexts, Coalitions and Cautions' in Lynn O'Brien Hallstein, Andrea O'Reilly and Melinda Giles (eds), *The Routledge Companion to Motherhood* (Routledge 2019).

<sup>81</sup> Here I use the idea of intersectionality posited by critical race feminists, e.g., Kimberlé Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum* 139.

<sup>82</sup> Examples include the effects of environmental degradation on indigenous and poor communities, see, e.g., Jessica Liddell and Sarah Kingston, "'Something was Attacking Them and their Reproductive Organs': Environmental Reproductive Justice in an Indigenous Tribe in the United States Gulf Coast' (2021) 18 *International Journal of Environmental Research and Public Health* 666; Elizabeth Hoover and others, 'Indigenous People of North America: Environmental Exposure and Reproductive

is evidence of the expansion of diseases harmful to reproductive well-being, including zoonotic diseases.<sup>83</sup> In addition, climate change and related disasters have reduced or eliminated access to reproductive health care services<sup>84</sup> and generally deepened the burdens of care and social reproduction on women.<sup>85</sup> This is particularly evident in the global south and among communities disadvantaged by class, race, gender, and other intersecting bases of inequality.<sup>86</sup>

The clear and deep links between intersectional gendered inequalities, capitalism and reproductive and climate injustices have led some feminist environmental and climate justice activists and scholars to develop the ecofeminist idea that all environmental issues are productive issues,<sup>87</sup> together with socialist feminist ideas of social reproduction, to encompass care for self, family, community and the environment.<sup>88</sup> Social reproduction pays attention to the conditions necessary for the reproduction of everyday life, including ‘biological reproduction, the reproduction of labour power and the social practices connected to caring, socialization and the fulfilment of human needs’.<sup>89</sup> Social reproduction has been subject to particular threats under neoliberal capitalism in the past decades with the shrinking of the welfare state and the removal or reduction of social entitlements, as well as the growing precarity of work, wages and income.<sup>90</sup> Di Chiro argues that social reproduction links reproductive and environmental justice, as a ‘common thread ... across scales and across diverse environmental justice and reproductive rights issues’,

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Justice (2012) 120 *Environmental Health Perspectives* 1645. See generally Global Gender and Climate Alliance, ‘Gender and Climate Change: A Closer Look at Existing Evidence’ (November 2016) 28–29.

<sup>83</sup> ‘Gender and Climate Change’ (n 82).

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Rebecca Pearce, ‘Gender and Climate Change’ (2017) 8(2) *WIREs Climate Change* e451 <https://doi.org/10.1002/wcc.451>.

<sup>87</sup> See, e.g., Maria Mies and Vandana Shiva, *Ecofeminism* (Zed Books 2014); Jael Silliman and Ynestra King (eds), *Dangerous Intersections: Feminist Perspectives on Population, Environment, and Development* (South End Press 1999). In an African context, see the work of Wangari Mathaai, discussed in Janet Muthuki, ‘Challenging Patriarchal Structures: Wangari Maathai and the Green Belt Movement in Kenya’ (2006) 20 *Agenda* 83. In contrast to the arguments in this chapter, some forms of ecofeminism posit essentialist relationships between women and nature.

<sup>88</sup> See, e.g., Di Chiro (n 46); Nancy Fraser ‘Climates of Capital: For a Trans-Environmental Eco-Socialism’ (2021) 127 *New Left Review* 1.

<sup>89</sup> Isabella Bakker and Stephen Gill (eds), *Power, Production and Social Reproduction* (Macmillan-Palgrave, 2003), 4.

<sup>90</sup> Nancy Fraser (n 88 at 5) has argued that capitalism as the ‘socio-historical driver of climate change’, and also figures centrally in ‘seemingly non-ecological societal impasses – in crises of care and social re-production; of finance, supply chains, wages and work; of governance and de-democratization’.

and directs us to interrogate the effects of current forms of capitalism on the ‘survivability of individual bodies, particular communities, national cultures and the earth itself’.<sup>91</sup> A similar argument can be made about the connections between reproductive and climate justice.

Here, the environment is not external or subordinate to humanity and human life, but deeply imbricated within it, connecting the human to the nonhuman world. The survivability of one is dependent upon the other and their issues and struggles are interconnected. In an era of deep environmental harm and rapid climate change, we cannot separate environmental or climate justice and socioeconomic issues, nor human and nonhuman: ‘global warming, national resources conservation, pollution, species extinction, overpopulation’ are all inseparable from ‘jobs, houses, transportation, public health, racial and sexual inequality, violence, poverty, reproductive freedom’.<sup>92</sup> Increasingly, the political struggles of communities to sustain everyday life are connecting reproductive and climate justice, to challenge the ways in which globalized capitalism/corporatism has eroded assurances of ‘liveable wages, affordable health-care, decent education, breathable air and clean water’,<sup>93</sup> as well as reproductive freedom.

This approach is rooted in the struggles of communities on the margins. Its goal is to enable the conditions for the accomplishment of just and egalitarian social reproduction at multiple levels – individual, family, community, environment and planet – and especially for women on the peripheries. In the last section, I consider what this means for themes of this chapter and this edited collection: how do we conceptualize (reproductive) rights within transformative ideas of equality and freedom to secure reproductive and climate justice.

### 3. OVERCOMING REPRODUCTIVE AND CLIMATE INJUSTICE: CONNECTING REPRODUCTIVE RIGHTS, FREEDOM AND TRANSFORMATIVE SUBSTANTIVE EQUALITY

How should those working in climate change and reproductive health address women’s reproductive rights? Rights, and reproductive rights, are critical resources in the struggle for a more just world as they affirm human dignity

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<sup>91</sup> Di Chiro (n 46) 280, 282.

<sup>92</sup> *Ibid.*, 279.

<sup>93</sup> *Ibid.*, 278. See also Kathleen de Onis, ‘“Looking Both Ways”: Metaphor and the Rhetorical Alignment of Intersectional Climate Justice Concerns’ (2012) 6(3) *Environmental Communication: A Journal of Nature and Culture* 308.

and agency,<sup>94</sup> establish universal moral standards, ground legal claims, and provide a means to mobilize around, call out and address injustices and inequalities via politics and law. At the same time, rights are contested and can be interpreted and deployed in multiple ways. This was illustrated above in the instrumentalization of the reproductive rights of poor women of colour for population control purposes, often relying on more abstract, individualized and neoliberal ideas of reproductive decision making. In contrast to this, a just and egalitarian approach to women's reproductive rights, in an era of planetary crisis, requires that we understand and enhance women's actual agency in making reproductive choices within the concrete context of multiple and multilayered inequalities and unequal power relations that shape their choices. These include broad considerations of reproductive and climate (in)justice. In this final section, I speak briefly to two key methods in achieving this: a) working with overarching concepts of (expanded) transformative substantive equality and freedom; and b) attention to the multilayered context of rights in ways that account for the connectedness of humanity, multiple species, climate and the environment and their entangled futures. I conclude by emphasizing the need to work with the connectedness of reproductive and climate justice across different levels and scales in ensuring that reproductive rights are met, and to draw inspiration from those local struggles that are already doing so.

**(a) Connecting the Values of Transformative Substantive Equality and Freedom to Account for the Connectedness of Reproductive and Climate Injustice**

As noted above, the connections between reproductive and climate justice, highlighted by feminist ideas of social reproduction, allow us to understand women's reproductive autonomy in ways that connect individual, family, community and environmental concerns and speak to more just, egalitarian and comprehensive forms of individual and social reproduction. For rights and legal scholars and activists, I suggest that this can also be found in ideas of substantive freedom and an expanded, transformative substantive equality which focus on securing the political, social, economic and environmental conditions (institutions, structures, norms and relations) to secure women's freedom, including reproductive freedom.<sup>95</sup>

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<sup>94</sup> Patricia Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401, 416.

<sup>95</sup> I set this out in more detail as 'equality of condition', albeit without the addition of environmental justice, in Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' (2018) 34 *South African Journal on Human Rights* 441.

Indeed, at the heart of conceptual debates about reproductive rights are different ideas of defining and understanding the relationship between gender equality and freedom. These populate a spectrum of ideas from a narrow focus on individual choice, free from state interference, to a wider understanding of the manner in which reproductive autonomy is contextual and relational, affected by power relations and inequalities at all levels, across race, class, gender and other key sources of inequality in society. Here a particular concern is with intersectionality, not as a metaphor for ‘poor black women’ needing rescue from the harms of climate change, but as a deep understanding of how interlocking systems of oppression and inequality that are degrading the planet also shape the ability of different groups of women to exercise reproductive choice and manage reproductive care. The core aspiration of reproductive justice is to ensure that everyone, especially those who are poor and marginalized, has the social, political and economic power and resources necessary to make healthy decisions about reproduction – both individual and social. Thus, not only is the exercise of reproductive autonomy indivisible from conditions of gender (in)equality, but struggles around autonomy and choice are indivisible from broader social and economic struggles for equality and justice.

The idea of freedom is substantive and relational: asking what it means – and what conditions and relationships need to be in place – for women to make substantive choices and secure self-determination. Research suggests that women already make relational decisions with due regard to their different positions within a series of relationships and collectives, made up of children, family, community and the state.<sup>96</sup> It is also increasingly evident that women take account of climate change and the environment in their reproductive choices.<sup>97</sup> The broad aim of reproductive rights work in a time of climate crisis should be to deepen our understanding of these relationships and conditions, and consider how they can be shifted, strengthened, dismantled and/or reconstructed in more egalitarian directions.

Although the idea of substantive equality, including intersectionality, in relation to sexual and reproductive health and rights has been routinely endorsed at international levels, there is little, if any, attention to how critical issues of climate justice might be brought into the mix (beyond the fetishization of numbers).<sup>98</sup> But more significantly, those working in climate change

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<sup>96</sup> See, e.g., Rosalind Petchesky, ‘Comparing Across and Within Differences’ in Rosalind Petchesky and Karen Judd (eds), *Negotiating Rights. Women’s Perspectives across Countries and Cultures* (Zed Books 1998). See generally Jennifer Nedelsky, *Law’s Relations* (Oxford University Press 2011).

<sup>97</sup> See, e.g., Di Chiro (n 46).

<sup>98</sup> See most recently Tlaleng Mofokeng, ‘Strategic Priorities of Work: Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health’, UN A/HRC/47/28 (7 April 2021).



and population – and even some working on reproductive rights – rely on instrumentalized and abstract ideas of reproductive rights, with scant attention to the actual conditions of inequality in which women find themselves. Yet, attention to these inequalities is critical to securing meaningful reproductive rights and to enhancing women’s ability to choose to regulate their fertility. To do this requires an idea of transformative substantive equality that is both multidimensional<sup>99</sup> and multilayered. First, (in)equality should be understood via multiple dimensions of (in)justice, typically illustrated in Fraserian ideas of recognition, redistribution and participation,<sup>100</sup> but with an additional, interrelated dimension relating to environmental and planetary sustainability. Second, equality is multilayered, taking account of individual, family, community, environment and planet (as suggested by the expanded idea of social reproduction). A revised idea of transformative substantive equality can help us look more deeply at ‘the underlying power dynamics that determine who lives and who dies, who is healthy and who is sick, whose environment is polluted and whose is clean, who is responsible for climate warming and who suffers the most from its consequences’.<sup>101</sup> In doing so, we can formulate more just solutions.

Thus substantive equality and freedom are inextricably connected to each other, and to our ability to sustain the planet. These ideas share ecofeminism’s ‘vision of the world that imagines the fight for and future of women’s equality and well-being as deeply intertwined with the objectives of a more just and ecologically flourishing world’.<sup>102</sup> As Ann Rojas-Cheatham and others write about the strategies of Asian Pacific women, we need to ‘look both ways’ – to reproductive and environmental justice – in developing an integrated approach to gender equality.<sup>103</sup>

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<sup>99</sup> For the application of multidimensional equality to green and engendered economy, see Sandra Fredman, ‘The World of Work: A Green and Feminist Future?’; and to CEDAW, see Meghan Campbell, ‘A Greener CEDAW: Adopting a Women’s Substantive Equality Approach to Climate Change’, both in this volume.

<sup>100</sup> For the original articulation, see Nancy Fraser, *Justice Interruptus: Critical Reflections on the ‘Post-socialist’ Condition* (Routledge 1997).

<sup>101</sup> Hartmann (n 54) 73.

<sup>102</sup> Cinnamon Carlarne, ‘Environmental Law and Feminism’ in Deborah Brake, Martha Chamallas and Verna Williams (eds), *The Oxford Handbook of Feminism and Law in the United States* (Oxford University Press 2021) 9.

<sup>103</sup> Ann Rojas-Cheatham and others, ‘Looking Both Ways: Women’s Lives at the Crossroads of Reproductive Justice and Climate Justice’ (Asian Communities for Reproductive Justice 2009).

**(b) Expanding Transformative Substantive Equality and Understanding Reproductive Rights within a Multidimensional and Multilayered Context**

In practical terms this requires multidimensional and multilayered attention to the context of structural, intersectional and relational inequalities in which reproductive choice and care is exercised. Here, Colleen Sheppard's model of multiple layers of context is helpful: a micro-level that focuses on the experiential harm of rights violations from the individual/group perspective; an intermediate level that considers the manner in which inequality is reproduced in social, political and economic institutions (family, workplace, educational institution, community, etc.) and a macro-context that examines the larger political, social, economic context of structural inequalities and unequal power relations.<sup>104</sup> Environmental and climate change issues operate at each level, which is illustrated in the following paragraphs in a few brief examples of the complexities of the context in relation to reproductive rights. Here I focus particularly on the choice of having, or not having, a child, but this approach would work for all aspects of reproductive justice, including what is needed to give birth safely and raise a child in a just, secure and intact environment.

Reproductive rights harms can be multiple and multidimensional at the level of experiential harm, corresponding to barriers related to biological reproduction. Women might have limited choices in deciding whether to fall pregnant, including absence of contraception, limited contraceptive choice as populationist ideas drive harmful long-term contraception, sexual coercion and assault (which climate change can exacerbate),<sup>105</sup> infertility from environmental contamination, inadequate welfare or resources, and so on). They might also struggle to access reproductive health services as a result of limited or no services or involuntary, coercive and forced interventions, consent or age requirements for contraception, unsafe contraception (often provided by population-driven programmes), forced contraception and sterilization, absence of safe abortions, inadequate or absent ante-natal and birthing care and reproductive healthcare services, to name a few. Here, the climate crisis itself affects access to services as they may become decimated or inaccessible.<sup>106</sup> For many poor, black, working class, migrant and rural women, especially in

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<sup>104</sup> Colleen Sheppard, 'Contexts of Inequality: Identifying and Remediating Discrimination' in *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press 2010).

<sup>105</sup> See Rowena Maguire, 'A Feminist Critique on Gender Based Violence in a Changing Climate: Seeing, Listening and Responding' in this volume.

<sup>106</sup> See Campbell (n 100).

the global south, their positions of intersectional disadvantage exacerbate and multiply these harms.

These harms are embedded in, and further linked to, the intermediate levels of context, which include those aspects of social reproduction that speak to the ‘reproduction of labour power and the social practices connected to caring, socialization and the fulfilment of human needs’.<sup>107</sup> Here inequalities are found in the gendered social, cultural and religious norms, practices, rules and laws – refracted via diverse social, political and economic institutions – that limit women’s reproductive choices at the same time as they place the burden of care and reproduction on women, and divest others in households, communities, corporations and states from responsibilities. In addition to these, we can add a meta-context of environmental issues – climate change, extreme weather patterns, environmental contamination and degradation, absence of clean air and water, that affect women’s reproductive choices and burden of care ‘to make parenting and parenting with sufficient resources and survivable environments increasingly difficult’.<sup>108</sup> Over and above this, the climate crisis has enabled the blaming and burdening of women by populationist approaches, thus deepening their vulnerability to harm.

At the macro-level are interrelated structures of capitalism, patriarchy, racism, heteronormativity, global climate change, and so on, that create and reproduce overlapping, intersectional gender inequalities and environmental injustices that disproportionately impact women living on the margins.

This multilevel contextual approach highlights the theme of connectedness. In seeking transformative solutions and disentangling the problem of reproductive rights violations and their solutions, it will often be necessary to address multiple issues that shape ‘the precarious intersectional positioning of those most vulnerable to climate change’ and to reproductive injustice.<sup>109</sup> By paying attention to the plight of women in marginalized communities, within a clear understanding of their complex and multilayered context, we can see how problems of reproductive and climate injustice are connected. This reminds us, in Fraser’s word, that we need ‘a broadly shared project of transformation’ that:

connect[s] ecological diagnosis to other vital concerns – including livelihood insecurity and denial of labour rights; public disinvestment from social reproduction and chronic undervaluation of carework; ethno-racial-imperial oppression and gender

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<sup>107</sup> Di Chiro (n 46) 281.

<sup>108</sup> See De Onís (n 80) abstract.

<sup>109</sup> De Onís (n 93) 309.

and sex domination; dispossession, expulsion and exclusion of migrants; militarization, political authoritarianism and police brutality.<sup>110</sup>

## CONCLUSION: TOWARDS THE PRACTICAL AND STRATEGIC USE OF RIGHTS TO ACHIEVE REPRODUCTIVE AND ENVIRONMENTAL JUSTICE

This chapter has argued that we need to think about reproductive rights as the ability to exercise substantive choice (to have or not have children and to give birth and raise children safely) within a multidimensional and multilevel idea of transformative substantive equality that takes account of reproductive justice (noting complex reproductive inequalities) and climate justice (noting accelerating climate and environmental destruction and their effects). This approach is based on an expanded idea of social reproduction that seeks to account for care of the environment, multiple species and earth itself, as an essential and connected context to humanity, whose survivability is essential to how human rights can be accessed and exercised in a just and egalitarian manner for the human and nonhuman world.

This chapter, however, only begins to explore how this approach might allow us to work with reproductive rights towards a more just world, free of climate crisis. Much more needs to be done to figure out how to achieve reproductive and climate justice. Some of this entails ensuring that the basics of reproductive justice – accessible and affordable reproductive health-care and social welfare services – are designed, maintained and delivered with due regard to the needs and contexts (in a multilayered sense) of different communities of women using a method that does not degrade the planet. Another is to identify and address the reproductive harms that emanate from the climate crisis. Here, as Di Chiro argues, there is much to learn on how reproductive and environmental struggles are increasingly connected in local struggles.<sup>111</sup> Analysing reproductive rights at ‘the intersection of reproductive justice and climate justice’ allows the ‘develop[ment of] new understandings of issues rooted in the lived experiences of our communities’.<sup>112</sup> This also takes us beyond the basics to begin to re-imagine how we might live in a just and caring world, in relation to reproduction, autonomy, relationships, kinship, family, community, and so on, including the nonhuman world. As De Onís argues, it is in ‘struggles for alternative ways of knowing and being ... that radical coalitional possibilities for uprooting false “solutions” that function

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<sup>110</sup> Fraser (n 88) 3–4.

<sup>111</sup> Di Chiro (n 46).

<sup>112</sup> Rojas-Cheatham and others (n 103) para 2.

to further alienate, erase, and threaten the lives of entire communities are possible'.<sup>113</sup> Similarly to Di Chiro, she highlights the 'imperative of centring the experiences and perspectives of women of colour, Indigenous peoples, and low-income communities to challenge the corporations, politicians, ideologies, and material conditions that make life unliveable for billions of people on Earth'.<sup>114</sup>

In the end, however, those concerned with both climate justice and reproductive justice need to work now with reproductive rights at all levels to engage, critique and reconstruct global and national policies on population, reproductive health, sustainable development, and so on. Whether at local, national and global scales, we need a social justice lens that 'looks both ways' to reproductive and climate justice to secure those laws, policies and programmes that not only enhance women's reproductive rights, but also secure a world in which both reproductive and climate justice are possible.

## ACKNOWLEDGEMENTS

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<sup>113</sup> De Onís (n 80) abstract; see also generally Di Chiro (n 46).

<sup>114</sup> De Onís (n 80) abstract; see also generally Di Chiro (n 46).

# 7. Gender equality and climate change in plural legal contexts: A critical analysis of Kenya's law and policy framework

**Patricia Kameri-Mbote and Nkatha Kabira**

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## INTRODUCTION

Although the UN 2030 Development Agenda and several international, regional and local laws and policies in Kenya recognize the importance of ensuring and integrating gender equality, on the one hand, and climate change mitigation and adaptation, on the other, these laws and policies continue to sideline women and face implementation challenges. The challenges abound because the policies and laws are characterized by incongruences that fail to recognize three things. First, as a threat multiplier, climate change impacts on both women's livelihoods and their participation in decision making, limiting their choices and silencing their voices in climate change mitigation and adaptation measures.<sup>1</sup> Second, women's knowledge and experiences have not been integrated into mainstream knowledge on climate governance.<sup>2</sup> Despite the acknowledgment that women are important agents of change, women's knowledge on climate governance, like other forms of women's knowledge, has been left out of the science of climate justice. Third, implementation challenges persist in the African context, especially because of discrepancies between the so-called formal and informal legal contexts and norms.

This chapter uses Kenya's law and policy framework on gender equality and climate change to explore these incongruences, especially as they occur in informal legal settings. The chapter argues that efforts to adapt to and mitigate

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<sup>1</sup> Patricia Kameri-Mbote, 'I Want It and I Want It Now: Women and Land in Africa' (University of Nairobi 2014).

<sup>2</sup> Wanjiku Mukabi Kabira, 'Gender Analysis of the IGAD Drought Disaster Resilience and Sustainability Initiative (IDDRSI) and Regional Programming Paper (RPP)' (Intergovernmental Authority on Development 2016).

against climate change cannot exclusively centre on formal laws and policies, but must also engage informal legal systems, as these are the legal systems in which many women live their lives. In Kenya, all its legal systems – formal, informal, living customary and religious – must engage climate justice and do so in a way that contributes to women’s equality and empowerment and mitigates climate change.

Kenya is a land of contrasts in terms of its physical, geographical and climatic conditions, and the social and cultural characteristics of its people. A former British colony, it is a commercial, transportation and communications hub for eastern Africa, with an estimated population of 56 million<sup>3</sup> (approximately 52 per cent women and 48 per cent men).<sup>4</sup> Kenya’s economy is based on climate sensitive sectors – agriculture, environment and natural resources, and tourism – which are affected by droughts and floods that lead to severe crop and livestock losses, famine and human and animal displacement.<sup>5</sup> Climate change has far-reaching social, economic, environmental and political impacts on these and many other sectors. These range from floods and droughts to cross-border conflicts, land degradation, deforestation, and internal and external economic shocks. Climate change also negatively affects agriculture and food production in the country. In the past two decades, the Kenyan government declared four drought-related food shortages as national disasters.<sup>6</sup>

These climate shocks fall disproportionately on poor communities in general, and on poor women in particular. According to the Kenya National Bureau of Statistics, women provide 80 per cent of Kenya’s farm labour and manage 40 per cent of the country’s smallholder farms, yet they own only roughly 1 per cent of agricultural land and receive just 10 per cent of available credit. Moreover, in terms of food security, 36.1 per cent of all Kenyan households are considered to be poor.<sup>7</sup> An estimated 16.4 million Kenyans have

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<sup>3</sup> Worldometer, ‘Kenya Population (Live)’ <https://www.worldometers.info/world-population/kenya-population/> accessed 20 May 2022.

<sup>4</sup> United Nations Department of Economic and Social Affairs, ‘World Population Prospects: the 2017 Revision’ (2018), cited in Government of Kenya, ‘National Climate Change Action Plan: Kenya 2018–2022’, Ministry of Environment and Forestry (2018) 9.

<sup>5</sup> The 2008–2011 drought caused \$12.1 billion in losses and damage. High population growth in urban areas is leading to expanding informal settlements, which are at risk of water scarcity, flooding and heat. Government of Kenya, ‘National Climate Change Action Plan: Kenya 2018–2022’, Ministry of Environment and Forestry (2018) 3.

<sup>6</sup> Kabira (n 2).

<sup>7</sup> Kenya National Bureau of Statistics, ‘Economic Survey 2017’ (2017) 5 <https://www.knbs.or.ke/?wpdmp=economic-survey-2017> accessed 1 November 2021.

limited or diminished access to food at all price levels.<sup>8</sup> This has had a significant impact on women and children, who bear a disproportionate burden of ensuring that the family is fed and taken care of, and the climate crisis will only compound this disadvantage.

Climate change, particularly extreme drought, is also changing the activities performed by men and women in some communities. For instance, in Kenya's Turkana District, women traditionally collected water and firewood, but due to increased conflict in this area during droughts, men have taken up this activity.<sup>9</sup> The loss of biodiversity also has an impact on the knowledge systems and practices of both men and women.<sup>10</sup> Havemann rightly notes that 'the indigenous knowledge of the ecosystem is learned and updated through observation'.<sup>11</sup> Women transmit knowledge to the next generation, but when climate change results in the migration of communities from their ancestral land, there is a break in the generational cycle of learning and the transmission of knowledge.

Throughout history, feminists the world over have argued that the law is gendered. Global and national law and policy on gender equality and climate change have proved to be no exception. This chapter argues that, despite the gendered impacts of climate change, mitigation and adaptation laws and policies largely ignore women's concerns. The robust equality provisions in Kenya's Constitution, policy, and international commitments have not resulted in the integration of women's concerns and interests in national and county climate change abatement commitments and programmes, nor in their full and equal participation in climate risk mitigation activities. Despite a broad commitment to gender equality and women's rights, climate justice laws and policies largely have a man in mind as the relevant legal persona, and patriarchal perspectives end up being cemented in the legal system, both formal and informal. The silo approach, where different areas of law are addressed separately from each other, has resulted in parallel initiatives with little synergy. When women's concerns and interests are considered in climate change programmes,

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<sup>8</sup> Layla Liebetrau, 'Realising the Right to Food: Kenya's Approach to Food Security in the Context of the Climate Crisis' (Heinrich Böll Stiftung, 16 December 2019) <https://za.boell.org/en/2019/12/16/realising-right-food-kenyas-approach-food-security-context-climate-crisis> accessed 1 November 2021.

<sup>9</sup> Nancy Omolo, 'Gender and Climate Change-Induced Conflict in Pastoral Communities: Case Study of Turkana in Northwestern Kenya' (2010) 10 *African Journal on Conflict Resolution*; Paul Havemann, 'Lessons from Indigenous Knowledge and Culture: Learning to Live in Harmony with Nature in an Age of Ecocide' (2016) *State of the World's Minorities and Indigenous Peoples* 46.

<sup>10</sup> Nyang'ori Ohenjo, 'Kenya's Castaways: The Ogiek and National Development Processes' Micro Study, Minority Rights Group International (2003).

<sup>11</sup> Kameri-Mbote, 'I Want It' (n 1).



it is through ‘adding and stirring’ women rather than having them inform the very design of the programmes from the outset. The situation is complicated by the existence of multiple laws – formal and informal – at the local level where people operate, and where they would have the greatest impact in addressing climate change.

This chapter comprises three sections. The first section sets out Kenya’s legal and policy framework on gender equality and climate change and looks at the congruences and incongruences between these regimes. Here we show that, despite a progressive Constitution and legislative and policy framework that addresses key issues of gender inequality, including those that are important for achieving gender justice in the context of climate change, significant challenges of exclusion and poor implementation remain. We then move on to show how the climate change regulatory framework pays insufficient attention to gender. The next section hones in on the plural legal context of Kenya, in which many women live under informal systems, giving rise to particular challenges for gender and climate justice. It concludes by identifying pathways for synergizing gender equality and climate change laws and policies, particularly under these informal systems. The final section concludes by noting that addressing climate justice with women in mind demands that we align climate justice norms – at both the formal and informal level – with equality and non-discrimination principles in the Constitution.

## 1. CONGRUENCES AND INCONGRUENCES IN THE LAW AND POLICY FRAMEWORKS ON GENDER EQUALITY AND CLIMATE CHANGE

Kenya is a constitutional democracy. However, as in all other areas of law and governance in Kenya, climate governance takes place against the backdrop of an amalgam of contending norms.<sup>12</sup> Kenya’s legal system is characterized by a bricolage of norms. It subscribes to a juristic legal pluralism approach,<sup>13</sup> where the official legal system recognizes several other legal orders and sets out to determine which norms of these legal orders will apply.<sup>14</sup> Statutes draw their authority and legitimacy from the Constitution, the supreme law of the land. The Constitution also provides an operating environment for other legal orders,<sup>15</sup> such as religious and customary laws for religious or ethnic groups on issues such as property rights, inheritance, burial and marriage. Customary

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<sup>12</sup> Kameri-Mbote, ‘I Want It’ (n 1).

<sup>13</sup> See Patricia Kameri-Mbote, *Contending Norms in a Plural Legal System: The Limits of Formal Law* (School of Law, University of Nairobi 2021).

<sup>14</sup> *Ibid.*, 9.

<sup>15</sup> *Ibid.*

and religious law must thus operate within the confines of constitutional principles.<sup>16</sup> In rural areas, customary law norms are pervasive and impact on land holding and land use, which are critical for climate change adaptation and mitigation.

This section first sets out the broad framework of gender equality in law and practice, in itself important for gender justice against the backdrop of climate change, before analysing the climate regime and the extent to which it includes and takes account of women and gender equality concerns.

### **(a) Gender Equality in the Constitution and Law**

The 2010 Constitution recognizes the need to redefine and rearrange societal relations to right the wrongs in society, including gender inequalities. Article 2(5) and (6) include international treaties that Kenya has ratified into the body of Kenya's law. This is important, as Kenya is party to several international instruments that provide for gender equality.<sup>17</sup> Even though the interpretation of these articles remains contentious, international law on gender equality continues to inform, shape, and guide local norms.<sup>18</sup>

#### **(i) Constitutional and legislative framework**

Article 27 of the Constitution provides that all persons are equal before the law. Further, Article 27(2) provides that equality includes full enjoyment of the fundamental rights and freedoms provided for in the Constitution and in law. This means, for instance, that all political, property, labour and socio-economic rights apply to both women and men.<sup>19</sup> Article 27(6) places a positive obligation on the state to establish legislative measures to redress past wrongs.

Beyond legislative action, the state is also required under Article 27(6) to use affirmative action and positive measures to ensure that inequalities are

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<sup>16</sup> *Ibid.*

<sup>17</sup> Some notable treaties that form the backbone of the regional framework include the following: United Nations Charter (1945); Universal Declaration of Human Rights; International Covenant on Economic and Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Vienna Declaration and Platform for Action (1993); International Conference on Population and Development, Cairo (1994), Nairobi Forward Looking Strategies; Beijing Declaration and Platform for Action (1985).

<sup>18</sup> See for instance a recent Supreme Court decision that partly clarifies the position, but still leaves the question as to whether Kenya is dualist or monist open: *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR.

<sup>19</sup> See Constitution of Kenya 2010, Articles 38, 40, 41 and 43.

corrected. Under Article 27(8), the state should ensure that not more than two-thirds of the members of any elective or appointive body are of the same gender. This is important as women have been absent from positions of influence, specifically in elective and appointive bodies. This provision is expected to ensure that there is a critical mass of women in decision-making positions, including those related to climate change mitigation and adaptation. However, it is disappointing that Parliament has failed to pass the legislation required to give effect to this provision five times in the last ten years.

Other provisions in the Bill of Rights in the Constitution have the potential to address violations of women's equality in the context of climate crisis. These include Article 53 on the rights of children, which is of concern to women as mothers. Further, the Constitution provides for socioeconomic rights (housing, water, sanitation, education, health, food and welfare) which are of specific concern to women and highly relevant in a rapidly changing climate.<sup>20</sup> In addition, every individual (irrespective of gender) has a right, either individually or in association with others, to acquire and own property of any description in any part of the country.<sup>21</sup> The general principles embedded within the constitutional architecture recognize equality and non-discrimination as key to social justice. Foundationally, equality and non-discrimination are included in the national values and principles of governance that bind all state organs, state officers and public officers.<sup>22</sup> These principles find expression in other constitutional provisions. For instance, the elimination of gender discrimination in law, customs and practices related to land and property is one of the constitutional principles of land policy.<sup>23</sup> Thus, there are strong constitutional textual provisions on women's equality in many areas of life, such as access to key resources such as water and land, that are pertinent to climate justice law and policies.

Following the promulgation of the 2010 Constitution, Parliament enacted various laws to implement its provisions. The Land Act No. 6 of 2012 and the Land Registration Act No. 3 of 2012 were enacted to guide the protection and administration of private and public land and the registration of land in Kenya respectively. Importantly, they contain provisions that seek to entrench equality in landholding between both men and women. Provisions such as these seek to entrench gender equality and empower women not only to access but to control their property rights. The Community Land Act<sup>24</sup> enacted in 2016

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<sup>20</sup> *Ibid.*, Article 43.

<sup>21</sup> *Ibid.*, Article 40(1).

<sup>22</sup> *Ibid.*, Article 10(2)(b).

<sup>23</sup> *Ibid.*, Article 60(f).

<sup>24</sup> Gives effect to Article 63 of the Constitution of Kenya 2010, which provides for a classification of land known as community land.

also contains gender equality provisions and is particularly significant because it operates in areas where gendered customary law reigns.<sup>25</sup> At a policy level, the National Land Policy Sessional Paper No. 3 of 2009 recognizes the inequalities between genders in terms of land ownership and seeks to streamline these.<sup>26</sup> Additionally, the 2019 policies on equality and on gender and development<sup>27</sup> seek to implement general equality and gender equality provisions.

## **(ii) The fallacies of equality: Non-discrimination and equality in practice**

Despite these robust provisions in the Constitution and legislative framework, women's equality is yet to be achieved. The embedded nature of discrimination against women has historical and contemporary roots.

In Kenya, law historically reinforced gender inequality through legal rules that validated social injustices leading to the marginalization of women.<sup>28</sup> This was achieved, first, through legal rules and principles in the statute books legitimising the subordination of women to men. Second, women's subordination was occasioned by the structure and administration of laws. Third, gender inequality was ingrained in the patriarchal ordering of society, under which political, economic, legal and social standards are either set by, or fixed in, the interests of men.<sup>29</sup> The entrenched and systemic nature of inequality has been difficult to dislodge, even with more progressive laws. For example, women were and continue to be systematically excluded from fully participating in development processes.

Despite the international and local laws stipulating that all women and men are equal, inequalities continue to exist.<sup>30</sup> Some of this arises out of competing conceptions of equality. The Constitution does not define women's equality. Miyandazi argues that it has competing and inter-related conceptions of equality. As a further layer of complication, the courts have not 'yet settled on a ... principled approach to adjudicating equality concepts', resulting in an inconsistent and confusing jurisprudence on women's equality.<sup>31</sup> She observes that Article 27(1) of the Constitution contains elements of formal equality, particularly the guarantee of equality before the law. As Kameri-Mbote has argued, laws requiring neutral or consistent treatment between men and women, or formal equality, can be used as a tool to reinforce inequalities, as

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<sup>25</sup> Areas such as Samburu and Turkana.

<sup>26</sup> Paras 24 (c), 25 (f), 170 (e) and 183 (e).

<sup>27</sup> Sessional Paper No. 02 of 2019 on National Policy on Gender and Development.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Kameri-Mbote, *Contending Norms* (n 13).

<sup>31</sup> Victoria Miyandazi, *Equality in Kenya's 2010 Constitution* (Hart 2021) 1.

equal or identical treatment may result in unanticipated de facto discrimination.<sup>32</sup> This model of equality has found its way into the jurisprudence of the Kenyan courts.<sup>33</sup>

Substantive equality defies easy definition. There is a recognition that differential treatment between men and women is required to address historical injustices, prejudices, stigmas, exclusion and structural distinctions in the Kenyan courts; there is a nascent understanding of substantive equality; and there is evidence of judges holding that differential treatment is required to overcome a history of systemic disadvantage and achieve equality.<sup>34</sup> However, as discussed earlier in this chapter, climate justice laws and policies are rarely built upon a commitment to women's substantive equality.

Under Article 27(4), the Constitution protects a range of identity characteristics from discrimination. This list is not exhaustive, meaning new grounds may be added. Notably absent in the context of climate change is any acknowledgement of how geography, that is, living in a rural community, can intersect with gender to be the basis for discrimination.<sup>35</sup> This is particularly pertinent in Kenya because, as mentioned in the introduction, rural women in Kenya are at the frontline of the climate crisis. However, privileging particular identities, through their recognition as a discrete and singular ground of discrimination, ignores the fact that individuals are often subjected to discrimination based on intersecting inequalities that creates a synergistic experience of discrimination.<sup>36</sup> This single-axis approach is evident in laws and policies addressing climate change at both national and international levels, where women are essentialized into a homogenous category, with little attention paid to how women's different identities and positionalities relate to climate change.

In Kenya, as in other African countries, the problem is further exacerbated by its plural legal system. Here, the plurality of norms and laws makes the application and implementation of women's equality complex and ambiguous. Legal pluralism has resulted in further manifestations of gender inequalities

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<sup>32</sup> Patricia Kameri-Mbote, 'Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' (2002) 35(3) *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 373.

<sup>33</sup> Miyandazi (n 31) ch 3; see also *Republic v Head Teacher, Kenya High School & Another Ex-parte SMY* [2012] eKLR (HC).

<sup>34</sup> Miyandazi (n 31) ch 3; *Mohamed Fugicha v Methodist Church in Kenya (Sueing Through Its Registered Trustees) and 3 Others* [2016] eKLR; *John Kabui Mwai & 3 Others v Kenya National Examination Council and 2 Others* [2011] eKLR (HC).

<sup>35</sup> See also Meghan Campbell, 'A greener CEDAW: Adopting a women's substantive equality approach to climate change' in this volume.

<sup>36</sup> Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139.

because customary law, and some of its gender unfriendly norms, which are entrenched and resilient, can render equality norms in the formal legal system powerless.<sup>37</sup> Further, semi-autonomous social fields drawing mainly from living law, which is closer to customary law than formal law, also influence the effectiveness of equality norms in the Constitution and statutory law. Importantly, customary law and semi-autonomous social fields are the most accessible and applicable of the legal norms in private law matters for most communities, compared to environmental and climate change public law.

It is against this backdrop that we argue that the various operative climate change laws and policies, including customary laws, ought to be reconfigured in a manner that ensures women's substantive and intersectional equality and non-discrimination.<sup>38</sup> This is critical for both gender justice and climate justice, and it raises the need to engage the positive aspects of customary law that can further gender equality, given the accessibility of this law to most people at local levels.<sup>39</sup> Such engagement will open opportunities to challenge and weed out negative customary law norms that perpetuate inequality and ensure that customary law is a cite of both gender and climate justice.<sup>40</sup> We return to this in the following section, but first we analyse the climate justice regime and its relationship with women and gender equality.

## **(b) Gender Equality and Climate Change**

The national framework on climate justice is anchored in Kenya's 2010 Constitution. On environmental governance, the Constitution provides for the right to a clean and healthy environment<sup>41</sup> and requires the state to ensure that a 10 per cent tree cover is attained.<sup>42</sup> This is the closest that the Constitution comes to recognizing environmental rights. The inclusion of international law as part of Kenya's applicable law makes the many international and regional conventions on climate change, especially as part of sustainable development, directly applicable.<sup>43</sup> We discuss these first.

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<sup>37</sup> Kameri-Mbote, *Contending Norms* (n 13).

<sup>38</sup> Patricia Kameri-Mbote, 'Constitutions as Pathways to Gender Equality in Plural Legal Contexts' (2018) 5 *Oslo Law Review* 21.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Constitution of Kenya 2010, Article 42.

<sup>42</sup> *Ibid.*, Article 69(1)(b).

<sup>43</sup> *Ibid.*, Article 2(5).

### (i) **International frameworks**

The international framework on climate change is expansive with a long history dating back to the 1992 UN Conference on Environment and Development, at the Earth Summit that led to Agenda 21, a blueprint for sustainable development and among the first UN conference documents to systematically refer to women's position and roles. Agenda 21 advocates for gender equality in areas such as land ownership, resource stewardship, education and employment.<sup>44</sup> It also highlights women's economic, social and environmental contributions to environmental management and sustainable development and calls on governments to eliminate all obstacles to women's full involvement in sustainable development.<sup>45</sup>

Kenya is party to the UN Framework Convention on Climate Change (UNFCCC)<sup>46</sup> and a signatory to the Paris Agreement on Climate Change.<sup>47</sup> The UNFCCC contains gender aspects addressing adaptation and capacity building.<sup>48</sup> The Paris Agreement of 2015 sets out a global framework to avoid dangerous climate change by limiting global warming to well below 2°C and pursuing efforts to limit it to 1.5°C. It also aims to strengthen countries' ability to deal with the impacts of climate change and support them in their efforts. The Agreement acknowledges that climate change is a common concern of humankind, and that parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human

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<sup>44</sup> United Nations Conference on Environment and Development, 'Agenda 21'; 'Rio Declaration on Environment and Development'; and 'Statement of Principles for the Sustainable Management of Forests' (1992).

<sup>45</sup> *Ibid.*

<sup>46</sup> Wanjiru Grace Kibe, 'Effectiveness of Kenya's Climate Change Mitigation Strategies after the Ratification of United Nations Framework Convention on Climate Change (UNFCCC) Protocols' (Master's thesis, United States International University – Africa 2018) <http://erepo.usiu.ac.ke/handle/11732/4590;jsessionid=B043556DD8601592B36C84B7C14BD7AA> accessed 7 February 2022.

<sup>47</sup> *Ibid.*

<sup>48</sup> See Women's Environment and Development Organization and Global Climate Change Alliance <https://wedo.org/> accessed 31 May 2022; WomenWatch, 'Women, Gender Equality and Climate Change' [https://www.un.org/womenwatch/feature/climate\\_change/](https://www.un.org/womenwatch/feature/climate_change/) accessed 21 May 2022. Other instruments that have had a special focus on gender equality in tackling climate change impacts at an international level include: 2012 Decision 23/CoP.18 on gender balance and women's participation; 2014 launch of the Lima Work Programme on Gender aimed at achieving gender-responsive climate policy in all relevant activities under the Convention; The Green Climate Fund took a fund-wide, gender sensitive approach in 2011, which was enhanced by a Gender Action Plan in 2014; gender sensitive language used in the 'Report of the Conference of the Parties on its Twenty-First Session' (COP21) (2015) <https://unfccc.int/process-and-meetings/conferences/past-conferences/paris-climate-change-conference-november-2015/cop-21/cop-21-reports> accessed 31 May 2022.

rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

Kenya also aims to implement the 2030 Agenda, which recognizes the importance of the three Rio Conventions for advancing sustainable development.<sup>49</sup> This Agenda urges all parties to fully implement their commitments under the UNFCCC,<sup>50</sup> the Convention on Biological Diversity<sup>51</sup> and the UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa.<sup>52</sup> States are to implement these international frameworks in accordance with their respective principles and provisions, as well as to take effective and concrete actions and measures at all levels and enhance international cooperation. The Outcome Document of the 2012 Rio Conference, ‘The Future We Want’, which contributed to the 2030 Agenda, acknowledges that

climate change is a cross-cutting and persistent crisis, and express our concern that the scale and gravity of the negative impacts of climate change affect all countries and undermine the ability of all countries, in particular, developing countries, to achieve sustainable development and the Millennium Development Goals, and threaten the viability and survival of nations.<sup>53</sup>

The Agenda also recognizes that climate change is ‘one of the greatest challenges of our time’ and that all countries, particularly developing countries, are vulnerable to the adverse impacts of climate change.<sup>54</sup>

Inclusivity in sustainable development is a key concern of Agenda 2030, which notes that gender equality and women’s empowerment are important for the realization of the Sustainable Development Goals (SDGs). It reaffirms commitment to ensuring women’s equal rights, access and opportunities for participation and leadership in the economy, society and political decision making.<sup>55</sup> It further recognizes, in accommodating ‘The Future We Want’, the

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<sup>49</sup> United Nations General Assembly, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ (Agenda 2030), Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

<sup>50</sup> United Nations, Treaty Series, vol. 1771, No. 30822.

<sup>51</sup> *Ibid.*, vol. 1760, No. 30619.

<sup>52</sup> *Ibid.*, vol. 1954, No. 33480.

<sup>53</sup> UN Conference on Sustainable Development, ‘The Future We Want: Outcome Document of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, 20–22 June 2012’ (2012) [25] <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf> accessed 21 May 2022.

<sup>54</sup> Agenda 2030 [14].

<sup>55</sup> Agenda 2030, Goal 5.5, [18].



need to promote gender equality and women's empowerment and to ensure their full, equal and effective participation in sustainable development policies, programmes and decision making at all levels.<sup>56</sup> It also links this to the implementation of parties' commitments in the Convention on the Elimination of All Forms of Discrimination Against Women, Agenda 21, the Beijing Declaration and Platform for Action, and the United Nations Millennium Declaration.<sup>57</sup>

The Agenda, as per 'The Future We Want', recognizes that socioeconomic and political inequalities continue to prevent the full realization of gender equality, and calls for measures that ensure women's substantive political participation in order to move beyond formal equality and thus achieve gender parity.<sup>58</sup>

We now turn to the key question which is the extent to which these commitments are realized in Kenya's national policy and legislative framework on climate change.

## **(ii) National policy and legislation**

In response to these global frameworks, Kenya has formulated climate change policies, action plans and strategies, including green growth and low carbon strategies, to integrate climate change considerations into development and sectoral plans, many of which include gender considerations.<sup>59</sup> Kenya recognizes that climate change impacts are likely to undermine development outcomes in the short and long term and that they have a disproportionate impact on women.<sup>60</sup> With support from various donors and financiers, Kenya has also planned adaptation and mitigation responses that integrate gender and climate change resilience into agricultural, energy, infrastructure and other sectoral development plans to enhance readiness to address the climate-related shocks.<sup>61</sup> However, because women have not participated in these plans,

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<sup>56</sup> 'The Future We Want' [8].

<sup>57</sup> *Ibid.*, [236].

<sup>58</sup> *Ibid.*, [237].

<sup>59</sup> See for instance Kenya's National Climate Change Response Strategy, Ethiopia's Climate Resilient Green Economy, Tanzania's Agriculture Climate Resilience Plan 2014–2019, and Uganda's National Climate Change Policy 2015.

<sup>60</sup> Valerie Nelson, 'Gender, Generations, Social Protection & Climate Change: A Thematic Review' (2011) Overseas Development Institute <https://odi.org/en/publications/gender-generations-social-protection-climate-change-a-thematic-review/> accessed 21 May 2022.

<sup>61</sup> Ruth Aura and others, 'Gender Review of Climate Change Legislative and Policy Frameworks and Strategies in East Africa' (2017) CGIAR Research Program on Climate Change, Agriculture and Food Security Working Paper no. 209 [https://cgspace.cgiar.org/bitstream/handle/10568/88253/WP\\_209.pdf?sequence=1&isAllowed=y](https://cgspace.cgiar.org/bitstream/handle/10568/88253/WP_209.pdf?sequence=1&isAllowed=y) accessed 21 May 2022.

they have not benefitted from women's knowledge and experiences, nor are women's specific needs and concerns taken into account.

The central legislation governing climate change is the Climate Change Act 11 of 2016 which provides a regulatory framework 'for enhanced response to climate change, mechanisms to enhance climate change resilience, and measures to achieve low carbon climate development'.<sup>62</sup> The guiding principles in applying the Act include 'ensuring equity and social inclusion in allocation of effort and costs and benefits to cater for special needs, vulnerabilities, capabilities, disparities and responsibilities of vulnerable populations including women'.<sup>63</sup> It is evident from the Act that it foresees protecting all persons including women. However, it is important to note that it envisions women to be 'vulnerable' rather than agents of change who are carriers of knowledge on climate change adaptation and mitigation. The characterization of women as a vulnerable group depicts women as a group in need of protection rather than as active participants in the quest for climate justice. The Act also provides for public participation in climate change affairs, creating an open forum for women and the marginalized to be active in responding to climate change.<sup>64</sup> However, the technical language in the Act makes it difficult for many to engage with the science of climate justice as encapsulated in the Act.

The Act establishes the National Climate Change Council to ensure that its objectives are realized.<sup>65</sup> This Council is required to ensure gender mainstreaming in climate change activities. However, the composition of the institution, comprised of cabinet secretaries and heads of organized bodies who are mainly men, might hinder its implementation of this objective.<sup>66</sup> Aura and others point out that gender mainstreaming remains a challenge, given that men are more likely to have positions on the Council, increasing the likelihood that women will be excluded.<sup>67</sup> Women's knowledge and experiences are therefore less likely to be included in the implementation of the climate change objectives.

The Climate Change Directorate is responsible for national climate change plans and actions and is expected to 'ensure the coordination and implementation of the gender and intergenerational climate change education, consultation and learning at both the national and county governments' level'.<sup>68</sup> Other functions include providing analytical support on climate change and serving as the national knowledge and information management centre for collating,

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<sup>62</sup> The Climate Change Act 11 of 2016, Kenya Gazette Supplement No. 68, 181.

<sup>63</sup> Constitution of Kenya 2010, Article 2.

<sup>64</sup> The Climate Change Act 11 of 2016, s 24.

<sup>65</sup> *Ibid.*, ss 5–7.

<sup>66</sup> Aura and others (n 61).

<sup>67</sup> *Ibid.*

<sup>68</sup> The Climate Change Act 11 of 2016, s 9.

verifying, refining and disseminating knowledge and information on climate change.<sup>69</sup> Moreover, the Act requires the Cabinet Secretary to formulate gender-responsive national public education and awareness strategies on climate change.<sup>70</sup>

The Act also establishes the Climate Fund, which provides for a financing mechanism.<sup>71</sup> Women's participation in this Fund is critical if they are to be effective agents in climate change mitigation and adaptation efforts. However, while women participate in change mitigation and adaptation, their participation in resource allocation for these activities is not guaranteed. In addition, like most funding mechanisms, this Fund does not adopt gender budgeting principles.<sup>72</sup> Accordingly, resources are not necessarily allocated for gender-specific needs in change mitigation and adaptation. This is despite the fact that the National Climate Change Council, which is tasked with administering the Fund, has a duty to approve a national gender and intergenerational responsive public education awareness strategy and implementation programme as an overarching national climate change coordination mechanism.<sup>73</sup>

Kenya submitted the first Nationally Determined Contributions (NDC) under the Paris Agreement in 2016 with the goal of preventing dangerous anthropogenic interference with the climate system. The mitigation contribution was intended to abate greenhouse gas emissions by 30 per cent by 2030. The NDC was updated in 2020 and commits to abating greenhouse gas emissions by 32 per cent by 2030. Additionally, Kenya's adaptation goal is to create a climate-resilient society by mainstreaming climate change into the Medium-Term Plans (for implementing Kenya Vision 2030) and the County Integrated Development Plans (overall framework for development in the counties) and implementing adaptation actions. Kenya is also committed to providing education, training, public awareness, public participation and public access to information on climate change adaptation across public

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<sup>69</sup> Ibid.

<sup>70</sup> Climate Change Act, No. 11 of 2016 s 8.

<sup>71</sup> See for instance, The Garissa County Climate Change Fund Act, 2018; Wajir County Climate Change Fund Act, 2016; County Government of Elgeyo Marakwet, County Integrated Development Plan (CIDP) 2018–2022 (County Government of Elgeyo Marakwet, 2018); County Government of Laikipia, Second County Integrated Development Plan 2018–2022, County Government of Laikipia, 2018; Isiolo County Climate Change Fund Regulations, 2018; Public Finance Management Act (Kitui County Climate Change Fund) Regulations, 2018; Public Financial Management (Makueni County Climate Change Fund) Regulations 2015; Draft Environmental Management and Coordination (Strategic Assessment, Integrated Impact Assessment and Environmental Audit) Regulations, 2018.

<sup>72</sup> Aura and others (n 61).

<sup>73</sup> Climate Change Act, No. 11 of 2016 ss 6, 8.

and private sectors.<sup>74</sup> While mitigation and adaptation actions are in sectors in which women are engaged, such as agriculture; water and sanitation; population; urbanization and housing; infrastructure (energy and roads); environment; and health, the NDC addresses gender only as part of a programme including youth and other vulnerable persons. The issues raised in the NDC are limited to the development of safety nets and access to technology. The NDC fails to recognize that gender is a cross-cutting issue in all the areas in which adaptation and mitigation are anticipated. It also ignores the agency that women should have as actors in mitigation and adaptation actions.

In addition, Kenya's law on climate change is buttressed by the Climate Smart Agriculture Strategy (CSA),<sup>75</sup> which aims at increasing productivity and the commercialization of agricultural-related value chains with nutrition and gender considerations. This has led to some successful examples of the inclusion of women.

One such example comes from women engaged in the East Africa Dairy Development, a CSA programme designed to boost the milk yields and incomes of small-scale farmers to lift themselves, their families, and the general society out of poverty.<sup>76</sup> While this framework also demonstrates a gendered approach in terms of data collection, Aura correctly notes that more can be done to ensure that the data collected reflects a true picture of the gendered impacts of CSA.<sup>77</sup>

Despite the elaborate regional and international frameworks on gender equality and climate change, an integrationist approach to gender and climate justice is yet to be fully adopted in the laws and policies. This fails to embed Kenya's gender equality constitutional provisions and women's rights in both a healthy and sustainable environment and in sustainable development recognized in international instruments and in the Maputo Protocol.<sup>78</sup>

The failure to integrate gender and climate action is paradoxical because earlier initiatives such as Nairobi Forward Looking Strategies and Beijing

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<sup>74</sup> Ministry of Environment and Natural Resources, 'Kenya's Intended Nationally Determined Contribution' (2015) [https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Kenya%20First/Kenya\\_NDC\\_20150723.pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Kenya%20First/Kenya_NDC_20150723.pdf) accessed 1 November 2021.

<sup>75</sup> Ministry of Agriculture, Livestock and Fisheries, 'Kenya Climate Smart Agriculture Strategy 2017–2026' (2017) [http://www.mediatorre.org/docactu\\_cGV4aW5lZy9kb2NzL2tlbnlhLWNsaW1hdGUtc2lhcncQfYWdyaWN1bHRlcmU=.11.pdf](http://www.mediatorre.org/docactu_cGV4aW5lZy9kb2NzL2tlbnlhLWNsaW1hdGUtc2lhcncQfYWdyaWN1bHRlcmU=.11.pdf) accessed 1 November 2021.

<sup>76</sup> *Ibid.*

<sup>77</sup> Aura and others (n 61).

<sup>78</sup> African Union, 'Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' (known as the Maputo Protocol) Adopted 11 July 2003, entry into force, 25 November 2005.

Platform for Action had already paved the way for their integration. Furthermore, the World Summit on Sustainable Development<sup>79</sup> recognized the adverse effects of climate change and called for more effective and accountable institutions for women's equal access to, and full participation in, decision making; for mainstreaming a gendered perspective by enacting resource management systems that support women and men; and for improving women's access to health care, education, land and credit. Moreover, the 2005 Hyogo Framework for Action (HFA) developed at the World Conference on Disaster Reduction, with a goal of substantially reducing disaster losses by 2015, incorporated gendered aspects of disaster planning and response. The HFA states that 'a gender perspective should be integrated into all disaster risk management policies, plans and decision-making processes, including those related to risk assessment, early warning, information management, and education and training'.<sup>80</sup> The November International Women Leaders Global Security Summit had also 'acknowledged that climate change poses significant security risks, particularly for women, and that women have to be included in decision making at all levels'.<sup>81</sup> It is worth noting that women's groups were among the most vocal civil society actors at the 27th meeting of the Conference of Parties to the UNFCCC in 2021.<sup>82</sup>

This section illustrates that international, regional and national laws are formulated based on the erroneous assumption that the person who will bring about climate change mitigation and adaptation is a man, and not a community. This man is described as a free, mobile, detached, atomistic individual who negotiates with others in the public realm for reasons of personal advantage. Indeed, the language of climate justice laws and policies in terms of the persons protected does not even begin to resemble the experiences of many women in developing countries, who provide the bulk of labour for water and energy provision and assume full responsibility for caring for their families. When climate mitigation and adaptation actions are disembowelled from daily

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<sup>79</sup> Medani Bhandari and Keshav Bhattarai, 'Institutional Architecture for Sustainable Development (SD): A Case Study from Bangladesh, India, Nepal, and Pakistan' (2017) 1(3) *SocioEconomic Challenges* 6.

<sup>80</sup> United Nations, 'Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters', 22 January 2005, A/CONF.206/6, 4.

<sup>81</sup> Women's Environment & Development Organization, with ABANTU for Development in Ghana, ActionAid Bangladesh and ENDA in Senegal 'Gender, Climate Change and Human Security: Lessons from Bangladesh, Ghana and Senegal' Hellenic Foundation for European and Foreign Policy (ELIAMEP) (2008) 18.

<sup>82</sup> Lærke Salhaug-Rasmussen, 'Emerging Powers in Global Climate Politics: The Discursive Story-Lines Used by the BASIC Countries Regarding the Climate Crisis, Responsibilities and Burden Sharing in the UNFCCC' Lund University (2020).

life and considered as isolated actions, women's participation is adversely affected.

The challenges persist because the policies and laws are characterized by incongruences that fail to recognize that climate change itself impacts on the ability to participate in climate change mitigation and adaptation measures;<sup>83</sup> that women's knowledge and experiences have not been integrated into mainstream knowledge on climate governance;<sup>84</sup> and that women's needs, concerns and knowledge on climate governance has been left out of the science of climate justice. In addition to this, discrepancies between the so-called formal and informal legal contexts and norms persist in the implementation process, and this is discussed in the section that follows.

## 2. INCONGRUENCES BETWEEN THE FORMAL AND INFORMAL JUSTICE SYSTEMS

Like all other areas of law and governance, climate governance takes place against the backdrop of an amalgam of contending norms. As pointed out above, Kenya has a juristic plural legal system where tiered and interactive normative systems operate under the Constitution, which recognizes the other legal orders and sets the parameters for their application. Customary law and religious laws apply in matters such as property rights, inheritance, burial and marriage. In rural areas, these customary law norms are pervasive and impact on land holding and land use, which are critical for climate change adaptation and mitigation.

In these plural legal contexts, where diverse laws co-exist and interact with other norm-generating and norm-enforcing spheres, tensions are bound to arise between the varieties of norms in their application. In relation to gender equality and climate change, this is further complicated by the effects of colonialism in general, and the vulnerable position of women in marginalized rural communities in particular. This raises unique challenges for gender equality, and specifically for how to achieve gender equality in light of competing norms and a changing climate.

### (a) A Colonial History of Exclusion Through Conservation

Climate change mitigation and adaptation are directly affected by the manner in which the conservation of environmental resources takes place. In plural legal contexts, the conservation of natural resources gives rise to varying

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<sup>83</sup> Patricia Kameri-Mbote, 'I Want It and I Want It Now' (n 1).

<sup>84</sup> Kabira (n 2).

norms and perspectives.<sup>85</sup> For most Kenyan rural communities, interaction with land, wildlife, forests and water bodies is part and parcel of their livelihoods and economic well-being. Given Kenya's British colonial legal history and the introduction and formalization of new norms governing political, social, economic and cultural life to govern environmental resources, tension arises between the formal legal norms and people's daily lives which rely on these resources and the connections between them. However, colonial law and policy on these resources severed the connections between people and resources through the establishment of protected areas.<sup>86</sup> The colonial and immediate post-independence policies on wildlife and forests were geared towards facilitating access for the settlers. For wildlife, game hunting was rife, while in forests, timber was harvested for local use and export purposes.<sup>87</sup> Thus colonial laws and policies were formalized and superseded pre-existing unwritten laws, which were relegated to 'informalism'. It became impossible for local communities dependent on wildlife and forests to lead their normal lives without breaking the law, because of the new boundaries placed between them and resources they needed for their livelihood.<sup>88</sup> The values attached to conservation were, for the most part, removed from the needs and aspirations of native Kenyans, for whom the whole process amounted to both the expropriation of their property rights and the severance of their relationship with their local environment and environmental resources.<sup>89</sup> In this process, colonialism decreased the sense of trusteeship by Africans over their natural resources.<sup>90</sup>

The colonial and immediate post-colonial policy on environment and natural resources was also incoherent and riddled with contradictions, as the main aim was extraction of resources. This was backed by state institutions, which were ruthless towards local people transgressing the boundaries between

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<sup>85</sup> Patricia Kameri-Mbote, 'Wildlife Conservation and Land Rights in Kenya: Competing or Complementary Agendas?' in Philippe Cullet and Sujith Koonan (eds), *Research Handbook on Law, Environment and the Global South* (Edward Elgar Publishing 2019).

<sup>86</sup> *Ibid.*, 99.

<sup>87</sup> Patricia Kameri-Mbote, 'The Development of Biosafety Regulation in Africa in the Context of the Cartagena Protocol: Legal and Administrative Issues' (2002) 11(1) *Review of European Community and International Environmental Law* 62.

<sup>88</sup> *Ibid.*

<sup>89</sup> Patricia Kameri-Mbote, 'Land Tenure, Land Use and Sustainability in Kenya: Towards Innovative Use of Property Rights in Wildlife Management' in Nathalie Chalifour and others (eds), *Land Use Law for Sustainable Development* (Cambridge University Press 2007).

<sup>90</sup> Patricia Kameri-Mbote and Philippe P Cullet, 'Law, Colonialism and Environmental Management in Africa' (1997) 6 *Review of European Community & International Environmental Law* 23.

them and the resources. The fact that new laws and policies were introduced through colonial rule shifted the control, access and use of resources from the local people, thereby affecting key strategies necessary for climate change mitigation.

This history of exclusion is the foundation upon which climate justice in Kenya is based. Beyond the general exclusionary nature of the laws, discussed above, which have direct impacts on climate justice and governance, the land and environmental laws have historically been couched in gender-neutral terms. This introduces an additional layer of exclusion for women. Gender disparities in the land and environment sectors thus interact with broader inequalities in representation and decision making at the national level, as described. The thrust of the liberal feminist movement was to get women into the public sphere and to challenge their relegation to the private sphere as appendages of men who made decisions for women in the public sphere.<sup>91</sup> This is yet to be achieved in the realm of environmental governance.

### **(b) Contested Norms in Climate and Gender Justice**

In the widest sense, informal norms and practices embedded in customary law on relationships between people and nature in the area of drought and natural resource loss and degradation, for instance, can hinder or promote climate justice. These include beliefs, norms and practices embedded in informal customary lifestyles and law. For example, the belief that adverse weather conditions are caused by supernatural powers may prevent members of the society from adopting proven scientific methods of adapting to climate change. In addition, the traditional reliance on raw natural resources for food and livelihood strains these resources and can make it hard to curb climate change. Further, the acceptance of gender discriminatory practices denies climate justice to valuable actors.<sup>92</sup> On the other hand, practices with positive benefits for climate change mitigation include traditional agricultural practices, such as bush fallowing, which allow the land to regain its natural state by reducing the use of artificial agricultural products that pollute the environment. Collective governance systems under customary law also facilitate coordinated approaches at the lowest, and often hardest to reach, levels.

However, the differing norms prescribe 'dos and don'ts' that may not be aligned, and this could lead to unintended negative outcomes for climate

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<sup>91</sup> Patricia Kameri-Mbote, 'Women, Land Rights and the Environment: The Kenyan Experience' (2006) 49(3) *Development* 43; Patricia Kameri-Mbote, 'What Would it Take to Realise the Promises? Protecting Women's Rights in the Kenya National Land Policy of 2009' (2009) 12 *Feminist Africa* 87.

<sup>92</sup> *Ibid.*



and gender justice. This is compounded by four related issues that weigh in favour of informal rules and practices: informal laws are accessible; people are active in spaces where formal laws do not exist; the arrival of formal laws is unaccepted by the members of the society; and informalism is the acceptable norm of practice.<sup>93</sup> For instance, in many parts of the country, informal norms still reign supreme with respect to land usage, despite more than six decades of attempts to formalize land relations.

Indeed, the tension between formal legal systems and customary practices in many communities in Kenya significantly influences women's ownership and control over land and land-based resources, as well as their voice in decision making over the resources. In this regard, it is notable that despite constituting half of the population, women in Kenya only hold title to between 1 and 5 per cent of the land.<sup>94</sup> This directly affects climate change mitigation and adaptation as women's land rights determine the extent to which women can access or control land and land-based resources.

Women from minority and indigenous communities in Kenya, who depend directly on the environment for their livelihood, also have to contend with the legacy of decades of marginalization from the state and wider society.<sup>95</sup> In the Kenyan context, these marginalized communities suffer from government policies that discriminate against them based on ethnicity or identity – sometimes to the point of denying the very existence of the group. Climate change has a disproportionate impact on women from minority groups, given that they struggle to access basic needs and services, and they often suffer violence because of inter-communal conflict due to state failure to provide security to the population.<sup>96</sup>

Women from these minority and indigenous groups face multiple forms of marginalization as recognized in the Kenyan Constitution. The Constitution makes a distinction between marginalized communities (ethnic minorities with a link to a particular land mass, such as Maasai, Ogiek and Endorois) and marginalized groups (who have no common ethnic descriptor, such as pastoralists). This reflects the notion that minority and indigenous women confront

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<sup>93</sup> Ibid.

<sup>94</sup> James Wanzala, 'Why Only Two Percent of Women in Kenya Own Land' (Standard Media, 30 July 2021) <https://www.standardmedia.co.ke/national/article/2001419552/why-only-two-per-cent-of-women-in-kenya-own-land> July 20th 2021 accessed 24 August 2021.

<sup>95</sup> Celestine Musembi and Patricia Kameri-Mbote, 'Mobility; Marginality and Tenure Transformation in Kenya: Explorations of Community Property Rights in Law and Practice' (2013) 17(1) *Nomadic Peoples* 5.

<sup>96</sup> Stephen Ndegwa, 'Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics' (1997) 91 *The American Political Science Review* 599.

multiple forms of discrimination: they are discriminated against because of their gender and because of their identification with groups that have been marginalized over time.<sup>97</sup> They also struggle to attain gender equality in many areas of social, cultural, economic and political life, like all other women in Kenya.

These are considerations that need to be contemplated in the making and implementation of climate justice laws.

### **(c) Addressing Climate Change with Women in Mind: Where the Rubber Meets the Road**

In the end, many of the problems for women lie not only in the law, but in the gendered social and cultural norms and practices that define their particular, hierarchically gendered roles and positions in the family and society. Addressing climate change as if women matter demands recognition of these gender and social cultural issues and the critical role they play in climate change mitigation and adaptation. This is important because social roles play out not only at the household level, but also in the communities, and entrenched cultural patterns may hinder gender equality and women's empowerment, all of which will impact negatively on climate governance and natural resource management.<sup>98</sup> The guiding principle is that social and cultural norms also guide the legal products and processes that can, and often do, impact negatively on women's lives. Such norms and products may include land rights, property/inheritance rights, participation in decision making, representation in governance structures, and utilization of instruments of power at community and national levels that may exclude women. Tradition also influences modern legal systems and perpetuates discrimination against women.<sup>99</sup>

Women's knowledge and experience must be taken into account when dealing with climate change. Women in rural areas are particularly vulnerable to climate change. In fact, many women depend on the ecosystem for their daily subsistence and livelihoods as they manage farms that depend on the collection of water and fuelwood for cooking and daily subsistence.<sup>100</sup> Women's knowledge of food production and sourcing of fuel for heating and cooking in a way that is friendly to the environment should be documented and fed into

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<sup>97</sup> Musembi and Kameri-Mbote (n 95).

<sup>98</sup> Kabira (n 2).

<sup>99</sup> Kameri-Mbote, 'Wildlife Conservation' (n 85).

<sup>100</sup> Jo-Ellen Parry and others, 'Climate Risks, Vulnerability and Governance in Kenya: A Review' (2012) Climate Risk Management Technical Assistance Support Project, Joint Initiative of Bureau for Crisis Prevention and Recovery, and Bureau for Development Policy of UNDP.

more climate-friendly policies and practices. In essence, addressing climate change as if women matter entails listening to women's voices, experiences and concerns, analysing these experiences, documenting them and identifying key areas that might influence law and policy on climate change mitigation.

Limiting climate change actions to formal law ignores a context where people interact with nature in a very intimate way governed by informal customary law and semi-autonomous field norms. This is an area where women are very actively involved. There is, therefore, a need to engage the normative content of these informal norms by isolating aspects that can facilitate gender equality and climate change adaptation and mitigation actions, while challenging and ousting those aspects that militate against equality and unsustainable use of resources. In forest management, for instance, women's role in sustainable resource management through clearing space under trees to give way for rejuvenation processes is lost in narratives of their engagement in illegal removing of forest resources and the constant harassment by forest authorities. This ignores the fact that women collect dead wood and tinder in forests, which is not invasive, and are not usually engaged in massive logging, which threatens the environment.

## CONCLUSION

This chapter examined the extent to which gender equality is considered in climate justice laws and policies, particularly within the plural, multi-sited and complex framework comprising local, county, national, regional, and international norms. It explored how women have to navigate this space among other actors and institutions; whether and how their interests are taken care of; and what their agency in climate change mitigation and adaptation is. The chapter demonstrated that although the UN 2030 Development Agenda and several other international, regional, and national laws and policies recognize the importance of ensuring gender equality in climate change mitigation and adaptation, these laws and policies continue to face implementation challenges. This is because they fail to recognize climate change as a threat multiplier, the interconnectedness of gender and climate change, and the enduring legacies of colonial rule that discount local knowledge from mainstream climate justice knowledge.

Addressing climate change in Kenya as if women matter demands a holistic and integrated approach that brings together diverse norms, actors, structures and interests. These actors include international, national, and local government agencies, development agencies, humanitarian organizations, non-governmental organizations, human rights and women's rights organizations, traditional leaders, local communities, families and other semi-autonomous social fields, and individual women. A pluralistic approach to climate justice has the

potential to contribute to gender equality and women's empowerment and to mitigate climate change. We need to ensure that climate change laws do not privilege formal structures without being informed by people's lived realities, particularly women's experiences and realities. Climate governance requires navigating gender equality against the backdrop of a plural legal terrain in which international and national law coexist and interact with local norms and practices.

## 8. Climate change and gender in Colombia: Exploring female led struggle in the flower industry

**Helena Alviar García and María Carolina Olarte-Olarte**

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### INTRODUCTION

In a 2020 interview, the Colombian environmental leader, Francia Marquez, argued that the economic development agenda of past and present Colombian governments was centred upon growth as the ultimate goal at the expense of food production and the protection of the lifestyle of local communities:

When they accuse us of opposing development I respond: Development for whom? For the people who have been displaced from their land and now are forced to work as laborers in large sugar cane estates that only give surplus to big landowners? Of what development are we talking about if in order to build a dam, fertile land where we used to harvest coffee, cacao, plantain has been buried?<sup>1</sup>

As Marquez's quote exemplifies, there is an existing tension between growth and its devastating consequences for the environment. In other interviews, she has also spoken of the more severe effects that environmental depredation have on women, mostly because so many dedicate their lives to food production and preparation.<sup>2</sup> Feminist academics have explored these differential effects over women at least since the 1960s and have provided diverse avenues for analysis

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<sup>1</sup> Lula Gómez, 'No nos Preguntamos si los Productos que Consumimos están Bañados en Sangre', Entrevista a Francia Márquez, Defensora de los DDHH y Premio Goldman (Publico, 15 October 2018) (translated by the authors) <https://www.publico.es/sociedad/femenino-plural/entrevista-francia-marquez-defensora-ddhh-premio-goldman-no-preguntamos-productos-consumimos-banados-sangre.html> accessed 9 March 2022.

<sup>2</sup> BBC World, 'Francia Márquez, la Mujer que Puso en Jaque a la Minería Ilegal y a las Represas en Colombia y Acaba de Ganar el Premio Goldman' (BBC News, 25 April 2018) <https://www.bbc.com/mundo/noticias-43879742> accessed 9 March 2022.

as well as possible solutions. Despite the existence of robust literature, it is unclear how activists use academic insights and relate to them.

This chapter will describe one example of activists from the flower industry in Colombia as an illustration of how different feminist perspectives hit the ground. Flower production is an interesting case study because it has been defended by neoliberal policy makers as an ideal agrobusiness for a country like Colombia (the second largest producer of cut flowers in the world),<sup>3</sup> built upon the country's comparative advantage and given the fact that it employs mostly women. A policy working paper on trade policy published by the World Bank in 1991 describes the success of the sector in the following terms:

The Colombian cut flower industry is one of the major development success stories of the last 20 years. The industry scarcely existed in 1966 but developed rapidly. By 1980, Colombia was the world's second largest exporter of cut flowers after the Netherlands, accounting for 8 percent of the world export supply of cut flowers and it continues to hold that position. [...]

The industry has also become a major employer of low-skill, largely female labor drawn from the low-income areas surrounding Bogota.<sup>4</sup>

The truth seems to be less worth celebrating. Cultivating flowers has dire consequences for the environment, female employees are paid minimum wages with little or no benefits and are hired according to production cycles, not on a permanent basis.<sup>5</sup> Workers are exposed to a very intensive pesticide crop and working conditions are taxing.<sup>6</sup> In addition, large swaths of very productive land are being used to cultivate flowers for export instead of food, highlighting Francia Marquez's insights mentioned above.

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<sup>3</sup> Gaby del Valle, 'The Hidden Environmental Cost of Valentine's Day Roses' (Vox, 12 February 2019) <https://www.vox.com/the-goods/2019/2/12/18220984/valentines-day-flowers-roses-environmental-effects> accessed 26 May 2022.

<sup>4</sup> José Mendez, *The Development of Colombian Cut Flower Industry* (The World Bank, 1991) abstract paras 2, 3, 5.

<sup>5</sup> Martin Donohoe describes how little of the final price of flowers is paid to workers in the industry: 'For instance, on an average day, one woman working in a Colombian carnation field will pick over 400 top-grade flowers. Four such flowers will cost just under \$4.00 at US florist, more than a worker earns in a day.' Martin Donohoe, *Public Health and Social Justice: A Jossey-Bass Reader* (John Wiley & Sons 2012) 165.

<sup>6</sup> As noted by Donohoe, *ibid.*, 166–167:

Flowers are the most pesticide intensive crop. They are grown and picked in arm, enclosed greenhouses, which keep pests out but result in high ambient levels of pesticides. One-fifth of the fertilizers, insecticides, fungicides, nematocides, and plant growth regulators used in floriculture in development nations are banned or untested in the United States. Many are known carcinogens.

This chapter will analyse the case of ASOQUIMAD (Madrid's Quinoa Organization), EMM (Women's School of Madrid), and the Herrera Association, which are interrelated organizations of mostly women seeking to transit from wage earners in the flower industry to work contributors to cooperatives that produce food. The example of these organizations will be used to illustrate how academic as well as policy makers' approaches to gender and environment are at times insufficient, and at other times instrumentalized or deemed irrelevant. The particularities of women's struggles in the outskirts of Bogotá show the need for more grounded approaches to the gender–climate nexus. In addition, the case demonstrates that it is essential for feminists engaged with climate change to move beyond gender inclusion and unpack the interaction between climate threats, labour conditions and political options.

The chapter has five short sections. In the first one, we lay out traditional feminist approaches to climate change. Then, we will analyse neoliberal economic development policies and their effects on climate and gender. This will be followed by a description of the relevant association, its main activities and the different actors involved. The third section will be dedicated to unveiling the diverse ways in which the association has related to policies and ideas about climate change and gender. We will end with some conclusions and a few proposals to contribute to a richer and potentially more transformative interaction between activists and policy makers.

## 1. FEMINISM AND CLIMATE CHANGE: A LONG RELATIONSHIP

Does ecological depredation and climate change affect women differently? This question has been asked by feminists and policy makers for at least half a century, although the query has become increasingly pressing. Understanding the relationship between women and sustainable economic development dates back to the early 1970s with Esther Boserup's ground-breaking work *Woman's Role in Economic Development*.<sup>7</sup> Boserup explored the gendered division of labour in agriculture as well as women's centrality in subsistence production. This prevalent role made them more sensitive to protecting the environment. In other words, the fact that women are in charge of planting crops to be consumed by the household (corn, plantain, rice, to provide a few

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<sup>7</sup> Ester Boserup, *Woman's Role in Economic Development* (first published 1989, Earthscan 2007). See also Irene Tinker, 'The Making of a Field: Advocates, Practitioners and Scholars' in Lynn Duggan and others (eds), *The Women Gender and Development Reader* (Zed Books 1996).

examples) makes them more attuned to changes in climate that bring droughts or flooding, as well as to practicing the best ways to protect nature.

More recent research has argued that climate change will disproportionately affect the poorest of the poor in the global south because of the geographical zones they occupy, the neighbourhoods they inhabit in major cities and the economic activities they dedicate their lives to. Along with these characteristics there is the fact that citizens with low incomes lack insurance and savings, and often their countries do not have welfare institutions that will help them face environmental disaster.

In Latin America, as in other parts of the world, academics and policy makers have different views of both the extent of the problem and the tools to attack it.<sup>8</sup> Liberal feminists centre their interpretation of the problem as one of lack of adequate women's representation in spheres that decide on energy resources, sustainable agricultural production and food security. In addition, they demand more land access and tenure, as well as the privileged gendered provision of technical and financial assistance.

Feminists inspired by the socialist tradition view the problem as less one of access or lack of representation. This group of feminists aim to undermine the romantic view of the relationship between women and nature by critiquing the sexual division of labour that has marginalized women to being only subsistence producers, natural resource managers with little or no access to property. The fact that women are mainly caretakers makes their work invisible. For this group of feminists, it is essential to provide state support for reproductive tasks in order for women to break with the cycle of poverty, but also to create social awareness of the importance of subsistence farming and its practices that protect the environment and its relevance for climate change.

There is a third feminist perspective, cultural feminism, which critiques the definition of the problem as one of equality and representation or the invisibility of reproductive work, and instead understands that the whole economic system should be redefined in order to incorporate an alternative, feminine view, one that shifts the emphasis from growth to nurture and connectedness.

Still other scholars have critiqued these feminists' views by arguing that the binary of men–women is an inadequate starting point. They defend the idea that gender is socially constructed, and that nobody is solely male or female and that there is a range of male and female behaviours in all of us. As a consequence, they critique the view that women, as a category, will be disproportionately affected by environmental depredation.

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<sup>8</sup> For more on the different strands of feminism in Latin America, see also Helena Alviar García, *Legal Experiments in Development in Latin America: Modernization, Revolution and Social Justice* (Routledge 2021).



In Latin America, women's social movements and feminist literature have identified and described the links between gender inequality, climate change in contexts of environmental degradation, and development. They include the inequality produced by an extractivist model,<sup>9</sup> the erasure of women's knowledge in mainstream climate change approaches,<sup>10</sup> the use of climate change narratives to displace other environmental issues associated with development,<sup>11</sup> and food justice.<sup>12</sup> In fact, in the region, decolonial and popular feminist approaches highlight the role that local knowledge plays in facing degradation; the superficiality of governmental policies regarding climate change; the centrality of nonhumans for socio-environmental and ecological struggles; and the importance of mobilizing communities to promote an understanding of nature as different from an economic resource.<sup>13</sup> In addition, the

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<sup>9</sup> Astrid Ulloa, 'Feminismos Territoriales en América Latina: Defensas de la Vida Frente a los Extractivismos' (2016) 45 *Nómadas* 123. See also Maristella Svampa, *Antropoceno Lecturas Globales desde el Sur* (Costureras 2019); Maristella Svampa, 'Feminismos Populares, Extractivismos y Patriarcado bajo el Consenso de los Commodities' in *Del Cambio de Época al Fin de Ciclo. Extractivismo, Gobiernos Progresistas y Movimientos Sociales* (Edhasa 2017); Miriam Gartor, 'El Feminismo Reactiva la Lucha contra el "Extractivismo" en América Latina' (La Marea, 17 February 2014); Mina Navarro, 'Mujeres en Defensa de la Vida contra la Violencia Extractivista en México' (2019) 51 *Política y Cultura* 11; *Territorio y Feminismos, 'Declaración del Encuentro De mujeres Frente al Extractivismo y al Cambio Climático'* (14 October 2014) <https://territorioyfeminismos.org/2014/10/15/encuentro-de-mujeres-frente-al-extractivismo-y-al-cambio-climatico/> accessed 9 March 2022.

<sup>10</sup> Astrid Ulloa, 'Producción de Conocimientos en Torno al Clima. Procesos Históricos de Exclusión/Apropiación de Saberes y Territorios de Mujeres y Pueblos Indígenas' (2012) 21 *desiguALdades.net Working Paper Series* 42.

<sup>11</sup> Paola Bolados and others, 'La Eco-Geo-Política del Agua: Una Propuesta desde los Territorios en las Luchas por la Recuperación del Agua en la Provincia de Petorca' (2017) 8(1) *Revista Rupturas* 167.

<sup>12</sup> Magdalena Fueres and others, *La Soberanía Alimentaria y las Mujeres* (Instituto de Estudios Ecologistas del Tercer Mundo 2013).

<sup>13</sup> See, among many others, Astrid Ulloa, *Políticas Globales, Nacionales, Locales de Cambio Climático y sus Incidencias en Desigualdades de Género y Etnicidad* (CLACSO, IDEAS, CODESRIA 2015); Mina Lorena Navarro, Raquel Gutiérrez and Lucía Linsalatta, 'Repensar lo Político, Pensar lo Común: Claves para la Discusión' in Daniel Inclán, Lucía Linsalatta and Mónica Millán (eds), *Modernidades Alternativas y Nuevo Sentido Común: Prefiguraciones de una Modernidad no Capitalista* (Facultad de Ciencias Políticas y Sociales UNAM and Ediciones del Lirio 2016); Cristina Carrasco, 'La Sostenibilidad de la Vida Humana: ¿Un Asunto de Mujeres?' (2003) 82 *Mientras Tanto* 43; Valeria Esquivel (ed), *La Economía Feminista desde América Latina: Una Hoja de Ruta sobre los Debates Actuales en la Región* (ONU Mujeres 2012); Corina Rodríguez Enríquez, 'Economía Feminista y Economía del Cuidado' (2015) 256 *Nueva Sociedad* 30.

interpretation of the term territory<sup>14</sup> as both a symbolic and material network of interdependent relations, rather than as an element of sovereignty, has become a central point for activists and academics.

The approaches described above touch upon labour issues, burdens and opportunities in climate change settings through critical perspectives on care and reproductive work.<sup>15</sup> Yet, literature on the specific connections between women's movements, labour and small-scale food production in peri-urban areas vulnerable to climate change is still scarce. One of our goals in this chapter is to analyse the impact that neoliberal public policies have on climate change and women's particular relationship to it in the peri-urban areas at the outskirts of Bogotá. In addition, our aim is to explore the way that activists relate to the environmental agenda set forth by government officials in public documents. As a consequence, this chapter is framed not only within public policies geared towards supporting the flower industry; the construction of a new airport (as essential to export-led growth) or the elimination of tariffs and taxes through the deployment of free trade zones, but also the documents that crystallize environmental, and more specifically, climate policy.

## 2. NEOLIBERAL POLICIES AFFECTING WOMEN AND THE ENVIRONMENT

### (a) The Flower Industry

Over the last 40 years, an export-oriented flower industry has developed in the Sabana de Bogotá (the Bogotá savannah). The municipality of Madrid, in particular, has the largest concentration of flower producers in Colombia. The industry became a major employer of female labour from low-income areas surrounding regions. By 2014, the flower sector was generating 68 per cent of employment in the municipality.<sup>16</sup> Currently, it employs approximately

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<sup>14</sup> Eva Vázquez and others, *La Vida en el Centro y el Crudo Bajo Tierra: El Yasuní en Clave Feminista* (Colectivo Miradas Críticas del Territorio desde el Feminismo 2014); Rocio Silva Santisteban, *Mujeres y Conflictos Ecoterritoriales: Impactos, Estrategias, Resistencias*. (Entrepueblos, AIETI, Demus, CMP Flora Tristán y Coordinadora Nacional Derechos Humanos 2017); Astrid Ulloa, 'La Resistencia Territorial en América Latina' (2015) 1 *Perspectivas Latinoamericanas* 39.

<sup>15</sup> Beyond the region, see the exceptional work of Stepania Barca on the nexus between labour and ecology, and alternative ecological visions. Stefania Barca, 'Labour and the Ecological Crisis: The Eco-Modernist Dilemma in Western Marxism(s) (1970s–2000s)' (2019) 98 *Geoforum* 226.

<sup>16</sup> Alcaldía de Madrid, *Diagnóstico Territorial* (Foro Regional del Floricultura: Miradas al Trabajo, el Territorio y su Gente 2014).

140,000 people,<sup>17</sup> most of whom are women: 60 per cent as staff and 62 per cent in production.<sup>18</sup>

The production process in the flower industry is highly labour intensive and resembles assembly-line factories. Within the flower farms, the gender division of labour is blatant. Women carry out most activities required in cultivation, such as planting, fertilizing, cutting, classifying, and bunching flowers together. Men, on the other hand, are hired to apply pesticides, maintain the greenhouse structures, and transport the flowers to Bogotá's international airport.<sup>19</sup> The work carried out by women causes various health problems, including constant pain in the carpal tunnel, in the rotator cuff and back, and in some cases, respiratory diseases because of constant contact with pesticides and soil moisture. As many of the women must remain standing up or bending over for several hours at a time – depending on the required type of growth of each flower in every stage – varicose vein problems and pain in the vertebral column and knees are also common issues. The division of work into productive stages – cultivation and flower care in green houses and then harvest and post-harvest – implies that women must move between high temperatures at first (between 35°C and 40°C) to low-temperature warehouses where flowers are classified, packed, and stored in cold rooms before exportation.

It is this everyday nature of their work, linked to the required achievement of the beauty and straightness of the flowers, that underlies women's realization

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<sup>17</sup> Flower production provides 17 jobs per cultivated hectare. This sector provides 130,000–140,000 direct and indirect jobs in 60 municipalities. Further, approximately 65 per cent of workers are the heads of female-headed households. Of the flower production, 66 per cent comes from Cundinamarca, the department where Madrid is located. '¿Cómo Funciona el Sector Floricultor en Colombia?' (Procolombia, 26 February 2019) <https://www.colombiatrade.com.co/noticias/como-funciona-el-sector-floricultor-en-colombia> accessed 9 March 2022; Ministry of Agriculture, 'Cifras Sectoriales: Cadena de Flores' (Ministry of Agriculture, February 2020) <https://sioc.minagricultura.gov.co/Flores/Documentos/2019-12-30%20Cifras%20Sectoriales.pdf> accessed 9 March 2022. According to Asocolflores, the trade association representing approximately 80 per cent of Colombia's flower exporters, an estimated 130,000 people are employed in the industry. Asocolflores, 'Who are we?' <https://asocolflores.org/es/quienes-somos> accessed 9 March 2022.

<sup>18</sup> Juliana Flórez and others, 'Politics of Place at the Women's School of Madrid: Experiences Around Bodies and Territory' in Wendy Harcourt (ed), *Bodies in Resistance: Gender and Sexual Politics in the Age of Neoliberalism* (Palgrave Macmillan 2017); María Carolina Olarte-Olarte and Guisella Lara-Veloza, "'Volver a la Tierra": Dimensiones Territoriales del Trabajo como Delimitantes de las Opciones Laborales para las Mujeres en Madrid, Cundinamarca' (2019) Special Issue *Revista CS* 167.

<sup>19</sup> Flórez and others (n 18).

that the transformation of the territory is also a transformation of their bodies.<sup>20</sup> The working routines in the flower industry have shaped not only their bodies, but also their movements. The chemicals deployed and the body positions required to care for and cut the flowers, for instance, have left traces in their nails and skin, and limited mobility in their shoulders, knees and hands even long after the industries modified working conditions.

Flower production has also changed the land, impacted water bodies, and transformed the landscape. Therefore, some of the women affirm that their bodies carry and tell stories about a damaged land, and the transformation of their bodies ‘cannot be detached from the transformation of territory’.<sup>21</sup>

The rhythms of the flower industry are different from that of the outside world. Frenzy takes over before Mother’s and Valentine’s Day. Those dates determine the increased work required to meet international demand, and therefore translate into longer working hours. During this period, additional seasonal employees are hired at lower wages and without legal or social security benefits. Yet, for many women, these dates are the key moments to acquire resources that will help them out the rest of the year. Furthermore, even though most of women have not ever seen a dollar, a sort of dollar currency imaginary dominates the way in which they interact socially, and shape and calculate their expectations.<sup>22</sup>

As we stated above, the flower industry was described by the World Bank as one of the major development success stories of the 80s.<sup>23</sup> In fact, as Flórez and others have noted, ‘[i]t was hoped that the settlement of these companies would “catapult” the territory toward development. However, this has not been the case’.<sup>24</sup> Besides its impact on the continuous urbanization of the municipality of Madrid,<sup>25</sup> the flower industry – along with the increasing presence of other industries – have transformed the land that was mostly devoted to

<sup>20</sup> Ibid.; Interviews with women members, Herrera Association (Madrid, Colombia, April 2015 and August 2018).

<sup>21</sup> Flórez and others (n 18) 34.

<sup>22</sup> Interviews with women members, Herrera Association (Bogotá, Colombia, December 2014).

<sup>23</sup> José Méndez, *The Development of Colombian Cut Flower Industry* (The World Bank 1991).

<sup>24</sup> Flórez and others (n 18) 26.

<sup>25</sup> Jair Preciado, ‘La Dimensión Ambiental como eje Estructurante de la Región Metropolitana de Bogotá’ (2012) Special Issue, Cuadernos de Vivienda y Urbanismo. For the rapid pace of urbanization in the region, see Secretaria de Planeación, ‘Proceso de Revisión del Plan De Ordenamiento Territorial de Bogotá D.C.: Documento de Diagnóstico. Tomo’ (Alcaldía de Bogotá 2020).

livestock and agricultural production for local supply.<sup>26</sup> Today, the various subterranean water reserves are under threat,<sup>27</sup> and the soil composition is feared to have been modified dramatically. Additionally, the flower industry has transformed the life of many inhabitants because of the dirt produced by continued passing of flower transportation trucks over unmade roads.<sup>28</sup> For these reasons, as the women at the EMM and Herrera Association have pointed out, the rhythms of the industry have also transformed their bodies beyond and outside the flower companies.<sup>29</sup>

## **(b) Free Trade**

The construction of a free trade zone in Mosquera, a municipality neighbouring Madrid, and the planning and building of a new airport for Bogotá in the Madrid municipality are the most recent causes of land use transformation and the target of women's environmental resistance. Yet, as we will argue, they are not part of the climate change national narratives and planning for the region. Both the airport and the free trade zone are the result of development policies and projects designed for this area, and reflect the central role of the capital city, national government centrality in its design and purpose, and, ultimately, the peri-urban character of the region. These initiatives also make it possible

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<sup>26</sup> Roberto González, 'Implicaciones de la Floricultura en las Transformaciones Espaciales de Madrid (Cundinamarca) a partir de 1970' (2009) 14 *Perspectiva Geográfica* 219; Edersson Cabrera and Patricia Ramirez, 'Estado Actual y Cambio en los Ecosistemas de los Andes Colombianos: 1985–2005', in Dolores Armenteras and Nelly Rodríguez (eds), *Monitoreo de los Ecosistemas Andinos 1985–2005* (Instituto de Investigaciones de Recursos Biológicos Alexander Von Humbolt 2007); Edersson Cabrera, *Estado Actual y Cambio en los Ecosistemas de los Andes Colombianos* (Universidad Nacional de Colombia 2018); Byron Calvachi, 'La Biodiversidad Bogotana' (2002) 67 *La Tadeo* 89.

<sup>27</sup> Corporación Autónoma Regional de Cundinamarca, 'Plan de Manejo Ambiental de Agua Subterránea para la Sabana de Bogota y la zona crítica', (CAR 2008); Corporación Autónoma Regional de Cundinamarca, 'Política de Agua Subterránea en la Sabana de Bogotá' (CAR 2004); Resolución CAR 1724 de 2016. According to the CAR (a regional autonomous corporation, which acts as environmental authority at the regional level), flower extraction has increased vulnerability in some areas in the region, particularly because of the increasing depth of the wells deployed for water extraction due to the lowering of the water levels. The CAR has also identified high rates of water loss in the aquifers in the Vereda los Arboles, where the association La Herrera is located.

<sup>28</sup> Interviews (Bogotá, Colombia, December 2014) (n 22); field work notes (Madrid, Colombia, March 2021).

<sup>29</sup> Interviews with women members, Herrera Association (Bogotá, Colombia, December 2015); Flórez and others (n 18).

to understand the exponential decrease in arable land in the Sabana<sup>30</sup> and in Madrid in particular.<sup>31</sup> They also highlight the heated debate about the type of development imposed on and resisted by the women, in this case, the turning of the peri-urban territory at the western outskirts of Bogotá into an expanding 'dry port', as it is known.<sup>32</sup>

Approved in December 2008, the free zone covers 32 hectares in the municipality of Mosquera, 12 km from Bogotá and 20 km from El Dorado International Airport. It is strategically located in relation to service and road infrastructure that connect with ports, airports and border areas, which facilitates its articulation with global commercial circuits.<sup>33</sup> For the women's movement, in contrast, this privileging of transportation and trade has made their goals to strengthen cooperative agriculture even more difficult as it has intervened in local ecosystems. The free zone has, in fact, not translated into better work opportunities.<sup>34</sup> This privileging of growth above the environment will probably be strengthened after a recent constitutional reform that created a new metropolitan region (the Región Metropolitana Bogotá-Cundinamarca). Approved by Congress in July 2020, the purpose of this new administrative entity is to 'guarantee the implementation of sustainable development plans and programmes, and the efficient and timely provision of services'.<sup>35</sup>

Even though it is too soon to evaluate how these factors will transform the decision-making processes over land use, climate change interventions, environmental activism, and labour options for women, there are three reasons to fear for the environmental future of both the Sabana and the women's movement in the area. First, there is no provision for how the intensification of climate change will significantly transform the determinants of climate

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<sup>30</sup> See Instituto Geográfico Agustín Codazzi, 'En el 63 Por Ciento de la Sabana Bogotá ya no se Cultiva: IGAC' (30 June 2015) <https://www.igac.gov.co/es/noticias/en-el-63-por-ciento-de-la-sabana-bogota-ya-no-se-cultiva-igac> accessed 10 March 2022; Olarte-Olarte and Lara-Veloz (n 18).

<sup>31</sup> Omaira Páez, Informe sobre la Floricultura Colombiana 2008: Condiciones Laborales y la Crisis del Sector (Corporación Cactus 2009); González (n 26); Luis Felipe Homez, 'Análisis Multitemporal de los Cambios de la Cobertura de la Tierra e Incidencia de la Floricultura en el Municipio de Madrid, Cundinamarca desde 1985 hasta 2015' (Bachelor's Thesis, Faculty of Environmental and Rural Studies, Pontificia Universidad Javeriana 2017).

<sup>32</sup> Interviews with women members, Herrera Association (Madrid, Colombia, March 2019); Flórez and others (n 18) 26.

<sup>33</sup> See Zona Franca de Occidente website <https://zonafrancaoccidente.com> accessed 27 May 2022.

<sup>34</sup> Olarte-Olarte and Lara-Veloz (n 18); Interviews with women members, Herrera Association (Madrid, Colombia, August 2018 and February 2020).

<sup>35</sup> Constitutional Reform 02 Colombian Congress 2020 (Acto Legislativo 02 de 2020), which modified article 325 of the Colombian Political Constitution, 1991.

vulnerability of the Sabana. Notably, discussions about the reform and its implementation have said nothing about the impact that the free trade zone has had upon land use and ecosystems. Second, it is not clear who is going to be the last resort environmental authority for the region. According to the reform, the decisions of the regional council – integrated by the municipalities’ mayors and the governor of the department they fall under (Cundinamarca) – will prevail over the decisions of the municipalities. The council’s decisions will affect land use planning, development policy and public service provisions. It remains to be seen how environmental issues will be solved when there are clashes with other environmental administrative authorities and local environmental activists. Finally, despite multiple academic and policy events aimed at highlighting the possibilities that the new metropolitan region offers in terms of gender inclusion, the environmental limitations generated by free trade zones have not been part of these discussions.

### **(c) A New Airport**

The planning of a new airport for Bogotá in Madrid threatens various water systems and cultivation zones.<sup>36</sup> For the women’s movements and other communities in the area, the airport will further reduce the land available for agriculture and affect the system of wetlands that sustain the ecological equilibrium of the soil. Given the large impacts foreseen, the women’s movement in the area is now part of a larger social mobilization called ‘El Aeropuerto me la vuela’ (the airport blows me away).<sup>37</sup> As the project threatens to dry out various wetlands (humedales)<sup>38</sup> and will impact not only on small-scale agricultural uses, but also on leisure plots and larger agricultural farms, the Herrera association has formed alliances with a range of actors.<sup>39</sup>

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<sup>36</sup> Patricia Veloza, ‘Conflictos Socioambientales alrededor del Agua: El Caso del Humedal Moyano, en la Sabana de Bogotá’ in Astrid Ulloa and Hugo Romero Torres (eds), *Agua y Disputas Territoriales en Chile y Colombia* (Universidad Nacional de Colombia 2018).

<sup>37</sup> Interviews with women members, Herrera Association (Madrid, Colombia, August 2018 and February 2020).

<sup>38</sup> Veloza (n 36). For the particular impacts upon the wetland El Moyano, see also Alejandra Lozano and Patricia Veloza, *Conflictos Socioambientales en la Sabana de Bogotá: El Caso del Humedal Moyano* (Asociación Ambiente y Sociedad 2017).

<sup>39</sup> In 2019, the National Environmental Authority of Colombia closed the file on the environmental permit requirement for the Airport project, as the available information was insufficient to make a decision (ANLA, Auto 03169, May 2019). Yet, the possibility of its future construction still exists, once the requirements of a new permit are satisfied. For this reason, the construction of the airport continues to be a concern for the inhabitants of the area and the women’s movement in particular.

Parallel to the neoliberal landscape in the Sabana outlined above, increasing data and studies warn against climate change risks, which will be significant.<sup>40</sup> It is estimated that for the period 2041 to 2070, the region could face an average temperature increase of 2°C and a daily precipitation increase of 1–2 mm. Greater vulnerability to floods, droughts and frequency of fires are also expected, which might in turn impact wetlands ecosystems. A reduction of hydric availability – as a result of an expected drop of water quality – further increases the region’s vulnerability.<sup>41</sup>

The flower industry, free-trade related changes in land use, and the projected airport are all interventions that may increase climate change vulnerability in both the municipality of Madrid and the Sabana region. The operation of the flower industry adds to associated climate risk causes and vulnerabilities, such as greenhouse emissions, a decrease of subterranean water, and clean water availability due to decades of subterranean water extraction. The airport project threatens ecosystems considered to be particularly vulnerable to climate change stressors; strategic ecosystems that also need concerted attention due to climate variability. Such is the case of the wetlands that are crucial in responding to the severe pollution of the Bogotá River. In turn, changes in land use because of free-trade-oriented planning further deepen the reduction of arable land in the region, a vulnerability factor and potential limit to adaptation.

Despite the small quantity of published research on small-scale agriculture in the Sabana, climate change impacts are stated to be a real risk for small-holders who use low levels of technology.<sup>42</sup> Further, Colombian agriculture, in general, could be affected severely,<sup>43</sup> particularly because climate change is

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<sup>40</sup> Instituto de Hidrología, Meteorología y Estudios Ambientales (IDEAM) and others, ‘Plan Regional Integral de Cambio Climático para la Región Capital Bogotá-Cundinamarca’ (PNUD 2012); Departamento Nacional de Planeación and Unidad Nacional para la Gestión del Riesgo de Desastres, ‘Plan Nacional de Adaptación al Cambio Climático, ABC: Adaptación, Bases Conceptuales, Marco Conceptual y Lineamientos’ (2012); Julian Ramirez-Villegas and others, ‘A Way Forward on Adaptation to Climate Change in Colombian Agriculture: Perspectives Towards 2050’ (2012) 115 *Climatic Change* 611.

<sup>41</sup> IDEAM and others, ‘Vulnerabilidad de la Región Capital a los Efectos del Cambio Climático’ (2014); IDEAM and others, ‘Estrategia Regional de Mitigación y Adaptación al Cambio Climático para Bogotá y Cundinamarca’ (2014); IDEAM and others, ‘Análisis de Vulnerabilidad y Riesgo por Cambio Climático en Colombia: Tercera Comunicación Nacional de Cambio Climático’ (2017).

<sup>42</sup> Ramirez-Villegas (n 40).

<sup>43</sup> Intergovernmental Panel on Climate Change (IPCC), ‘Fourth Assessment Report: Climate Change 2007’ (AR4) (2007); IPCC, ‘Cambio Climático 2007: Informe de Síntesis’ (2008).



expected to cause shifts in the distribution and incidence of water sources, as well as extreme weather events,<sup>44</sup> which are determinants of crop yields.

The factors highlighted so far show the impact and burdens that current and future climate change effects might entail for the Sabana. This analysis, however, should not mislead us to the perception that climate change is a phenomenon that has yet to come. Madrid's women have been dealing with the consequences of climate change – particularly droughts, floods, and water scarcity – since long before the consolidation of the policies described here, even if they do not refer to these facts explicitly as climate change issues. In framing environmental depredation, labour dispossession, and the struggle to remain in and defend their territory, the women's movements are demonstrating that climate change has a history that cannot be overlooked. This will probably play an important role in future debates in the Sabana, especially considering how climate policy currently compartmentalizes economic and environmental factors as if they did not have a shared history.

Thus, current vulnerability will increase and have an effect on women seeking to shift to solidarity schemes for food production. This might affect further the political project of Madrid's women's movement, and demand diverse adaptive capacities, especially considering the crops they grow (quinoa, lettuce, chard, broccoli, cauliflower, among others). Yet, it is not clear how increasing awareness of climate change impacts the development-oriented organization of both economy and territory in La Sabana. As we will show in the next section, the few responses there have been seem indifferent to the gender dimensions of work, women's environmental demands, and the developmental tenants of the peri-urban planning of Bogota's outskirts.

### 3. THE GOVERNMENT'S WEAK AND ERRATIC POLICIES ON GENDER AND CLIMATE CHANGE

The manner in which gender and climate change links are recognized in national policies and public allocutions indicates the limitations of the mainstream feminist agenda in Colombia in three ways. First, while some public documents acknowledge the disproportionate effects of climate change on women and the need to take into account social inequality and gender sensibility to prevent a worsening of structural inequalities resulting from these, gender concerns are simply translated into general calls for multisectoral

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<sup>44</sup> IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability* (Cambridge University Press 2007).

inclusion.<sup>45</sup> For example, the current Colombian Nationally Determined Contribution (NDC) for 2020–2030<sup>46</sup> expressly mentions gender equality and empowerment as a topic that should be incorporated across the board following a gender mainstreaming perspective.<sup>47</sup> Yet, concrete expressions of a gender perspective are weak. They are limited to recording the number of women participating in the workshops carried out to socialize the NDC climate change strategy; to a commitment to incorporate a gender perspective into the educational system to enhance behavioural changes for a low carbon, resilient and adaptive development (without providing further detail); and to vague promises to develop, in the years following 2020, a gender perspective in the climate change targets,<sup>48</sup> drawing upon the Enhanced Lima Work Programme on Gender.<sup>49</sup>

In addition, in the increasing bureaucratic climate change universe of norms, policies and offices,<sup>50</sup> local institutions are described as the place

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<sup>45</sup> IDEAM and others, ‘Segundo Informe Bienal de Actualización de Colombia a la Convención Marco de las Naciones Unidas para el Cambio Climático (CMNUCC)’ (2018): see especially the section on the gender perspective and its intersection with climate change, 56–64.

<sup>46</sup> The Nationally determined contributions (NDCs) are the post-2020 Climate Actions each signatory country must outline and communicate following the Paris Agreement (article 4, paragraph 2). As national climate plans, the NDC include domestic climate related targets as a contribution to long-term goals for global climate action. They include mitigation and adaptive measures and targets to reduce greenhouse emissions. In Colombia, the NDC has become one of the main focus of the current President Duque regarding climate change policy and international visibility.

<sup>47</sup> Government of Colombia, ‘Actualización de la Contribución Determinada a Nivel Nacional de Colombia (NDC)’ (COL 2020) 3 <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Colombia%20First/NDC%20actualizada%20de%20Colombia.pdf> accessed 10 March 2022.

<sup>48</sup> *Ibid.*, 3, 4, 7, 8, 43.

<sup>49</sup> The Lima Work Programme on Gender seeks to achieve gender responsive climate policy and action by means of advancing gender balance and integrating gender considerations into the work of the Paris Treaty Parties and the UN Secretariat in implementing the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. It sets out objectives and activities under five priority areas that aim to advance knowledge and understanding of gender-responsive climate action and its coherent mainstreaming in the implementation of the work of Parties, the Secretariat, United Nations entities and all stakeholders at all levels, as well as women’s full, equal and meaningful participation in the UNFCCC process. (Decision 3/CP.25, Dec 1, 2019).

<sup>50</sup> In 2010, the National Economic and Social Policy Council defined the need for an institutional framework for climate change, establishing the National System of Climate Change (SISCLIMA) as the institution responsible for coordinating and promoting climate change policy and action (CONPES 3700). The SISCLIMA, which was not regulated until 2016 (Decree 298 of 2016), was designed to coordinate the imple-

where climate change management and gender should be articulated.<sup>51</sup> Within the climate change policy architecture, ‘local’ refers to a system of regional sites created by the National System of Climate Change for the coordination between national and local level institutions.<sup>52</sup> Yet, concrete actions referring to gender and participation in climate change are again limited to the recording of information of participation in workshops and meetings disaggregated by sex; a series of vague guideline proposals not reflected in the broader climate policy to promote a gender perspective for climate change; and a promise to develop future recommendations for the incorporation of a gender perspective in the Climate Change National Policy.<sup>53</sup> More tellingly, the Central Andean Regional Site, to which La Sabana belongs, has not included any concrete action or reference to gender and climate.<sup>54</sup>

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mentation of four climate change strategies: The Climate Change National Adaptation Plan (CCNAP); the Colombian Low-Carbon Development Strategy (CLCDS); the National REDD+ Strategy (ENREDD+); and the Strategy for Fiscal Protection Against Natural Disasters. Yet, the SISCLIMA objectives are far wider as it is supposed to coordinate private and public organizations and offices, policies, norms, proceedings, resources, plans, strategies, mechanisms and information on climate change to manage the mitigation of greenhouse gases and the adaptation to climate change. To date, access to information as to how the coordination works and how the strategies and institutions link to each other’s actions and projects is yet to be provided. Additionally, there is the Intersectoral Commission for Climate Change (created by the Decree 298 2016), the Report and Verification Monitoring (Resolution 1447 of 2018), the RENARE Platform for recording emissions reduction, and the Climate Change Law adopted in 2018 (Ley 1931). At the local level, climate change related policies, plans, programmes and norms expand considerably. Under the current government, President Duque has focused on the updated NDC for 2030 and the E2050 strategy which seeks to define realistic long-term objectives and targets for reducing greenhouse emissions on the basis of climatic resilience. Ministry of Environment (Colombia) and others, ‘E2050 Colombia’s Long-Term Climate Strategy to Meet the Paris Agreement’ (2021) 100, 144 <https://unfccc.int/documents/311208> accessed 2 June 2022.

<sup>51</sup> IDEAM, ‘Segundo Informe Bial de Actualización de Colombia’ (n 45) 57.

<sup>52</sup> The Climate Change Regional Sites, created by Decree 298 of 2016, sets out the organization and functioning of the Climate Change National System. See also for a detailed approach on the Sites, Ministry of Environment, ‘Política Nacional de Cambio Climático’ (MADS 2017); Ministry of Environment, ‘Nodos Regionales de Cambio Climático: Articulando Acciones e Intereses Frente al Cambio Climático’ (MADS 2013).

<sup>53</sup> IDEAM, ‘Segundo Informe Bial de Actualización de Colombia’ (n 45) 56–57.

<sup>54</sup> See CAR, ‘Nodo Regional Centro Oriente Andino de Cambio Climático – NRCOA’ <http://bproyectos.car.gov.co/cambioclimaticoNRCOA/#AcercaDe> accessed 10 March 2022; CAR, ‘Documentos Públicos del NRCOA’ <http://bproyectos.car.gov.co/cambioclimaticoNRCOA/Home/Public> accessed 10 March 2022. For the Central East Andean Site, see Alianza Interinstitucional Estratégica, functioning since 2011, and led by IDEAM and PNUD, together with all the institutions in charge of the ter-

Furthermore, the recognition of women's contribution to food production (which the women of the Madrid region see as one way of dealing with climate change) is impossible, not only because of the economic development policies set forth in the region but also because of the way in which food production has been described, namely as being bad for the environment. In fact, PNUD Colombia (Programa de las Naciones Unidas para el Desarrollo, or United Nations Development Programme) in 2018 stated the need for gender sensitive policies regarding climate change given that the 'main source of carbon emissions is related to the agricultural and livestock sector'<sup>55</sup> and that Colombian rural women 'represent more than the 48 per cent of the censused population, 36 per cent of which are agricultural producers'.<sup>56</sup> Therefore, while there is an acknowledgment of the centrality of women for food security and nutrition within homes through their reproductive role, this framing seems to posit women who are food producers as both saviours and the cause of environmental degradation.<sup>57</sup>

All in all, it is hard to identify a clear or transformative gender perspective or agenda. At most, these references amount to a superficial version of liberal feminism aimed at equal representation through participation. It is impossible to establish, from the information available (which is essentially made up of random declarations), whether there is a robust understanding of the gendered impact of climate change. For these reasons, climate change policy and institutional narratives might hamper what Alviar refers to as the increasingly important link 'between women's emancipation and the environment'.<sup>58</sup>

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ritorial, administrative and political management of Bogotá-Cundinamarca (among others, Alcaldía Mayor de Bogotá, Gobernación de Cundinamarca, CAR, Corpoguvavio, Corporinoquia, Instituto Alexander von Humboldt, Parques Nacionales de Colombia, Ministerio de Ambiente y Desarrollo Sostenible, DNP). The management of this site receives financial support from the governments of Spain and Quebec. The PRICC project includes general reference to a commitment to a comprehensive inclusion of gender. See PNUD, 'Cambio Climático con Enfoque Territorial en Región Capital Bogotá-Cundinamarca 2010–2012' (2010) [https://www.climateandforests-undp.org/sites/default/files/downloads/prodoc\\_colombia\\_tacc\\_firmado.pdf](https://www.climateandforests-undp.org/sites/default/files/downloads/prodoc_colombia_tacc_firmado.pdf) accessed 10 March 2022.

<sup>55</sup> PNUD Colombia, 'Género: Un Tema para la Agenda de Cambio Climático en Colombia' (8 November 2018) para 7 (translated by the authors) <https://www.co.undp.org/content/colombia/es/home/presscenter/articles/2018/11/8/genero--un-tema-para-la-agenda-de-cambio-climatico-en-colombia-.html> accessed 10 March 2022.

<sup>56</sup> *Ibid.*, para 8.

<sup>57</sup> *Ibid.*; see also IDEAM, 'Segundo Informe Bial de Actualización de Colombia' (n 45).

<sup>58</sup> Helena Alviar García, 'Competing Perspectives on Climate Change and Gender' (COGITO Research Magazine 18 May 2020) para 1 <https://www.sciencespo.fr/>

#### 4. IN DIALOGUE WITH PUBLIC POLICY

Women's social mobilization and organization in the Sabana de Bogotá, and the Municipality of Madrid in particular, articulates various initiatives and collective actions. It began as a movement concerned with the transformations triggered by development projects and urbanization in their region, a peri-urban area in the outskirts of the city. Initially, the women focused upon the effects the export led flower industry had on the bodies and work options for both them and their daughters. Increasingly, environmental issues related to the flower industry and other developmental initiatives became a key concern for them. The organization wanted to change the circumstances that gave them only the option to be waged workers, and instead wanted to be able to grow food in cooperative arrangements.

We will focus on three interrelated initiatives of the Madrid women's social organization to explore the emerging intersections of gender and climate change: the Herrera Association, the EMM (Women's School of Madrid), and ASOQUIMAD (Madrid's Quinoa Organization). The three are interrelated and are part of the same social movement.

The Herrera Association is a social organization that consolidated an initiative of the daughters and sons of workers and former workers of flower companies who began to bring attention to the industry's dire social and environmental impact. The women participating in the association's projects include peasants, women living in precarious urban areas, employed and unemployed women with different work experiences ranging from workers or ex-workers in the flower agroindustry, domestic service, health care, informal trade and domestic production.<sup>59</sup>

The EMM (Women's School of Madrid), in turn, emerged as 'a pedagogical space for intergenerational meetings for popular women'.<sup>60</sup> Run since 2011 by various ex-workers of the flower industry and their daughters, the project has made it possible for some women to transit from being wage-earning

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research/cogito/home/competing-perspectives-on-climate-change-and-gender/?lang=en accessed 10 March 2022.

<sup>59</sup> Flórez and others (n 18).

<sup>60</sup> *Ibid.*, 36. Throughout the chapter, the term 'popular' is used when referring to grassroots women's movements in the Sabana, their struggles, their land-related educational projects and their movement's archive. The use of 'popular', as used by the movement to describe its praxis and struggle, is intended to reflect the movement's aim to highlight and to give visibility to how gender justice is inseparable from their collective, material, and territory-bound struggles against land dispossession, environmental despoliation, and economic deprivation. Their lifeworld and survival struggles are the core of the popular feminism, with which many of their projects identify.

employees to cooperative workers in collective organic vegetable gardens. Crucially, a profound political awareness about the interrelation between gender, reproductive work and development transformations underlies the pedagogical agenda of the school. As the women running it have pointed out, ‘we cannot separate our teaching either from the work we do or from economic activities’. That is why ‘[w]hile we try to think of ways to transform our gender relationships, we also think about how to make a living’.<sup>61</sup> For this purpose, the school’s project is to: (a) understand and register how the flower agroindustry and development projects in the Sabana have been installed in women’s lives;<sup>62</sup> (b) transform the way women experience their bodies; and (c) identify and create new life options based in their territory.

Finally, ASOQUIMAD is a productive association created by some of the women of the EMM, to work on an empty piece of land (2,000 m<sup>2</sup>) lent to them by the local government in 2009.<sup>63</sup> The use of this plot to cultivate food is a successful example of a small-scale solidarity economy and an important triumph of the struggle to preserve a campesino (peasant) use of the land in a peri-urban area.<sup>64</sup> Besides transforming the empty lot into a vegetable garden and a seedling nursery, the terrain became an important place where political organization took place to think about food autonomy, share agroecological knowledge, and recover diverse and interconnected ecosystems in the region. Yet, in 2015 the local mayor took over the terrain. The crop was lost, and to date the lot remains empty. This was a significant loss for the movement as well as for their livelihoods.<sup>65</sup>

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<sup>61</sup> Ibid., 36.

<sup>62</sup> Ibid.

<sup>63</sup> Olarte-Olarte and Lara-Veloza (n 18).

<sup>64</sup> The expression ‘peri-urban’, in general terms, refers to ‘the transformative processes that occur in the areas surrounding large cities’: John Friedmann, ‘The Future of Periurban Research’ (2016) 53 *Cities* 163. Regularly, in peri-urban and peri-urbanization areas, allusion is made to processes of change in places that cannot be fully understood as urban or rural; these processes often include the emergence of urban constructions in semi-peripheral rural areas, such as industrial districts. There is a growing interest and literature on climate change in peri-urban areas (e.g., Lazaro Mngumi, ‘Ecosystem Services Potential for Climate Change Resilience in Peri-Urban Areas in Sub-Saharan Africa’ (2020) 16 *Landscape and Ecological Engineering* 187; Gloria Soto-Montes-de-Oca and Miriam Alfie-Cohen, ‘Impact of Climate Change in Mexican Peri-Urban Areas with Risk of Drought’ (2019) 162 *Journal of Arid Environments* 74; Lwasa and others, ‘A Meta-Analysis of Urban and Peri-Urban Agriculture and Forestry In Mediating Climate Change’ (2015) 13 *Current Opinion in Environmental Sustainability* 6. Yet, most of this literature do not approach gender concerns or perspectives.

<sup>65</sup> Olarte-Olarte and Lara-Veloza (n 18).

This event changed relations with the local government at two levels. First, the members of ASOQUIMAD realized how they had been instrumentalized to fulfil governmental indicators on gender participation and sustainable farming. Second, they decided to radicalize their claims in order to become independent from the local government's decisions. Thus, they continue with the solidarity economy project by harvesting organic crops in small vegetable gardens at home, and in a community vegetable garden located at the Herrera Association.<sup>66</sup>

In the last five years, a shift to environmental concerns has intensified within the movement, given the foreseeable changes to land use and the environmental impact of setting up the free trade zone and the planning of a new airport for Bogotá.

'Climate change', as a phrase, a motto, is not the centre of the women's movement's claims in Madrid, Colombia. Yet, their worries and political organization coincide with many climate change concerns. These include climate uncertainty, the increasingly frequent occurrence of droughts and floods; concern and awareness about the role ground water plays in sustaining ecosystems and enabling human adaptation to climate variability and change; the strategic importance of ground water for water access and food production; the increasing variability in precipitation, soil moisture and surface water; the implications of surface-groundwater interactions, and water quality. Further, for the associations, 'changing climate' cannot be separated from the distributive consequences of development and the correlated impacts on their bodies, or from the possibility of shifting towards a cooperative economy for food production and organizing politically for the defence of the environment as a central element allowing for the women to remain in the territory. Their entry point to climate change and gender discussions is, therefore, distribution and power.

The question then, is how women, labour and political environmental activism are or are not incorporated in local and national agendas related to climate change. There is an undeniable disparity between national claims regarding commitments to prevent climate change, the immovable tenets of peri-urban development, and the women's goals of producing food on the basis of autonomy and solidarity.

In the case of the women's movement in Madrid, the symbolic recognition of gender equality on contemporary national climate change agendas, on the one hand, and the distributive consequences of this specific view of gender,<sup>67</sup>

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<sup>66</sup> Ibid.; Interviews with women members, Herrera Association (Bogotá, Colombia, December 2014).

<sup>67</sup> See IDEAM, 'Segundo Informe Bienal de Actualización de Colombia' (n 45).

on the other, might intensify the tensions between the women's struggle and the development-oriented transformation of the outskirts of Bogotá.

In fact, the EMM and the ASOQUIMAD association advocate for a gender perspective based on popular feminism. This perspective has been consolidating over the last nine years through the design and implementation of various popular education initiatives and actions: the Madrid Women's School, a popular peasant high school programme (*bachillerato campesino popular*) and, more recently, popular diploma courses.<sup>68</sup> These projects frame food production and the concern for women's structural inequality based on a different relationship between gender and environment. Popular feminism foregrounds the inextricable continuum between a body and a territory, the struggle for dignified work, and the prevention of environmental damage. Regarding the continuum, women in popular education identify the pain caused by years of working in the flower industry as inseparable from the transformation of the land as a result of water depletion and the use of agrochemicals. Such continuum also enables the search for and collective design of alternative forms of relating to the territory. Thus, these popular education scenarios have become laboratories for envisaging forms of an economy based on solidarity that could heal their bodies, the landscape and the land. Women learn and exchange knowledge on indigenous flowers species as an alternative to industry flowers, the soil rhythms, to avoid its exhaustion, and the changing dynamics of droughts and floods.<sup>69</sup> In addition, popular education programmes are connected to the women's small gardens project. They have become a place not only to grow food, but also to share knowledge and experiences, learning about self care, and the basis of a small-scale peasant and solidarity economy. They also are places of political organization for sustaining food autonomy, envisaging how to create a system of popular credit, and collectively planning how to acquire a bigger plot in order to guarantee their subsistence.

The body–territory continuum is also connected to the centrality of dignified work for the popular feminist orientation.<sup>70</sup> The search for dignified work through solidarity agriculture involves a collective identification of the traces left by previous work carried out in the flower industry, and how women's bodies are shaped by the reducing working possibilities that the developmental organization of the territory creates, that is, as warehouse, domestic or

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<sup>68</sup> Herrera Association popular archive.

<sup>69</sup> Interviews with women members, Herrera Association (Bogotá, Colombia, March 2021); Herrera Association popular archive; Madrid Women's School syllabus (2011 onwards) and popular high school syllabus (2016 onwards).

<sup>70</sup> *Ibid.*



flower industry workers.<sup>71</sup> For this reason, the EMM Women's School and the popular high school articulate work and economy with the history of how economic development transformed their bodies. For this purpose, they focus on the knowledge women have of the particular material and labour history of the place they live in. This approach also includes an understanding of reproductive work as work, and an approach to care and self-care as determined by the impact of their past and present work, the time that organizing themselves politically demands, and the challenges that transforming gender relations within the household entail.<sup>72</sup>

Finally, the research triggered by the popular education programmes traces the impact of development in the region and how it has been 'installed in women's lives'.<sup>73</sup> On this issue, they have identified and analysed how development takes place in the region, what kind of development prevails, and who are its beneficiaries. It is crucial for popular feminist education to understand how economic development plans to privilege agribusiness over subsistence farming are inseparable from environmental degradation and, therefore, from their labour options. It is from this matrix that environmental harms should be understood and resisted. Crucially, socioenvironmental struggles to recover and protect water resources, wetlands and soil are intertwined with women's search for ways to emancipate their bodies and for labour alternatives to development.

### **(a) Effects of the Dialogue**

In our opinion, there are three significant consequences (in terms of resource distribution) of the superficial framing of gender that underlies public policy and its interaction with the organizations we describe above.

First, national, and regional policies designed to attack climate change do not tell the story about how we arrived where we are today. Gender inclusion, as described above, dehistoricizes the process of environmental degradation that has been at the core of peasant women's struggles. The incorporation of the term 'gender' into the policy seems purely cosmetic and does not consider the economic development policies that triggered climate change. This further reflects a more complex issue, that is, the disconnection between official climate change discourses on the one hand and environmental and ecological

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<sup>71</sup> Guisella Lara-Velosa, Patricia Veloza-Torres and Juliana Flórez-Flórez, 'Escuela de Mujeres de Madrid: Lugar, Corporalidad y Trabajos No-Capitalistas' (2015) 43 *Nómadas* 95.

<sup>72</sup> Interviews with women members, Herrera Association (Bogotá, Colombia, December 2014); Herrera Association popular archive.

<sup>73</sup> Flórez and others (n 18) 36.

struggles on the other. In contrast, Madrid women relate to floods and droughts – climate events familiar to them – as part of a history of environmental destruction profoundly intertwined with the growth-driven transformation of the rural and peri-urban territory.

Second, the way that climate change policy includes gender concerns depoliticizes women's socioenvironmental struggles. When gender is only measured in terms of the number of women who went to workshops or meetings, the topic is deemed closed and therefore excluded from further political discourse. This superficial incorporation of gender excludes discussions and interventions on social and political inequalities and power relations, particularly, debates regarding the equating of economic development to growth.

Third, women's struggle to remain in the territory as food producers and environmental defenders might face new challenges because of climate change itself. Climate-related impact could add to existing pressures to settle for available labour options – at warehouses, or as domestic or flower workers. Even though there are no available studies to foresee the costs of likely climate stress events in the Sabana or how they might impact Madrid women's political project to transit to a solidarity economy, the harmful effects of climate change upon small scale food production are stated to be a real risk – a risk, nonetheless, ignored so far in current climate policy.

All in all, adaptation to climate change will demand a shift in the modes in which these women relate to land, as well as additional work in the case of extreme climate events, which could be also more costly in the absence of adaptive technology and climate safety nets. In addition, the immediacy and increasing centrality of climate change measures in the Sabana might demand new political and community organizing work from Madrid's women, who are already carrying the burdens of previous and current environmental depredation. Engaging with multiple public policies (including those related to climate change) will require additional political efforts, that is, a new front of struggle will need to be opened to show the disparity between climate change measures and the socioenvironmental struggles these women have carried out for years. As mentioned before, concrete provisions for the Sabana focus on a myriad of scattered, selective and derisory adaptive capacities alien to both the particular vulnerability of the ecosystems and the connection between environmental degradation and inequality in the region. Indicatively, national provisions committed to preserving ecosystems that are central for facing climate change, in particular, wetlands, omit any reference to the climate change peri-urban risks threatening wetlands and water systems.

In a similar vein, currently accepted climate change risks in the Sabana are not reflected in the Climate Actions.<sup>74</sup> On the contrary, concrete actions to reduce carbon emissions in the region – such as reducing energy consumption in public buildings or training companies’ transporters to make more efficient use of petrol – are insubstantial.<sup>75</sup> This is not just a question of inefficacy. As women’s environmental fights are indivisible from development, existing climate change narratives – symbolically akin to gender perspectives but indifferent to development determinants of climate change – rewrite women’s struggles into a climate change matrix that leaves little room for discussing the terms of the definition of climate change. This entails a new burden for women engaged in political organization: to translate themselves into the climate change language so they will be heard. Struggling to be heard in this framing, as expressed by one of the leaders of the women’s movement, is yet another task, adding to their urgent material and environmental needs.

## CONCLUDING REMARKS

In Colombia, official policies aimed at combating climate change and how it affects women are ill equipped for the task. As this chapter has demonstrated, the definition of climate change is excessively narrow as well as ahistorical, and the inclusion of women extremely superficial. These factors hide the diverse political dimensions that the environmental struggle entails, including an opposition to existing definitions of economic development (simply as growth) and mainstream neoliberal policies.

As climate change permeates national policy (mostly through the setting up of technocratic standards and indexes), this chapter demonstrates that it is extremely important to analyse the official discourse about climate change. The official discourse, as our example illustrates, includes a superficial version of liberal feminism, simply counting women participating in meetings or exchanges. In fact, there is a striking contrast between the general and insubstantial way in which institutional documents link climate change to gender, and the way in which Madrid women’s organizations articulate it. For the government, the inclusion of gender fits with existing views of economic development. For the women’s organizations, emancipation is inextricably linked to liberating the environment from the causes of wet land degradation, water depletion, and soil use conversion.

It is therefore difficult to imagine how a more robust understanding of climate change can be aligned with existing development initiatives in the

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<sup>74</sup> IDEAM ‘Estrategia Regional de Mitigación’ (n 41); see Climate Actions (n 46).

<sup>75</sup> Ibid.

outskirts of Bogotá. Current policies seem to be a distraction from profound environmental conflicts in terms of power, resources, visibility and relevance. The case of the women's movement in Madrid illustrates that it is not possible to think about climate change and gender without considering the particularities of the conditions of labour in a specific place, the connections between work and people's bodies, and the effects of local economic development projects on the territory.

Activist women in Madrid are inviting us to think about how we understand climate change, and its relationship to economic development and gender. Particularly, they open up a new agenda for research and activism. The terms of this agenda can be summarized as follows. The Madrid experience suggests that climate and gender claims do not seem to overcome our current ecological crisis. The loose link between gender and climate as reflected in a scattered myriad of documents and allocutions do not deal with the question of power and distribution. These women's mobilization leads us to ask how the framing of climate change is intricately connected to gender and peri-urban configurations of development. They place a lens on the societal forces that drive climate change, and the changes required to stop it. Their mobilization teaches us the urgency of understanding not only the causes of climate change, but the problems of climate politics that remains market-centred. This underlines the relevance of a politics of climate that are not found in climate and gender policies that are blind to the causes of inequality. As these women mobilize forms of life that sustain reproduction – both social and natural – the political sphere of climate change is widened to be a site of the search not just for better policies, but for new political projects and ways of living.

As climate change invocations might turn into another form of disciplining these women's bodies and their territory, any serious attempt to overcome the environmental threats faced in the Sabana should start with the dismantling of a constructed invisibility of the link between environmental activism and labour. The risk women face is that what is not climate related is projected as alien, or postponed or invisibilized. If climate change is not the frame but the centre of politics, women's distributive demands require us to come to terms with the manner in which climate change adaptation and governmental initiatives regarding gender are transforming women's reproductive work and the space for political organization.

As we finish this chapter in November of 2021, Colombia's president Iván Duque announced the country climate change commitments at the COP26 held in Glasgow: to protect 30 per cent of the country's territory by 2022, reach carbon neutrality by 2050, and back these with green finance. They were received with ovations as one of the most ambitious promises presented. His silence, however, on the murder of environmental defenders in Colombia, the most dangerous country in the world for them, makes Francia Marquez' quote

from the introduction more pressing. While the ambitious climate change announcements remained indifferent to the existing tension between growth and its devastating consequences for the environment (which Marquez warns us about), Madrid's women continue resisting through collective practices and local knowledge to defend the environment and face the effects of climate change. It is in this context that their work could be a radical option for narrating climate change, identifying multiple agencies and engaging with the material and historical drives of environmental popular feminist resistances.

# 9. The value of litigation to women environmental human rights defenders in South Africa

**Lisa Chamberlain**

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## INTRODUCTION

The apartheid history of the mining industry in South Africa is characterized by the exploitation of black labour and the exclusion of black people, and black women in particular, from decision making about natural resources, as well as from opportunities to benefit from the use of those resources. In response, the key piece of legislation promulgated to govern the mining industry after South Africa's transition to democracy, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), seeks to confront the inequalities and injustices of the past. Furthermore, in conjunction with the MPRDA, the environmental regulatory system, guided by the environmental rights contained in section 24 of the Constitution of the Republic of South Africa, 1996 (the Constitution)<sup>1</sup> and the National Environmental Management Act 107 of 1998 (NEMA), strongly supports the participation of women in decision making. This enabling constitutional and legislative framework is further strengthened by some progressive jurisprudence emanating from both the High Court and the Constitutional Court of South Africa.<sup>2</sup>

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<sup>1</sup> Section 24 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that:

Everyone has the right:

- (a) to an environment that is not harmful to their health or wellbeing; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

<sup>2</sup> See e.g., *Nkala v Harmony Gold Mining Co Ltd* 2016 (5) SA 240 (GJ); *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP); *Maledu v Itereleng Bakgatla*

Despite all of this, the mining sector continues to perpetuate rather than to deconstruct patriarchy, exclusion and poverty. In this context, women living in mining-affected communities have demonstrated remarkable resilience. Many of them have come together to form a network called Women Affected by Mining United in Action (WAMUA). Alongside other Women Environmental Human Rights Defenders (WEHRDs), both in SA and elsewhere, the women of WAMUA play an important role in the realization of environmental and other rights.

One of a wide range of tools available to WEHRDs is the use of litigation to hold and pry open spaces for expression and dissent that would otherwise not exist. While the effectiveness and desirability of using litigation as part of rights-claiming is contested, it nevertheless remains one of the key strategies used by WEHRDs. WAMUA have used litigation at various points in their struggle. This chapter examines a case in which WAMUA (and others) have challenged their exclusion from the process to amend the Mining Charter, which is a legislatively required instrument designed to facilitate the transformation of the mining industry in South Africa.

This litigation forms part of a strong tradition of environmental justice activism in South Africa, which more recently has become infused with calls for climate justice.<sup>3</sup> The case demonstrates one of the core demands of climate justice – the demand for inclusion. This is succinctly captured in the ‘nothing about us without us’ refrain frequently invoked by WAMUA and other mining-affected communities. Climate justice questions both the need for the extraction of fossil fuels and the inequalities that characterize *how* mining takes place, especially in relation to the unequal distribution of environmental harm associated with mining. The WAMUA litigation is therefore a useful vehicle through which to explore ideas of participation and autonomy, and the

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Mineral Resources 2019 (2) SA 1 (CC). In *Nkala*, one of the considerations that the Court took into account was the burden on women of caring for sick mineworkers, and the resultant gender bias in the common law position that prevented the transmission of a mineworker’s claim for general damages to their estates upon their deaths [214]. While neither *Baleni* nor *Maledu* were adjudicated through a gendered lens, judicial pronouncements that confirm the need to consult with, and in some cases obtain the consent of, affected community members provide women in mining-affected communities with useful leverage in relation to mining companies, but also within their own communities.

<sup>3</sup> A full examination of the nuances between environmental and climate justice is beyond the scope of this chapter. Instead, the chapter operates from the position that no part of ecosystem functioning is immune from the impacts of climate change, and thus uses the terms environmental justice and climate justice interchangeably (as is also the trend among the activist community in South Africa).

relationship between participation and litigation, as experienced by WEHRDs advancing environmental justice in the mining industry in South Africa.

The chapter is organized into the following sections. The next section locates mining within climate justice struggles, and section 2 places the WAMUA litigation in context by providing further background on the mining industry in South Africa and describing the formation of WAMUA. Section 3 outlines the Mining Charter litigation. Section 4 discusses the debates around the role and impact of public interest litigation as a tool used by human rights defenders (HRDs) more broadly, and then proceeds to apply that theoretical framework to the Mining Charter litigation discussed in section 3.

## 1. MINING AND CLIMATE JUSTICE

As global concerns about the impacts of climate change escalate, there is a growing call for climate justice. But what is climate justice, and how does it relate to mining in South Africa? The answers to these questions lie partly in how mining contributes to climate change. Briefly, global warming is the primary driver of climate change. Global warming in turn, is caused by the emission of high levels of greenhouse gasses, such as carbon dioxide. Coal mining and the fossil-fuel based power stations it supports, are the greatest contributors to global greenhouse gas emissions.

The role of mining in causing climate change is the reason why proponents of climate justice often focus on the need to keep fossil fuels in the ground. This is evident, for example, in the stated aims of the Life After Coal campaign (LAC) which is the vanguard of the just transition movement in South Africa. LAC is a joint campaign by Earthlife Africa Johannesburg, groundWork, and the Centre for Environmental Rights, which aims to ‘discourage the development of new coal-fired power stations and mines, reduce emissions from existing coal infrastructure and encourage a coal phase-out, and enable a just transition to sustainable energy systems for the people’.<sup>4</sup>

Climate justice thus often requires opposition to the very purpose of coal mining, that is, the extraction of fossil fuels. But from a climate justice point of view, it is not only *why* such mining activity exists that matters, but also *how* mining takes place. This is because one of the key features of a call for climate justice is a call for inclusion – for those most affected by environmental degradation and climate change to be part of designing and implementing responses to it. To properly understand why inclusion matters so much, it is

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<sup>4</sup> Life After Coal/Impilo Ngaphandle Kwamalahle, ‘Home’ para 1 <https://lifeaftercoal.org.za/> accessed 30 May 2022.



necessary first to appreciate the significance of adopting an environmental justice framework.

The environmental justice movement developed largely in response to the racism inherent in the location of environmentally harmful land uses such as large industrial complexes, waste treatment plants, landfill sites and tailings dumps from mining activity, when research revealed that toxic industries and facilities were commonly situated close to low income, primarily black, areas.<sup>5</sup> This coincided with a push-back against the ways in which (largely white) environmentalists had traditionally focused on conservation issues rooted in a desire to protect ‘pristine nature’. Instead, a growing environmental justice movement increasingly showcased that the environment we seek to protect encompasses where people ‘live, work, and play’.<sup>6</sup> An environmental justice lens thus foregrounds the systemic inequality in the impact of environmental harm, and in the distribution of environmental benefits.

This more nuanced understanding of environmental issues, and the inequalities that permeate them, locate environmental justice within broader social justice struggles. Jackie Cock, one of South Africa’s leading environmental justice thinkers, explains that the environmental justice movement ‘is located at the confluence of three of our greatest challenges: the struggle against racism, the struggle against poverty and inequality and the struggle to protect the environment, as the natural resource base on which all economic activity depends’.<sup>7</sup>

Importantly, environmental justice offers participation, access and inclusion as vital responses to this prevailing inequality. ‘Demands for participation and procedural justice have always been present in movement discourse and analysis, as it is exclusion from decision making that has enabled inequitable distribution and exemplified the broader context of injustice in vulnerable communities.’<sup>8</sup> A look at the South African Climate Justice Charter<sup>9</sup> reveals that participatory democracy is understood as one of the key principles of a just

<sup>5</sup> Daniel Kevin “‘Environmental Racism’ and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies’ (1997) 8(1) *Villanova Environmental Law Journal* 121.

<sup>6</sup> Patrick Novotny, *Where We Live, Work and Play: The Environmental Justice Movement and the Struggle for a New Environmentalism* (Praeger 2000) cited in David Schlosberg and Lisette Collins ‘From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice’ (2014) 5(3) *WIREs Climate Change* 359, 360.

<sup>7</sup> Jacklyn Cock, ‘Public Sociology and the Environmental Justice Movement’ Paper presented at RAU Sociology Seminar 2004/21 (10 September 2004) 5.

<sup>8</sup> Schlosberg and Collins (n 6) 3.

<sup>9</sup> Launched in 2020, the Climate Justice Charter is a civil society initiative that integrates input from water-stressed communities, the media, labour, faith-based com-

transition by climate activists. This Charter understands participatory democracy in the following way: ‘all climate and deep just transition policies must be informed by the voices, consent and needs of all people, especially those facing harm’.<sup>10</sup> This focus on procedural justice and autonomy reflects what has always been at the core of environmental justice demands.

The mining industry thus sits at the heart of climate justice struggles in South Africa. It sparks necessary conversations about unequal distribution of environmental harm, and is a major site of contestation around the participation of those most affected by such harm. The next section explores the ways in which the mining industry is characterized by the intersectional exclusion of women living in mining-affected communities, and therefore why tools (like litigation) that can facilitate participation, are so important.

## 2. SOUTH AFRICA’S MINING SECTOR IN PERSPECTIVE

### (a) Regulation and Realities

The history of mining in South Africa is permeated by the exploitation of black workers, a callous attitude to the harmful impact of mining on the health, well-being and environment of local communities, and exclusion of black people and women from employment opportunities in the industry.<sup>11</sup>

Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently ... black South Africans ... were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty.<sup>12</sup>

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munities, youth, climate scientists, academics, women’s organizations, environmental and social justice organizations.

<sup>10</sup> Climate Justice Charter Movement, ‘The Charter’ para 16 <https://cjcsm.org.za/the-charter/en> accessed 30 May 2020.

<sup>11</sup> Sonwabile Mswana, Farari Mtero and Michelle Hay, ‘Dispossessing the Dispossessed? Mining and Rural Struggles in Mokopane, Limpopo’ (2016) Society, Work and Development Institute Working Paper 7/2016, 11; Tracy Humby, ‘Redressing Mining Legacies: The Case of the South African Mining Industry’ (2016) 135 *Journal of Business Ethics* 653.

<sup>12</sup> *AgriSA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) [1]. In this case the Constitutional Court was called on to consider whether the Mineral and Petroleum Resources Development Act 28 of 2008 itself amounted to expropriation of privately-held mining rights. The Court held that the effect of the MPRDA was deprivation but not expropriation. This conclusion was supported by transitional arrangements that painstakingly protected pre-existing mineral rights, as well as the purpose of the

In response to these historical injustices, the MPRDA established a system in which the state is custodian of mineral resources on behalf of all the people of South Africa.<sup>13</sup> Among other things, the MPRDA commits to eradicating all forms of discriminatory practices in the mining sector and undertakes to take measures to address the effects of the skewed distribution of economic benefits that took place under colonialism and apartheid.<sup>14</sup> The MPRDA further aims to expand opportunities for historically disadvantaged persons, including women, to participate actively in the mining industry and to benefit from the exploitation of the nation's mineral resources.<sup>15</sup>

An evolving body of South African jurisprudence has further emphasized the prevailing inequalities that the MPRDA seeks to deconstruct, and the need for community participation to form part of that process of deconstruction. In *Bengwenyama*,<sup>16</sup> the Constitutional Court explained that South Africa's legal history of controlling access to mineral resources has had a profound impact on the unequal allocation and distribution of wealth and economic power,<sup>17</sup> and hence that the MPRDA was enacted to give effect to the constitutional imperative to redress inequalities in respect of access to the natural resources of the country.<sup>18</sup> More recently, in *Minerals Council*,<sup>19</sup> the High Court held that the MPRDA attends to South Africa's legacy of a racially discriminatory past that produced poverty and inequality on a vast scale by aiming to transform the process, as well as the manner, by which the mineral wealth of the country is exploited, with a particular focus on those who have historically been excluded.<sup>20</sup>

Litigation has also yielded important precedents confirming the right of communities to participate in decision making around natural resources, infor-

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MPRDA to facilitate equitable access to the mining industry and to advance the eradication of all forms of discriminatory practises in the mining sector. While the excerpt quoted above refers to apartheid as the cause of the landlessness and exclusion of black people, these practices have their origins in the centuries of colonialism which preceded apartheid.

<sup>13</sup> The Mineral and Petroleum Resources Development Act 28 of 2008 (MPRDA) s 3(1).

<sup>14</sup> *Ibid.*, Preamble and ss 2(c) and (d).

<sup>15</sup> *Ibid.*, s 2(d).

<sup>16</sup> *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC). See also Tracy Humby, 'The Bengwenyama Trilogy: Constitutional Rights and the Fight for Prospecting in Community Land' (2012) 15(4) *Potchefstroom Electronic Law Journal* 165.

<sup>17</sup> *Bengwenyama* (n 16) [1].

<sup>18</sup> *Ibid.*, [3].

<sup>19</sup> *Minerals Council of South Africa v Minister of Mineral Resources and Others* (20341/19; 43806/19) [2020] ZAGPPHC 301 (30 June 2020).

<sup>20</sup> *Ibid.*, [12].

mal land rights in relation to mining,<sup>21</sup> and the need for mining companies and state regulators to obtain the consent of communities before mining on land held by a community with informal or customary land tenure.<sup>22</sup> This mining legislation and jurisprudence is situated within a broader constitutional and statutory dispensation in South Africa which encourages participation and seeks to promote community agency.<sup>23</sup> In addition to broad constitutional commitments to participation, the regulation of the mining industry is also located within an environmental law regime<sup>24</sup> in which public participation in environmental decision making is entrenched.<sup>25</sup>

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<sup>21</sup> In terms of the Interim Protection of Informal Land Rights Act 31 of 1996.

<sup>22</sup> Maledu (n 2); Baleni (n 2); Baleni v Regional Manager Eastern Cape Department of Mineral Resources 2021 (1) SA 110 (GP). The *Baleni* cases are discussed in detail in Goldblatt and Hassim, “‘Grass in the Cracks’”: Gender, Social Reproduction and Climate Justice in the Xolobeni Struggle’ in this volume. See also Yolandi Meyer ‘Baleni v Minister of Mineral Resources 2019 2 SA 453 (GP): Paving the Way for Formal Protection of Informal Land Rights’ (2020) 23 *Potchefstroom Electronic Law Journal* 1.

<sup>23</sup> One of the founding values of the Constitution is a commitment to principles of accountability, responsiveness and openness (s 1(d) of the Constitution) and it is widely accepted that the form of democracy embraced in South Africa is not only representative, but also participatory. Indeed, participation in public affairs is deeply rooted in African traditions. As recognized by the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) [101]:

The idea of allowing the public to participate in the conduct of public affairs is not a new concept. In this country, the traditional means of public participation is imbizo/lekgotla/bosberaad. This is a participatory consultation process that was, and still is, followed within the African communities. It is used as a forum to discuss issues affecting the community. This traditional method of public participation, a tradition which is widely used by the government, is both a practical and symbolic part of our democratic processes. It is a form of participatory democracy.

<sup>24</sup> For a discussion of the relationship between mining and environmental regulation in South Africa, see Tracy Humby, ‘One Environmental System: Aligning the Laws on the Environmental Management of Mining in South Africa’ (2015) 33(2) *Journal of Energy & Natural Resources Law* 110.

<sup>25</sup> National Environmental Management Act 107 of 1998 (NEMA) s 2(4)(f). It requires the promotion of participation of all interested and affected parties in environmental governance and the particular promotion of participation by vulnerable and disadvantaged persons of NEMA. Section 23(2)(d) further provides that one of the objectives of integrated environmental management is to ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment. Furthermore, the required procedures for the investigation, assessment and communication of the potential impact of activities must ensure public information and participation procedures that provide all interested and affected parties with a reasonable opportunity to participate, and s 24(4)(a)(v), which provides that procedures for the investigation, assessment and communication of the potential conse-

Nevertheless, despite the lofty transformative objectives of the MPRDA, and the work of the judiciary in reinforcing these objectives, mining in South Africa continues to perpetuate cycles of poverty.<sup>26</sup> To borrow from Joel Modiri, ‘poverty is the logical outcome of a system which distributes benefits and opportunities along specific axes of social power’.<sup>27</sup> Ultimately, the current mining regime is failing to protect the communities whose land, livelihood and culture is directly affected, sometimes destroyed, by mining.<sup>28</sup>

**(b) The Impact of Mining on Women Living in Mining-affected Communities**

These failures are felt most acutely by women – both women formally employed in the mining sector and women living in mining-affected communities. The latter group includes the mothers, daughters, sisters, wives and partners who support men working in the mines, as well as women trying to earn a living in the informal economies that spring up around mining.

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quences or impacts of activities on the environment, must ensure public information and participation procedures that provide all interested and affected parties with a reasonable opportunity to participate in those information and participation procedures. See also Michael Kidd, ‘The National Environmental Management Act and Public Participation’ (1999) 6(1) *South African Journal of Environmental Law and Policy* 21; Tumai Murombo, ‘Beyond Public Participation: The Disjuncture Between South Africa’s Environmental Impact Assessment (EIA) Law and Sustainable Development’ (2008) 11(3) *Potchefstroom Electronic Law Journal* 105; Anel du Plessis, ‘South Africa’s Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?’ (2011) 27(2) *South African Journal on Human Rights* 279.

<sup>26</sup> Bonita Meyersfeld, ‘Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?’ (2017) 2(1) *Business and Human Rights Journal* 31.

<sup>27</sup> Joel Modiri, ‘Law’s Poverty’ (2015) 18(2) *Potchefstroom Electronic Law Journal* 224, 239.

<sup>28</sup> A full discussion of these failings is beyond the scope of this chapter, but see Melanie Murcott, ‘Introducing Transformative Environmental Constitutionalism in South Africa’ in Erin Daly and others(eds), *New Frontiers in Environmental Constitutionalism* (United Nations Environment Programme 2017); Tracy Humby, ‘South African Community Wins Right to Access Mining Application: But Who Will Win the War?’ (The Conversation 13 October 2020) <https://theconversation.com/south-african-community-wins-right-to-access-mining-application-but-who-will-win-the-war-147522> accessed 31 May 2021; Lisa Chamberlain, ‘Beyond Litigation: The Need for Creativity in Working to Realise Environmental Rights’ (2017) 13(1) *Law, Environment and Development* 1. See also the 2016 Report by the South African Human Rights Commission entitled ‘National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa’ (2016) <https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf> accessed 31 May 2021.

Some progress has been made in relation to inclusion in formal employment in the mines. According to the Minerals Council,<sup>29</sup> the number of women working in the industry has increased from 11,400 in 2002 to 57,800 in 2015. By 2017, women were reported to constitute 13.2 per cent of the overall workforce, with black women comprising 10.2 per cent.<sup>30</sup> This increase in women in the mining workforce has been driven largely by quotas set in the Mining Charter. Yet, as Thandi Dlamini has pointed out, ‘something seems amiss when a government, through legislation, encourages women to take up objectively harsh work in mines but does not also simultaneously provide them with a proper social wage for their role in reproducing society, thus enabling their refusal of such work’.<sup>31</sup> Asanda Benya’s work confirms that masculinity permeates and defines mining occupational culture and conceptions of mines and mineworkers.<sup>32</sup> Arguably, the worst gender blindness in the mining industry’s approach to women is that the position, place, space and socioeconomic relevance of women is seen solely in relation to formal employment.<sup>33</sup> As a result, the vast majority of women in mining-affected communities (who do not work for mining companies in any formal capacity) remain unseen.<sup>34</sup>

This has a range of consequences. Women living in mining-affected communities are sidelined from key moments of decision making around mineral resources and are thus unable to prevent or shape the course of mining activity.<sup>35</sup> When environmental harm then ensues as a result of mining activity,

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<sup>29</sup> The Minerals Council is an industry body that facilitates interaction among mining companies and advocates for mining in South Africa.

<sup>30</sup> Chamber of Mines Fact Sheet, ‘Women in Mining’ (2017) <http://www.chamberofmines.org.za/industrynews/publications/fact-sheets/send/3-fact-sheets/424-women-in-mining> accessed 31 May 2021.

<sup>31</sup> Thandi Dlamini, ‘Gender in the Mining Industry’ (A Review of African Political Economy, 10 February 2016). For a detailed discussion on women working in the mining industry, see Asanda Benya, ‘Women in Mining: A Challenge to Occupational Culture in Mines’ (Master’s thesis, University of the Witwatersrand 2009).

<sup>32</sup> Asanda Benya, ‘Women, Subcontracted Workers and Precarity in South African Platinum Mines: A Gender Analysis’ (2015) 48(1&2) *Labour, Capital and Society* 69. Benya also highlights that because women’s inclusion came at a time when men, who had worked in the industry for a century and a half, were facing retrenchments, women tended to be seen as undeserving and their inclusion a threat (71).

<sup>33</sup> Although the Nkala judgment (n 2) did recognize the care work provided by women in rural, labour-sending areas [214].

<sup>34</sup> ActionAid South Africa, ‘Mining in South Africa 2018: Whose Benefit and Whose Burden’ 81; Asanda Benya, ‘Absent from the Frontline but not Absent from the Struggle: Women in Mining’ (2013) 22 *Femina Politica* 144.

<sup>35</sup> The Womin Collective, ‘Extractives vs Development Sovereignty: Building Living Consent Rights for African Women’ <https://womin.africa/wp-content/uploads/2021/05/R2SN-WoMin-Collective-Article-ENG.pdf> accessed 11 November 2021. See also Responsible Mining Foundation, ‘Research Insight: Gender Inequality Runs Deep

women living in those areas are disproportionately affected because their pre-existing insecurity of land tenure limits their ability to move away from environmental harm. This means they often have no choice but to live next to mines that pollute the water they drink, the air they breathe and the soil in which they seek to grow food for their families. In addition, they face the additional risks of reproductive health challenges, as well as the burden of caring for others that fall ill.<sup>36</sup> All these consequences undermine the dignity of the women concerned and further entrench the gendered power disparities they face. From a governance perspective, the exclusion of women in mining-affected communities also weakens environmental decision making, as the valuable knowledge that resides in such women is not integrated into decisions about how to manage natural resources. All this further reinforces the need for the adoption of a more inclusive approach to mining grounded in environmental justice.

### **(c) Women in Resistance: The Formation of WAMUA**

Nevertheless, it is important not to define women in mining-affected communities as passive victims of exclusion and environmental degradation. In many instances they are HRDs actively resisting the injustices in their communities and articulating alternative visions of development. HRDs play an accepted and seminal role in furthering the realization of human rights, and thereby in promoting democracy, sustainable development and the rule of law.<sup>37</sup> In the

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in Mining' (22 June 2020) [https://www.responsibleminingfoundation.org/app/uploads/EN\\_Research-Insight-Gender-Inequality-June-2020.pdf](https://www.responsibleminingfoundation.org/app/uploads/EN_Research-Insight-Gender-Inequality-June-2020.pdf) accessed 11 November 2021, where it is argued that impact assessments that consult only with formal community organizations may inadvertently miss the perspectives and concerns of women, who are often underrepresented in these groups.

<sup>36</sup> WoMin, 'A WoMin Perspective on International and Regional Policy and Human Rights' 4 <https://womin.africa/wp-content/uploads/2020/09/paper-one-1.pdf> accessed 31 May 2021; Bonita Meyersfeld, 'Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013); Asanda Benya, 'Going Underground in South African Platinum Mines to Explore Women Miners' Experiences' 2017 25(3) *Gender & Development* 509. See also Nkala (n 2) [214].

<sup>37</sup> See, e.g., the Preambles to Resolution 68/181: United Nations General Assembly (UNGA), 'Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: Protecting Women Human Rights Defenders' A/RES/68/181 (2013), and Resolution 273: UNGA, 'Resolution on Extending the Scope of the Mandate of the Special Rapporteur on Human Rights Defenders in Africa', (2014). See also Benya, 'Absent from the Frontline' (n 34) 144.

environmental context specifically, the UN General Assembly has recognized the contribution of environmental human rights defenders (EHRDs) to the enjoyment of human rights, environmental protection and sustainable development, and acknowledged the particular role of EHRDs in furthering the implementation of the Paris Agreement<sup>38</sup> and realizing the 2030 Agenda for Sustainable Development.<sup>39</sup> The acknowledgment of the value of the contribution made by WEHRDs in these international instruments resonates with the inclusion principle inherent in environmental justice.

In South Africa, out of the exclusionary, discriminatory and patriarchal mining industry, a mobilized, committed and knowledgeable national network of women has risen in the form of Women Affected by Mining United in Action (WAMUA). WAMUA is a sub-network within a national network called Mining-Affected Communities United in Action (MACUA).<sup>40</sup> MACUA was established in 2012 in response to the need to shape an alternative counter-power structure to contend with the growing alliance between mining companies and the government in South Africa. The centrality of the experiences of women are reflected in MACUA's vision, which is '[t]o be a powerful movement of mining-affected communities united around the empowerment of women, the disabled and youth, based on the Peoples Mining Charter, in pursuit of Economic, Environmental and Social Justice'.<sup>41</sup> Since its inception in 2012, MACUA has acknowledged the need for women to self-organize as a targeted response to the gendered impacts of mining, resulting in the formation of WAMUA as a sub-network within MACUA.

MACUA itself recognize that 'WAMUA presents a critical channel through which to address patriarchy not only within the mining sector, related policies and practices, but within MACUA and communities, they represent as well'.<sup>42</sup> The internalization of women's issues into the mainstream of the movement has strengthened the ability of women leaders to raise concerns in their own

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<sup>38</sup> The Paris Agreement aims to strengthen the global response to the threat of climate change by striving to limit the global temperature rise to 1.5°C, and to strengthen the ability of countries to deal with the impacts of climate change. See United Nations Climate Change, 'What is the Paris Agreement' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 31 May 2021.

<sup>39</sup> Clause 2 of General Assembly Resolution A/HRC/40/L.22/Rev.1 issued on 21 March 2019.

<sup>40</sup> MACUA, 'History of MACUA' <https://macua.org.za/history-of-macua/> accessed 31 May 2021.

<sup>41</sup> MACUA, 'About Us' Vision and Mission para 5 <https://macua.org.za/about-us/> accessed 31 May 2022.

<sup>42</sup> MACUA, 'History of MACUA' (n 40) para 36.



communities, and to stand up to ward councillors and traditional leaders.<sup>43</sup> According to WAMUA:

it became of paramount importance to women to mobilise against mining that tends to be exploitative to mining affected communities. Women need to be at the forefront of championing those struggles as they are the ones who carry the burdens of mining or environmental degradation on land and mining resources.<sup>44</sup>

**(d) The Demand for Inclusion**

WAMUA's stance on the need for inclusion is clear. What is less clear is what their position is/would be when/if given the chance to meaningfully participate. Attitudes to mining in all mining-affected communities are contested. Some communities are outright opposed to mining in their area, while others are more concerned that any potential benefits associated with mining activity (such as job creation) must go to local residents. Often there is limited consensus on these positions within a single community. Historically in South Africa, the 'reform model', which advocates for mining to continue only along more equal lines, has probably been more dominant. However, this may shift as climate activists, including those living in mining-affected communities, increasingly articulate the need to transition away from reliance on fossil fuels.

While views may understandably differ on whether to prevent or to reform mining, one thing that all WEHRDs agree on is that they must be included in decision making. Further, they agree that real inclusion requires meaningful engagement and not just a token public participation exercise conducted for the purposes of box-ticking. This concern was particularly important for WAMUA as it plays out starkly in the case discussed in this chapter.<sup>45</sup> Ultimately, the key demand from mining-affected communities, including from WAMUA, is about autonomy and the right to choose – whether to choose to say no to mining, or to choose to participate in and benefit from it.

Nevertheless, while WAMUA's use of litigation has focused largely on the need for inclusion, their insistence on being consulted is not motivated by a desire for consultation for its own sake, but because WAMUA wanted access to platforms in which they could influence the actual content of the Mining Charter. What they would ultimately want to see in the Charter is not always clear, probably because so much of their time and energy has needed to go into the prior battle for participation. But some sense of their gendered demands

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<sup>43</sup> Ibid.

<sup>44</sup> Supporting affidavit by WAMUA in Chamber of Mines of South Africa v Minister of Mineral Resources and Others 2018 (4) SA 581 (GP) [5]–[6].

<sup>45</sup> Ibid.

does emerge and is discussed further in the analysis in section 4 of this chapter. Importantly, WAMUA's experience suggests the need to distinguish between the role of litigation and the role of inclusion. This is because litigation may be able to trigger enhanced participation by WEHRDs, and can be understood as valuable for doing so, but participation alone is no guarantee of substantive change. Participation might not develop into influence, and without influence, inclusion may ring hollow.

But even if their use of litigation did not ultimately result in the Mining Charter being amended in gender-conscious ways as they might have wished, it has still been useful when the relationship between this litigation and climate justice more broadly is considered. The value of this litigation is more fully ventilated in section 4, but it is worth noting upfront that part of its value lies in the way in which it enabled the community networks concerned to reframe the issues from capitalist concerns about how implementation of the Mining Charter might disrupt 'business as usual', to a focus on the Charter's transformative intentions. The broader narrative surrounding the case therefore resonates with climate justice claims for meaningful participation, for the redistribution of power, and for a re-imagining of a more sustainable future.

### 3. OUTLINE OF THE MINING CHARTER LITIGATION

Notwithstanding the limitations of litigation, it remains one of the key strategies used by WAMUA to agitate for more meaningful inclusion. This section describes WAMUA's use of litigation in relation to the Mining Charter. It is intentionally descriptive in nature, as the analysis is contained in section 4.

One of the ways in which the MPRDA seeks to expand opportunities for both black people and women to enter the mining industry in South Africa, and to benefit from the exploitation of mineral resources,<sup>46</sup> is by requiring the Minister of Minerals Resources and Energy (the Minister) to develop and implement a Mining Charter. The aim of such a Charter is to redress historical, social and economic inequalities and to set a framework, timetable and targets for facilitating the entry of excluded people into the mining industry.<sup>47</sup> The Charter is therefore located very much in the 'reform model' of mining rather than in the more expansive climate justice call for a move away from reliance on fossil fuels.

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<sup>46</sup> Required by s 2(c) and (d) of the MPRDA.

<sup>47</sup> Section 100(2)(a) of the MPRDA.

The first Mining Charter was released in 2004.<sup>48</sup> In the years since then, the Charter has attracted much controversy from industry and mining-affected communities alike. Points of contestation have included the legal status of the Charter,<sup>49</sup> whether continued compliance with the Charter is required, and most significantly for the purposes of this chapter, the requirement to consult around its provisions.

While the Mining Charter is one of the most important mechanisms in South Africa for promoting transformation and addressing the legacy of inequality in the mining sector, various iterations of the Charter over the years have been developed without meaningfully engaging the very people that the Charter is intended to benefit: mining-affected communities.<sup>50</sup> Instead, negotiations around the Mining Charter reflect the historical and continued exclusion of communities and have typically involved only government, mining companies and organized labour.<sup>51</sup> In the process, any opportunity to transform mining meaningfully has been lost.

In 2008, a formal consultation forum called the Mining Industry Growth, Development and Empowerment Task Team (MIGDETT) was formed. MIGDETT was a tripartite forum in which government, industry and labour (but not mining-affected communities) were represented, and has been used as a platform to discuss amendments to the original Charter. A second version of the Charter was released in 2010 (the 2010 Charter) and a third iteration in

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<sup>48</sup> Minerals Council (n 19) [2].

<sup>49</sup> In *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* 2018 (4) SA 581 (GP) the Court clarifies that the Charter gains force and effect when considering the other provisions of the MPRDA which refer to it. For example, s 23(1)(h) of the MPRDA provides that the Minister must grant a mining right if doing so will ‘substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources’ (s 2(d)) and ‘promote employment and advance the social and economic welfare of all South Africans’ (s 2(f)) in accordance with the Charter contemplated in s 100. The Court thus found that the Charter has legal significance through s 23(1)(h) and that compliance with the Charter is therefore best ensured by incorporating such compliance into the terms of a mining right. In this regard, s 47(1)(b) of the MPRDA, which grants the Minister the power to cancel or suspend a mining right if the right-holder ‘breaches any material term or condition of such right, permit or permission’ is the tool to achieve such accountability [92].

<sup>50</sup> See further Lisa Chamberlain, ‘Creative Lawyering: Leveraging the Flexibility of Institutional Relationships to Advance Social Justice – Two Case Studies from South Africa’ (2021) 13(1) *Journal of Human Rights Practice* 165.

<sup>51</sup> Organized labour refers only to unionized workers and therefore still leaves out everyone employed in the informal economy, as well as people living in mining-affected communities who are unemployed.

June 2017 (the 2017 Charter). The 2017 Charter was challenged in *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*<sup>52</sup> (the 2017 review), when industry queried whether, once a mining company met the required black economic empowerment (BEE)<sup>53</sup> ownership targets and was granted a mining right, it was required to maintain that target (the so-called ‘once empowered, always empowered’ principle). The Court agreed with industry that maintenance of the BEE target was not required.<sup>54</sup>

Significantly though, this judgment refers to the fact that the original Mining Charter was developed through a process of ‘extensive consultation’.<sup>55</sup> Nevertheless, the Court proceeds to clarify that the parties consulted by the Minister at the time were representatives of the Department of Mineral Resources and Energy (DMRE), the Chamber of Mines (the predecessor to the Minerals Council),<sup>56</sup> the South African Minerals Development Association (SAMDA) and the National Union of Mineworkers (NUM).<sup>57</sup> Again, mining-affected communities were notably absent.

Deeply concerned by their exclusion from opportunities to participate in the development of a policy document whose implementation affects them so significantly, various networks of mining-affected communities across the country, including WAMUA, united to join the 2017 review. In contrast to the industry objection to the 2017 Charter (which argued for the ‘once empowered, always empowered principle’), the community networks asked the Court to set aside the 2017 Charter on the basis that affected communities had not been meaningfully engaged in its development. The community networks also sought a declaratory order confirming that mining-affected communities are core stakeholders who must be meaningfully engaged through a process that is transformative, democratic and transparent when any new Charter is developed. At this stage, the case focused purely on procedural justice.

Despite vehement opposition by the Chamber of Mines,<sup>58</sup> in November 2017 the Court granted the community networks leave to intervene<sup>59</sup> and the

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<sup>52</sup> Chamber of Mines (n 49) [105]–[107]. This case has been appealed to the Supreme Court of Appeal.

<sup>53</sup> BEE is a government policy to advance economic transformation and enhance the economic participation of Black people in the South African economy.

<sup>54</sup> Chamber of Mines (n 49) [105]–[107].

<sup>55</sup> Ibid.

<sup>56</sup> See n 29.

<sup>57</sup> Reference is made in a footnote to the judgment that more stakeholders became involved in the consultation processes at a later time (Chamber of Mines (n 49) fn 38).

<sup>58</sup> Presumably motivated by a desire to mine ‘unfettered’ by having to accommodate community concerns and the environmental justice issues that were highlighted.

<sup>59</sup> Along with the individual mining affected communities of Bakgatla Ba Sefikile, Lesethleng, Babina Phuthi Ba Ga-Makola and Kgatlu, represented by Lawyers for Human Rights.

case was heard in February 2018.<sup>60</sup> The Court ordered that the 2017 review be postponed in order for the President to start an inclusive consultation process which revisited the Mining Charter. Significantly, the Court recognized that the community networks' concerns about being excluded from the process should be taken seriously, and declared mining-affected communities to be core stakeholders for the purpose of future consultation.<sup>61</sup>

Subsequent to this court order, the Minister embarked upon a consultation process of sorts. However, mining-affected communities have strongly contested the legitimacy of this process. A key feature of the process was the establishment of a Mining Charter Transformation Team (MCTT) by the Minister. The MCTT consisted of officials from the Minister's department, the Minerals Council, the Council for Geoscience, SAMDA, and the trade unions operating in the mining sector.<sup>62</sup> Community members were again notably absent from this structure. Instead, from March to May 2018, the Minister held a *parallel* process of consultations in mining-affected communities around the country. This demonstrates the tendency of the DMRE to sideline communities.

The affected communities have expressed many concerns about the conduct of this process, which negated any meaningful participation by them. These

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<sup>60</sup> The actual proceedings involve an interesting tale which further demonstrates the ways in which mining-affected communities are excluded from tables of power. The case was set to be heard from 19–21 February 2018. Late in the afternoon on 18 February 2018, it emerged that the state and industry had been meeting over the preceding weekend to discuss a postponement of the case. Despite the fact that the community networks were co-applicants in the case, they were not invited to participate in these discussions (the author was employed at the Centre for Applied Legal Studies at the time, which represented the community networks and therefore has first-hand knowledge of these events). This mirrors the daily experiences of mining-affected communities across South Africa and is part of the same pattern of exclusion that led communities to approach the Court in the first place.

<sup>61</sup> Responding to this victory, Elton Thobejane, deputy chairperson of MEJCON, said:

We are the people most affected by mining activity. What the Court has done for us ... is recognize that those who bear the costs of mining must be taken seriously. Mining affected communities must be involved in the design of the Charter and the Court order strengthens our position to do so.

His colleague Meshack Mbangula, national coordinator of MACUA echoed this by stating 'The Court has recognised that our concerns are equally important as those of the mining industry' (Lee-Anne Bruce, 'Victory for mining affected communities' (Centre for Applied Legal Studies press release 19 February 2018) paras 7, 8 <https://www.wits.ac.za/news/sources/cals-news/2018/victory-for-mining-affected-communities.html> accessed 31 May 2021).

<sup>62</sup> Namely, NUM, the Association of Mineworkers and Construction Union (AMCU), Solidarity, and the United Association of South Africa (UASA) (Minerals Council (n 19) [19]–[20]).

concerns were captured in a series of letters written by the Centre for Applied Legal Studies,<sup>63</sup> WAMUA's legal representatives, to the DMRE and the Presidency.<sup>64</sup> Some of the key objections were that:

- communities were often given little notice as to the timing and venue of consultations (typically only one or two days prior to the meeting);
- unsuitably small venues were selected for consultations, which resulted in the exclusion of some community members;
- no transport support was offered to make it possible for community members to attend meetings far from their homes;
- consultations were conducted during working hours making it impossible for anyone with a job to attend;
- consultations were too short to allow for community members to make meaningful inputs;
- consultations were conducted in languages with which community members were unfamiliar;<sup>65</sup>
- communities were never provided with copies of the revised Mining Charter, let alone in their home languages.<sup>66</sup>

Following this flawed consultation process, a further draft Charter was published in June 2018 (the draft 2018 Charter). WAMUA and its partners made submissions on this version, repeating their earlier critiques of the con-

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<sup>63</sup> The Centre for Applied Legal Studies (CALs) is a public interest law clinic and research centre based at the University of the Witwatersrand in Johannesburg, South Africa.

<sup>64</sup> The purpose of these letters was to seek information about the details of the DMRE's public engagement plan so that the community networks could prepare, and to bring defects in the process to the attention of the DMRE and request that those be remedied (submissions on the draft June 2018 Charter by CALs on behalf of MACUA, WAMUA and the Mining and Environmental Justice Community Network of South Africa (MEJCON-SA) 29 August 2018) [https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/bhr/resources/Comments%20on%20Draft%20Mining%20Charter%20\(CALS%20Representing%20MACUA,%20WAMUA,%20MEJCON-SA.pdf](https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/bhr/resources/Comments%20on%20Draft%20Mining%20Charter%20(CALS%20Representing%20MACUA,%20WAMUA,%20MEJCON-SA.pdf) accessed 31 May 2021 (CALs 2018 Charter Submissions) [9]. A response to only one of these letters was received: that dated 4 July 2018 (CALs 2018 Charter Submissions [9]).

<sup>65</sup> Interestingly, the complaint here was not the usual one about the dominance of English, but rather that the Minister did things like conduct the consultation in Limpopo in isiXhosa – an indigenous language spoken predominantly in other parts of the country – which is something that the Minister would have known.

<sup>66</sup> CALs 2018 Charter Submissions (n 64) [10]; see also ActionAid (n 34) 22. The objections raised did not however set out the ways in which the contested consultation process was problematic from a gendered perspective.

sultation process. In addition, over 100 community representatives gathered in Johannesburg in early July to consider the draft 2018 Charter. During two days of deliberation, communities overwhelmingly rejected the draft 2018 Charter. At the core of their position was their exclusion from negotiations on the Charter, despite a court order requiring that the DMRE consult with them specifically and meaningfully. The communities viewed the approach by the Minister and the DMRE as a direct assault on their agency and legitimacy and expressed their anger and disappointment that the Minister and the DMRE had ignored the express commitment of the Constitution to foster inclusive and participatory forms of democracy. They argued that instead of being treated as people with dignity and deserving of respect, the DMRE had treated them as ‘a problem to be overcome’.<sup>67</sup>

Despite their objections, in September 2018, the Minister released a further revised version of the Charter (the final 2018 Charter). Contestation around the Mining Charter continued when the Minerals Council subsequently took the final 2018 Charter on review (the 2019 Review).<sup>68</sup> Interestingly, in the 2019 Review, the DMRE raised a preliminary point arguing that the 2019 Review should not proceed until WAMUA and other networks and communities who had intervened as parties in the 2017 Review<sup>69</sup> were joined as parties to the 2019 Review. This is more likely a spurious invocation of the need for community inclusion when it suited the DMRE as an argument to be used against the mining industry, rather than a genuine adoption of an inclusionary approach. Nevertheless, the Court agreed, finding that the community parties:

have not only demonstrated that they have rights that require protection in the 2018 Charter, they have through great effort and expense actually exercised those rights. Their exclusion from the litigation not only impoverishes the proceedings but could result in them suffering harm should the orders sought by the applicant be granted.<sup>70</sup>

The community networks then joined the proceedings and the 2019 Review was heard in May 2021. In the resulting judgment, handed down in September 2021, the Court held that the Mining Charter has the status of policy only,

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<sup>67</sup> ActionAid (n 34) 23.

<sup>68</sup> Arguing that the final 2018 Charter is not binding and again advocating for the application of the ‘once empowered, always empowered principle’ (Minerals Council (n 19)).

<sup>69</sup> MACUA, WAMUA, MEJCON-SA, Bakgatla Ba Sefikile Community, Lesethleng Community, Babina Phuti Ba Ga-Makola Community, Kgatlu Community, AMCU, UASA, NUM, Solidarity and SAMDA (see Minerals Council (n 19) [45]).

<sup>70</sup> Minerals Council (n 19) [36].

not legislation, and a number of the final 2018 Charter's provisions were set aside.<sup>71</sup>

Catalysed by exclusion, the litigation around the Mining Charter has been a protracted contestation. At its core has been the extent to which mining-affected communities in general, and WAMUA and its constituents in particular, should be consulted in the revision of the Mining Charter. Along the way, WAMUA have secured two court orders confirming how important it is that they be consulted. Yet the consultation process that followed the first of those orders appears to have been more of a tick-box exercise than a genuine attempt at meaningful consultation. These issues are discussed further in the next section.

#### 4. INTERROGATING THE VALUE OF LITIGATION FOR WAMUA

This section examines some of the debates and controversies surrounding the value of public interest litigation more generally, in order to lay the groundwork for the analysis of the value of the WAMUA litigation in particular.

##### (a) Contested Notions of the Role and Impact of Public Interest Litigation

The use of law in general, and litigation in particular, to achieve social and economic change has been much debated and critiqued. Some activists and scholars argue that the law is ideologically biased towards the preservation of the status quo and that judges tend to favour powerful economic interests.<sup>72</sup> The use of law in social justice struggles is also critiqued from a decoloniality perspective by scholars who emphasize the need to recognize the ways in which racial identities and hierarchies are embedded in legal systems in general and human rights discourses in particular.<sup>73</sup> Another key criticism of public interest litigation (PIL) is that over-reliance on legal strategies can demobilize political

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<sup>71</sup> Minerals Council (n 19).

<sup>72</sup> Peter Gabel and Duncan Kennedy, 'Roll over Beethoven' (1984) 36(1/2) *Stanford Law Review* 1.

<sup>73</sup> Joel Modiri, 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 405; Tshepo Madlingozi, 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28 *Stellenbosch Law Review* 123, 146.



ones<sup>74</sup> by altering radical aspirations<sup>75</sup> and deflecting resources away from collective grassroots action.<sup>76</sup> In contrast, other commentators urge critics to adopt a bottom-up lens and examine how social movements use litigation with positive effect, despite its limitations.<sup>77</sup>

There is a rich and growing body of literature examining the impact of PIL. At least two camps have emerged in these debates. The first has become known as the materialist approach, which evaluates the impact of PIL by seeking to identify a linear relationship of cause and effect between a court case and what measurable direct benefits could be attributed to the case. Materialists argue that courts have neither the political authority nor the normative resources necessary to bring about social change.<sup>78</sup> The materialist approach is therefore pessimistic about the value of PIL and emphasizes that ‘[a] right asserted successfully by litigants who then wait in vain for any tangible benefit to flow from the costly process of litigation, is rapidly transformed into an illusory right’.<sup>79</sup>

Dissatisfaction with the materialist approach resulted in the development of the legal mobilization tradition which points out that litigation can *indirectly*

<sup>74</sup> Scott Cummings and Deborah Rhode, ‘Public Interest Litigation: Insights from Theory and Practice’ (2009) 36(4) *Fordham Urban Law Journal* 603, 607; Michael McCann and Helena Silverstein, ‘Rethinking Law’s “Allurements”’: A Relational Analysis of Social Movement Lawyers in the United States’ in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998).

<sup>75</sup> Wendy Brown and Janet Halley, *Left Legalism/left Critique* (Duke University Press 2002).

<sup>76</sup> Tshepo Madlingozi, ‘The Roles and Impacts of Socio-Economic Rights Strategies on Post-Apartheid Social Movements’ in Langford and others (eds), *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (Cambridge University Press 2015); McCann and Silverstein (n 74), 262, as discussed in Socio-Economic Rights Institute of South Africa, ‘Public Interest Legal Services in South Africa’ (2015) (PILS Report) [https://www.pils.org.za/wp-content/uploads/2016/05/images\\_documents\\_SERI\\_PILS\\_Project\\_Report\\_Final.pdf](https://www.pils.org.za/wp-content/uploads/2016/05/images_documents_SERI_PILS_Project_Report_Final.pdf) accessed 31 May 2021, 11. This report nevertheless makes the point that in practice, public interest litigators are acutely aware of the shortcomings of litigation and are often its most vocal critics: Cummings and Rhode (n 74) 608 as discussed in PILS Report, *ibid.*, 12.

<sup>77</sup> Open Society Justice Initiative, ‘Strategic Litigation Impacts: Insight from Global Experience’ (2018) Foreword 13 <https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf> accessed 31 May 2021 (OSJI Report).

<sup>78</sup> Michael McCann, ‘Reform Litigation on Trial’ (1992) 17(4) *Law & Social Inquiry* 715, 730.

<sup>79</sup> Dennis Davis, ‘Adjudicating the Socio-Economic Rights in the South African Constitution: Towards “Deference Lite”?’ (2006) 22(2) *South African Journal on Human Rights* 301, 314.

effect social change through the mobilization catalysed in preparation for it, and in its aftermath.<sup>80</sup> This mobilization can resonate beyond the limits of the legal process by contributing to the empowerment of civil society and energizing movements.<sup>81</sup> Michael McCann argues that rights-claiming must be made real by other forms of political action, such as campaigning or protest.<sup>82</sup> Understood this way, PIL can help frame and develop collective identity regardless of whether there are actual material outcomes for the rights-claimers.<sup>83</sup>

Another leading proponent of the legal mobilization approach, César Rodríguez-Garavito, argues that litigation can result in changes in ideas, perceptions and collective social constructs relating to the subject matter of the litigation and that:

even when judges' holdings are contrary to the positions of those promoting social change, judicial [and linked mobilisation] processes can nonetheless generate transformative effects by increasing visibility of the problem in the media or by creating lasting bonds between activist organisations. These alliances can outlast the decision and lead to collective political actions that promote the same cause in contexts other than the courtroom.<sup>84</sup>

Legal mobilization theorists thus criticize the materialist approach on the basis that the value of PIL cannot be reduced to a favourable outcome in court, and instead emphasize the indirect, symbolic and political impact of PIL. Understood in this way, PIL is recognized as valuable because it can strengthen grassroots movements, focus campaigns for change, amplify previously unheard voices and shift the power dynamics between the various players

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<sup>80</sup> See the discussion in Stuart Wilson, 'Litigating Housing Rights in Johannesburg's Inner City: 2004–2008' (2011) 27(1) *South African Journal on Human Rights* 127, 129.

<sup>81</sup> Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994) as discussed in Jackie Dugard and Katherine Drage, 'Shields and Swords: Legal Tools for Public Water' (2012) *Municipal Services Project Occasional Paper* 17, 6.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Social and Economic Rights in Latin America' (2011) 89 *Texas Law Review* 1669. Nevertheless, Rodríguez-Garavito is not always as hopeful about the potential of PIL. See e.g., César Rodríguez-Garavito, 'Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2010) 18(1) *Indiana Journal of Global Legal Studies* 263, 266, where he emphasizes the coexistence of legal protections confirmed in jurisprudence, and the extreme violence and exclusion experienced by indigenous communities in Colombia and other Latin American countries.

involved.<sup>85</sup> In addition, litigation can promote unity between groups that may have had differences in the past.<sup>86</sup> A further argument that its supporters make is that PIL provides a platform for struggles to be publicly recognized, and can amplify community voice where political avenues have failed.<sup>87</sup>

Jackie Dugard and Malcolm Langford extend the understanding of the political impact of PIL by suggesting that litigation can be enabling in another way, which is to expand the ‘resources available for social groups that have the potential to contribute to political and, ultimately, structural change by providing greater leverage in civil society’s engagement with the state (or even private power)’.<sup>88</sup> This approach, they argue, engages with the critique that rights-based approaches have traditionally neglected the dimension of power, as rights discourse has tended to over-emphasize the agency of actors, and under-emphasize the structures of dominating power (whether these are social, political or economic).<sup>89</sup>

Thus, while earlier literature frequently criticized the potential and effectiveness of PIL, more recently scholars have developed a more nuanced, contextual approach to the use of PIL which recognizes it as ‘an imperfect but indispensable strategy for social change’.<sup>90</sup> There is now a much broader understanding of PIL as a political tool located in a web of interrelated strategies, which, while limited, still has the potential to bring about far-reaching social change.<sup>91</sup> Such an approach views the ‘law as politics by another name, and links court-room battles to political mobilization and community organ-

<sup>85</sup> PILS Report (n 76) 52, 63; OSJI Report (n 77) 60, 69.

<sup>86</sup> PILS Report (n 76) 52.

<sup>87</sup> This is evidenced by the response of one of the applicants in the Constitutional Court judgment in *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC), discussed in Jackie Dugard and Malcolm Langford, ‘Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism’ (2011) 27(1) *South African Journal on Human Rights* 39, 44.

<sup>88</sup> Dugard and Langford (n 87) 56.

<sup>89</sup> *Ibid.*

<sup>90</sup> Cummings and Rhode (n 74) 604.

<sup>91</sup> This nuanced approach to PIL is epitomized by Scott Cummings and Deborah Rhode, who argue that litigation should be measured in the light of various essential claims:

- (a) litigation is a political tool that, when used strategically, can stimulate meaningful change and complement other political efforts;
- (b) whether litigation ‘works’ or not must be judged in relation to available alternatives; and
- (c) in order to evaluate the social change potential of litigation in a given circumstance, it is necessary to examine the conditions – political, economic, cultural, and organizational – within which a lawsuit operates

(Cummings and Rhode (n 74) 609, as discussed in PILS Report (n 76) 12).

izing<sup>92</sup> and understands that PIL can disrupt entrenched institutional power if used strategically and in combination with other strategies.<sup>93</sup>

Other scholars have sought to harmonize the materialist and the legal mobilization approaches. For instance, Jason Brickhill posits a typology of impact consisting of three categories of impact, namely legal, material and political (referred to here as the Brickhill typology).<sup>94</sup> In the Brickhill typology, material effects include the provision of social goods or services, the payment of compensation or damages, and compelling or prohibiting specific conduct. Legal effects refer to changes in law or policy.<sup>95</sup> Political impact is concerned with the effect of litigation on power relations, discourse and the ‘agenda’ in relation to a particular set of issues.<sup>96</sup> Essentially the combination of his material and legal effects represent a generous explanation of traditional materialist approaches, while his understanding of political impact resonates with legal mobilization approaches. Brickhill’s approach to understanding impact will be applied in the analysis that follows.

## **(b) Analysis of the Mining Charter Litigation**

In this analysis of the effectiveness of WAMUA’s use of litigation in the Mining Charter cases, I adopt the Brickhill typology and use material, legal and political impact as organizing principles. I apply Brickhill’s definition of material and legal impact, where material effects include the provision of social goods or services, the payment of compensation or damages, and compelling or prohibiting specific conduct, and legal effects are changes to law or policy resulting from PIL. I adopt an inclusionary approach to political impact, understanding it to include the power of PIL to:

1. catalyse and strengthen social mobilization;
2. build collective identity within a single group or the cohesion of groups who had previously been disparate;

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid., 610; Charles Cabel and William Simon, ‘Destabilization Rights: How Public Law Litigation Succeeds’ (2004) 117 *Harvard Law Review* 1016. as discussed in PILS Report (n 76) 12. Impact is also very contextual, an issue discussed further in the next section.

<sup>94</sup> Jason Brickhill, ‘Introduction’ in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta 2018), 42. His typology draws on the work of Dugard and Langford (n 87), Malcolm Langford and others (eds), *Socio-Economic Rights in South Africa: Symbols or Substance* (Cambridge University Press 2014) and César Rodríguez-Garavito, ‘Beyond the Courtroom’ (n 84).

<sup>95</sup> Brickhill, ‘Introduction’, *ibid.*, 42.

<sup>96</sup> *Ibid.*, 43.

3. boost energy and morale;
4. shift power relations;
5. increase the visibility of an issue and/or group and amplify community voices;
6. reframe an issue and/or change perceptions.

**(i) Legal impact**

Understanding the legal impact of PIL as changes to law or policy, the Mining Charter litigation did not result in any significant legal impact. At best, the litigation confirmed what the law already is, given that the obligation to consult with affected communities is already part of the South African legal system. Unfortunately, the Court did not really elaborate on the nature of consultation required. Another way to understand legal impact in this case is to ask whether the litigation resulted in changes to the Mining Charter. Unfortunately, the answer to this is no (discussed further below).

**(ii) Material impact**

Brickhill suggests that material impact includes the provision of social goods or services, the payment of compensation or damages, and compelling or prohibiting specific conduct. On this understanding, the analysis of whether the Mining Charter litigation had material impact is a mixed bag. Certainly the litigation did not result in the provision of goods or services or the payment of any compensation or damages, but it did compel specific conduct, as the DMRE was ordered, numerous times, to consult with mining-affected communities in the development of the Mining Charter.

The key question is whether these consultation directives are sufficient to qualify as material impact. This question is complicated by the fact that, while the litigation and associated advocacy described above focused on ensuring consultation, the communities' insistence on being consulted ultimately stems from their wish to influence the content of the Mining Charter.

In this regard, one of the key substantive issues concerning WAMUA has been the Mining Charter's approach to gender. WAMUA critiqued the final 2018 Charter on the basis that where it did attempt to include women in procurement processes, women were mentioned interchangeably with youth.<sup>97</sup> This meant that a mining company could procure goods and services from youth-owned companies and still comply with the need to procure from youth- or women-owned companies. In addition, the final 2018 Charter did not provide targets for the employment of women as mineworkers.<sup>98</sup> The

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<sup>97</sup> ActionAid (n 34) 81.

<sup>98</sup> *Ibid.*, 82.

argument is that progressive targets could help create a critical mass of women in the workplace, which could in turn hold the potential to reduce the levels of gender-based violence in mines.

In its analysis of the final 2018 Charter, the Centre for Applied Legal Studies or CALS (who represented WAMUA) highlighted that despite mining's contribution to gender inequality in South Africa, there is no reference to women in the objectives of this iteration of the Charter.<sup>99</sup> CALS notes that like its predecessors, the final 2018 Charter contains no measures for addressing the gendered impacts of mining on communities, that is, the ways in which mining exacerbates gender inequality. CALS argues that the arrival and/or expansion of mining operations is increasingly associated with the dispossession of rights to communal land, including use rights. This has impacted on women who have customary rights to work the land. Where mining dispossesses women of these rights, they are placed in an economically vulnerable position which ultimately increases their vulnerability to gender-based violence. At the same time mining operations employ men nearly exclusively, which skews economic power in communities. In the Mining Charter participation process, women have stated that the arrival or expansion of mining in their communities changes the demographic balance in favour of men.<sup>100</sup>

Understood in this context, because the litigation has not resulted in any increased employment or other income-generation opportunities for women in mining-affected communities, it has therefore not had the desired material impact. Arguably though, this failure is less about the litigation and more about the nature of the state's compliance with the various court orders. The manner in which DMRE conducted the contested consultation process made meaningful participation by women in mining-affected communities near impossible. In fact, DMRE's actions can be considered 'malicious compliance' with the court order. Malicious compliance is a term used to describe a situation in which government officials (or private parties) interpret court orders as restrictively as possible in an attempt to frustrate the objectives of the litigating organization, while simultaneously still complying with the court order. In other words, malicious compliance occurs when the state does not support the rationale for a court order and hence does the very minimum it can get away with while still being considered to be complying with the order.

In this example, the DMRE designed its consultation process in a way which excluded many community members, including members of WAMUA.<sup>101</sup> As

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<sup>99</sup> CALS 2018 Charter Submissions (n 64) [25].

<sup>100</sup> *Ibid.*, [81].

<sup>101</sup> Note that the critique of the consultation process made by WAMUA and its legal representatives is not specifically a gendered critique, but rather focuses on the exclusion of all people from mining-affected communities.

a result, WAMUA's input on the need for the revised Charter to acknowledge and address the ways in which mining reinforces gender inequality went unheard. Consequently, subsequent versions of the Charter did not include the kind of provisions that WAMUA would have liked to have seen (so no legal effect), and also failed to provide improved employment or income-generating opportunities for women in mining-affected communities (so no material effect).

Of course, even full compliance and participation may not have guaranteed these substantive provisions, and the value of participation for its own sake should not be lost. However, that value is perhaps more appropriately housed under the banner of political impact and will be addressed later.

The question that arises is whether this outcome was avoidable, or at least whether it could be avoided in future. In this regard it is possible that had the Court crafted its order in a different way, malicious compliance would have been harder to execute, and the litigation may therefore have had better legal and material impact. The issues of appropriate relief in PIL is complex.<sup>102</sup> Section 172(1) of the South African Constitution empowers courts hearing constitutional cases (which PIL inevitably are) to grant relief that is 'just and equitable'. There is a wealth of jurisprudence on this topic.<sup>103</sup>

One of the remedies which has emerged in response to judicial frustration in compelling recalcitrant state parties to comply with court orders is that of a structural interdict. A structural interdict is where a court requires a party to take certain action while also requiring it to report back to the court on its progress. It is thus a mechanism for a court to exercise supervisory jurisdiction over a recalcitrant organ of state.<sup>104</sup> Despite some initial reluctance (grounded in concerns about maintaining the separation of powers between different arms of government), South African courts are showing increasing willingness to order structural interdicts.<sup>105</sup> Had the Court done so in the *Mining Charter* litigation, it may have been possible for WAMUA to bring the DMRE's malicious compliance with their obligation to consult WAMUA to the attention of the Court. This, in turn, may have resulted in WAMUA's gender-based concerns about the content of the Mining Charter being properly heard.

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<sup>102</sup> See e.g., *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) [101].

<sup>103</sup> See cases such as *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC); *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); and *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) as discussed in Georgina Jephson and Osmond Mngomezulu, 'Constitutional Litigation Procedure' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta 2018).

<sup>104</sup> See e.g., the cases discussed in Jephson and Mngomezulu, *ibid.*, 150 fn 93.

<sup>105</sup> *Ibid.*, 151.

The next complex question to consider is: if litigation should be used as a last resort,<sup>106</sup> and the remedy sought in such litigation is consultation, when consultation happens (albeit in a flawed fashion) but does not achieve any material or legal impact, what then is the point of litigation? The answer to this question lies in an examination of the possible *political* impact of litigation, as litigants can place value on a judgment's vindication of their rights independent of whether the judgment was implemented.<sup>107</sup> We turn now to consider how the *Mining Charter* litigation might be understood as valuable notwithstanding its failure to deliver legal impact, and the limited material impact that it catalysed.

### (iii) Political impact

To re-state, political impact is the focus of legal mobilization approaches to understanding the value of PIL, and is concerned with the effect of litigation on power relations, the strength of social mobilization, discourse and the 'agenda' in relation to a particular set of issues.

#### *Strengthening cohesion in mobilization*

The *Mining Charter* litigation cannot really be said to have catalysed mobilization. WAMUA had been formed many years before the litigation and, together with its partners, WAMUA had been mobilizing around the Mining Charter for years before the litigation was launched. However, where the litigation did have significant political impact was the way in which it brought disparate networks of mining-affected communities together and fuelled their continuing mobilization.

For many years, two different networks of mining-affected communities with very similar mandates had operated across South Africa – MACUA (WAMUA's brother network) and the Mining and Environmental Justice Community Network of South Africa (MEJCON).<sup>108</sup> Inevitably there have been tensions between these networks, so understood against this backdrop, the *Mining Charter* litigation is extremely significant. This is not because of the substance of the judgment it resulted in, but because it brought these mining community networks closer together. In fact, this litigation was the first time that MACUA and MEJCON had operated so cohesively. It was thus also

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<sup>106</sup> While the 'last resort' principle might not be universally recognized, in this case the litigation was indeed preceded by extensive engagement, media advocacy and protest action.

<sup>107</sup> OSJI Report (n 77) 61.

<sup>108</sup> MACUA is closely aligned with ActionAid and MEJCON with the Centre for Environmental Rights.



the first time that the mining industry and the state were confronted with *united* opposition from mining communities.

#### *Boosting energy and morale*

A second way in which the litigation had positive political impact is that it boosted the energy and morale of WAMUA and the other community networks. Their experience over many years has been one of systematic exclusion from decision making. Time and again they have been confronted with deaf ears and blind eyes. These judgments thus embody a powerful vindication of WAMUA's importance, and even of its very existence. Recognition by a respected and credible institution like the judiciary has gone a long way in boosting the morale of the movement.

#### *Disrupting power relations*

The legal mobilization approach reminds us that litigation can provide a way to shift harmful power dynamics. It has done so in this case in two important ways. The first concerns the relationship between mining-affected communities on the one hand, and the state and mining industry on the other. These relationships have long been characterized by a power imbalance, with the state and industry wielding huge power, and communities much less. By uniting the two largest national networks of mining-affected communities, the *Mining Charter* litigation has served to consolidate the power wielded by mining-affected communities and thereby gone some way to equalize the traditional power imbalances prevalent in the mining industry. The state is far more likely to take a *united consolidation* of community networks seriously than a collection of scattered communities. The state's hesitation to proceed with the 2019 Review without the inclusion of the national community networks is testament to this. This disruption of the existing and problematic power asymmetry is an important part of the broader struggle for environmental justice which centres the need for equality and inclusion.

Secondly, the litigation has had an important impact on the power dynamics *within* the community networks themselves. Specifically, the litigation provided a way to foreground WAMUA and the interests of women in mining-affected communities.<sup>109</sup> This is extremely significant as these are women who are confronting by not only power imbalances vis-à-vis mining companies and the state, but also the patriarchy, which concentrates in the mining sector. Recall that one of the very reasons for the establishment of

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<sup>109</sup> While there may be a potential tension between the interests of the movement and those of individual women in mining-affected communities, such a tension is beyond the scope of this chapter.

WAMUA was MACUA's recognition that 'WAMUA presents a critical channel through which to address patriarchy not only within the mining sector, related policies and practices, *but within MACUA and communities they represent* as well.'<sup>110</sup>

It is for this reason that CALS chose to cite WAMUA as the *first* applicant in its application to intervene in the 2017 review. This meant that the founding affidavit in those proceedings was deposed to by Nester Ndebele, one of WAMUA's central leaders. This was a deliberate choice aimed at using the litigation process (regardless of its outcome) to foreground the voices of women affected by mining.

Nevertheless, attempts to disrupt patriarchal practices within mining communities themselves have not been plain sailing. For example, it is notable that the community contact points listed on CALS' press releases tend to be men, and the women who lead WAMUA have played a minimal role in discussing the litigation in the media.

There may also have been less obvious ways in which the litigation has made things difficult for the women of WAMUA. The iconic *Endorois* judgment<sup>111</sup> is described as having negative implications for women in the Endorois community. Christine Kandie, programme officer of the indigenous community activist group the Endorois Welfare Council, explains that the litigation has had detrimental effects on women as they were the ones left at home to care for the children, livestock, and the home as the men met to strategize around the litigation. The litigation thus had negative economic and social impacts on women in the Endorois community.<sup>112</sup> The extent to which a similar pattern has played out in relation to WAMUA is unclear, but it is worth bearing these kinds of risks in mind when evaluating the Mining Charter litigation.

### *Increasing visibility and amplifying community voices*

In relation to increasing visibility and amplifying community voices, there has been significant political impact. As mentioned above, the litigation has quite literally, in the words of the court orders it resulted in, recognized WAMUA and its partners as core stakeholders in the Mining Charter process. This has increased the legitimacy with which they are perceived by both the state and the mining sector. In addition, by engaging in the litigation, WAMUA created

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<sup>110</sup> MACUA (n 40) (emphasis added).

<sup>111</sup> The 2010 decision of the African Commission on Human and Peoples Rights in Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya 276/2003, in which an indigenous community in Kenya successfully contested their eviction from their ancestral land by the Kenyan government.

<sup>112</sup> OSJI Report (n 77) 64, 67.

a platform in which to air its concerns about the lack of gender responsiveness in the Mining Charter. Members have been able to articulate these concerns both in the affidavits that formed part of the litigation, in their input to the consultation process (flawed as the process was) and in their subsequent submissions on the Mining Charter to the DMRE. Their struggle has thus been publicly acknowledged and the litigation has served to amplify their voices where other avenues had failed.

### *Reframing the issues*

Until the intervention of WAMUA and its partners, contestation about the Mining Charter had taken place exclusively between industry and the state, and had been dominated by industry's attempts to water down their compliance obligations (by arguing for the once empowered, always empowered principle) and to sidestep compliance with the Charter entirely by arguing that it is not legally binding. These debates, because they took place between powerful and resourced players, had received a lot of media coverage. The national narrative thus focused on the suggestion from industry that the Mining Charter was problematic because it placed unreasonable burdens on mining companies which might deter investment and therefore damage the South African economy.<sup>113</sup>

Through their intervention in the litigation, WAMUA and its partners were able to reframe this narrative. Their contributions have highlighted the need for the inclusion of women and other groups who have historically been excluded, from both jobs and a seat at the decision-making table.<sup>114</sup> Instead of a bureaucratic nuisance, the Charter thus became an instrument with potential to transform the mining industry. Of course, the key word here is potential. None of the subsequent versions of the Charter have been truly transformative, and as discussed above, the precise contours of what exactly WAMUA want, beyond inclusion, are not always clear.

But WAMUA have managed to reframe the issues in another important way, which is that they have consistently nuanced understandings of who

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<sup>113</sup> For an example of this kind of narrative which describes the Mining Charter as 'a significant source of uncertainty' and as having 'unsettled investors and prompted adverse pronouncements by sovereign credit ratings agencies', and which references the so-called 'extensive public participation and negotiation process', see Peter Leon, 'Mining Charter III: Certainty, But at a Cost' (Biznews, 12 March 2019) paras 2, 7 <https://www.biznews.com/briefs/2019/03/12/mining-charter-peter-leon> accessed 11 November 2021.

<sup>114</sup> See, e.g., Hassen Lorgat, 'Mining Charter: Who is Fooling Whom?' (GroundUp 4 April 2018) <https://www.groundup.org.za/article/mining-charter-who-fooling-whom/> accessed 11 November 2021.

the correct beneficiaries of the Charter are. Usually debates about improving inclusion and transformation in the sector have focused on mineworkers. WAMUA have spotlighted that the communities who support those workers – and particularly the women who form the bedrock of such communities – are equally important.<sup>115</sup>

This is a refrain that WAMUA and its partners have taken forward into subsequent work, such as their intervention in litigation concerning the appropriateness of Covid-19 regulations for the mining sector. In that litigation, the community networks successfully obtained recognition from the Court that the vulnerability of mineworkers in turn renders the communities in which they live vulnerable to Covid-19. There are almost half a million mineworkers in South Africa. Any Covid-19 infection at a mine is likely to spread to the communities surrounding the mine where the mineworkers live. This risk is not new: mineworkers have long brought tuberculosis and HIV and/or AIDS from the mines back to their communities.<sup>116</sup> Mining-affected communities are also particularly vulnerable to Covid-19 because they too have a higher burden of lung disease and HIV and/or AIDS, precisely because they host mineworkers. These communities are often in rural, underserved areas of South Africa or neighbouring countries with poorer access to healthcare than other South Africans enjoy.<sup>117</sup>

The judgment in this case thus confirms that the spread of the Covid-19 virus has profound implications for mining-affected communities in South Africa, and is another example of judicial recognition that community networks are key stakeholders who must be meaningfully engaged on the laws and policies that impact them. Arguably, it demonstrates that WAMUA learned how an issue could be reframed in the *Mining Charter* litigation and went on to successfully apply this in the subsequent Covid-19 litigation.

### *Impact on resources*

Another consideration in assessing the political impact of the *Mining Charter* litigation is that WAMUA's participation in the flawed consultation process

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<sup>115</sup> Even Creamer Media's Mining Weekly, a notoriously industry-centred publication, now includes community perspectives on the gender-based injustice raised by WAMUA and its partners in its reporting on the Mining Charter litigation: Donna Slater, 'Court Confirms "Once Empowered, Always Empowered" Principle' (Mining Weekly, 22 September 2021) [https://www.miningweekly.com/article/court-confirms-once-empowered-always-empowered-principle-2021-09-22/rep\\_id:3650](https://www.miningweekly.com/article/court-confirms-once-empowered-always-empowered-principle-2021-09-22/rep_id:3650) accessed 11 November 2021.

<sup>116</sup> Nkala (n 2).

<sup>117</sup> *Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy and Others* [2020] 9 BLLR 929 (LC) [6].

which followed the first round of litigation significantly depleted their resources. It required the deployment of women to attend meetings across the country, usually in fairly remote places and at short notice. Recall also that the DMPE provided no support to community members to facilitate their attendance. All of this therefore needed to be funded by WAMUA and its partners. In addition to financial resources, constant participation in what WAMUA viewed as an exclusionary and often downright insulting process must also have impacted on the well-being and morale of the organization. Arguably, this erosion of resources resulted, at least indirectly, from the litigation, and would have meant fewer resources available for mobilization and political activity. In this way, the litigation could be seen as undermining the use of other strategies, and therefore having negative political impact.

## CONCLUSION

Despite a constitutional and legislative framework designed to confront the injustices of the past, the South African mining industry remains characterized by the exclusion of black women from decision making about natural resources, as well as from opportunities to benefit from the exploitation of those resources. Undeterred, women in mining-affected communities have demonstrated remarkable resilience. WAMUA has emerged as a key player in struggles for social, environmental and gender justice, and have chosen to use litigation as part of their struggles.

An assessment of the impact and value of WAMUA's use of litigation in the *Mining Charter* cases is layered. The litigation did produce two court orders requiring that WAMUA be consulted in the process of revising the Mining Charter. However, despite these important victories in court, given the state's malicious compliance with the first court order, WAMUA's gender-based concerns were not heard. Subsequent versions of the Mining Charter do not acknowledge or respond to the ways in which mining exacerbates gender inequality. This means that the litigation has not had legal impact in the sense envisaged by Brickhill. The litigation has also not resulted in any increased employment or other income-generation opportunities for women in mining-affected communities. This might seem to be an absence of material impact. However, the litigation did result in court orders compelling state action (to consult) and can therefore be understood as having some material impact, albeit limited.

Nevertheless, legal mobilization approaches to understanding the value of PIL encourage us to look beyond material and legal impact and recognize that PIL can have useful political impact. In this case study, there are a number of ways in which the litigation can be said to have political impact. The litigation has strengthened the cohesion between networks of mining-affected commu-

nities, which is usefully disrupting the traditional power imbalances between communities and the state/private sector. Perhaps the litigation's greatest political success lies in the way in which it has increased the legitimacy with which WAMUA and its partners are perceived by both the state and the mining sector.

The litigation has also enabled the community networks to reframe the issues from capitalist concerns about how implementation of the Charter might disrupt 'business as usual' to a focus on the Charter's transformative intentions. Furthermore, it has provided a platform to foreground WAMUA and the voices of women in mining communities that it represents, who have used the litigation to air their concerns about the lack of gender responsiveness in the Mining Charter. Yet patriarchal practices within mining communities themselves remain, evidenced by which voices were prioritized in media advocacy around the cases.

This suite of political impact confirms the value of litigation beyond just its material and legal effect. In the particular context of climate justice, it shows how litigation can fortify inclusion, which is one of the central tenets of climate justice, but also how judicially-ordered inclusion does not always translate into meaningful inclusion of marginalized communities in practice. The discussion in this chapter therefore demonstrates both litigation's limited ability to deliver inclusion, and its potential to redistribute power. As the cry for climate justice from WEHRDs across the world gets louder and louder, we must confront the environmental injustice of our past and seek new ways to reconcile the relationship between people and planet. For as long as mining continues to exploit and silence those most affected by the environmental harm and climate change it causes, inequality will persist. Such inequality is inconsistent with a future characterized by climate justice and we must therefore continue to explore ways to advance a more sustainable, more just world. WAMUA's experiences demonstrate that litigation can prove a useful tool in this project.

# 10. ‘Grass in the cracks’: Gender, social reproduction and climate justice in the Xolobeni struggle

**Beth Goldblatt and Shireen Hassim**

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The very sense that we are living at the edge of a volcano makes it even more crucial to realise that, in the midst of so much destruction, another world is growing, like the grass in the cracks of the urban pavement, challenging the hegemony of capital and the state and affirming our interdependence and capacity for co-operation.

Silvia Federici<sup>1</sup>

## INTRODUCTION

Duduzile Baleni, a Pondo headwoman from the Xolobeni area of South Africa’s Wild Coast, is the first applicant in a case brought by her community against the South African government and an Australian mining company hoping to secure the right to mine titanium and other minerals in an open cast mine over 900 hectares of coastal land on which the community resides. In late 2018, the High Court held that the mining rights could not be granted without the agreement of the community living there.<sup>2</sup> The decision has been appealed. The mining plan has caused conflict within the community, and between the community and the provincial and central governments, tragically involving the deaths of activists.

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<sup>1</sup> Silvia Federici, *Re-Enchanting the World: Feminism and the Politics of the Commons* (PM Press 2019) 1.

<sup>2</sup> *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP). Note that the case has already been the subject of considerable scholarly attention, including by: The WoMin Collective, ‘Extractives vs Development Sovereignty: Building Living Consent Rights for African Women’ (2017) 25 *Gender and Development* 421; Thuto Thipe, ‘Land and Reparation Politics and Policy after Apartheid’ in Daniel Magaziner (ed), *The Oxford Handbook of South African History* (Oxford Handbooks Online edn, Oxford University Press 2020); Jackie Dugard, ‘Evaluating Transformative Constitutionalism in South Africa: A View Through the Mineral Rights Adjudication Looking Glass’ (2021) 39(3) *Nordic Journal of Human Rights* 373.

This chapter examines the Xolobeni opposition to the proposed mining to highlight the links between environmental justice struggles and feminist efforts to overcome the gendered structures of production and reproduction underpinning capitalism. What can the arguments against extractive mining in Xolobeni offer for constituting feminist responses to climate change? How can rights be engaged to challenge destructive extractivism that threatens the environment, the climate and continued life on earth? And how can such rights-based strategies centre gender equality in fighting for climate justice? At issue is not only protecting common resources, but also ensuring that they are governed sustainably and with full attention to gender inequalities. The Xolobeni struggle over nearly two decades, and notably its pursuit through the courts, is a productive case for considering these questions. First, the system of communal land management has resonances with global struggles for a rural commons; second, the anti-mining claims of the community (by no means singular) have been articulated through and by women, and framed in terms of law and rights; third, the success, thus far, of the legal and political struggles has engaged the local, national and transnational levels.

The chapter draws on the ideas of Silvia Federici<sup>3</sup> about gender, social reproduction, and resistance to enclosure of the commons to argue that the Xolobeni struggle is in important ways simultaneously gendered and anti-capitalist. These sites of contestation tend to be treated separately in practice, even though their interrelationships have by now been well noted, and we show how they might be brought into conversation with each other. We argue that struggles against mining constitute a particular and urgently needed intervention to halt, if not reverse, the pernicious effects of neoliberalism: the privatization and marketization of all aspects of human and nonhuman life leading to environmental and climate disaster. Since gender is a central structuring force within capitalism, resistance to mining can also be framed to entail resistance to the exploitation of women's reproductive labour. We use Federici's gendered framing of the commons to tease out the key tensions in the long drawn-out opposition to mining in Xolobeni: the involvement of women as the main producers of food and custodians of the conditions for the reproduction of food, their movement to the centre of the struggle in the context of violence against activists, and their assertion of new forms of temporality that engage the responsibilities of the present generation to the future. We recognize that ultimately it is the collective political organization of people on the land that will advance and sustain justice. However, institutional mechanisms such as the law and Constitution can be allies as people mobilize. With Federici, we argue that the commons is not necessarily the space of egalitarianism, and the

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<sup>3</sup> Federici (n 1).



struggles for the commons must be attentive to the ways in which women are included as agents.

In the context of a rather bleak moment, the Xolobeni struggle is a space of hope: it is the articulation of the possibility that destructive, extractivist patriarchal capitalism may be halted and that rights struggles may contribute to achieving climate justice. We understand climate justice as the recognition that climate change has differential social, economic and health impacts and therefore requires a movement for transformative action in all these interlinked areas. The Xolobeni struggle against mining on their land concerns environmental damage and destruction of the means to life. As Mary Mellor explains, (sufficiency) provisioning is at the heart of the relationship between productive and reproductive labour: ‘It is critical to the development of a radical political economy that is both socially just and ecologically sustainable’.<sup>4</sup> In challenging extractivist capitalism, a central contributor to climate harm, the climate justice movement questions core ideas underpinning this system: that the earth’s resources can be squandered without thought for the future; that enclosure of land and the destruction of communal custodianship is required in the pursuit of profit; and that the capitalist state is a central facilitator of these goals. The Xolobeni example provides insights into strategies of resistance to this system and hope for wider efforts to undermine the structural conditions that have produced climate change.

Our argument is in two parts. First, we read the *Baleni* judgment in some detail to explore how a serious consideration of social reproduction could have changed both the ways in which the litigants framed their case and the way the court articulated its judgment, arguing that there is an opportunity in the appeal case for a closer and more valuable link to be made between environmental justice and gender equality. Second, we argue that specific legal gains are important in advancing the climate justice movement but that the sustainability of victories lies in the institutionalization of democratic and inclusive mechanisms. In this respect, the specific histories of land tenure and governance in South Africa shape what is politically possible; we lay out some of these contours. In sum, we argue that a gender egalitarian approach to climate justice requires a focus on social reproduction as well as inclusive governing of common resources. The chapter begins with a history and account of the Xolobeni struggle within and outside of the courts. It then conducts a re-reading of the High Court judgment, *Baleni*’s affidavit and the Acts at the centre of the litigation to draw out the unexamined gender issues in the case. It goes on to outline the ideas of Federici and others on gender, climate and

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<sup>4</sup> Mary Mellor, ‘An Eco-Feminist Proposal: Sufficiency Provisioning and Democratic Money’ (2019) 116/117 *New Left Review* 189, 190.

the commons to construct an analysis of the Xolobeni case and reflect on what the unfinished story of Xolobeni means for the uses of law and rights in the gendered struggle for climate justice.

## 1. HISTORY OF COMMUNITY RESISTANCE, INCLUDING THROUGH LITIGATION, TO THE MINING LICENCE

Xolobeni lies between the Mzamba and Mtentu rivers and is the traditional land of the Mpondo people. The area has five village settlements, with Xolobeni being the largest. Xolobeni village itself has around 320 residents; the wider area has no more than 3,000 people tightly connected by family ties, with women constituting the majority of residents.<sup>5</sup> All the villages fall under the Amadiba Traditional Authority. This is communal land,<sup>6</sup> nominally owned by the state (already a form of enclosure) and in practice, designated customary land. The occupants hold a coveted Permission to Occupy certificate that guarantees secure tenure. The area is the second-richest botanical reserve in South Africa and this biodiversity is central to food security. Crops grown for consumption include yams, spinach, carrots, lemons and guavas; most are produced for subsistence but some of them make their way to markets in Durban and East London.

This is not an area without problems. Xolobeni is under the provincial jurisdiction of the Eastern Cape, which has suffered under poor governance and corruption for the past two decades. Formal unemployment is high, and its pattern is gendered. Zamchiya estimated that only 12.7 per cent of residents in the Xolobeni area had formal paid jobs, and of those, 70 per cent are held by men between the ages of 21 and 40 years.<sup>7</sup> The Xolobeni area has a youthful population, with over two-thirds between the ages of 18 and 35.<sup>8</sup> There are no jobs in the cities. Literacy levels are low – unsurprising as the nearest school is

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<sup>5</sup> Adrian Frith, 'Xolobeni A: Main Place 297385 from Census 2011' <https://census2011.adrianfrith.com/place/297385> accessed 20 May 2021.

<sup>6</sup> Note that there are important distinctions between communal land, communal activity, 'the commons', communitarian forms of social organization, etc. Colonialism and apartheid have complicated the use of these terms in the South African context, but we are nevertheless intending here to draw out the implications of complicated land tenure and ownership relations for democratic forms of decision making on public resources as understood generally under the label of 'the commons'.

<sup>7</sup> Phillan Zamchiya, 'Differentiation and Development: The Case of the Xolobeni Community in the Eastern Cape, South Africa' (2019) PLAAS Working Paper 61 <http://repository.uwc.ac.za/xmlui/handle/10566/5086> accessed 4 June 2021.

<sup>8</sup> Statistics South Africa, 'Xolobeni B' (Statistics South Africa, 2011) [http://www.statssa.gov.za/?page\\_id=4286&id=6537](http://www.statssa.gov.za/?page_id=4286&id=6537) accessed 4 June 2021.

15 km away – and the community is reliant on erratic mobile clinics for health care. Virtually the whole population (89 per cent) is dependent on natural water from springs, boreholes and small dams. Very few households have access to electricity.<sup>9</sup>

The extraordinary biodiversity resulted in the area being brought under the Pondoland Marine Protected Area, governed by the National Environmental Management: Protected Areas Act 57 of 2003. By the time this protected status was legally declared, an Australian mining company, Mineral Resources Commodities (MRC), was eyeing the coastline's rich deposits of ilmenite and other minerals containing titanium – described on the company's website as 'world class mineral sands'.<sup>10</sup> Under the Environmental Act, mining was prohibited.

MRC had entered the country just after the end of apartheid, securing the rights to mine on the Eastern Cape's West Coast and establishing the Tormin Mineral Mine. Exploratory drilling for titanium by the Australian company Transworld Energy and Mineral Resources (TEMR) on the Wild Coast found that there were considerable reserves in the sands of Xolobeni and the government gave the company prospecting rights. In 2001, MRC acquired a large share of TEM, making it the holding company. MRC proceeded the following year to seek the rights to mine for the lucrative mineral titanium in a strip 22 km long and 2 km wide. It is estimated that there are 20 years' worth of mineral in the sands.<sup>11</sup> A process of designating the land as mineable began when it was granted a prospecting license in 2002 (a year before the area was designated a Marine Protected Area) and a full mining license was granted in 2008. MRC had allies within government: most notably the Ministry of Mineral Resources, which saw mining as a desirable form of development, harking back to a century earlier when gold and diamonds were the basis of building the modern South African economy. The process of awarding the license was considered suspicious by activists in the area in terms of public consultation (who precisely had been consulted inside the affected communities?) as well as a skimpily conducted environmental impact assessment.<sup>12</sup>

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<sup>9</sup> Nomsa Virginia Sibane, 'Environmental Politics: The Case of the Xolobeni Mining Project in Mbizana, Eastern Cape Province, South Africa' (MPhil thesis, University of Fort Hare 2012).

<sup>10</sup> MRC, 'Mineral Sands' (2020) <https://www.mineralcommodities.com/operations-projects/south-africa/> accessed 20 May 2021.

<sup>11</sup> Dale McKinley, 'Xolobeni, Eastern Cape' in Julie Reid and Dale McKinley (eds), *Tell Our Story: Multiplying Voices in the News Media* (Wits University Press 2020).

<sup>12</sup> For a thorough discussion, see Andrew Bennie, 'The Relation between Environmental Protection and "Development": A Case Study of the Social Dynamics

In 2003, in line with the black economic empowerment regulations introduced in the Mbeki era, MRC created a local 'empowerment partner' called the Xolobeni Empowerment Company (XolCo), which claimed to represent the communities affected. XolCo's right to represent the interests of the Xolobeni was highly contested.<sup>13</sup> XolCo was invited to a community meeting in March 2007. When they failed to turn up, an alternative mechanism for representation, the Amadiba Crisis Committee, was formed by some members of the community.<sup>14</sup> Traditional councils are themselves divided on whether to allow the mining. While Lungi Baleni, the most senior traditional leader (male), joined XolCo, headwoman and relative Cynthia Baleni has been a leader of the anti-mining members of the community. These separate and competing claimants to community representation were only the start of the tensions that would follow.

The struggle against mining in the area has been marked by high levels of violence against leading activists. Between 2002 and 2018, at least 12 opponents of the mining are believed to have been murdered; all the cases remain unsolved.<sup>15</sup> The backbone of the opposition to mining, predictably, is the women in the area, currently led by the feisty Nonhle Mbhuthuma.<sup>16</sup> Mbhuthuma was one of the founders of the Amadiba Crisis Committee (ACC). Her colleague Sikhosiphe (Bazooka) Rhadebe was assassinated in 2016, and she lives with permanent bodyguards as she has been threatened so many times. Given their roles in food production, and apartheid era laws that restricted their movement into the cities, women are the stalwarts of rural areas. While their economic and social roles are generally recognized, there has been a longstanding battle between rural women and the state in relation to the governance arrangements advanced by the post-1994 government. Legislation entrenching the power of traditional leaders has been consistently

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involved in the Proposed Mining at Xolobeni, Wild Coast' (MA research report, University of the Witwatersrand 2010).

<sup>13</sup> McKinley (n 11).

<sup>14</sup> Legal Resources Centre and Richard Spoor Inc, 'Withdrawal of Australian Mining Company MRC Welcomed by Xolobeni Community; Questions on Way Forward Remain' Mining Weekly (Johannesburg, 18 July 2016) <https://www.miningweekly.com/article/withdrawal-of-australian-mining-company-mrc-welcomed-by-xolobeni-community-questions-on-way-forward-remain-2016-07-19> accessed 20 May 2021. This statement summarizes objections raised over many years.

<sup>15</sup> Lindsay Maasdorp and Thabi Miyeni, 'Threats and Murder Won't Stop South Africa's Environmental Activists' Open Democracy (London, 3 January 2021) [www.opendemocracy.net/en/5050/threats-and-murder-wont-stop-south-africas-environmental-activists/](http://www.opendemocracy.net/en/5050/threats-and-murder-wont-stop-south-africas-environmental-activists/) accessed 20 May 2021.

<sup>16</sup> Rosa Luxemburg Stiftung, 'Xolobeni – The Right to Say No' (5 Feb 2020) [www.youtube.com/watch?v=Q8p1VXDgLkY](http://www.youtube.com/watch?v=Q8p1VXDgLkY) accessed 4 June 2021.

challenged by women on the grounds that it deprives them of meaningful equal participation in decision making.<sup>17</sup> The incorporation of women into the national government creates a further South African peculiarity in the roles of women in governance struggles, as gender targets place women in numerous places of authority, sometimes pitted against each other in ways that complicate questions of representation. In Xolobeni, for example, the Pondo queen, MaSobhuza Sigcau, intervened directly as broker between the community and the Minister of Cooperative Governance Buyelwa Sonjica, also a woman.

The ACC was in for a long war of political attrition, using direct collective action and legal challenges.<sup>18</sup> It also astutely drew on experienced lawyers with a track record in both the history of land and fighting mining companies. After intense and highly mobilized opposition by the local communities, the mining license was first suspended and then withdrawn in 2011 and reissued in 2015. As the opposition escalated, the ministers responsible in the Cabinet changed. President Ramaphosa appointed Gwede Mantashe as the Minister of Mineral Resources in early 2018. Mantashe is a 'local boy' from the Eastern Cape, a former gold mine worker and leader of the National Union of Mineworkers, who as government minister stepped in on the side of the mining company. His position reveals most explicitly the extent to which the government remains rooted – statically and unhelpfully – in the old extractivist models of economic development in South Africa. For Mantashe, the community ought to welcome titanium mining as it would build the economy in the same way that coal, gold and diamonds did a century ago. It is, he said, 'being treated like a curse rather than a blessing. It is not treated as a wealth; it is treated as more of a negative. It is a polluter, it is a deprivation and all that. That worries me because

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<sup>17</sup> Sindiso Mnisi and Aninka Claassens, 'Rural Women Redefining Land Rights in the Context of Living Customary Law' (2009) 25(3) *South African Journal on Human Rights* 491.

<sup>18</sup> Thom Pierce, 'South Africa's Wild Coast Under Threat of Mining: Photo Essay' *The Guardian* (Sydney, 20 Aug 2018) [www.theguardian.com/environment/2018/aug/20/the-australian-mining-threat-to-south-africas-wild-coast-photo-essay](http://www.theguardian.com/environment/2018/aug/20/the-australian-mining-threat-to-south-africas-wild-coast-photo-essay) accessed 4 June 2021; Sonwabile Mswana 'Why South African Community's Win Against Mining Company Matters' *The Conversation* (Melbourne, 13 December 2018) <https://theconversation.com/why-south-african-communitys-win-against-mining-company-matters-107746> accessed 4 June 2021; Andrew Bennie, 'Mining will not Bring Jobs to Xolobeni' *Daily Maverick* (Johannesburg, 15 January 2019) [www.dailymaverick.co.za/article/2019-01-15-mining-will-not-bring-jobs-to-xolobeni/](http://www.dailymaverick.co.za/article/2019-01-15-mining-will-not-bring-jobs-to-xolobeni/) accessed 4 June 2021; Sabelo Ngubeni, 'Xolobeni Mining Ruling Compromises the State' *Mail & Guardian* (Johannesburg, 13 September 2019) <https://mg.co.za/article/2019-09-13-00-xolobeni-mining-ruling-compromises-the-state/> accessed 4 June 2021; Thom Pierce, 'Postcards from Xolobeni' (Thom Pierce Studio, 2020) <https://thompierce.com/postcards-from-xolobeni> accessed 4 June 2021.

the mining we have, we are endowed with it naturally.<sup>19</sup> Mantashe reflects a deafness here to the environmental justice movement that has long pointed out the impacts of gold mining on the land.<sup>20</sup> His response also exposed the government's authoritarian side – its preparedness to use its power to impose decisions on communities. In Xolobeni, specifically, the government is refusing to see loss of lands and long-term depletion of fertile soil as any kind of significant loss of rights, or to consider the implications of mining for the environment or, fundamentally, to understand that the state has a responsibility to protect public goods.

Clearly, these represent conflicting visions of development and the good life. On the one side, government wants to turn the people of Xolobeni into wage workers rather than farmers and fisher people, with enclosure classically leading to proletarianization and precarity. Jacklyn Cock shows these links:

[T]he environmental imaginary of the post-apartheid state is focused on economic growth; nature is viewed instrumentally as a store of resources for growth, rather than for social needs or environmental sustainability. It is an imaginary which involves conflict and violence both to nature and people. But this hegemonic imagery is increasingly being challenged by disparate groups of the poor and marginalised who are promoting an alternative environmental imaginary centered on nature as a source of justice, meaning the acknowledgement of rights (which often implies the need for redistribution) and livelihoods.<sup>21</sup>

On the other side, people contest the narrative that development is necessary because they are poor: ACC chairperson Sibusiso Mqadi (sadly deceased early in November) stated:

We don't need outsiders to tell us we are poor. We are not poor. Not a single person in Xolobeni goes to bed hungry ... We get fish, crayfish, mussels from the sea ... we plant vegetables in this beautiful and fertile soil of ours. We are happy with this way of life and feel it is an insult to suggest we are poor.<sup>22</sup>

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<sup>19</sup> S'thembele Cele, 'Mantashe: Xolobeni Ruling Means We Could Have No Mining in SA' City Press (Johannesburg, 22 November 2018) [www.news24.com/citypress/business/mantashe-xolobeni-ruling-means-we-could-have-no-mining-in-sa-20181122](http://www.news24.com/citypress/business/mantashe-xolobeni-ruling-means-we-could-have-no-mining-in-sa-20181122) accessed 4 June 2021.

<sup>20</sup> Jacklyn Cock, 'Radical Agendas #5: An Eco-Socialist Order in South Africa' [18 January 2016] Review of African Political Economy <https://roape.net/2016/01/18/radical-agendas-5-an-eco-socialist-order-in-south-africa/> accessed 4 June 2021.

<sup>21</sup> Jacklyn Cock, 'Conflicting Environmental Imaginaries in Post-Apartheid South Africa' in Katharine Legun and others (eds), *The Cambridge Handbook of Environmental Sociology* (Vol 1, Cambridge University Press 2020) 285.

<sup>22</sup> Lubabalo Ngcukana, 'Mining Project will Destroy Us, say Xolobeni Villagers' City Press (Johannesburg, 1 October 2018) [www.news24.com/citypress/news/mining-project-will-destroy-us-say-xolobeni-villagers-20181001](http://www.news24.com/citypress/news/mining-project-will-destroy-us-say-xolobeni-villagers-20181001) accessed 4 June 2021.

And 85-year old Magusheni Madondo insisted:

We never said we want mining and we never said we are poor, and no one must decide for us. That we are poor. We don't need their jobs if it comes through mining ... This is the land of our forefathers and we are going to fight for it for the benefit of our own children and their offspring.<sup>23</sup>

On these issues, there are alliances between the residents of Xolobeni and environmental justice activists. The environmental justice movement was mischaracterized as being driven by white people.<sup>24</sup> It is obviously a convenient narrative in racialized South Africa to attribute opposition to mining as being pushed by an 'outsider' to the community and to cast ecotourism as a 'white' strategy.<sup>25</sup> But the ACC argues that the outcomes of mining – depletion of the land, pollution of the soil and likely the ocean – are of limited benefit to the community. What is needed, they argue, is to look to the future, to think of the land as being held in trust for this generation as well as future generations, that the mine was only projected to last for approximately 20 years, and after that the community would be worse-off for no longer being able to subsist on the land.<sup>26</sup>

The community of Xolobeni eventually challenged the mining project through the courts. In the main case, the ACC took on the Minister of Mineral Resources to test the meaning of consultation.<sup>27</sup> A further court success followed on 14 September 2020 when the North Gauteng High Court held that the Xolobeni community was entitled to a copy of the company's application for a mining right, previously withheld from them.<sup>28</sup> The court found that this was necessary for 'meaningful consultations'. These decisions were significant

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<sup>23</sup> Ibid.

<sup>24</sup> For a wider perspective on race and the environmental movement, see also Neil Overy, 'St Lucia, Xolobeni and the Problem of Wilderness' *Daily Maverick* (Johannesburg, 1 March 2019) [www.dailymaverick.co.za/article/2019-03-01-st-lucia-xolobeni-and-the-problem-of-wilderness/](http://www.dailymaverick.co.za/article/2019-03-01-st-lucia-xolobeni-and-the-problem-of-wilderness/) accessed 20 May 2021.

<sup>25</sup> Jacklyn Cock, 'The Radicalization of Environmental Justice in South Africa' in Dorothy Hodgson and Judith Byfield (eds), *Global Africa: Into the Twenty-First Century* (University of California Press 2017).

<sup>26</sup> Rosa Luxemburg Stiftung (n 16).

<sup>27</sup> Baleni (n 2).

<sup>28</sup> *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* 2021 (1) SA 110 (GP). See also Tracey-Lynn Field, 'South African Community Wins Right to Access Mining Application. But Who Will Win the War?' *The Conversation* (Sydney, 14 October 2020) <https://theconversation.com/south-african-community-wins-right-to-access-mining-application-but-who-will-win-the-war-147522> accessed 5 June 2021.

blows to the state and companies involved in mining rights applications and have wider implications for communities elsewhere in South Africa.

We now examine the main decision on community consultation to consider how the missing gender dimension in the case might be introduced productively into conceptualizations of the impacts of extractivism. Our critical reading of the case aims to understand how gender impacts on the dynamics of this community, its resistance and its recourse to law, in order to learn broader lessons about gendered rights struggles for climate justice.

## 2. THE UNTOLD STORY: EXCAVATING GENDER IN THE XOLOBENI LITIGATION

The Baleni judgment of Judge Basson, while very significant in its progressive interpretation of the law based on the Constitution of the Republic of South Africa, 1996,<sup>29</sup> is largely silent on issues of gender affecting the community.<sup>30</sup> The judgment provides a narrative that situates the Xolobeni community as proud occupiers of land that is central to their history, culture, subsistence and way of life. It uses rich and emotive language to illustrate this, describing the terrain as 'a coastline area of immense natural beauty'<sup>31</sup> and beginning the judgment with a moving quote illustrating the brutal dispossession of black South Africans,<sup>32</sup> to explain the centrality of the struggle to regain their most valued resource – their land.<sup>33</sup> Racial justice and self-determination are central values informing the decision. The judgment refers to the centrality of 'living customary law', communal decision making, and the importance of ancestral graves and community rituals. Again, it is expressive in referring to the community as comprising 'the collection and intertwined relationships between the living and the dead'.<sup>34</sup>

The Court was required to determine the interaction between the consent requirements of the Interim Protection of Informal Rights to Land Act 31

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<sup>29</sup> Dugard (n 2).

<sup>30</sup> The Court is of course guided by the arguments before it as shaped by the legal team who choose whether to highlight issues of gender in the case; see Cathi Albertyn and Shamim Meer, 'Citizens or Mothers? The Marginalization of Women's Reproductive Rights in the Struggle for Access to Health Care for HIV-Positive Pregnant Women in South Africa' in Maitrayee Mukhopadhyay and Shamim Meer (eds), *Gender, Rights and Development: A Global Sourcebook* (Royal Tropical Institute (KIT) 2008).

<sup>31</sup> Baleni (n 2) [2].

<sup>32</sup> *Ibid.*, [1].

<sup>33</sup> The judgment mentions the history of violent conquest by the Zulu nation (the Mfecane) that led the community to settle in the early 1800s; *ibid.*, [9].

<sup>34</sup> *Ibid.*, [7].



of 1996 (IPILRA) and the consultation requirements of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).<sup>35</sup> The MPRDA replaced the common law owner of land with the state, as ‘custodian of all mineral resources on behalf of the people of South Africa’,<sup>36</sup> while the IPILRA was introduced by the new democratic government to ‘protect those who held insecure tenure because of the failure to recognise customary title’ under apartheid.<sup>37</sup> The Court concluded that, by reading both Acts together, the community must be allowed to reach a communal decision based on their custom regarding whether to consent to deprivation of their land. This is an important interpretation of the law that firmly privileges decision making by the affected community based on the Constitution’s focus on advancing the rights of historically excluded people under apartheid.<sup>38</sup>

The Founding Affidavit of Dudu Baleni, itself a story crafted by lawyers to make a compelling case, offers hints about the links between gender and struggles for the land.<sup>39</sup> The affidavit certainly attests to communitarian rights to land,<sup>40</sup> the social and economic interdependence of the community,<sup>41</sup> and ‘networks of support and mutual dependency’ in the sharing of food, resources and labour.<sup>42</sup> Subtle references to gender differences are mentioned. For example, the affidavit explains the process of land allocation to the ‘umzi’ (household):

Land is typically allocated to an umzi and not to individuals. The head of umzi in whose name the land gets allocated holds it in trust for all members of their umzi. After allocation, such land becomes a resource exclusively belonging to that particular umzi in perpetuity. This is so even if it is clear that only specific family members, such as the women in the umzi, will have the primary or even exclusive use thereof.<sup>43</sup>

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<sup>35</sup> The case built on the Constitutional Court decision in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) that found that communal occupiers could not be evicted from land by mining companies in exercise of their mining rights.

<sup>36</sup> Baleni (n 2) [42] citing the Mineral and Petroleum Resources Development Act 28 of 2002, s 3. Note that the Act has led to the drafting of a Mining Charter which has been the subject of significant contest for many years. See Centre for Applied Legal Studies (CALs), ‘Mining Charter’ University of the Witwatersrand (2019) <https://www.wits.ac.za/cals/our-programmes/environmental-justice/mining-charter/> accessed 5 June 2021.

<sup>37</sup> Baleni (n 2) [51].

<sup>38</sup> See Thipe (n 2); Dugard (n 2).

<sup>39</sup> Duduzile Baleni, ‘Founding Affidavit, In the High Court of South Africa (Gauteng Division, Pretoria)’ (2016) Case No: 73768/2016.

<sup>40</sup> *Ibid.*, [72].

<sup>41</sup> *Ibid.*, [115].

<sup>42</sup> *Ibid.*, [57].

<sup>43</sup> *Ibid.*, [96].

This implies that while a male household head may be named as the person to whom the land is allocated, women will still have use of the land. It also implies that male members may leave the area for paid labour elsewhere, but do not relinquish entitlements to the land worked by remaining women. Women who remain on the land provide the continuous care of land and property that supports the communities living there and those returning intermittently. This is a well-worn tale of gendered patterns of migrant labour in South Africa. What is unusual is the occupancy rights and decision-making powers of women in the Xolobeni community, less commonly seen elsewhere in South Africa.<sup>44</sup>

Baleni's affidavit also references the different roles of men and women during the 'Pondo revolt' of the 1960s to resist attempts to relocate the community by an apartheid government 'betterment programme'.<sup>45</sup> She explains that 'In this war, all able-bodied men of the community took up arms, while women were supplying food, intelligence and protection.'<sup>46</sup> While this indicates the longstanding resistance to enclosure of the land, it is further evidence of the different but equally important allocation of gender roles in the communal life of, and in the defence of, the commons. The affidavit also documents the physical violence suffered by men and women in the community who have resisted the mine.<sup>47</sup> Similar events have been seen in contests over access to land by mining companies elsewhere in South Africa. In October 2020, Fikile Ntshangase, a woman leader of the Mfolozi Community Environmental Justice Organisation, (MCEJO) opposing coal mining in Northern KwaZulu-Natal was shot dead in her home.<sup>48</sup> Women have been fierce in their resistance and have been met with violence, as is often seen in struggles to enclose commons all over the world.<sup>49</sup> This echoes the earlier resistance of the Pondo revolt, although in this case women seem to be even more active on the frontline of conflict.<sup>50</sup>

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<sup>44</sup> The WoMin Collective (n 2) 434.

<sup>45</sup> Baleni, 'Founding Affidavit' (n 39) [63].

<sup>46</sup> *Ibid.*, [118].

<sup>47</sup> *Ibid.*, [185–201].

<sup>48</sup> Fred Kockott and Matthew Hattingh, 'Fikile Ntshangase Opposed a Mine Extension. Last Night She was Murdered' GroundUp (Cape Town, 23 October 2020) [www.groundup.org.za/article/mining-activist-murdered-kzn/](http://www.groundup.org.za/article/mining-activist-murdered-kzn/) accessed 5 June 2021.

<sup>49</sup> Itzá Castañeda Camey and others, Gender-Based Violence and Environment Linkages: The Violence of Inequality (International Union for Conservation of Nature 2020), 162-177.

<sup>50</sup> The WoMin Collective (n 2).

Baleni's affidavit captures the dangers that mining and destruction of the land and way of life pose to the community. She notes that:

There will be strong opposition in the community to significant members [sic] of outsiders coming to live in our community. We are concerned that they will overwhelm our existing and limited social services, that they may introduce crime, alcohol, prostitution and other social ills, as is often the case.<sup>51</sup>

This suggests that the state services such as schools and clinics,<sup>52</sup> though sparse, are essential to support the community alongside its own communal resources. The litigants' fear is that outside workers will deplete these resources,<sup>53</sup> putting strain on the careful balance of communal subsistence. Their assumption is that the state will not step in to increase service provision in a province where government has been slow to improve the lives of its people. They also worry, based on the experience of other mining-affected communities, that an influx of workers will lead to damaging social impacts.

The concerns expressed in the affidavit are not unfounded. Mine workers, usually men living in hostels, tend to displace the labour of reproduction such as cooking and laundry on to women. Many of these women in the communities surrounding the mines are already burdened with sustaining their own families. Alcohol, crime and sex work also threaten the community in gendered ways with sexual violence and other forms of interpersonal violence evidently a (legitimate) fear. The gendered impacts on mining affected communities are well documented both within and outside South Africa and are clearly known to the Xolobeni community.<sup>54</sup> The judgment could have drawn on this evi-

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<sup>51</sup> Baleni, 'Founding Affidavit' (n 39) [145].

<sup>52</sup> *Ibid.*, [154.6.1].

<sup>53</sup> Shirin Rai, Catherine Hoskyns and Dania Thomas, 'Depletion: The Cost of Social Reproduction' (2014) 16 *International Feminist Journal of Politics* 86; Beth Goldblatt and Shirin Rai, 'Recognizing the Full Costs of Care? Compensation for Families in South Africa's Silicosis Class Action' (2018) 27 *Social & Legal Studies* 671.

<sup>54</sup> WoMin, 'Women, Gender and Extractivism in Africa: A Collection of Papers' (International Alliance on Natural Resources in Africa) <https://womin.africa/archive/available-literature/> accessed 2 June 2021; Christina Hill and Kelly Newell, 'Women, Communities and Mining: The Gender Impacts of Mining and the Role of Gender Impact Assessment' (Oxfam Australia 2009) <https://policy-practice.oxfam.org/resources/women-communities-and-mining-the-gender-impacts-of-mining-and-the-role-of-gende-293093/> accessed 5 June 2021; Kuntala Lahiri-Dutt (ed), *Gendering the Field: Towards Sustainable Livelihoods for Mining Communities* (ANU Press 2011); South African Human Rights Commission, 'National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa' (2016) <http://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf> accessed 5 June 2021; Salimah Valiani and Nester Ndebele,

dence to show how the proposed mine might undermine the necessary social reproduction of the community.

A further way in which the case relates to, but does not tackle, gender issues concerns the two central pieces of legislation in the case: the MPRDA and the IPILRA. Both refer to the inclusion of women as central to the aims of each Act, while evading the question of underlying gender inequalities. The MPRDA lists expanding 'opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources'.<sup>55</sup> The Act also lists the objectives of advancing the social and economic welfare of all South Africans<sup>56</sup> and giving 'effect to s 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development'.<sup>57</sup> The relationship between ecological sustainability, mining, the needs of communities and the social and economic development of the wider society are undoubtedly complex. However, the Act does not provide any meaningful direction in resolving this. The reference to 'women and communities' as historically disadvantaged groups assumes that they should benefit from mining along with other more advantaged stakeholders. It does not consider the possibility that 'women and communities', or the environment for that matter, may be better served without mining proceeding at all.<sup>58</sup>

To give effect to the IPILRA, the Department of Rural Development and Land Reform prepared a policy and procedure for the Minister of Land to make development decisions about land where the Minister is nominally owner of the land.<sup>59</sup> This policy refers to the White Paper on South African Land Policy, which states that decisions about land must 'establish whether the changes protect the rights of women' and the Minister must ensure that the rights of women are protected in the decision-making process.<sup>60</sup> While the Baleni

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'A Feminist Perspective on Women and Mining in South Africa' in Salimah Valiani (ed), *The Future of Mining in South Africa: Sunset or Sunrise?* (Mapungubwe Institute for Strategic Reflection 2018).

<sup>55</sup> Mineral and Petroleum Resources Development Act 2002, s 2(d).

<sup>56</sup> *Ibid.*, s 2(f).

<sup>57</sup> *Ibid.*, s 2(h).

<sup>58</sup> Communities are aware that where mining rights have been granted with requirements to remediate land after the project ends, there is evidence that this is neither undertaken nor enforced by the state, leading to further doubts about allowing such projects; 'National Hearing on the Underlying Socio-Economic Challenges' (n 54).

<sup>59</sup> Documented in Baleni, 'Founding Affidavit' (n 39) [236].

<sup>60</sup> White Paper on South African Land Policy (South Africa, Department of Land Affairs April 1997) 90–91 [www.gov.za/documents/south-african-land-policy-white-paper](http://www.gov.za/documents/south-african-land-policy-white-paper) accessed 5 June 2021.

application does not list women's rights as one of the rights implicated in this case,<sup>61</sup> the references to these rights in the MPRDA and the policy documents flowing from the IPILRA point to the need to investigate how these rights are impacted by the proposed mine.

As noted, the case was framed around land rights and community consent. The judgment responds well to this framing by asserting the centrality of the land to the reproduction of the community now and for future generations. While this was an important victory, from a feminist climate justice perspective the framing was limited. Neither the affidavit nor the judgment foreground gender and environmental rights sufficiently. In the next section, we read the possibilities for a more nuanced interpretation of the complex interplay of issues in this case. Using the concepts of provisioning and social reproduction, both of which are framed as part of the commons by Mellor and Federici, we explore how mining impacts climate change and how unchecked extraction impacts the production-reproduction nexus. Such arguments might fortify responses to the government and the mining company's appeal case and provide precedent for future interpretation of the legislation.

### 3. XOLOBENI AS PREFIGURATIVE FOR CLIMATE STRUGGLES: DEFENCE AND GOVERNANCE OF THE COMMONS

The discussion above lays out what could be read as a straightforward account of successful social movement mobilization combined with strategic uses of the law, albeit with insufficient attention to gender and the environment. However, we want to extend this to highlight the prefigurative aspects of this struggle for the range of issues that may arise in litigating cases connected to environmental destruction and climate change, and to tease out the gender questions at stake. Margaret Davies explains prefigurative theory, or 'methodologies that are hopeful in the sense that they imagine and create at the same time as engage with and describe the world'.<sup>62</sup> In 'choosing a present in order to imagine a future'<sup>63</sup> we consider how the Xolobeni struggle and the way of life it defends anticipates an ecologically sustainable and just social system built around social reproduction and production within the commons, and

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<sup>61</sup> See Baleni, 'Founding Affidavit' (n 39) [276].

<sup>62</sup> Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017).

<sup>63</sup> Margaret Davies, 'Beyond Unity: Feminism, Sexuality, and the Idea of Law' in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Cavendish Press 2007); Davina Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Duke University Press 2014).

a legal framework that can recognize this as legitimate, desirable, and even exemplary. The legal struggle is thus prefigurative in terms of the politics of resistance, but also in terms of substantive conceptions of social and ecological ordering and new ways of understanding and using law. Just as law is often complicit in the harm of climate destruction, it might, in some instances, be mobilized both to remedy harm that has already occurred and also work to anticipate and prevent it.<sup>64</sup> It may even, in the right conditions, support radical transformative conceptions of new social formations that require environmental remediation and a sustainable world.<sup>65</sup>

### (a) Ecofeminism and Climate Justice

Skosana and Cock argue that the struggles of women in mining-affected communities are ecofeminist in practice, even if not explicitly articulated as such, and even when not part of how the women themselves might identify. They point to three relevant ways in which ecofeminist concerns underlie their struggles: (a) their roles in social reproduction (especially in the garnering of food, energy and water); (b) the solidaristic and communal nature in which struggles are fought; and (c) the respect for nature itself.<sup>66</sup> Ecofeminists have noted the uneven impact of environmental degradation and climate destruction on women who perform much of the world's social reproductive work, itself dependent on natural resources.<sup>67</sup> Mellor explains that reproductive work, which is gendered, 'stands between "the economy" and the natural world,

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<sup>64</sup> Beth Goldblatt and Shirin Rai, 'Remedying Depletion through Social Reproduction: A Critical Engagement with the United Nations' Business and Human Rights Framework' (2020) 3(2) *European Journal of Politics and Gender* 185.

<sup>65</sup> Bronwen Morgan and Declan Kuch, 'The Socio-Legal Implications of the New Politics of Climate Change' (2016) 39 *University of New South Wales Law Journal* 1715.

<sup>66</sup> Dineo Skosana and Jacklyn Cock, "'Our Existence is Resistance": Women and the Challenge of the Climate Crisis and Covid-19 Pandemic Lockdown in Mining-Affected Communities in South Africa' (2020) Society, Work & Politics Institute, University of the Witwatersrand [www.swop.org.za/post/our-existence-is-resistance-women-and-the-challenge-of-the-climate-crisis-and-covid-19-pandemic](http://www.swop.org.za/post/our-existence-is-resistance-women-and-the-challenge-of-the-climate-crisis-and-covid-19-pandemic) accessed 5 June 2021.

<sup>67</sup> Julie Nelson and Marilyn Power, 'Ecology, Sustainability, and Care: Developments in the Field' (2018) 24(3) *Feminist Economics* 80; Stephanie Buechler and Anne-Marie Hanson (eds), *A Political Ecology of Women, Water, and Global Environmental Change* (Routledge 2015); Patricia Perkins 'Climate Justice, Gender and Intersectionality' in Tahseen Jafry (ed), *Routledge Handbook of Climate Justice* (Routledge 2019); Bernadette Resurrección, 'Persistent Women and Environment Linkages in Climate Change and Sustainable Development Agendas' (2013) 40 *Women's Studies International Forum* 33.

grappling with the consequences of ecological destruction'.<sup>68</sup> Federici argues that 'as the primary subjects of reproductive work, historically and in our time, women have depended on access to communal natural resources more than men and have been most penalized by their privatization and most committed to their defence'.<sup>69</sup> Based on the idea that social reproduction is the work involved in creating and maintaining life, threats to the communal land and environment of Xolobeni are intricately enmeshed in threats to the way of life of people in that community, particularly the women, and their capacity to reproduce themselves over time.

Perkins notes that 'In the face of climate change, movements in the Global South and North, largely led by women, are resisting ongoing enclosures for extraction and fossil fuel industries and, in the process, reclaiming commons'.<sup>70</sup> Federici points out that not all struggles for the commons are successful, but the very fact that they are fought is important. They contain, she argues, both the reinstatement of democratic politics – the renewal of voices at the grassroots, and the mobilizations of ordinary people otherwise disabled by neoliberalism – as well as the seeds for a different future. 'It is impossible, in fact, to defend existing communal rights without creating a new reality, in the sense of new strategies, new alliances and new forms of social organization'.<sup>71</sup> Legal strategies are part of these struggles, with a growing focus by ecofeminist lawyers on linking environmental and climate justice to broader intersectional feminist and social justice movements.<sup>72</sup>

## **(b) Governance of the Commons**

An important link between climate justice concerns and gender egalitarianism is the precise design of governance and the role of traditional authorities, which impacts on the control over and uses of the commons. Federici con-

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<sup>68</sup> Mellor (n 4) 191.

<sup>69</sup> Federici (n 1) 107.

<sup>70</sup> Patricia E (Ellie) Perkins, 'Climate Justice, Commons, and Degrowth' (2019) 160 *Ecological Economics* 183.

<sup>71</sup> Federici (n 1) 3.

<sup>72</sup> Angela P Harris, 'Vulnerability and Power in the Age of the Anthropocene' (2015) 6 *Washington and Lee Journal of Energy, Climate, and the Environment* 98 <https://scholarlycommons.law.wlu.edu/jece/vol6/iss1/5> accessed 5 June 2021; Rowena Maguire, 'Gender, Climate Change and the United Nations Framework Convention on Climate Change' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019); Cinnamon Carlarne, 'Environmental Law and Feminism' in Deborah Brake, Martha Chamallas and Verna Williams (eds), *The Oxford Handbook of Feminism and Law in the United States* (Oxford Handbooks, Oxford University Press 2021).

siders the process of formalizing and extending traditional control a form of gender enclosure, as it restricts women's access to and control over land by placing control in the hands of a few. We can see the use of these instruments in the Xolobeni conflict. In November 2019, President Ramaphosa signed the Traditional and Khoi-San Leadership Act 3 of 2019 into law. The Act will allow traditional councils to sign partnerships with companies without necessarily gaining the consent of the communities they govern. The Act is seen to resurrect colonial and apartheid forms of chiefly authority, reinscribing a compulsory dual legal system. Undue power will be given to chiefly authorities while the rights of ordinary rural people are undercut. It comes on top of the Traditional Courts Bill 1 of 2017 which directly affects women and children who are the main rural dwellers. It allows traditional authorities an enormous say in land allocation and allows them to charge a 'tax' or fees for use of resources. It deprives rural citizens of the right they previously had to choose whether they would prefer civil law or customary law – something especially important to women. This Bill was previously defeated by gender rights groups and rural women's groups and has come back into parliament. If passed, it will undermine the ideals of consensual decision-making procedures that are central to traditional consultations as well as give traditional leaders undue power over women's personal lives.<sup>73</sup> This is a return to colonialism and its vestige institutions, not a valorization of indigenous customs as it is being portrayed by traditional leaders. It is a reminder of the key role that chiefs played in the past in servicing the mining industry with male labour.<sup>74</sup> Now, it creates an incentive structure for chiefs to derive personal benefits – what

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<sup>73</sup> Aninka Claassens, 'Traditional Courts Bill: How to Entrench Inequality and a Parallel Reality for 18 Million Marginalised South Africans' *Daily Maverick* (Johannesburg, 4 February 2021) [www.dailymaverick.co.za/article/2021-02-04-traditional-courts-bill-how-to-entrench-inequality-and-a-parallel-reality-for-18-million-marginalised-south-africans/](http://www.dailymaverick.co.za/article/2021-02-04-traditional-courts-bill-how-to-entrench-inequality-and-a-parallel-reality-for-18-million-marginalised-south-africans/) accessed 8 June 2021; Aninka Claassens, "'Bantustan Bills' Trample on the Rights of Rural People' *Daily Maverick* (Johannesburg, 4 November 2019) [www.dailymaverick.co.za/article/2019-11-04-bantustan-bills-trample-on-the-rights-of-rural-people/](http://www.dailymaverick.co.za/article/2019-11-04-bantustan-bills-trample-on-the-rights-of-rural-people/) accessed 8 June 2021; Aninka Claassens, 'Who Told them we Want this Bill? The Traditional Courts Bill and Rural Women' (2009) 23(82) *Agenda* 9; Aninka Claassens and Sizani Ngubane, 'Women, Land and Power: The Impact of the Communal Land Rights Act' in Aninka Claassens and Ben Cousins (eds), *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press 2008).

<sup>74</sup> Belinda Bozzoli, 'Marxism, Feminism and South African Studies' (1983) 9(2) *Journal of Southern African Studies* 139.



Comaroff and Comaroff call ‘Ethnicity Inc’.<sup>75</sup> One example from the Eastern Cape underscores this:

In November 2018, King Ndamase Ndamase of Western Pondoland signed a lease with a Chinese investment company in which he undertook to clear all the inhabitants from a 30 km stretch of coastline around Port St Johns, in exchange for the low rent of R1 million per year.<sup>76</sup>

Allowing women to also be traditional leaders, which is one demand made in the women and land debates, will not resolve the problems of commodifying land use and mismanaging resources.

The struggle in Xolobeni opens the question of what a democratic and egalitarian (feminist) system of governing the commons might look like in ways that extend the existing frame of land debates. While we agree with and draw on Federici on the importance of linking social reproduction with struggles to defend the commons, we differ somewhat with her reading of law, which for her is only and inextricably tied with the defence of private property. She comments that what women need is not more law, but more land.<sup>77</sup> To be sure, Federici is concerned to point out how the commons are neither automatically nor necessarily egalitarian. As she notes, who represents and who is being represented in the community have been central in contestations over land. She is less clear, however, on what is to be done about that. In gesturing towards the ultimate goal of shifting power directly into the hands of people (‘challenging the hegemony of capital and the state and affirming our interdependence and capacity for co-operation’),<sup>78</sup> she leaves open a number of important questions about how to safeguard women’s rights to participate. As the bitter fights over the bills leading to the Traditional and Khoi-San Leadership Act and the Communal Land Rights Act 11 of 2004 in South Africa have demonstrated, representing rural women is a contentious matter. We want to distinguish the Xolobeni struggles from those which:

- (a) assume that democratizing the institution of traditional leadership will give women equal access to positions of authority;

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<sup>75</sup> Jean Comaroff and John Comaroff, *Ethnicity Inc* (University of Chicago Press 2009).

<sup>76</sup> Kevin Bloom, ‘China, the Pondo King and Namaqualand: In Pursuit of the “Disney Playground” Deal’ *Daily Maverick* (Johannesburg, 26 March 2019) <https://www.dailymaverick.co.za/article/2019-03-26-china-the-pondo-king-and-namaqualand-in-pursuit-of-the-disney-playground-deal/> accessed 26 May 2021.

<sup>77</sup> Federici (n 1) 124.

<sup>78</sup> *Ibid.*, 1.

- (b) foreground a return of land to communities without any specification of what the internal relations of those communities will be; or
- (c) those that proceed from the assumption that the traditional arrangements are fixed and egalitarian and that there can be a recuperation of precapitalist relations.

The Xolobeni struggles are about control of land by communities, of course, but they reveal the very complicated and messy (and gendered) power relations within communities. The contestation in Xolobeni is a story of spaces that are held in community trust, but whose inner logics of decision making and livelihood making are intensely political and contested.

There is a long history of women's struggles in relation to land that intersect with these developments in Xolobeni, but the issue of mining exceeds the ways in which land and gender issues have previously been thought about. Up to now, the questions have related to the disjuncture between women's labour on the land and their lack of control over decision making (what and when to plant, how to distribute the benefits of production, and so on). In the post-1994 debates, these have played out in various contestations between groups of rural women, communities, and traditional leaders – fights over the legislative framework that would regulate the governance of land and unresolved tensions over titling, among other issues. Xolobeni shifts the stakes to a more fundamental set of issues about the implications of control of land for the survival of communities. It is about whether the developmental path offered by mining will lead to such profound changes to the land that it will in time lose its viability as habitation.<sup>79</sup> This is, in Federici's terms, what is at stake in the contemporary forms of enclosure: (a) that primitive forms of accumulation are not eclipsed in capitalist development but are endemic and ongoing, and are disciplined by violence; and (b) that appropriating women's labour is key to the dispossession that accompanies primitive accumulation. Mining in Xolobeni is an exemplary form of enclosure, in that it appropriates land (with corpo-

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<sup>79</sup> This raises some unresolved questions about land: the twin pillars of land policy have been restitution and redistribution, that is addressing the dispossession of land under apartheid (though not colonialism) and offering either land or financial recompense. The Land Commission has been weak, with much left to resolve. There are still large tracts of land that were not taken away by apartheid, of which Xolobeni is an example. In this case, new kinds of questions arise. Communal land does not necessarily mean community-controlled land; resolving control by giving individual title to women is also not a clear solution. If there had been individual title to this land, it is likely that the corporation and/or government could have secured control more easily by a divide and rule strategy. Of what use would secure tenure be if resources are commodified to the extent that they are depleted and the land ultimately depreciated as a source of survival?

rations and the state colluding) and reduces independent producers (mainly, though not exclusively, women) to wage workers, and may increase women's dependence on male wage workers, while degrading the environment so that it will reduce inhabitants to abjection over the longer term (the mineral resources will have been extracted within a single generation). It intersects with previous struggles of women in several interesting ways: traditional leaders' expropriation of decision making from women; women's ongoing responsibilities to bear and manage the impact of violence; and women coming to the fore as representatives of a community in crisis.

As before, women have articulated a different conception of time from that of development-time, linking past and future differently from the linear narrative of capitalist expansion. The demand is not for an exit from the modern state, but rather for a more holistic understanding of what is at stake and a recalibration of how public funds are distributed nationally. The underlying argument of the anti-mining activists is that the preservation of these lands is a common good and that the residents should not have to give up one set of resources (land) in order to access other public goods (schools, clinics and roads). This is a struggle that is about holding out for a different future, for what seems unimaginable. The Xolobeni struggle is thus prefigurative and instructive in exposing the complex challenges of contests over land and resources and in positing new types of resistance that protect and maintain the commons, while resisting extraction that threatens the environment, the climate and the earth we inhabit.

## CONCLUSION

This chapter is a preliminary reading of the complex relationships between struggles over environmental destruction through extraction and its links to climate change, gender, law and rights. It provides a discussion of the Xolobeni battles in and outside the courts as a positive case study of resistance to mining and loss of access to communal land. While the case is central to the contest over land rights in post-apartheid South Africa, we see it as prefigurative of a more fundamental gendered challenge to capitalist enclosure, at the root of climate destruction. Xolobeni is a tiny, under-serviced community in a far-flung corner of the country, which has dug in its heels and taken on the state and international investors using the law, among other weapons. Women have been central figures of resistance who are deeply concerned with the threats to the means to reproduce themselves and those who come after them. The somewhat surprising success of these struggles provides hope that legal mechanisms may at times prove effective, in combination with other means, in halting the relentless march of damaging extraction. Federici's image of grass pushing through the cracks in the concrete affirms the idea that the Xolobeni

struggles prefigure a different way of being – one that is sustainable, communal and attentive to the voices of women. We do not wish to romanticize a pre-industrial way of life, an ideal commons where patriarchy is absent, or a struggle where women are the stereotyped victims or heroes; indeed, as we show, despite women's frontline role in the struggle, gender concerns have been insufficiently articulated. Nor do we wish to over-claim the place of law, on its own, in defending marginalized people. Our suggestion is that the case provides evidence of some optimism that this (thus far) successful struggle using legal rights can inform similar struggles elsewhere. Further, it demonstrates that even where neither gender nor the climate are centred within rights claims, such litigation can nevertheless advance an ecofeminist justice agenda, but that inclusion of strong gender and environmental rights may further bolster the development of exemplary jurisprudence.

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# 11. Indigenous women against Bolsonaro's government in Brazil: Resisting right-wing authoritarianism and demanding climate justice

**Marta Rodriguez de Assis Machado, Denise Vitale and Danielle Hanna Rached**

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## INTRODUCTION

'There is no solution to the climate crisis without us'<sup>1</sup> was the message of Txai Suruí, a young indigenous activist at the official opening of the last United Nations Climate Change Conference (COP26), in Glasgow. She was the only Brazilian at the event, while the Brazilian president Jair Bolsonaro did not even show up.

Txai is right. In face of the global Brazilian position, in which the protection of the Amazon is the cornerstone of the country's role in climate justice, the protection of indigenous land is one of the most incontrovertible measures to save the forest. Facing the attacks of a far-right government that promotes deforestation and grabbing of indigenous land, the indigenous resistance – led significantly by the indigenous women's mobilization – is a crucial battle taking place in the local–global field of dispute around climate change.

In this chapter, we argue that indigenous women's movement in Brazil has been an important counterpoint to Brazil's right-wing government view of climate change and of indigenous peoples' rights. The movement has challenged the populist logic (which vows to create enemies within societies – the real people versus the rest; or us versus them) by demanding inclusion and recognition of their cosmovision and constitutional rights. Second, the movement defends a stronger stance against individualism and neoliberal practices

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<sup>1</sup> 'Indigenous People of Brazil Defend their Territory with Drones' (Trainee AG, 4 November 2021) para 15 <https://traineeag.com/2021/11/24/indigenous-people-of-brazil-defend-their-territory-with-drones/> accessed 4 June 2022.

by pressing for a collective solution to the climate crisis. If climate justice means 'paying attention to how climate change impacts people differently, unevenly, and disproportionately, as well as redressing resultant injustices in fair and equitable ways',<sup>2</sup> then the indigenous women's movement highlights the ways through which they have been sidelined from environmental related decision-making processes, and why they are better positioned to protect the Amazon.

From the beginning of Brazil's colonization until the 1988 Constitution, indigenous autonomy was not recognized by the state. The hegemonic and official conception of an indigenous policy understood indigenous individuals as less capable and requiring state tutelage until fully integrated into the nation. From the 1970s onwards, with the flourishing of grassroots and social movements in Brazil and Latin America, the indigenous movement started to coalesce as a political movement, claiming autonomy and collective rights to their lands. The 1988 Constitution consolidates a new paradigm, recognizing the rights of the indigenous to be indigenous, with original rights of the lands where traditionally they live.

Although Brazilian indigenous women only began to take shape as a specific social movement in the last decade, they have taken the stage in different public arenas, from Rock in Rio to Climate Change Conferences, from the National Congress to grassroots associations, from the United Nations to the Inter-American Court of Human Rights, raising their voices in the name of the forest, their lands and the planet's future. The intersectionality of their twofold condition of being both women and indigenous underlines their specific situation of vulnerability and, at the same time, enhances their role as social and political leaders, crossing different fields of mobilization, from gender to environmental battles, in a continuum that goes from the local to global and to local again. Moreover, due to the importance of the Amazon to climate governance, their position regarding the defence of the forest and indigenous lands and territories has made them key actors in the global field of contention around climate politics and simultaneously in the resistance against Bolsonaro policies.

This chapter starts by describing the emergence of the indigenous women's movement in Brazil, connecting elements of gender, indigenous rights and environmental protection, and how they fostered alliances both in the national and international contexts. We characterize this as a longstanding process that has been taking place since Brazil's redemocratization, which today allows the indigenous women's movement to occupy a strategic position both in the

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<sup>2</sup> Farhana Sultana, 'Critical Climate Justice' (2021) 188 *The Geographical Journal* 118, abstract.

resistance to the government attacks against the environment and indigenous rights, and in the global climate contention.

We then turn in the second section to describing the challenges that the movement is now facing, and how indigenous women are resisting the authoritarian methods of the government, expanding its alliances, strengthening grassroots mobilization and using national and international litigation for the first time. The global stage of climate change functioned as a strategic arena to amplify indigenous people's demands and connect them to larger contentions on climate justice. Finally, in the last section, we discuss how neoliberalism and authoritarianism have been framing Brazilian contemporary politics and how particular features of indigenous women's mobilization challenges the assumptions that underpin the national development paradigm. Brazilian governments on the progressive spectrum have already brought environmental and social imbalance, but the intensification of the economic drive when dealing with land and other natural wealth by the Bolsonaro government (something demonstrated by his explicit alliance with landowners and agrobusiness caucus in Congress, as well as huge mining and timber companies, coupled with the advancement of his authoritarian anti-environment and anti-indigenous rights agenda) has triggered an even greater resistance from indigenous groups. The current resistance of indigenous women is about their people's survival, but it can also be framed as an attempt to find the answer to one of the most puzzling questions of our time.

## 1. THE BRAZILIAN INDIGENOUS' WOMEN MOVEMENT: FROM LOCAL TO GLOBAL

The first Brazilian women's indigenous associations emerged with democratization and flourished after the promulgation of the 1988 Constitution, during the 1980s and 1990s. These included the Association of Indigenous Women of the Alto Rio Negro, the Association of Indigenous Women of Taracua, Rio Uaupés e Tiquié, the Association of Indigenous Women Sateré Mawé and the Association of Indigenous Women of Roraima.<sup>3</sup> Although originally focused on the promotion of income-generating activities such as handicrafts, escalating struggles over land and health rights, deforestation, tensions with financial institutions and governments transformed these associations' initial mission into a more political one within the socio-environmental movement.

Indigenous women gradually assumed leadership positions within the indigenous movement, having demonstrated proactivity and capable com-

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<sup>3</sup> Ângela Sacchi, 'Mulheres Indígenas e Participação Política: A Discussão de Gênero nas Organizações de Mulheres Indígenas' (2003) 14 *Antropológicas* 95.

munication skills. They took the lead in the mobilization field due to their capacity for action, and at the same time, the more they did, the more they acquired legitimacy and were able to occupy important spaces, including in institutional and international arenas. If, on the one hand, this proactivity and greater leadership capacity can be explained by an internal process of learning by doing, on the other hand it was also enhanced by external influences and alliances such as the previous experiences of the indigenous women in other Latin-American countries and the international women's movement developed at the UN, especially UN Women, and the move towards the mainstreaming of gender in diverse documents and guidelines.

The 1990s was a decade of civil society participation in international affairs and an opportunity for Brazilian social movements for internationalization and alliance building. The United Nations conferences on the environment (Rio 92 and the subsequent ones) stimulated the creation of platforms of action and networks of women from indigenous peoples and/or traditional communities. Women's mobilization was also going through the same ebullient moment for transnational activism, with the Vienna (1993), Cairo (1994) and Beijing (1995) Declarations.

The mobilization of indigenous women catalysed intersectional politics throughout the 2000s. Women began to bring new gender-related concerns to the larger indigenous agenda. Issues such as domestic violence, reproductive health, income generation and women's participation in decision making expanded the original agenda of the movement and at the same time broadened its alliances with the feminist movement.<sup>4</sup> Their special position within the larger group of women makes intersectionality a key concept, capturing the criss-crossing of oppressions coming from different sources,<sup>5</sup> so that the experience of different groups of women are not collapsed into the demands of white women. Black and indigenous women, for example, have a different experience of discrimination and denial of rights that comes from the intersection of different social markers (gender, race, class, ethnicity, etc.) in a mutual and reciprocal influence.<sup>6</sup> The mobilization of indigenous women has had a key role in bringing specific demands and adding an intersectional lens to both the Brazilian women's movement and the indigenous movement.

Women's chapters were developed in indigenous organizations, such as the Confederation of Indigenous Organizations of the Brazilian Amazon

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<sup>4</sup> Ricardo Verdum, *Mulheres Indígenas, Direitos e Políticas Públicas* (Instituto de Estudos Socioeconômicos (INESC) 2008).

<sup>5</sup> Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum* 139.

<sup>6</sup> Patricia Hill Collins and Sirma Bilge, *Intersectionality* (Polity Press 2016).



(Coordenação das Organizações Indígenas da Amazônia Brasileira (COIAB)), and the Federation of Indigenous Organizations of Rio Negro (FOIRN).<sup>7</sup> Nationally, the creation of a National Bureau of Politics for Women in 2003 and the promulgation of the Maria da Penha Law in 2006<sup>8</sup> are milestones in efforts to promote women's rights and eradicate violence through public policies and with an intersectional lens.<sup>9</sup> Indigenous women's issues gained the attention and support of NGOs and government agencies, inducing intersectional public policies, such as domestic violence services and health programmes with approaches focused on indigenous women.

The Feminist Political Platform approved in 2002 at the National Conference of Brazilian Women – a participatory structure created by the Workers' Party in the federal government – was a landmark in the construction of intersectional public policies of national scale. It was drafted by a very diverse group of women, with a significant presence of black and indigenous women. According to Sueli Carneiro, the document represents the recognition of racism and racial discrimination as structural elements of gender and race inequalities. The Platform sealed a pact of solidarity between white, black and indigenous women in the struggle to overcome gender and race inequalities.<sup>10</sup> Importantly, it deals with agricultural, agrarian, and socio-environmental issues, questioning the existing rural development model in Brazil and pointing to the need for agrarian reform and public policies for women rural workers. It also defends indigenous women, whose peoples have been subjected to processes of physical and cultural massacre.

Other initiatives during the years of the Worker's Party governments included the First National Meeting of Indigenous Women, held in Brasilia in 2006 by the Department of Women of the COIAB and the Institute of Socioeconomic Studies (INESC), attended by 28 women from various regions and peoples. In 2007 there was a surge in meetings and workshops, leaving no doubt that the issue of indigenous women was now on the country's public agenda.<sup>11</sup>

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<sup>7</sup> Sacchi (n 3).

<sup>8</sup> Known as Lei Maria da Penha in Portuguese (Law of Maria da Penha), Act No. 11340 of September 2006, aims at reducing gender-based domestic violence in the country.

<sup>9</sup> Denise Vitale and Renata Nagamine, 'Towards Another Cosmopolitanism: Indigenous Women's transnational activism in Brazil' *Revista Direito GV*, São Paulo, v. 18, n. 3, e2238, 2022. <https://doi.org/10.15910/2317-6172202238>.

<sup>10</sup> Sueli Carneiro, 'Mulheres em Movimento' (2003) 17 *Estudos Avançados* 117.

<sup>11</sup> Meetings in 2007 included the Indigenous Women, Violence and Public Policy Workshop, by the Department of Women of the COIAB and the Institute of Socioeconomic Studies (INESC) together with regional indigenous chapters; the Women and Youth Indigenous National Meeting in Cuiabá/MT, organized by FUNAI

By the end of the first decade of the millennium, associations of indigenous women were forming more endogenously, without the mediation of other NGOs or government bodies. For example, in 2009 the formation of the Takiná Indigenous Women's Organization in Mato Grosso began to promote the Assemblies of Indigenous Women, which have been held annually since 2001, organized by the Missionary Council for Indigenous Peoples (Conselho Indigenista Missionário, or CIMI). The 2011 highlight was the creation of the Union of Indigenous Women of the Brazilian Amazon. From 2012 onward, the indigenous women of Mato Grosso do Sul met annually in the Great Assembly of Indigenous Women, bringing together the Guarani and Kaiowá peoples.<sup>12</sup>

One highlight of this recent rise of indigenous women to national political leadership was the choice of Sonia Guajajara as coordinator of the main national indigenous association, the Brazilian Indigenous Peoples Collective (APIB), in 2014.<sup>13</sup> Her experience as vice-chair of COIAB (2009–2013), and her many achievements have helped Guajajara increase the visibility of the indigenous cause nationally and internationally. Other indigenous women occupy spaces of political power and leadership within the indigenous movement, for example, in organizations such as COIAB, which at its Assembly in 2017 elected Nara Baré as coordinator, and Angela Amanakwa Kaxuyana as treasurer-coordinator. Telma Taurepang was elected general secretary of the Women's Movement of the Indigenous Council of Roraima from 2010 to 2017 and, since 2017, she has been coordinator of the Union of Brazilian Indigenous Women.<sup>14</sup>

In 2020 there were, in Brazil, 92 indigenous women's organizations of a total of 1,029 indigenous organizations.<sup>15</sup> The rise of the indigenous movement in the country can be attributed to the internal political processes of indigenous peoples, but also to the dynamics imposed on them by transnational

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and the National Commission for Indigenous Policy, among others, as well as regional meetings in the north and centre-south. See Denise Vitale and Renata Nagamine, 'Towards Another Cosmopolitanism' (n 9).

<sup>12</sup> More examples are the founding in 2015 of the Association of Indigenous Women Warriors of Rondônia, and in 2016, the First Meeting of Munduruku Women in the Middle Tapajós, in the village of Praia do Índio, in Itaituba. In 2017, the Acre federal state created space for the mobilization of indigenous women, holding the Indigenous Women's Meeting, with 25 people attending from the Brazilian and Peruvian Amazon.

<sup>13</sup> APIB was established in 2005, during the 'Acampamento Terra Livre', an annual mobilization to make the indigenous peoples' situation visible and to claim their rights from the Brazilian state.

<sup>14</sup> Denise Vitale and Renata Nagamine, 'Towards Another Cosmopolitanism' (n 9).

<sup>15</sup> Instituto Socioambiental, data available at <https://www.socioambiental.org/pt-br> accessed 15 August 2021.

processes, especially global and regional cooperation, as was the case among indigenous Amazonian peoples such as the Taurepang and the Kichwa of Sarayaku, who, by 2010 were already familiar with the transnational space.<sup>16</sup> Indigenous women's leadership on international fronts was also favoured in Brazil by an initiative of UN Women of small but symbolic projects. Since 2015, UN Women has implemented a pioneering project called the Voice of Indigenous Women in partnership with the Norwegian Embassy. The purpose of the project is for indigenous women to develop a common political agenda and to raise the profile of their demands in Brazilian society, creating favourable conditions for advocating for their most urgent political, economic and social issues.<sup>17</sup> The mix of national and international factors fostering the Brazilian indigenous women's movement made decisive contributions to the formation and development of a stronger and more autonomous movement. The Worker's Party period in government opened a wider dialogue, allowing alliances to be built between progressive social movements, and it is credited with having created a more positive context for social, gender and environmental movements. However, the openness to social movements varied depending on the government in power, and the array of interests surrounding the government in the Congress, for example, growing conflict between environmental and indigenous issues with the increasing political and economic power of agribusiness interests within Congress.

One of the consequences of the empowerment of the indigenous women's movement within the indigenous movement was the transmitting of their leadership from indigenous politics to institutional arenas. During the 2018 national election, although the extreme right-wing candidate Bolsonaro was elected, Sonia Guajajara ran as vice-president with presidential candidate Guilherme Boulos for the left-wing Liberty and Socialism Party (PSOL). Despite representing a small party, it was the first time in Brazilian history that there was an indigenous candidate, and especially a woman, on the vice-presidential slate. It was also the first time that an indigenous woman, Joênia Wapichana, was elected to the National Congress, by the Rede Sustentabilidade. Guajajara's leadership has gained more visibility with artists such as Alicia Keys whom she joined on stage at the Rock in Rio Concert (2017) and Caetano Veloso inviting her to share the stage at several concerts as an act in defence of the Amazon Rainforest. In 2018 federal and 2020 municipal parliamentary

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<sup>16</sup> See Kichwa Indigenous Peoples of Sarayaku v. Ecuador IACHR Series C No. 245 (2012).

<sup>17</sup> Denise Vitale, Renata Nagamine and Giselle Amorim de Souza, 'A ONU Mulheres na Aldeia: Interações Democráticas e Mediação Cultural' in Denise Vitale and Renata Nagamine (eds), *Gênero, Direito e Relações Internacionais: Debates de um Campo em Construção* (Edufba 2018).

elections, black, trans and indigenous women candidates represented the institutionalization of intersectional politics opening space for their causes in institutional settings. While still in the minority, the fact that they participated in the electoral competition and won seats is significant, given the previous absolute absence of those groups in such arenas for 100 years.

The aggravation of the situation of indigenous peoples and the offensive from the Bolsonaro Government against environmental and indigenous rights catalysed indigenous activism and alliances, with indigenous women occupying a crucial position on the social mobilization front. Indigenous women convened important national marches against the Bolsonaro administration and also mobilized around the complaint of the crime of genocide at the International Criminal Court in face of the government's handling of the pandemic.<sup>18</sup> As the government's policies towards the environment and indigenous rights erode the Amazon protection system and incite deforestation, indigenous women's movements were pushed not only to become a point of immediate resistance to the government, and crucial in the struggles to defend the forest, but also key actors in the climate politics field.

The movements' centrality in the current local–global contestation on climate justice is thus the result of three decades of persistent mobilization, interwoven with their cosmivision and their role as guardians of the forest, but was also driven by increasing attacks from certain interest groups against the demarcation of indigenous lands, interests that became fully represented by the federal government from 2018 onwards. In the following sections we will discuss how Bolsonaro's government challenges indigenous rights and environmental policies in Brazil, pressuring the movement and climate justice pathways. As we will show in sections 2 and 3, indigenous women's movement tenets provide important counterpoints in resisting the current combination of authoritarianism and neoliberalism in the country, and the menace this poses to a sustainable future.

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<sup>18</sup> See Articulação dos Povos Indígenas do Brasil (APIB), 'Unprecedented: APIB Denounces Bolsonaro Before the ICC, in The Hague, for Indigenous Genocide' (APIB Oficial, 9 August 2021) <https://apiboficial.org/2021/08/09/unprecedented-apib-denounces-bolsonaro-before-the-icc-in-the-hague-for-indigenous-genocide/?lang=en> accessed 20 March 2022. The statement presented by APIB at the International Criminal Court (ICC) builds on a previous statement presented by the Collective of Advocacy on Human Rights and the Arns Commission, which describes how the government of Bolsonaro has been inciting crimes against humanity and genocide against indigenous peoples.

## 2. INDIGENOUS WOMEN VERSUS BOLSONARO'S AUTHORITARIANISM

Bolsonaro represents a palpable threat to the Amazon. Under his government, environmental policies are being reviewed and, in many cases, rolled back. Institutions that were created to protect the environment are being publicly challenged, discredited, captured, or simply defunded. His government has dismantled the authority of important agencies, such as the Brazilian Institute of the Environment and Renewable Natural Resources (IBAMA) and the Chico Mendes Institute for Biodiversity Conservation (ICMBio), for oversight and protection of the environment.<sup>19</sup> Fines for environmental wrongdoing are no longer enforced: since the Bolsonaro government has been in power, 98 per cent of environmental sanctions have been halted.<sup>20</sup> The Ministry of the Environment has dismissed a long list of public officials linked to IBAMA for being proactive in environmental enforcement, including those who fined the president himself in 2012 for illegal fishing in an environmental reserve in Rio de Janeiro.<sup>21</sup>

Bolsonaro interrupted the slow but continuous process of indigenous land demarcation by former governments, and weakened the specific social policies for indigenous peoples in the health and education sectors. But the government's omissions, which are worrisome in themselves, are only part of the story. Bolsonaro has demonstrated support for loggers and miners, and has been persistently vocal against the legal regime of indigenous lands, advocating in favour of occupation and 'development' in the Amazon region. Bolsonaro's colonialist views of indigenous people rely on long-discredited

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<sup>19</sup> One way to destroy the authority of these bodies is to create an extra step before fines are paid by environmental offenders: the 'environmental conciliation hearing' (Decree N. 9760/2019). These conciliation hearings have the authority to annul fines or uphold them, but the main problem is that, so far, they have not taken place. Since 2019, IBAMA has held only five conciliation hearings out of 7,205 scheduled to happen, while ICMBio has not held any. See the climate litigation lawsuit that awaits a decision from the Supreme Federal Court: PSB et al. v. Brazil (on deforestation and human rights) (Climate Case Chart) <http://climatecasechart.com/non-us-case/brazilian-socialist-party-and-others-v-brazil/> accessed 8 April 2022. A similar approach was adopted by Joint Ordinance N. 1/2021, which required environmental sanctions to be confirmed and validated by a hierarchical superior of the IBAMA inspectors.

<sup>20</sup> Cristina Leme Lopes and others, 'Conciliação Ambiental e Desmatamento na Amazônia Implicações e Desafios a partir de Evidências' (Climate Policy Initiative and WWF-Brasil, 14 December 2021).

<sup>21</sup> 'Chefes do Ibama que Agiram Contra Garimpeiros são Exonerados pelo Governo' (Correio Braziliense, 30 April 2020) <https://www.correio braziliense.com.br/app/noticia/brasil/2020/04/30/interna-brasil,850174/chefes-do-ibama-que-agiram-contra-garimpeiros-sao-exonerados-pelo-gove.shtml> accessed 20 March 2022.

ideas of assimilation and devaluation of indigenous culture and ways of living. His government mirrors the prevailing mindset of the military regime, which promoted the idea of 'progress' through the occupation of the Amazon by economic activities and the 'integration' of indigenous peoples into the 'dynamic of society'.<sup>22</sup>

The situation became acute as Bolsonaro's speeches, together with the dismantling of environmental law enforcement, has triggered a process of invasion of indigenous territories and violence against indigenous communities and leaders. The Missionary Council for Indigenous Peoples (CIMI), in 2019, issued the report 'Violence Against Indigenous Peoples in Brazil', reiterating 'the picture of an extremely perverse and worrying reality of the indigenous peoples in Brazil in the first year of Jair Bolsonaro as president'.<sup>23</sup> The report describes a situation of the 'intensification of expropriations of indigenous lands, forged in the invasion, land grabbing, and subdivision of the lands [which] is quickly and aggressively being consolidated throughout the national territory, causing immeasurable destruction'.<sup>24</sup> According to the report, in 2019 'there was an increase of 134.9% cases related to invasions (in indigenous lands) compared to those recorded in 2018'.<sup>25</sup> It also reports increases in different types of violence against indigenous peoples, from death threats to bodily injury and deaths.<sup>26</sup>

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<sup>22</sup> General Villas Boas gives an illustration of this mindset. In an interview he criticizes the politics of indigenous land demarcation by saying:

See what happened in Raposa/Serra do Sol [whose non-indigenous people were removed]. Demarcation was promoted, and the economic structures had to leave. Today the indigenous peoples have difficulties in finding viable alternatives. What the private initiative provided there, the government finds it difficult to provide ... The indigenous, poor people, are prisoners of two aspects: economic interest and environmentalist fundamentalism.

Lucas Reis, 'País Trata a Amazônia como Colônia', *Diz Comandante Militar* (Folha de S. Paulo, 19 October 2013) para 9 <https://www1.folha.uol.com.br/poder/2013/10/1359068-amazonia-ainda-nao-esta-integrada-ao-restante-do-pais-e-como-uma-colonia.shtml> accessed 15 August 2021.

<sup>23</sup> 'In 2019, Indigenous Lands were Ostensibly Invaded from North to South of Brazil' (Conselho Indigenista Missionário, 30 September 2020) para 1 <https://cimi.org.br/2020/09/in-2019-indigenous-lands-were-ostensibly-invaded-from-north-to-south-of-brazil/> accessed 15 August 2021.

<sup>24</sup> *Ibid.*, para 1.

<sup>25</sup> *Ibid.*, para 11.

<sup>26</sup> The same 2019 CIMI report compares types of violence against indigenous peoples in the years 2018 and 2019: death threats went from eight to 33; various threats went from 14 to 34 cases; intentional bodily injuries almost tripled, going up from five to 13; and deaths due to lack of assistance went from 11 to 31 cases in 2019 (*ibid.*, para 17).

The offensive of the government and of invasions triggered a strong reaction in the indigenous mobilization field towards the strengthening of national and international alliances and the escalation of mobilization campaigns. Indigenous women thus became more active than ever in publicly claiming their people's rights, fighting for the demarcation of their lands, for generating income, against all types of violence, and for maintaining the values and rights of their peoples. A landmark event in the resistance to the government's stance against the environment and indigenous rights took place at the April 2019 Acampamento Terra Livre (Free Land Camp), when different indigenous groups and activists occupied the federal government headquarters in Brasília. The mobilization resulted in a document representing the claims of over 4,000 leaders of indigenous peoples and organizations in Brazil, which denounced the government purposes of exterminating indigenous peoples, the dismantling of public institutions and policies aimed at guaranteeing environmental and indigenous rights, and the attacks orchestrated by the Agricultural Parliamentary Front, which in alliance with the government 'responds to powerful financial interests, from business corporations, many of them international, from agribusiness and mining, among others'.<sup>27</sup> In the same year in August, indigenous women organized the First Indigenous Women's March. With the theme 'Territory: Our body, our spirit', more than 2,000 indigenous women from 113 different peoples participated, calling on the government to halt the dismantling of the gender and indigenous peoples' agenda. The march was important for fostering unity in the movement<sup>28</sup> and defining the theme and the calendar of protests of the indigenous women's movement for the year, which would start with the participation in the Marcha das Margaridas in Brasília, an annual strategic action organized by women from the countryside and the forest, promoted by feminist movements, the rural workers' movement and unions.

In 2020, the pandemic aggravated the complex and risky circumstances in which indigenous peoples live, insofar as they are a vulnerable group, exposed both to the virus and to invaders of their lands (miners, land grabbers and

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<sup>27</sup> Comissão Pró-Índio de São Paulo, 'Documento Final do XV Acampamento Terra Livre' (26 April 2019) [6] <https://cpisp.org.br/acampamento-terra-livre-2019/> accessed 7 April 2022.

<sup>28</sup> APIB, 'Documento Final Marcha das Mulheres Indígenas "Território: Nosso Corpo, Nosso Espírito"' (APIB Oficial, 15 August 2019) <https://apiboficial.org/2019/08/15/documento-final-marcha-das-mulheres-indigenas-territorio-nosso-corpo-nosso-espirito/> accessed 30 November 2021.

loggers). By the middle of February 2022, 1,274 indigenous people had died due to Covid-19, with more than 66,000 cases registered among 162 peoples.<sup>29</sup>

An administrative norm issued by Funai, an agency linked to the Ministry of Justice, 'Normative Instruction No. 9',<sup>30</sup> promulgated in the midst of the pandemic, further aggravated the situation. The administrative rule ensures the certification of property for squatters and land grabbers in indigenous lands that were not yet formally approved. In other words, the norm favours those who invade and disrespect the territorial rights of indigenous peoples, creating formal incentives for land invasions, at a moment when this meant not only risk to indigenous territories, but risk to the existence of their peoples.

Faced with official attempts to mask the data about the infection among indigenous people, indigenous women remained mobilized, strengthening their national and international alliances and resorting to various mobilization strategies, nationally and internationally. They promoted and were present at several online events to give visibility to their demands and strengthen networks in Brazil and worldwide.<sup>31</sup> One landmark of this mobilization took place on 7–8 August 2020, with the 'Big Online Assembly: The Sacredness of Existence and the Healing of the Earth'.<sup>32</sup> Within the context of the pandemic, the theme chosen evoked the issue of healing, which is intrinsically related to the Mother Earth in a holistic approach that does not separate the individual from nature, since according to indigenous peoples' cosmology, the meaning of existence, of life and death, is completely linked to nature and the environment represented by their lands.

In June 2020, the COIAB issued a public note condemning the progress of the coronavirus in the direction of indigenous lands and the lack of federal government action to contain infection.<sup>33</sup> Right after that, Sonia Guajajara,

<sup>29</sup> Instituto Socioambiental 'COVID-19 e os Povos Indígenas' <https://covid19.socioambiental.org/> accessed 15 February 2022; Panorama Geral da COVID-19 [https://emergenciaindigena.apiboficial.org/dados\\_covid19/](https://emergenciaindigena.apiboficial.org/dados_covid19/) accessed 15 February 2022.

<sup>30</sup> Ministério da Justiça e Segurança Pública/Fundação Nacional do Índio, 'Instrução Normativa 9/2020' <https://www.in.gov.br/web/dou/-/instrucao-normativa-n-9-de-16-de-abril-de-2020-253343033> accessed 7 April 2022.

<sup>31</sup> Instituto Socioambiental, 'Organizações de Mulheres Indígenas no Brasil: Resistência e Protagonismo' (5 August 2020) <https://www.socioambiental.org/pt-br/noticias-socioambientais/organizacoes-de-mulheres-indigenas-no-brasil-resistencia-e-protagonismo> accessed 15 August 2021.

<sup>32</sup> APIB, 'Mulheres indígenas: O Sagrado da Existência e a Cura da Terra' (APIB Oficial, 1 (translated by the authors) August 2020) <https://apiboficial.org/2020/08/01/mulheres-indigenas-o-sagrado-da-existencia-e-a-cura-da-terra/> accessed 15 August 2021.

<sup>33</sup> COIAB, 'A Covid 19 Adentra nas Terras Indígenas e o Cerco se Fecha Para os Povos Indígenas Isolados' <https://coiab.org.br/conteudo/nota-p%C3%BAblica-1591734588632x150919665523097600> accessed 7 April 2022.



Indigenous Peoples of Brazil (ABIP) and left-wing political parties launched a constitutional case at the Federal Supreme Court, seeking to oblige the federal government to take measures to contain and mitigate the effects of Covid-19 in indigenous communities.<sup>34</sup> It was the first time that indigenous mobilization resorted to constitutional litigation. The case calls attention to the real possibility of the extermination of ethnic groups, especially isolated or recently contacted groups, due to the actions and omissions of the government. As circumstances aggravating the situation, the case points to the unpunished presence of invaders on indigenous lands, stimulated by government policies and the President's hate speeches against indigenous people; the greater socio-epidemiological vulnerability of indigenous people; the logistical difficulties of treatment in remote localities; the serious deficiencies already existing in the indigenous health system; and the failures and omissions of state bodies, in particular, public policies to confront Covid-19. Deciding in favour of the claim, the Federal Supreme Court required the government to prioritize the vaccination of indigenous people, to take measures to protect their territories against invaders, and to create a policy to combat and contain the pandemic among indigenous peoples, to be formulated directly by the National Council for Human Rights together with representatives of indigenous communities.<sup>35</sup> The Court's decision has not been implemented.

Going further, on 9 August of the same year, the international day of indigenous peoples, ABIP, along with indigenous lawyers, denounced the Brazilian President at the International Criminal Court for genocide and crimes against humanity.<sup>36</sup> It was the first time in history that indigenous peoples have stood before the ICC.

Meanwhile, the global contentious field of climate change functioned as an opportunity to leverage indigenous activism in the local–global spiral. Recent climate disasters around the globe and international events such COP26 and the World Leaders Summit<sup>37</sup> put climate change debates at the centre of national and international agendas. The indigenous peoples mobilization, with

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<sup>34</sup> *Arguição de Descumprimento de Preceito Fundamental (ADPF) 709* <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986> accessed 7 April 2022. (An ADPF is an Allegation of Noncompliance with a Fundamental Precept.)

<sup>35</sup> Decision ADPF 709 <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15343710124&ext=.pdf> accessed 7 April 2022.

<sup>36</sup> See APIB, 'Unprecedented' (n 18).

<sup>37</sup> APIB, 'World Leaders Summit: Indigenous Peoples and Local Communities should be Part of Announced Financial Mechanisms to Secure Land Tenure in the Fight against Climate Change' (APIB Oficial, 2 November 2021) <https://apiboficial.org/2021/11/02/world-leaders-summit-indigenous-peoples-and-local-communities-should-be-part-of-announced-financial-mechanisms-to-secure-land-tenure-in-the-fight-against-climate-change/?lang=en> accessed 7 April 2022.

a strong representation of indigenous women leadership, took to the global stage to connect climate justice activists around the world to their cause: 'there is no solution to the climate crisis without us'.<sup>38</sup>

Representation and diplomacy at COP26 was organized by ABIP together with grassroots organizations, who sent 40 indigenous leaders to Glasgow to discuss solutions to the climate crisis. It was the largest delegation of indigenous leaders in the history of the Climate Conferences. Their goal was to alert the world to the 'genocide and ecocide' underway in Brazil and call attention to the need to defend indigenous peoples' rights and lands for the future of the planet.<sup>39</sup> Txai Suruí's speech at COP26 calling for climate action drew the ire of an absentee Bolsonaro. Txai and other indigenous women met with ministers of the environment (from the UK and US) and Leonardo DiCaprio, occupying an important role in the mobilization generated by the event and calling attention to their centrality in the global climate justice project.

This was taking place as Bolsonaro – like other populist leaders – was constantly attacking the legitimacy of international law and actors, pitting them against the interests of the local people.<sup>40</sup> It is not a coincidence that the arrival of Bolsonaro, in 2019, meant to Brazil the loss of the country's international influence and leadership on global issues, such as climate change and global health, previously achieved during democratic governments committed to international mechanisms and a human rights agenda.<sup>41</sup> Losing influence and reputation, the country has become a pariah that denies science, deforests the Amazon and accumulates accusations at the International Criminal Court.<sup>42</sup> In contrast, indigenous diplomacy is finding leverage in the international sphere and is occupying it as a source of amplification of their domestic mobilization.

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<sup>38</sup> APIB, 'Indigenous People are Heading to COP26: 'There is No Solution to the Climate Crisis, Without Us'' (APIB Oficial, 29 October 2021) <https://apiboficial.org/2021/10/29/indigenous-people-are-heading-to-cop26-there-is-no-solution-to-the-climate-crisis-without-us/?lang=en> accessed 7 April 2022.

<sup>39</sup> Ibid.

<sup>40</sup> As an example, President Jair Bolsonaro questioned the intentions of the G7 countries that offered donations to combat fires in the Amazon in the following terms: 'Does anyone help someone with no return? Who has an eye on the Amazon? What do they want there?' See Eliane Oliveira and others, 'Bolsonaro Questiona Ajuda Internacional a Amazônia: "O que Eles Querem Lá?"' (O Globo, 26 August 2019) <https://oglobo.globo.com/brasil/bolsonaro-questiona-ajuda-internacional-amazonia-que-eles-querem-la-23904409> accessed 7 April 2022.

<sup>41</sup> See Kelley Lee and Eduardo Gómez, 'Brazil's Ascendance: The Soft Power Role of Global Health Diplomacy' (2011) (Jan–Feb) *European Business Review* 61.

<sup>42</sup> 'Bolsonaro has Turned Brazil into a Global Pariah' was the headline from El País on 9 March 2021. Eliane Brum, 'Bolsonaro has Turned Brazil into a Global Pariah' (El País, 9 March 2021) <https://english.elpais.com/usa/2021-03-09/bolsonaro-has-turned-brazil-into-a-global-pariah.html> accessed 15 August 2021.

With their deep-rooted cosmopolitanism, indigenous women draw attention to the fact that it is necessary to value the socio-cultural and environmental characteristics existing in the forest region, as well as promote greater articulation of regional structures with national and international circuits.<sup>43</sup>

While it remains to be seen whether international pressure will play a role in containing the government's offensive against the Amazon and the rights of indigenous peoples, the reality on the national front remains daunting. The combination of anti-environmental and anti-indigenous policies implemented by the government have had a dramatic impact on indigenous peoples. While the Executive Branch acts surreptitiously to dismantle environmental institutions, such as FUNAI, and the protection of rights guaranteed by the Constitution, the National Congress, which maintains a conservative composition and a strong representation of landowners and agribusiness, has been gestating an anti-environmental law reform package. Controversial bills are being discussed in Parliament which would directly impact on environmental protection and on indigenous peoples' rights. At the time of writing, five stand out: Bill 2159/21, which waives environmental licensing;<sup>44</sup> Bills 2633/20<sup>45</sup> and 510/21,<sup>46</sup> which provide amnesty and encourage illegal occupation of public land; Bill 6299/02, which facilitates the approval of pesticides;<sup>47</sup> Bill 191/20, which allows mining and hydroelectric dams on indigenous land,<sup>48</sup> and Bill 490/07, which adopts a timeframe criterion ('marco temporal') – 5 October 1988, the date when the Brazilian Federal Constitution was enacted – as a condition for indigenous land demarcation.<sup>49</sup> The latter bill was harshly criticized by the Inter-American Commission on Human Rights as it

disregards the innumerable cases in which indigenous peoples were violently evicted from the territories they traditionally occupied and, for that reason only, were not occupying them in 1988. Accordingly, the Commission considers that the thesis contravenes international and inter-American human rights norms and

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<sup>43</sup> Denise Vitale and Renata Nagamine, 'Towards Another Cosmopolitanism' (n 9).

<sup>44</sup> Brazilian Federal Senate, Bill No. 2159 (2021) <https://www25.senado.leg.br/web/atividade/materias/-/materia/148785> accessed 7 April 2022.

<sup>45</sup> Brazilian House of Representatives, Bill No. 2633 (2020) <https://www.camara.leg.br/propostas-legislativas/2252589> accessed 7 April 2022.

<sup>46</sup> Brazilian Federal Senate, Bill No. 510 (2021) <https://www25.senado.leg.br/web/atividade/materias/-/materia/146639> accessed 7 April 2022.

<sup>47</sup> Brazilian House of Representatives, Bill No. 6299 (2002) <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=46249> accessed 7 April 2022.

<sup>48</sup> Brazilian House of Representatives, Bill No. 191 (2020) <https://www.camara.leg.br/propostas-legislativas/2236765> accessed 7 April 2022.

<sup>49</sup> Brazilian House of Representatives, Bill No. 490 (2007) <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=345311> accessed 7 April 2022.

standards, especially the American Convention on Human Rights and the American Declaration on the Rights of Indigenous Peoples.<sup>50</sup>

The theme of these bills is to reduce environmental safeguards, reduce the scope of indigenous rights and to plunder national wealth to produce profit for a few.

In order to confront the alliance between the executive and legislative branches of government, the indigenous movement is strengthening alliances with other social movements, mainly the environmental movement, and is acting on many fronts, including litigating for the first time.

In September 2021, the Second Indigenous Women's March took place in Brasília. Organized by the National Alliance of the Indigenous Women Warriors of Ancestry, the event mobilized 4,000 women from 150 indigenous different peoples in Brazil. The March was entitled 'Indigenous Women: Reforesting Minds for the Healing of the Earth'<sup>51</sup> and was strongly focused on the defence of indigenous lands from current institutional attacks. The last landmark for this stronger resistance was the 'Act for the Earth', led by Caetano Veloso and other famous artists, on 9 March 2022 in Brasília, when more than 100,000 people gathered to protest against five anti-environmental and anti-indigenous rights bills, popularly known as 'the package of destruction'. In April 2022, the 18th edition of the Acampamento Terra Livre (Free Land Camp) mobilized around 8,000 indigenous people from the whole country, and for the first time, foregrounded institutional politics, pre-launching indigenous candidates to run for parliamentary posts in the 2022 election, with the slogan 'retomando o Brasil: demarcar territórios e aldear a política' (retaking Brazil: demarcating territories and reshaping politics with the rural communities). On 12 April, the camp was visited by former president and current candidate for president, Lula da Silva, who promised to demarcate indigenous territories and to respect Convention 169 of the UN International Labour Organization (which upholds the rights of indigenous communities) if elected. The approach of making politics more indigenous holds a turning point for the indigenous movement, which is particularly important for indigenous women, who have only recently occupied this formal public space. Joenia Wapichana was elected

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<sup>50</sup> Inter-American Commission on Human Rights, 'Situation of Human Rights in Brazil' (2021) <http://www.oas.org/en/iachr/reports/pdfs/Brasil2021-en.pdf> accessed 7 April 2022 [66].

<sup>51</sup> APIB, 'II Marcha Nacional das Mulheres Indígenas: "Não Lutar com a Mesma Arma do Inimigo, Não Significa que Estamos Desarmados"' (APIB Oficial, 7 September 2021) (translated by the authors) <https://apiboficial.org/2021/09/07/ii-marcha-nacional-das-mulheres-indigenas-nao-lutar-com-a-mesma-arma-do-inimigo-nao-significa-que-estamos-desarmados> accessed 28 March 2022.

in 2018 and is currently the only indigenous parliamentary; Sonia Guajajara ran as a candidate for vice-president in 2018 and announced her candidacy for Congress in 2022.

As a last resort, the actions and omissions of the government in relation to the environment were taken to the Brazilian Supreme Court through several lawsuits proposed by political parties, with the participation of several environmental organizations and APIB.<sup>52</sup> At the time of writing, the cases had not yet been decided, but one metaphor used by Justice Cármen Lucia is significant in understanding the government's methods related to the green agenda: like 'a colony of termites', the government is silently and invisibly corroding from the inside not only the environmental protection institutions, but also democracy in Brazil.<sup>53</sup> If left unchecked, these destroyers could bring lasting ruin to overall structures (in this case, mechanisms of accountability and control and participation of civil societies organizations), thanks to their skill at causing damage and their reproductive velocity.

An undeniable accomplishment of the indigenous women's movement, faced with a scenario as threatening as that represented by the Bolsonaro government, is that they are not letting the termite colony act in silence. They are protesting by all possible means, expanding their alliances and occupying all institutional and non-institutional, national and international spaces that are within their reach to denounce the government's authoritarianism and the risks it inflicts on the future of the planet.

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<sup>52</sup> The green docket is a set of seven lawsuits that were combined to be decide together. Most of these lawsuits were proposed by political parties. Issues surrounding government's omissions were present in three of them: the suspension of the financial mechanisms to protect the Amazon (ADO 59); the suspension of the Action Plan for the Prevention and Control of Deforestation in the Amazon, considered a milestone in environmental protection (ADPF 760); and the inability of the government to curb deforestation in the Amazon (ADO 54). The other three lawsuits highlight potentially illegal government actions: the exclusion of civil society from the Deliberative Council of the National Environmental Fund (ADPF 651); the misuse of the army to defend deforestation to the detriment of the environmental protection agency, IBAMA (ADPF 735) and the automatic granting of environmental licences (ADI 6808). The last lawsuit, proposed by the Attorney General, questions the lack of acceptable standards of air quality (ADI 6148).

<sup>53</sup> 'Cármen Lúcia Acusa "Cupinização" de Órgãos de Meio Ambiente' (*Correio Braziliense*, 1 April 2022) paras 1 and 2 <https://www.correiobraziliense.com.br/brasil/2022/04/4997483-carmen-lucia-acusa-cupinizacao-de-orgaos-de-meio-ambiente.html> accessed 5 June 2022.

### 3. A COLLECTIVE CLIMATE JUSTICE PROJECT CHALLENGING NEO-EXTRACTIVIST LOGICS

According to APIB's message to world leaders and business and civil society organizations attending COP26:

We [indigenous peoples] stand against false solutions based on technological innovations designed from the same developmental and productivist logic that causes climate change. We criticize solutions that do not recognize indigenous peoples and local communities as central to the defence of forests, the reduction of deforestation and fires, and as essential to ensure that we reach the stated goal of keeping global warming below 1.5 degrees Celsius.<sup>54</sup>

This declaration is a meaningful characterization of indigenous people's activism, which poses deep questions to the current developmental logic of global capitalism.

Taking stock of the richness of indigenous women's movement's repertoires and values, in this section we call attention to lessons that could enrich conversations about climate justice. As a social movement so deep-rooted in a collective approach to land and an integrative relationship between human beings and nature, the movement represents a counterpoint to the current frame of neoliberalism, which has acquired neo-extractivist and authoritarian logics in South American countries, as it has in other parts of the world.

Entangled transnational inequalities<sup>55</sup> are not irrelevant to understanding the escalation of the political conflict involving indigenous peoples in Brazil. As in other countries in Latin America, the lack of competitiveness of regional industrial products meant that the only path to international participation in the neoliberal globalized era was to rely on exporting primary goods. So both neoliberal and left-wing governments in Brazil from the 1990s onwards based economic growth on neo-extractivism.<sup>56</sup> In this chapter, we loosely define neo-extractivism as a development model deeply reliant on the intense exploitation of natural resources, primarily destined to be exported, with little industrial processing.<sup>57</sup>

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<sup>54</sup> APIB, 'Indigenous People are Heading to COP26' (n 38) para 2.

<sup>55</sup> Elizabeth Jelin, Renata Motta and Sérgio Costa, *Global Entangled Inequalities: Conceptual Debates And Evidence From Latin America* (Routledge 2017).

<sup>56</sup> Lucas Savino, 'Landscapes of Contrast: The Neo-Extractivist State and Indigenous Peoples in "Post-Neoliberal" Argentina' (2016) 3 *The Extractive Industries and Society* 404.

<sup>57</sup> For a conceptual explanation of neo-developmental and neo-extractivist policies, see Bruno Milanez and Rodrigo Santos, 'Topsy-Turvy Neo-Developmentalism: An Analysis of the Current Brazilian Model of Development' (2015) 53 *Revista de*

While the Bolsonaro government has exacerbated the use of such logic, previous progressive governments had not managed to depart from this pattern, even if they simultaneously advanced social welfare policies and enhanced democratic participation. Labelled as neo-developmental governments,<sup>58</sup> The Lula and Rousseff governments were able to circumvent some aspects of the neoliberal discourse, while maintaining others, one of which was ‘reprimarization’, that is, a return to the commodification of a country’s economy instead of fostering industries and services, which has deep consequences for the environmental and indigenous agendas.<sup>59</sup>

One of these consequences was the convergence between the agendas of the Executive and agribusiness interest groups in Congress. For more than a decade, these neo-developmental governments made space for bills aiming at relaxing the protection of environmental laws in order to facilitate the advancement of monocultures, soy plantations and cattle at the frontier of Amazonia. This became clearer with the enacting of the new Forest Code in 2012, which permitted the exploitation of natural resources in rural lands.

The neo-developmental profile of Lula’s and Rousseff’s governments was also manifested in the implementation of huge and controversial infrastructure projects across the country, such as the IIRSA (Initiative for the Integration of the Regional Infra-Structure of South America) in the Amazon, the transposition of the São Francisco river, in the north-east, and the discovery and exploration of oil in the pre-salt layer off the south and south-east Brazilian coast, more than 7,000 metres below sea level. All these projects were implemented on the basis of the claim that they were necessary for the strategic development of the country, despite their inherent environmental risks. Particularly in the Amazon, the IIRSA project, initially devised in 1998, was resumed and intensified during the years of Lula’s and Rousseff’s Workers’ Party governments. This was publicly justified as a means to foster South American integration, but mainly intended to build infrastructure for commodities exportation to Asia. The building of hydroelectric installations (Santo Antonio, Jirau and Belo Monte) and large roads, as well as mining, oil and gas projects, have had huge impacts on indigenous lands and peoples.

It is worth noting however, that there were tensions and conflicts within the Workers’ Party government regarding how flexible the government should be in dealing with environmental and indigenous issues. In the first years of the

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*Estudios Sociales* 12 <http://journals.openedition.org/revestudsoc/9205> accessed 7 April 2020.

<sup>58</sup> Luiz Carlos Bresser-Pereira, *Em Busca Do Desenvolvimento Perdido* (FGV Editora 2018).

<sup>59</sup> Donald Kingsbury, ‘Latin American Extractivism and (or after) the Left’ (2021) 56(4) *Latin American Research Review* 977.

Lula administration, especially while Marina Silva, an important environmental leader, headed the Ministry of Environment, important regulatory steps were taken to slow down deforestation rates effectively, expand protected lands, and enhance government monitoring and enforcement capacity.<sup>60</sup>

Pre-existing tensions concerning the environmental agenda inside the Worker's Party government were aggravated after the first corruption scandal involving the party, which pushed the government to rebuild its support base in Congress. Since then, the decrease in the pace of demarcation of indigenous lands by the federal government has been inversely related to the rise of the 'ruralist' front in Congress, representing large landowners and agro-industries.<sup>61</sup> A milestone in this process was the resignation of Marina Silva from the Ministry of Environment, in 2008, a few days before the Convention on Biological Diversity at COP9 in Bonn. According to green groups, it was a turning point and a disaster, as she was seen as the main and almost only voice that spoke out for the environment in Lula's administration.<sup>62</sup>

The tensions between the Worker's Party governments and the environmental and indigenous agendas reached its peak in Dilma Rousseff's government (2010–2016), with the visible slowing down of the indigenous lands' demarcation process and the implementation of the Belo Monte hydroelectric project, which had an enormous impact on gender and indigenous issues. The construction of the Belo Monte dam in the Brazilian Amazon was originally conceived during the 1970s, but was advanced and later implemented by the governments of presidents Lula and Rousseff. The Belo Monte project has always attracted protests from indigenous communities and from the international environmental community for the social and environmental harm it still inflicts.<sup>63</sup>

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<sup>60</sup> Daniel Nepstad and others, 'Slowing Amazon Deforestation through Public Policy and Interventions in Beef and Soy Supply Chains' (2014) 344(6188) *Science* 1118.

<sup>61</sup> Manuela Carneiro da Cunha and others. 'Indigenous Peoples Boxed In by Brazil's Political Crisis' (2017) 7 *Journal of Ethnographic Theory* 403.

<sup>62</sup> For the repercussions of Marina's Silva resignation, see 'Brazil's Environmental Minister Resigns after Losing Amazon Fight' (Mongabay, 14 May 2008) <https://news.mongabay.com/2008/05/brazils-environmental-minister-resigns-after-losing-amazon-fight/> accessed 7 April 2022; Alexei Barrionuevo, "'Stagnation' Made Brazil's Environment Chief Resign' (The New York Times, 16 May 2008) <https://www.nytimes.com/2008/05/16/world/americas/16brazil.html> accessed 7 April 2022; Raymond Colitt, 'Amazon Defender Quits Brazil Environment Post' (Reuters, 13 May 2008) <https://www.reuters.com/article/idUSN13420813> accessed 7 April 2022.

<sup>63</sup> For an analysis of the Belo Monte dam issues, see Anthony Hall and Sue Branford, 'Development, Dams and Dilma: The Saga of Belo Monte' (2012) 38(6) *Critical Sociology* 851.



Although conflicts between Rousseff and the environmental movement were acute under her government, Carneiro da Cunha and others show that her impeachment in 2016 made things even worse, because the vice-president who assumed office, Michel Temer, promoted landowners' and mining interests more aggressively. According to them, from this moment, 'the "ruralistas" are celebrating a "new moment" in Brazil. They sense they now have free rein'.<sup>64</sup> Under Temer's term, for example, the National Programme for Land Regularization (Programa Nacional de Regularização Fundiária) was enacted to apply processes to regulate occupied public land near protected areas.

This constant process of deterioration of environmental protection was substantially accelerated under Bolsonaro's government, which has consolidated those interests both in Congress and in the Executive branch. Bolsonaro aims to transform indigenous lands into private property, to be explored economically, which would, ostensibly, contribute to indigenous people's 'integration' into Brazilian society. According to him, the indigenous peoples 'are poor landowners on rich land'.<sup>65</sup> Because of this viewpoint, he advocates handing over land titles to communities so they are able to sell the land, and opening up indigenous lands for large-scale economic activities such as mining and agribusiness. Pursuing those stated goals, the speed with which anti-environmental and anti-indigenous rights measures are advancing through administrative and malicious routes is unprecedented: deforested areas more than doubled under Bolsonaro's term, compared with Rousseff's term,<sup>66</sup> and indigenous peoples face serious risks to their existence.

So, on the one hand, Bolsonaro government has consolidated a union of convenience between groups of interests who, once in power, have captured the state for private interests. These political factions include the 'Bancada Ruralista' (landowners and agrobusiness caucus), the 'Bancada Evangélica' (neopentecostal religious caucus) and the 'Bancada da Bala' (gun rights caucus), among others. These groups form a conservative alliance in Parliament, cutting across several right-wing parties and imparting political sustainability to the government. In turn, they have allied with a government willing to do anything, including the use of anti-democratic methods, to

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<sup>64</sup> Manuela Carneiro da Cunha and others, 'Indigenous Peoples Boxed In' (n 61).

<sup>65</sup> Cristiane Agostine, 'Bolsonaro Diz que Índios "são Latifundiários Pobres em Cima de Terras Ricas"' (Valor, 10 October 2019) title (translated by the authors) <https://valor.globo.com/politica/noticia/2019/10/10/bolsonaro-diz-que-indios-sao-latifundiarios-pobres-em-cima-de-terras-ricas.ghtml> accessed 7 April 2022.

<sup>66</sup> Vitor Hugo Brandalise, 'O Que as Queimadas na Amazônia têm a ver com a Economia e Por Que as Eras Dilma e Bolsonaro Fogem à Regra' (BBC News Brasil, 14 September 2019). <https://www.bbc.com/portuguese/brasil-49683787> accessed 8 April 2021.

advance their interests, represented by the acceleration of the destruction of forests and biomes and the grabbing of indigenous lands to develop economic activities. On the other hand, if we look more closely at this process, we see that the neo-extractivist development model adopted since redemocratization explains a long-term disagreement and an older deterioration of the relationship between indigenous peoples and the federal state, which has structural roots.

Indigenous people's struggles express a deep disagreement with the neoliberal neo-developmental option, through exposing its limitations and contradictions, and ultimately, these struggles contest our current reliance on natural resources to promote unmitigated growth. Going even deeper, as solutions to the climate change through private property arrangements such as commodification and carbon trade are limited and ambivalent,<sup>67</sup> indigenous peoples views and values, advanced by the indigenous women's movement, present an alternative path for future imaginations through questioning private property and market-based relations with the land.

Indigenous peoples claim that their territory is vital for the physical and cultural reproduction of their societies. The plurality of indigenous peoples' cosmovision expresses itself through practices, beliefs and traditional knowledge, passed orally through generations. In Brazil, the variety of cosmovisions integrating all these dualities in a holistic approach have been well represented in indigenous literature – a field that has been increasingly occupied by indigenous women<sup>68</sup> – and have been vocalized in the public sphere by indigenous leaders, among whom indigenous women have demonstrated a salient agency. From those contributions, it is possible to state that indigenous peoples in Brazil envisage society through a far more open frame, with no clear borders between people alive and dead, people and animals, people and forest. The land is mother Earth that feeds and protects people, not an outside object to be dominated or exploited. As Sonia Guajajara's states:

we, indigenous women, have been saying that humanity must treat and recognize the Earth as a mother ... Understanding the Earth as mother, everyone will reconnect

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<sup>67</sup> For a critical overview of the market-based mechanisms established under the Kyoto Protocol, see Benjamin Sovacool, 'Four Problems with Global Carbon Markets: A Critical Review' (2011) 22(6) *Energy & Environment* 681.

<sup>68</sup> For a list of women indigenous literature in Brazil, see 'Leia Mulheres Indígenas: 25 Escritoras para Você Conhecer' (Visibilidade Indígena, 6 May 2020) <https://www.visibilidadeindigena.com/post/leia-mulheres-ind%C3%ADgenas-25-escritoras-para-voc%C3%AA-conhecer> accessed 7 April 2022. See also Maria Clara Multini Belchior and Célia Regina Rossi, 'El Retorno de las Mujeres Cosmológicas y Originarias: El Protagonismo de las Mujeres Indígenas en los Centros de Poder Políticos y Sociales en Brasil y en el Mundo' (2021) 8(16) *Revista de Estudios Brasileños* 101.

and respect. We cannot go back to a place where we stopped before the pandemic. We need a new moment that requires this reconnection to mother Earth in order to assure life in our planet.<sup>69</sup>

While using ‘mother’ as a metaphor for planet earth, shared by many indigenous peoples from different countries using different names (Pachamama for the Andeans, Mother Earth for the Amazonians)<sup>70</sup> is aligned with framings from cultural feminisms, our focus here is the collective epistemology advanced from this mindset. For the Guarani-Kaiowá peoples, for instance, the word tekoha does not merely mean a territory and a place that provides a subsistence, it signifies people’s way of living in a certain land.<sup>71</sup> So, tekoha is a symbiotic relation between the specific ethnic land and the cultural way of life that permits the Guarani-Kaiowá people to be who they are. The connection to the tekoha is a condition for the reproduction of life itself. The people will no longer exist if the forest is not standing. As a consequence, indigenous peoples act as forest guardians. The importance of the collective territory to indigenous peoples’ cosmovisions, especially for indigenous women, and the threat they have been experiencing explain its centrality in indigenous mobilization for rights.

The call for acceptance of indigenous rights as collective rights has been a longstanding demand of the movement, which sees the individualistic regime of private property and individual rights as inadequate and inappropriate. Indigenous peoples claim rights collectively by virtue of shared identity, culture and history, a view that is not compatible with the notion of the indi-

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<sup>69</sup> Leda Antunes, ‘Sonia Guajajara: “Não dá para Falar de Direitos Indígenas sem Falar de Direitos Ambientais”’ (O Globo, 5 September 2020) para 27 (translated by the authors) <https://oglobo.globo.com/celina/sonia-guajajara-nao-da-para-falar-de-direitos-indigenas-sem-falar-de-direitos-ambientais-1-24612755> accessed 7 April 2022.

<sup>70</sup> In the call for the ‘The Sacredness of Existence and the Healing of the Earth’ event in 2020, the voice of the indigenous women underlined this explicitly:

For us, indigenous women, we are also the land, because the land is made inside us. Through the strength of the song, we connect in every corner, with the enchanting of our Ancestry. The land is a sister, a daughter, an aunt, a mother, a grandmother, a womb, food and healing for the world. How can we shut up in the face of an attack? In the face of a genocide, when the earth screams even if we are silent? Because the land has many children and a mother cries when she sees it, when she feels that the mother who gave birth to life, is today threatened.

But there is still a chance to change that, because we are the healing of the Earth! (APIB, ‘Mulheres indígenas’ (n 32) paras 3, 4, translated by the authors).

<sup>71</sup> Juliana Grasiéli Bueno Mota, ‘Os Guarani e Kaiowá e suas Lutas Pelo Tekoha: Os Acampamentos de Retomadas e a Conquista do Teko Porã (Bem Viver)’ [2017] *Revista Nera*.

vidual as the ultimate rights bearer.<sup>72</sup> It is remarkable that this idea has been embraced both by the Brazilian Constitution and by international spaces and norms. As we mentioned, the 1988 Constitution declares that demarcated lands are public: they belong to the Federal Union and are intended for the 'permanent possession' and 'exclusive usufruct' of indigenous people, and cannot be sold.<sup>73</sup> Moreover, the right to a collective land as inherent in the implementation of indigenous rights is included in the grammar of human rights insofar it is recognized by both the United Nations Declaration of the Rights of the Indigenous Peoples, 2007, and the American Declaration of the Rights of the Indigenous Peoples, 2016.

However, while the acknowledgement of the collective rights of indigenous peoples is indispensable to their existence as distinct peoples,<sup>74</sup> many states see the indigenous right to self-determination as a challenge to national political structures, and as 'constitut[ing] a serious threat to the stability and sovereignty of states'.<sup>75</sup> This view is held more strongly by right-wing populists, who usually share a strong anti-cosmopolitan view, from which Bolsonaro does not depart. Bolsonaro's view of indigenous people is in blatant opposition both to the Constitution and to the declarations of the UN and Organization of American States, assumptions of indigenous women and men as autonomous peoples who have collective rights. The ultimate clash we have here is between a radical neo-extractivist destructive project, inserted into the alliance connecting neoliberalism and authoritarianism, and a collective solution to the climate crisis, promoting a stronger connection between local and global. That there has been no solution to the climate problem since the beginning of the United Nations Framework Convention on Climate Change leaves no doubt that, if positive change is to be achieved, victory must lie with the indigenous peoples.

## CONCLUSION

Climate change alone is considered a factor that amplifies inequalities around the world. It separates developed and less-developed nations, the rich and the

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<sup>72</sup> Isabelle Schulte-Tenckhoff, 'Treaties, Peoplehood and Self-Determination: Understanding the Language of Indigenous Rights' in Elvira Pulitano (ed), *Indigenous Rights in the Age of UN Declaration* (Cambridge University Press 2012) 72.

<sup>73</sup> See Constitution of the Federative Republic of Brazil 1988, Article 231 (translated by the authors).

<sup>74</sup> United Nations, 'Declaration on the Rights of the Indigenous Peoples' A/RES/61/295 (13 September 2007) preamble.

<sup>75</sup> John Henriksen, 'The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process' in Claire Charters and Rodolph Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Right of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009) 81.

poor, men and women and other vulnerable minorities, such as indigenous communities, who are highly dependent on natural resources. The emergence of the Brazilian indigenous women's movement as an important voice in the global debate about climate change is a call for inclusiveness in the climate justice field, despite the constant challenges authoritarian governments pose to the mechanisms of global governance.

This chapter focused on the emergence and consolidation of indigenous women's mobilization fostered by opportunities created by the Brazilian transition to democracy, increased access to international fora, and the internationalization of the movement. Indigenous women activists have developed strong ties and alliances nationally and internationally, and have occupied important positions in the international arena. Being key guardians of the forest, they were already mobilized and prepared to take strategic roles both in the resistance to a right-wing authoritarian government advancing through the environment and indigenous lands, and in the local-global field of climate contention.

The chapter also analysed Bolsonaro's government in Brazil, focusing on his anti-environmental and anti-indigenous rights policies, the main agendas influencing the Brazilian position on climate justice. We have shown how his rhetoric and autocratic measures have rolled back rights and developments that were fought for over decades. Indigenous women are at the political intersection of these agendas, being simultaneously deeply affected and central political actors.

The movement has been put under extreme pressure by government policies and the informal practices of the President. At the same time, the movement was well prepared and organized to resist these, and to occupy national and international spaces. The chapter describes how Brazil is currently Janus-faced. This is expressed, on the one hand, by the consolidation of private interests in power, which, through a combination of formal and informal strategies, are aggressively advancing deforestation and the grabbing of indigenous land. On the other hand, the chapter calls attention to the important agency demonstrated by indigenous women in denouncing the exacerbation of attacks made by the government against the protection of the Amazon and indigenous people's rights. Despite being extremely burdened by deforestation and the deepening vulnerability of their groups, and dealing with a situation in which mining and agribusiness, backed by the government, advances towards indigenous lands, the indigenous women's movement represents an important counterpoint not only in Brazilian politics, but in global climate contention. If 'climate change is not "a problem" waiting for "a solution" [but rather] an environmental, cultural and political phenomenon which is re-shaping the way we think about

ourselves, our societies and humanity's place on Earth',<sup>76</sup> then the indigenous collective worldview can inspire the visualization of a collective future.

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<sup>76</sup> Mike Hulme, *Why We Disagree about Climate Change: Understanding Controversy, Inaction and Opportunity* (Cambridge University Press 2009) abstract.

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