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One-dimensional law: a critique of the human right to a clean, healthy and sustainable environment

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ABSTRACT

This article argues that the human right to a clean, healthy and sustainable environment preserves the one-dimensional nature of industrial society, where capitalism serves as both the backdrop and the ultimate goal, as critiqued in Marcuse's *One-Dimensional Man*. Marcuse's work dissects late industrial society, identifying two forces that sustain capitalism: 'positivism', the reduction of thought to observable phenomena while ignoring the systemic forces at play; and 'containment', the system's capacity to absorb external challenges by reducing them to the terms of its own logic. The article contends that this new right is one-dimensional, that is, coextensive with the status quo, for two reasons. First, it embodies positivism by focusing on environmental degradation as an isolated issue, diverting attention from its structural causes. Second, it employs a containment strategy through the unnecessary inclusion of 'sustainable' as a legal qualifier, which acts as a Trojan horse embedding capitalism as the system to uphold. Therefore, the right to a clean, healthy and sustainable environment is incapable of yielding a reality different from the one that existed before its adoption.

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[T]oday we should not sacrifice eternity to alleviate our misery in the present, we should not bequeath to our descendants an accumulation of miseries that will eventually become an indestructible evil.¹

Introduction

In the 1960s Herbert Marcuse (1898–1979) was reported to be the most discussed living philosopher. His most influential work, *One-Dimensional Man*, published in 1964, became the 'defining treatise of the late 1960s' (Aronowitz, 2015, pp. 1–19, 11). This work is a riveting critique of capitalism that highlights its adverse effects on individuals and nature, and offers a thought-provoking account of how its

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organisational system manages to thrive by foreclosing society's ability to transcend its established parameters.

However, the relevance of *One-Dimensional Man* and Marcuse decayed with time. This is in line with Marcuse's own predictions. He foretold that advanced industrialism produced a society that, due to its level of unparalleled wealth, would lose the capacity for internal critique (Marcuse, 2002, xxxix).

Unlike some of his Frankfurt School colleagues, such as Theodor Adorno or Jürgen Habermas, Marcuse has gone largely unnoticed in legal commentary.² This article reclaims the value of his work in critical *legal* scholarship. *One-Dimensional Man* provides a theoretical framework that enables '[n]aming the things that are absent' to 'break the spell of the things that are' (Marcuse, 2002, 71). In legal commentary, this entails looking at existing laws and policies to detect the things they cannot achieve.

With that spirit, this article uses the model of analysis developed in *One-Dimensional Man* to probe a key human rights response to climate change: the recognition of a right to a clean, healthy and sustainable environment.

In July 2022, the UN General Assembly passed resolution 76/300 recognising the right to a clean, healthy and sustainable environment (UN General Assembly Resolution).³ Albeit rights to the environment already existed at the regional and domestic levels, the General Assembly Resolution made it acquire a larger significance: 161 states voted in favour, there were eight abstentions, and no vote against. Moreover, it included 'sustainability' as a legal ingredient of the right which was not standard in international and domestic formulations, as demonstrated later. The UN Secretary-General welcomed the recognition of the right to a clean, healthy and sustainable environment as a 'historic decision' and a 'landmark development' that demonstrates how Member States 'can come together in the collective fight against the triple planetary crisis of climate change, biodiversity loss and pollution'.⁴ This article is written from the opposite side of the spectrum of enthusiasm: such level of consensus should instead be seen as a reason for suspicion and caution as to how much this right can achieve.

Interrogating the boundaries of the human right to a clean, healthy and sustainable environment through the lens of *One-Dimensional Man* allows having an early diagnosis of its shortcomings. This undertaking is crucial because the formulation of this right, which currently inhabits the world of soft-law, may assume binding forms in the near future. Moreover, this right was recognised in, and for the context of, the Anthropocene, where 'the dominant risk to our survival is ourselves'⁵ and a resolution must be found within a deadline (Eckersley, 2021, pp. 245–265, p. 261). Human rights are one of the powerful catalysers of global change. The very inception of this field is motivated by the conjunctural crisis of the aftermath of World War II. It is hard to imagine how the world would be without the 1948 Universal Declaration of the Human Rights and the movement it generated because, for all its faults, human rights have influenced international and domestic standards, and our own conception of fairness. The way in which human rights law deals with climate change will shape the direction taken at this fork between 'historical alternatives'.⁶

However, human rights are not a panacea nor a neutral structure. Many have warned against their transformative capacity in light of their Western, neoliberal and capitalist historical origin (Kennedy, 2002, pp. 101–125, at 115–16). TWAIL scholarship, for example, has been instrumental in disentangling the rapport between international law

norms and power imbalances in the North–South divide.⁷ Critics also focus on human rights as a structure that maintains coloniality.⁸ Adopting also a critical stance, this analysis uses the framework of *One-Dimensional Man*, complemented by scholarship from philosophy, law, sociology, international law cases and contemporary events, to expose why the right to a clean, healthy and sustainable environment is subservient to the hegemonical neo-liberal system, and cannot give rise to a reality and a direction qualitatively different to the one that existed before its adoption.

This article contributes to the literature in three ways. First, it adds to the valuable corpus of legal commentary that analyses the greening of human rights law from a positive perspective⁹ by offering a critical legal theory reading to that trend. Second, by the same token, it adds to the critical legal scholarship concerned with the protection of nature¹⁰ by providing a concrete examination of the newly added right to a clean, healthy and sustainable environment. Lastly, Douglas Kellner, the scholar who has studied Marcuse's life and work most extensively, has recently declared -along with Rainer Winter- that Marcuse's theories 'should not be condemned to the dustbin of history' (Kellner and Winter, 2021, 79–85). In particular, they recommend taking a closer look at Marcuse's critique of technological rationality in 'light of the climate catastrophes that are looming over us and threatening' (Ibid., 81). This article rediscovers Marcuse and the relevance of his theories for legal scholars grappling with the Anthropocene because, albeit his work has recently been used in, for example, philosophy, sociology and ecology,¹¹ it is yet to take hold in legal commentary.

The structure of this article is as follows: I present the thesis of *One-Dimensional Man*, connecting its tenets to contemporary events to demonstrate that it still holds explanatory power. This gives way to presenting the role of two underlying forces that ensure the tenure of industrialised society: positivism, the dominant methodology that focuses exclusively on studying what can be observed; and containment, the system's ability to suppress external challenges. Then, I turn to the right to a healthy, clean, and sustainable environment. Therein, I first argue how this right is an expression of positivism because its premise and formulation reproduces, rather than challenges, the current state affairs. Containment is present in the notion of 'sustainability', a qualifier within the wording of the human right that acts as a Trojan horse because its inclusion ensures that the goals of capitalism always remain part of the equation. Overall, this article claims that, while human rights were born as instruments of opposition, what the right to a healthy, clean and sustainable environment proposes is coextensive with the *status quo*.

One-Dimensional Man

One-Dimensional Man is a pure expression of critical theory where Marcuse put forward a bleak description of advanced industrial society. The book confronts the reader -past and present- with the disjunctive between what society 'is', with what it 'ought' to be (Marcuse, 2002, 100).

Marcuse characterises capitalism as a new phase in civilization (Kellner, Introduction to Marcuse, 2002, xii). that has supplanted previous modes of organisation and excluded alternative ways of living. He describes capitalism as an administrative apparatus that is entirely structured to achieve and perpetuate its pre-established goals of production, consumption, and accumulation of wealth (Ibid., xxv). Capitalism, however, is just one

organisational model that prevailed as a choice over other historical options. Yet, this system has been successful in painting a deceptive reality that conceals the factors it is made of as if they were unavoidable facts. In other words: capitalism portrays its purposes as objective causes. This is despite the fact that this Western model has remarkable and visible contradictions: it attains production through destruction, accumulation through deprivation and, to defend its universe, reifies everything it touches (Marcuse, 2002, xl, 20). In fact, ‘man and nature become fungible objects of [its] organization’ (Ibid.).

Even though *One-Dimensional Man* was published in the 1960s, its observations remain current today. For example, a World Bank report called ‘The Changing Wealth of Nations 2021: Managing Assets for the Future’ (World Bank, 2021, emphasis added), refers to the human and the natural as types of ‘capital’ and uses them as measuring units for wealth estimations (Ibid., 46), that is, it reifies both persons and nature. The report reveals that inequality is growing and that poor countries remain poor, even though they are depleting their natural resources in an attempt to obtain short-term gains (Ibid., 4).¹² Wealth is not distributed but concentrated. The 2022 World Inequality report speaks of an ‘extreme concentration of the economic power in the hands of a very small minority of the super-rich’ (Chancel et al., 2021, p. 3). This inequality has a climate equivalence: between 1990–2019 ‘the bottom 50% of the world population has been responsible for only 16% of all emissions growth, whereas the top 1% has been responsible for 23% of the total’ (Chancel, 2022, pp. 931–938, 931). What’s more, the majority of emissions from the top 1% ‘comes from their investments rather than from their consumption’ (Ibid.). As such, the economic ambition of a few, bears a disproportionate effect on the planet and on 99% of humanity.

For Marcuse, another contradiction is that Western society, while premised on individual freedom, is ‘still organized in such a way that procuring the necessities of life constitutes the full-time and life-long occupation of specific social classes which are *therefore* unfree’ (Marcuse, 2002, 132, emphasis in the original). He admonished, ‘we live and die rationally and productively’ (Ibid., 149) accepting that progress comes at the cost of destruction, and toil is the price for the instant gratification that we relentlessly seek.

Yet, the glaring contradictions, the resulting injustices, and the overall irrationality of the whole do not provide enough reasons to initiate a revolution demanding change. This is because these faults are daily ‘absolved by [the] efficacy and productiveness’ (Ibid., 88) with which capitalism delivers its promises. Extractivism, exploitation and proliferation of waste are instrumental in yielding unprecedented levels of comfort and possession of goods (Ibid., 4, 53, 88). As Kellner puts it, Marcuse described how capitalism had created an unparalleled affluence of consumer society characterised by ‘stifling conformity’ (Kellner, Introduction to Marcuse, 2002, xi, xxv).

Marcuse did not offer a theory of advanced industrial society in which individuals had become alienated from the system. He did not perceive that society felt disconnected or withdrawn from this mode of living (Marcuse, 2002, 13). Far from it, a key idea in Marcuse’s theory is that individuals have undergone a mimetic process with the system whereby they identify their own needs with those of capitalism:

The people recognize themselves in their commodities; they find their soul in their automobile, hi-fi set, split-level home, kitchen equipment. The very mechanism which ties the

individual to his society has changed, and social control is anchored in the new needs which it has produced (Ibid., 11).¹³

The example of the hi-fi set can be updated today with the smartphone, but the pattern of behaviour remains the same and equally paradoxical: individuals search their uniqueness in commodities that are mass produced. With their free time, individuals consume the type of leisure that advertisements sell as desirable (e.g. luxurious vacation on a remote island and under a palm tree). What transpires is a complete alignment between what the system offers and what individuals think they need. A ‘surrender of thought’ (Marcuse, 2002, xliii) takes place where the collective political requirements seamlessly transform into individual desires and aspirations. This mass hypnosis justifies ‘even the most destructive and oppressive features of the enterprise’ (Ibid., 149). Consequently, any potential conflict between public and private needs dissipates, creating a one-dimensional existence (Ibid., xlvi, 32).

This colonisation of the mind is reinforced by culture, media, politics and science (Ibid., 14, 16, 21–22). Marcuse pointed out that culture was undergoing a process of ‘desublimation’, that is, a flattening out of the habitual opposition that culture maintained with social reality (Ibid., 59–60). In the words of Mark Horkheimer and Theodor Adorno, ‘[c]ulture today is infecting everything with sameness. Film, radio, and magazines form a system.’ (Horkheimer & Adorno, 2002, p. 94) For example, Marcuse noted how art and literature occupied their content with extolling the virtues of Western society and demonising communism, serving ‘as instruments of social cohesion’ (Ibid., 60), instead of providing a space for contestation. He also critiqued science, social sciences, and the humanities for being overly empiricist. Empiricism, as a method, is descriptive in nature and thus ‘coextensive with the established universe of discourse and behavior’ (Ibid., 175).¹⁴ These realms of meaning, from music to philosophy, have lost their capacity of immanent critique and focus instead on producing output that is immediately practical (Ibid., 60). In short, they have also become one-dimensional.

In *One-Dimensional Man*, Marcuse briefly touched upon the relationship between urban spaces and late industrial society (Ibid., 194). Guy Debord, a leading figure of the situationist movement, further delved into this idea suggesting that capitalism appropriates both the natural and human environment, transforming them into its own staged setting (Debord, 1994, paras. 18, 169, 174). Cities, highways, colossal shopping malls with vast parking lots, diminishing living spaces, the car, the commute, and so forth, are purposeful designs to maximise work, production and consumption (Horkheimer & Adorno, 2002, pp. 94–95). The outcome is that ‘the world tends to become the stuff of total administration’ (Marcuse, 2002, 172), a ‘rational universe which, by mere weight and capabilities of its apparatus, blocks all escape’ (Ibid., 75) and, in light of its irresistible achievements, creates a ‘society without opposition’ (Ibid., xil).

In Marcuse’s theory, there are two factors that play a fundamental role in maintaining the *status quo*: positivism and containment. Positivism, the dominant methodology in most fields of knowledge, is concerned with the study of observable and measurable facts. Containment refers to the phenomenon whereby the system closes itself to ideas that transcend its boundaries by either banishing them from the realm of discussion, or by reducing them to the terms of its own universe. These two forces act as two subsequent levels of safeguard: positivism ensures that most of us think within the box; containment makes the box inter-vene and display all its forces to herd back those that try to go beyond its folds.

The role of positivism

Positivism derives from empiricism and purports that true and genuine knowledge resides in testing and analysing positive findings, that is, observable facts. Positivism as a method was born in a quest to dismantle medieval forms of governance, and thus rejects metaphysical or theological explanations of the world (Park et al., 2020, pp. 690–694, 690). It aims to produce coherent and systematic accounts of the subjects it analyses. It does so by generating ‘explanatory associations or causal relationships that ultimately lead to prediction and control of the phenomena in question’ (Ibid.). Positivism relies on the ‘scientific method’ of observation, prediction, hypothesis, test, and verification.

Auguste Comte, its key proponent, wrote that the qualities that distinguished positivism from forms of thought belonging to antiquity were ‘reality’, ‘usefulness’, ‘certainty’, and ‘precision’ (Comte, 1880, p. 41). The identity of positivism is therefore structured around the following precepts: to only look at that which can be observed (i.e. reality); to focus only on results that are of application in the known frame of reality (i.e. usefulness); and to produce outputs that, within these premises, are immediately testable as being true (i.e. certainty and precision). By elevating empirical data to the only source from which knowledge can be derived, the confirmation of hypotheses leads to ‘discovering [...] evidence-based truth’ (Ibid., 691). As a result, positivism prescribes its findings to be objective, the embodiment of reason (Marcuse, 1955, pp. 253–255). The indemonstrable, does not exist.

Positivism provoked a paradigm shift that was instrumental in reorganising society away from the feudal model. Comte observed in the mid-nineteenth century that positivism was increasing its influence over theological and metaphysical principles to an extent that ‘it has become evident that it is destined to supersede them altogether’.¹⁵ He was right, around two-hundred years later, positivism continues to dominate science, social sciences, and the humanities, law included.¹⁶

Marcuse critiqued positivism as the methodology that tries to systematize our knowledge of the whole, but pre-limits what the whole can be. It creates a ‘self-sufficient world of its own’ (Marcuse, 2002, 187) where the theory describes the facts, and the facts prove the theory. In this never-ending cycle of self-corroboration, positivist thinking ‘gives its blessing to the forces which *make* this universe’ (Ibid., 179) while stigmatising ‘non-positive notions as mere speculation, dreams or fantasies’ (Ibid., 177).

In positivist science, nature ‘appears as a calculable manifestation of (scientific) rationality’ (Ibid., 172). It is objectified, divided into functional units, measured and analysed within the framework of the specific purposes it is intended to fulfil in the context of capitalism and technological reality. Laws that regulate climate change and the environment are no strangers to positivist precepts (e.g. procedural guarantees that demand environmental impact assessments). These laws aim to control nature through measurement and predictions so that it continues providing a milieu for the realisation of the liberal economic model. For example, the 2015 Paris Agreement wants to hold ‘the increase in the global average temperature to well below 2°C above pre-industrial levels’ and pursue ‘efforts to limit the temperature increase to 1.5°C above pre-industrial levels’.¹⁷ This reproduces the mindset of man’s mastery over nature by assuming science can accurately identify the sweet spot between relentless exploitation and Armageddon.

As a reflection of positivist thinking, the Paris Agreement does not challenge the forces that have made this universe, that is, the premises that have brought about the current crisis. It does not call for a shift in the underlying modes of living and production. Instead, it establishes ‘the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change’.¹⁸ The calls for adaptation, mitigation and resilience are actions coextensive with, and not defiant of, the current state of affairs. Furthermore, by establishing this to be the *global* goal, it ensures that States align with the demands of capitalism, precluding escape at an international scale. Parties ‘recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change’¹⁹ by whatever methods possible (e.g. technology transfer, mitigation strategies, discrete reduction of greenhouse emissions)²⁰ except for one that questions the underlying causes. The Paris Agreement’s overarching implied goal is thus to maintain the dominion of capitalism over reality, using science and technical rationality to mitigate its impact over the planet.²¹

The 1992 Convention on Biological Diversity (CBD) provides another example of how positivism treats nature and its elements as external observable data subject to quantification and manipulation. The CBD espoused objectives are ‘the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources’.²² The introduction of the official text and annexes of its Secretariat reveals why States are actually concerned with conserving biodiversity: ‘[t]he Earth’s biological resources are vital to humanity’s economic and social development’.²³ Moreover, article 3 of the CBD declares that States have the sovereign right to exploit their resources, making abundantly clear that nature is a site of exploitation and instrumentalization. The CBD displays a plethora of positivist techniques to achieve its purpose, including, systematic observation, monitoring and categorisation of habitats and species.²⁴ For instance, article 25 established the ‘Subsidiary Body on Scientific, Technical and Technological Advice’ that, *inter alia*, provides scientific assessment on the status of biological diversity, and on the measures adopted for its conservation.

The CBD aims to maintain ecological balance so that the environment continues to yield optimal conditions for the system’s preservation, just as Mother Gothel looks after Rapunzel to ensure her hair is long and shiny. As such, the same scientific rationality that can monitor and raise alarm over the loss of diversity is used to superimpose solutions over the problem,²⁵ lest it confront the issue directly.

The triumph of positive epistemology in ‘modern’ societies has grounded individuals in the frame of a box that portrays current reality as if its boundaries were inevitable. In this one-dimension, men and women only think what is shown to them, because they only focus on facts of the world and not on the influences that are concealed behind (Marcuse, 2002, 100). As rigorous as it might be, and as noble as some of their aims may turn, positivism is intrinsically conformist and uncritical at the metalevel.

The phenomenon of containment

Containment is the second level of safeguard of the system that comes into play when its foundations are defied. The possibility of qualitative change exists in the environment

outside, but the system's capacity to contain such change is perhaps its 'most singular achievement' (Ibid., x). Marcuse expressed this contingency as follows:

ideas, aspirations, and objectives that, by their content, transcend the established universe of discourse and action are either repelled or reduced to the terms of this universe. They are redefined by the rationality of the given system (Ibid., 14).

The capitalist system resides in a model of societal organisation that purports being diverse while absorbing opposing values. Marcuse referred for example to the alignment of the trade union consciousness with ever-more liberal agendas, with the result that the interests of labour are increasingly getting closer to those of the company (Ibid., 41–43). This organisational model has centrifugal tendencies that wash out alternative currents of thought. It does so by superficially adjusting to some of their demands while phagocytosing the core of their content. For instance, nation States, instead of becoming unrestrained versions of free-liberal capitalism, adopt a welfare model by allocating government spending on social security, public works, and foreign aid (Ibid., 42). The integration of opposites by the States and the reduction of alternative discourses to the terms of their universe, is the systems' way of becoming immune to genuine change.

The idea of containment is similar to the theory of autopoiesis. Autopoiesis is a scientific term in biology that refers to the ability of some autonomous microorganisms to self-replicate (Maturana & Varela, 1980, p. v). Niklas Luhmann, a German sociologist from the second half of the twentieth Century, applied this concept to develop his theory on social systems (e.g. Luhmann, 1995). He observed that social systems have autopoietic tendencies because they expand and stabilise through self-referential techniques (Luhmann, 1982, 131–138, 133), repelling outside influences. Systems are built around their function and have boundaries that distinguish them from the rest of the cosmos (Ibid., 132–133). They preserve their integrity by reinforcing the importance of their internal function and toughening those boundaries. To achieve this, external beliefs are either forced into unity with the logic of the system, or perpetually banished to its outer space. Therefore, systems form closed operational universes where meaning is given according to their own language, points of reference and for their own purposes. These autopoietic self-defences allow their core to remain unscathed: no matter how big the challenge is, it can never be existential.

In advanced industrial society, capitalism also forms a closed universe where external interferences only exert influence in accordance with its terms (Urteaga, 2010, pp. 301–317, 304). For example, choosing a repressive petrostate such as the United Arab Emirates to host the UN Climate Change Conference COP28 in 2023 (and then Azerbaijan), and putting the head of an oil and gas company as its president, exemplifies the unapologetic co-opting power of capitalism. During that meeting, the COP28 approved a declaration that, for the first time, refers to fossil fuels by name, and calls for transitioning away from their use by 2050. The fact that it has been known for decades that fossil fuels are the leading contributor of all carbon emissions, but were 'named' only in 2023, the distant timeframe for achieving the COP28 goal (i.e. 2050), and the non-binding nature of this document (i.e. it is a declaration and not a convention), shows the depths of the system's capacity to reduce challenges of lethal proportions to mosquito bites.

The COP28 established a ‘loss and damage fund’ which ‘aims to help compensate vulnerable nations for the impact of climate change’.²⁶ The creation of this fund implies accepting that there are going to be ‘sacrifice zones’.²⁷ In containment parlance, this implies acknowledging that there is an outer challenge that could call into question the voracity of industrialised society, but capitalism treats it as an issue to solve according to its own rules. To be sure, instead of adopting prompt action to avert sacrifice zones, world leadership monetises their damage. Disasters are forecasted, tolerated and paid for because the forces that precipitate climate change are necessary for the system to keep turning. Therefore, in the whirlwind of the capitalist framework, certain States too, have become means to an end.

Amid the controlled protests at COP28, some banners read ‘no climate justice without human rights’.²⁸ While the pursuit of a more just world can be positively influenced by both substantive and procedural human rights, to what extent can the right to a clean, healthy and sustainable environment trigger qualitative change?

The right to a clean, healthy and sustainable environment

The right to a clean, healthy and sustainable environment was adopted by the General Assembly on 28 July 2022. As a General Assembly resolution, this recognition of the right is not binding on States or other actors and instead has become part of the corpus of soft-international-law. As a quasi-legislative global body though, resolutions passed by this organ are authoritative documents that can mainstream its content into the international plane at different levels. For example, they can tilt a judicial decision in favour of a result more in keeping with its spirit, trigger amendments to existing international instruments, or favour the adoption of entire new ones. UNGA Resolutions may also serve as a springboard to draft policies, strategic plans and guidelines by both States and non-State actors.²⁹ Moreover, given the overwhelming consensus behind the UNGA Resolution, it is entirely predictable that it will eventually constitute evidence of a new customary international norm.

The wording of the UNGA Resolution largely resonates that of the Human Rights Council (48/13) adopted on 8 October 2021.³⁰ This resolution was also entitled ‘[t]he human right to a clean, healthy and sustainable environment’, and was the first one to have global reach. The formulation of the right is therefore not an original coinage of the UN General Assembly, but the product of years of background work at the UN. Upon the adoption of the UN General Assembly Resolution, the former Special Rapporteur on human rights and the environment, David R. Boyd (2018-2024), commented that ‘it is our genuine hope that the right to a clean, healthy and sustainable environment will serve as a catalyst for systemic and transformative changes to produce a just and sustainable future in harmony with nature’.³¹

To the contrary, I argue that the right to a clean, healthy and sustainable environment cannot engender systemic changes because it represents an elaborate exercise of positivism and containment that codes the status quo in its formulation. So, while it may achieve some tangible results in the form of, say, new conventions and discrete courtroom victories, these would be of mitigating rather than of transformative nature, as explained below.

The right to a clean, healthy and sustainable environment as a manifestation of positivism

The right to clean, healthy and sustainable environment is a manifestation of positivism for three reasons. First, its justification puts the climate at the centre of the discussion, as if it was the problem to address. Choosing the environment as the observable fact has the effect, as Marcuse would put it, of concealing the factors that are propelling climate change. They are effectively treated as unchangeable facts of this world, rather than a product of history that supplanted previous modes of organisation, just as this one can also be supplanted by a new one. Second, the formulation of the right compartmentalises the environment, reproducing the positivist mindset of dealing with nature as an external object subject to measurements and prediction. Third, the right operates within human rights architecture, ensuring that its enforcement does not challenge the in-built limitations of the system.

(1) 'There is a climate emergency'

The background of the adoption of the right to a clean, healthy and sustainable environment revolves around affirmations that there is a 'climate emergency'³² or a 'planetary crisis'.³³ For example, the UN High Commissioner for Human Rights has referred to the 'triple planetary crisis of climate change, nature loss, and pollution' as 'the greatest threats to human rights of our era'.³⁴ Likewise, the preamble of the UNGA Resolution identifies climate change, biodiversity loss desertification and unsustainable development as some of the most pressing serious threats that are interfering with the enjoyment of human rights. These statements illustrate how the symptoms are confused with the underlying illness, which is conspicuously absent as the driving factor. As Louis J. Kotzé notes, '[t]he more critical issue that the resolution does not recognise is that these ecosystems are in decline precisely because of increasing human pressures that are promoted by capitalist-oriented pro-growth laws, including human rights.' (Kotzé, 2023, pp. 194–198, at 197) The right to a healthy, clean and sustainable environment not only 'stays with the trouble'³⁵ but, echoing the words of *One-Dimensional Man*, it absolves the factors that have provoked environmental decline.

The threats are not the loss of biodiversity or environmental degradation. The threat are the causes that lead to such outcomes. It is as if a fish restaurant was notorious for giving food poisoning to its customers and health authorities attempted to address it by sending IV fluids to those affected. Forget about the fish, let alone an inspection. The customers have a problem and, eventually, they *are* the problem.

It remains inconceivable that the resolutions of the UN General Assembly would instead challenge the dominant, unwavering belief in economic growth, given its profound implication in environmental degradation, alongside fossil fuels and the investments of the world's wealthiest 1%, and actively explore alternative socio-economic models.³⁶ It does not seem this will happen in the foreseeable future. In fact, the UN Pact for the Future, approved by the UNGA in September 2024, expresses in action n. 9 to be 'deeply concerned at the current slow pace of progress in addressing climate change'. Yet, this action point is embedded in a section dedicated to sustainable development and its financing. Moreover, the UN Pact for the Future reiterates the commitment

of the Paris Agreement and insists on the need to operationalise ‘the Fund, for responding to loss and damage.’³⁷

By depicting the climate as the object of the crisis, the right to a healthy, clean and sustainable environment is complicit in concealing the Capitalocene (see e.g. Moore, 2016). In truth, the problems that the environment has are not *its* problems. As Michelle Farrell has eloquently put it, ‘there is no such thing as a climate emergency, the emergency is capitalism’.³⁸

(2) The environment as a compartmentalised concern

Focusing on the environment, as opposed to the factors that are causing its degradation, carries a problematic second implication: the environment is treated as an isolated manageable issue, suggesting that it can be neatly separated from the broader socio-economic forces at play. Marcuse remarked that positivist methods divide nature into functional units, then measures and analyses it to fulfil the purposes of technological society. The formulation of this right reproduces such logic: it strips the environment of its interconnectedness with social, economic, and political systems, reducing it to a calculable resource rather than a living, integral part of a larger whole. It is represented as another phenomenon to put under the microscope for tests and experimentation at a global scale. As Timothy Luke would write in 1995, the environment becomes ‘the site of supervision, where environmentalists see from above [...] environments can be disassembled, recombined, and subjected to the disciplinary designs of expert management’ (Luke, 1995, pp. 57–81, at 65).

The formulation of the right to a healthy, clean and sustainable environment mirrors the ‘modern’ scientific approach of seeking control over nature. The environment is reduced to quantifiable manifestations, and its behaviour subject to mathematical prediction so that it yields three concrete outcomes: to be clean, to be healthy and to be sustainable. Reality is thus split because ‘[w]hat we observe is not nature in itself, but nature exposed to our method of questioning’.³⁹ Trying to ensure that the environment is healthy, clean and sustainable reveals an intention to dominate and instrumentalize, as per the demands of capitalism, rather than to cultivate a rapport of mutual care.

(3) Preserving the human rights enforcement structure

Another way in which the right to a healthy, clean and sustainable environment constitutes a positivist exercise lies in the method chosen to address climate change, namely, adding a human right to the existing list of civil, political, economic, social and cultural rights. This has the positivist implication of, paraphrasing Marcuse, presenting the limits of the human rights framework as if they were unsurmountable. Framing this concern as a human right reproduces the status quo in three ways. Firstly, this right does not attempt to challenge the system and instead hops on a pre-existing reality. This is because there are already several regional instruments that recognise a human right to the environment (e.g. African Charter of Human and Peoples Rights since 1981, the San Salvador Protocol since 1988 and the Aarhus Convention since 1998). What’s more, as the next section shows, the wording of the UNGA Resolution, if anything, potentially dents these regional efforts due to the inclusion of the concept of sustainability.

Secondly, the method of merely adding a right to the list submits to the scheme of human rights as we know it, without questioning who is entitled to rights and how these can be enforced. Declaring that humans have a right to a clean, healthy and sustainable environment automatically denies nature any agency or meaningful existence beyond its utility to humans.⁴⁰ Mountains, air, forests, meadows, marshes, lakes, seas and oceans exist because and for our benefit. The global agreed response from the human rights corner at this time of conjunctural crisis is thus to entrench, rather than to question, the objectification of nature. It is a continuation of the ‘delirious anthropocentrism’⁴¹ that emerged after Rio 1992. Some implications of the subordination of the environment to humanity include ‘pre-rigging’ the outcome of potential conflicts between human and nature interests in favour of the former. In addition, environmental concerns can only be vindicated if they affect humans, that is, if a tree falls in a forest and no one is around to hear it, we may never know if it makes a sound, but it would definitely not give grounds for a human rights lawsuit.

Thirdly, merely adding the right to a clean, healthy and sustainable environment (when binding) would reproduce the existing human rights enforcement deficits. This includes, for example, an inversely proportional relationship between the regions where the impact of climate change is most felt (e.g. Pacific Islands), and those that have stronger enforcement mechanisms (e.g. Continental Europe). Likewise, the single-jurisdiction focus of human rights proceedings is unfit for the transnational nature of environmental harm. Violations of the right to a healthy environment are fundamentally different from the prototype of the classical breach of human rights (e.g. torture, enforced disappearance, right to privacy) where only one State is the culprit, as opposed to the collective involvement in causing environmental decline. Yet, to date, human rights bodies have not made the requirement for exhausting domestic remedies more flexible in a manner that aligns with, and is proportional to, the distinct nature of the origin of violations of this right. Moreover, fragmentation is already starting to arise in relation to the territorial jurisdiction test.

So far, two potentially landmark cases concerning climate change have been stopped at the gates of human rights enforcement. This happened, first, in 2019 with a complaint that 16 children submitted against Argentina, Brazil, France, Germany and Turkey to the UN Committee on the Rights of the Child.⁴² The UN Committee on the Rights of the Child adopted a relaxed jurisdictional test according to which the potential victims of transboundary environmental harm can be considered to be within the jurisdiction of the offending State if some conditions are met.⁴³ This relaxed test for climate change cases was, in turn, inspired by an advisory opinion of the Inter-American Court of Human Rights.⁴⁴ The UN Committee nevertheless declared the complaint inadmissible because the applicants had not tried to exhaust domestic remedies in each one of the five respondent States.⁴⁵

In 2024, the Grand Chamber of the European Court of Human Rights declared a claim filed by six Portuguese children against 33 States inadmissible. The applicants had argued that a special test for territorial jurisdiction was needed considering the special circumstances of climate change. Although the European Court conceded that climate change is a problem of ‘a truly existential nature for humankind, in a way that sets it apart from other cause-and-effect situations’,⁴⁶ judges were ultimately unpersuaded to ‘revolutionize its approach to extraterritoriality’.⁴⁷ The other ground for dismissal was the lack of exhaustion of local remedies, which the applicants had not tried to fulfil because they

deemed that seeking remedies in multiple States for the same issue was unreasonable, and they had little prospects of success.⁴⁸ This decision of inadmissibility was unanimous, which signals that the gates of the European Court of Human Rights are armoured when it comes to climate change cases involving multiple respondent States. This is like having a house on fire but needing to call a different fire department for each room, and only after proving that the home fire extinguisher was not sufficient.

If the UN General Assembly Resolution and the recognition of the right to a clean, healthy and sustainable environment was meant to be a game-changer, it could have at the very least called for action to streamline how these judicial challenges ought to be addressed. This could have, for example, generated focused discussion, momentum for funding, and agendas in civil society and academia to move the signpost a bit further. Yet, the Resolution does not even contain a faint preambular reference to such jurisdictional challenges in cases of transboundary damage.

In short, the right to a healthy, clean and sustainable environment is a manifestation of positivism because it chooses ‘the environment’ as the observable issue to address, while concealing the structural forces that propel its deterioration; it treats nature as an object that can be sliced away from the rest of reality and subject to quantifications so that it yields three concrete optimal results (to be clean, healthy and sustainable); and it makes it reside in the human rights enforcement house, which acts as a straightjacket due to its current inability to respond to the collective and transnational nature of environmental harm.

The right to a clean, healthy and ‘sustainable’ environment as a containment strategy

One could argue that an operational human right to a clean, healthy and sustainable environment, all things considered, is still a welcome development. This would be because framing a value as a human right immediately catapults it to the apex of the legal framework. Cloaking the environment with a human right cape serves, as Dworkin would say, as a trump⁴⁹ that displaces goals of other nature (e.g. commercial, urban). Understood this way, a human right connected to the environment can be a backdoor to make environmental concerns enter the top of the normative hierarchy. Indeed, it is conceded that this right could lead to discrete courtroom victories⁵⁰ and pose a limit to, say, some extractivist activities. This is where containment comes in to make sure the impact of this right is not drastic. Recalling Marcuse, containment refers to the system’s capacity to repel ideas and discussions that jeopardise its existence or, in the alternative, phagocyte them altogether in a way that suits the system’s needs.

The right to the environment has experienced the latter process ever since the concept of ‘sustainability’ became one of its ingredients. As demonstrated below, this was a deliberate inclusion that has a Trojan horse effect because it ensures that the application of the right will align with industrial objectives.

The concept of sustainability and international law

Sustainability is a very charged word and is itself a site of ‘hegemonic struggles’.⁵¹ It is not the exclusive province of Western ideology. There are, for example, Andean Indigenous systems of belief that do not subscribe to the perspective that our current state is

underdeveloped and requires continual enhancement. Additionally, they reject the fundamental assumption that poverty is linked to a scarcity of material goods, or that wealth is synonymous with their abundance (Acosta, 2011, p. 190). Similarly, Klaus Bosselman recounts that long before modern times, ‘the idea of “sustainability” described a physical balance between human settlements and their natural surroundings’ (Bosselman, 2022, pp. 23–44, 24). He himself defends the concept of ‘strong sustainability’ where ecological integrity needs to come before societal or economic concerns (Bosselman, 2023, pp. 115–127, 119–120). Alexander Gillespie concedes that, while the concept may be as old as history itself, since the Enlightenment, the version of ‘development’ that revolves around ‘anthropocentrism, technology and industrialization [...] has been pursued with a global vigour’. (Gillespie, 2001, p. 1) This dominant version of sustainable development presupposes aspiring to some sort of linear progress (Coombe and Jefferson, 2021, 188), where the future is better (although not necessarily greener) because we will have more (see Bist, 2008, 16, 254). This concept took a strong step forward in 1949, when US President Truman identified underdeveloped areas as a global problem, which would be solved if they achieved ‘greater production’ (Gillespie, 2001, p. 1). This idea immediately layered the world in three levels: the developed; the developing; and the underdeveloped with a longer way to go. It consequently implied pointing at the Western model as the holder of the carrot everybody should chase.

The triumph of this understanding of sustainable development is a byproduct of the double tragedy that Bruno Latour described in his book *We Have Never Been Modern* (1993). Shortly after the fall of the Berlin Wall, he wrote:

former socialist societies think they can solve problems by imitating the West; the West thinks it has escaped those problems and believes it has lessons for others even after it leaves the earth and its people to die. The West thinks it is the sole possessor of the clever trick that will allow it to keep on winning indefinitely, whereas it has perhaps already lost everything (9).

The prevailing understanding of sustainable development is therefore ‘a *product of history*’ (Bist, 2008, p. 215) that, since the triumph of the Western neo-liberal system, has also become ‘*an agency that produces history*’ (Ibid.). In the language of *One-Dimensional Man*, this notion of ‘sustainable development’ was just one historical alternative among many others that has nevertheless managed to impose itself as an objective goal. In line with Marcuse’s gloomy predictions, we only want to achieve growth because it is all we know and desire as a society. Consequently, the concept of sustainability has overwhelmingly been perceived as a positive agreeable purpose despite voices of opposition (Loibl, 2004, p. 97).

For example, Alexander Gillespie and Ruth Gordon chide with the failure of sustainable development to interrogate ‘the dominant paradigms of trade and production’ (Gordon, 2015, pp. 50–73, 62). This leads to some sort of collective self-deception (Gillespie, 2001, p. 14) because ‘development on such scale is biophysically impossible’ (Gordon, 2015, pp. 50–73, p. 66). Louis J. Kotzé and Sam Adelman describe the concept as a false promise built on the ‘delusion of infinite natural assets that the capitalist system has at its disposal to expand forever’ while sustainable development is leading to the ‘ever-deepening socio-ecological destruction of a finite planet’ (Kotze and Adelman, 2023, 227–248).⁵² Counterproposals include focusing on degrowth instead, a concept

that is not equal to recession.⁵³ However, these attacks -no matter how frontal or correct- cannot change the hegemonic concept of 'sustainable development' because it exists in a one-dimensional universe that is deaf and immune to external challenges.

The mainstream notion of 'sustainable development [...] assumes a capitalist mode of production' (Fyock, 2022, 42). This notion has been inherited by international law, as it is epistemically dominated by Western frameworks of thought. From its first express formulation in the 1987 report 'Our Common Future' of the World Commission on Environment and Development (the Brundtland Report) (Brundtland Commission, 1987, para. 27), and its subsequent development in the 1992 Rio Declaration, the common approach to sustainable development is likewise tied to economic growth (Ibid., paras 27, 28).⁵⁴ To be sure, in 1997, the ICJ (the 'World' Court) would go on to affirm in the *Gabčíkovo-Nagymaros* case: '[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development',⁵⁵ an interpretation that it then endorsed in the *Pulp Mills* case twice.⁵⁶ So, when 'sustainability' is merged with the right to a healthy and clean environment, it reinforces the utilitarian understanding of nature.⁵⁷ The environment exists as the medium of operations for human and economic expansion. Impact environmental assessments and similar science-based predictions become central in measuring and forecasting how to go about pursuing economic growth while exploiting nature.

The 2030 Sustainable Development Agenda adds a social component to the concept of sustainable development.⁵⁸ International law thus mixes in the same space environmental, economic and social considerations. The UN General Assembly Resolution on the right to a clean, healthy and sustainable environment endorses this understanding of the concept of sustainability. In fact, the preamble refers to the three dimensions of sustainable development which, in alphabetical order, should be economic, environmental and social. Incidentally, in the UN General Assembly Resolution, the environmental dimension is always mentioned last.⁵⁹

Sustainability's incursion into the human right to the environment

Even though the concept of sustainable development has been part of international law for decades, the incursion of 'sustainability' into the discourse of the human right to the environment constitutes a development that is recent and puzzling in equal measure. To be sure, the 1987 Brundtland Report, which otherwise defined the concept of 'sustainable development', proposes a fundamental human right to the environment that does not mention sustainability: '[a]ll human beings have the fundamental right to an environment adequate for their health and well being'.⁶⁰ In 1990, the UN General Assembly adopted a resolution called the 'need to ensure a healthy environment for the well-being of individuals' that repeats expressions such as better and healthier environment, but never speaks about *sustainable* environment.⁶¹ The otherwise unapologetically anthropocentric 1992 Rio Declaration likewise provides that 'human beings are at the centre of concerns for sustainable development' and that 'they are entitled to a healthy and productive life in harmony with nature'.⁶² Nevertheless, it does not say that human beings are entitled to a 'sustainable environment' either.

The expression is also absent from resolutions relevant to the environment from the then Commission of Human Rights⁶³ and from the Human Rights Council⁶⁴ throughout

the 2000s. It seems that the first express reference to ‘sustainable environment’ appears in the Human Rights Council Resolution 16 of 2011. Its preamble reaffirms ‘the Millennium Development Goals, including Goal 7, on ensuring environmental sustainability’.⁶⁵ In 2012, the Human Rights Council declared that ‘certain aspects of human rights obligations relating to the enjoyment of a safe, clean, healthy and *sustainable environment* require further study and clarification’⁶⁶ and appointed ‘an independent expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and *sustainable environment*’.⁶⁷ This appointment eventually led to the establishment of a Special Rapporteur on human rights and the environment. From then on, the expression ‘sustainable’ became embedded into the formation of this new right.

A 2019 report of said Special Rapporteur asserted that more than 150 countries out of the 193 UN Member States ‘legally recognize the right to a safe, clean, healthy and sustainable environment’.⁶⁸ This affirmation is an overstatement, to say the least. This is because there are no references to ‘sustainable environment’ in regional human rights, and it is quite rare to find such expression in domestic constitutions recognising a right to the environment.

The African Charter on Human and Peoples’ Rights (1981) says that ‘all peoples shall have the right to a general satisfactory environment favourable to their development’.⁶⁹ The San Salvador Protocol (1988), a regional agreement within the Inter-American system, recognises everyone’s right ‘to live in a healthy environment’.⁷⁰ The Aarhus Convention (1998), a European instrument, speaks about ‘the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being’.⁷¹ The 2004 Arab Charter confers ‘every person [...] the right to a healthy environment’.⁷² Exceptionally, the Escazú agreement (2018), operative in State parties from Latin American and Caribbean regions, refers to ‘the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development’.⁷³ Yet, even in the Escazú agreement, ‘healthy environment’ and ‘sustainable development’ are presented as two different values, rather than combined as a single goal of ‘sustainable environment’.

The 2019 report of the Special Rapporteur on human rights and the environment lists 110 countries that have recognised some sort of right to the environment in their constitutions.⁷⁴ I surveyed a random but geographically representative sample of 23 of those constitutions which contrarily revealed that only a minority expressly refers to sustainability as an integral part of the right (Greece, Kenya, Uganda and Zimbabwe);⁷⁵ the majority of constitutions do not mention sustainability at all (Azerbaijan, Benin, Cameroon, Fiji, Finland, South Korea, Mexico, Nicaragua, Spain, Togo, Turkmenistan, Ukraine, Vietnam);⁷⁶ followed in number by countries that refer to neighbouring concepts such as ‘ecologically-balanced’ or ‘proper utilization’ of the environment, but not ‘sustainability’ as such (Argentina, Bolivia, Cape Verde, Romania, Thailand, Timor-Leste).⁷⁷

The notion of sustainability was not, by any measure, a necessary legal ingredient of the right to the environment. Regrettably, as discussed below, the inclusion of sustainability is a qualifier to the right that changes everything.

Sustainability as a Trojan horse

Sustainability is linked to economic growth. Economic development is however a value that fits more closely with a political goal, rather than entitlements capable of being held

individually. Economic growth is an objective of its own that may not always, and probably often, pull into the same direction of environmental protection. The reason why sustainability may become a Trojan horse is because economic considerations are not phrased as restrictions to the right to the environment, akin to what the goals of the protection of national security, public order or morals do in relation to freedom of expression.⁷⁸ Not being portrayed as a legitimate aim exception, economic development considerations are not subject to the doctrine of narrow interpretation. Instead, sustainability can act as counterbalancing consideration that reverses the relation that ‘should exist between norm and exception, right and restriction’.⁷⁹

It is as if the right to a clean and healthy environment, by virtue of incorporating the concept of ‘sustainable’, came with its own automatic proportionality test. It is like if a vampire carried a wooden stake kit for his own self-destruction. Every time this right will be applied, it would need to pay due regard to goals that are more closely aligned with industrialised society than with the preservation of the environment. The example below shows how the application of the right can turn into utilitarianism in disguise because actions potentially harming the environment can be justified in the name of general interests.

The news broke out in June 2023 that a Canadian mining company had been given ‘rights to conduct exploratory mining in a 30-square-mile area that overlaps partially with [three forests reserves]’⁸⁰ in Putumayo, a region of the Colombian Amazon. The plans, that have already led to exploratory drilling, have alarmed most of the local and Indigenous communities.⁸¹ In a panel discussion titled ‘Copper Exploitation in the Amazon: Progress or Regression?’⁸² Dr. Andrés Cancimance warned that ‘[m]ining, specifically copper extraction, can cause irreversible environmental damage such as pollution of water sources, deforestation, and loss of biodiversity’.⁸³ The Colombian government, on the other hand, has referred to copper as a mineral of strategic importance ‘due to its high global demand for the production of electric vehicles, solar panels, and wind turbines’.⁸⁴ The country’s president, Gustavo Petro, stated that ‘Colombia can be a Saudi Arabia in clean energy’,⁸⁵ and regards the exploitation of copper as an instrument to secure a stronger position in global geopolitics and the country’s own industrialisation.⁸⁶ As a result, it seems as if the best thing that could ever happen to the Amazon rainforest is to be mined for copper. This is because the expected outcome ticks all three boxes of sustainability: it leads to a greener environment, economic development and new jobs. The Putumayo mine is one of many that exist in the Andean belt that are subject to the same logic.⁸⁷

Furthermore, the right to a clean, healthy and sustainable environment lacks a definition of the ‘environment’ and is not explicit in limiting it to the immediate surroundings of the right-holder. This allows for asymmetrical treatment where, potentially, nature closer to Indigenous and local populations can suffer harm, but areas removed from them (i.e. where electric cars will be purchased, and wind turbines and solar panels installed) will benefit in lieu because the advantages to the latter offset the harm done to the former. The dynamics of capitalism are thereby perpetuated: new products and technology ‘here’ (in the West), will mean destruction and exploitation ‘there’ (everywhere else). Incidentally, the geographical division between the ‘here’ and the ‘there’ mirrors historical colonial boundaries (Isla, 2022), echoing Marcuse’s speech

from 1966 where he reportedly said that the survival of industrialised states depends on the exploitation of the so-called underdeveloped nations.⁸⁸

Conclusion

This article has argued that the recognition of a right to a healthy, clean and sustainable environment has the effect of walking on a treadmill: it gives the illusion of moving forward while it keeps everything in the same place. Marcuse's work provides the lenses and language to deconstruct the hidden bias and intrinsic limitations of this right which, rather than confront, 'stays with the trouble' (Haraway, 2016) of the Anthropocene. *One-Dimensional Man* reveals how capitalism has generated an order where all elements of society, from institutions and politics to the individuals composing it, act in a coordinated manner to achieve the system's goals. Much of this collaboration is unconscious and a product of one-dimensional thinking. One-dimensional thinking is preserved by the influence of positivism and containment. Positivism continues to reign as the leading methodology in pure and social sciences, ensuring that its focus and achievements are limited to the description and measurement of observable facts. The ever-presence of positivism builds four walls around us and represents them as if there was nothing beyond, as some sort of Truman Show display. The containment phenomenon, the system's second-level of safeguard, ensures that ideas and movements existing outside those four walls either do not enter or, if they do, adapt to the enclosed environment.

Marcuse argued in *One-Dimensional Man* that culture, music, literature, and media have lost their capacity to criticise and contest reality. This diagnosis can also be extended to the right to a clean, healthy and sustainable environment. Human rights are meant to be tools for social contestation but, conversely, what this right proposes is coextensive with the state of affairs. This is because the adoption of the right to a clean, healthy and sustainable environment is an exercise in positivism from start to finish. Positivism can be observed in the choice of the issue to address (the environment) which denotes a blindness or refusal to accept that the real problem lies in the factors that have led to climate deterioration. It is also present in the method chosen to address the climate issue, that is, adding another title to the list of human rights. This neither questions nor remedies the aspects of human rights law that undermine the possibility of significant changes: nature continues to appear as an object for human domination, and the procedural limitations inhibiting global and concerted action are ignored.

The deliberate and unnecessary choice to introduce the term 'sustainable' ensures that the changes this new right may achieve do not alter the foundations upon which the system is built. The relationship between the environment and economic growth is antagonistic. Sustainability therefore acts as an undercover agent that guarantees environmental concerns can never be dissociated from economic growth.

The criticism that has always been raised against critical theory is the lack of action and design of alternatives. Marcuse has indeed been described as 'a stimulant to fantasy and action, not the architect of a system' (Kellner, 1984, 1). However, alternative epistemologies do exist, whether Indigenous,⁸⁹ currents advocating for degrowth,⁹⁰ etc. The problem is that they exist in the outer environment of oblivion. When they try to break into the

existing framework, as Marcuse warned, they are portrayed as fantasy or utopia. They are forced to reside in the realm of epistemic neglect while, in reality, they may be all we have left.

Notes

1. Edmund Husserl, (1910–1911, p. 337), quoted in Herbert Marcuse (1974, p. 33) (own translation).
2. Exceptions can be found in Caren Irr (2002); Saru Matambanadzo (2009); Fernando Trazegnies Granda (1969, pp. 42–60); referring to Marcuse in some parts of their papers, see Deborah Whitehall (2019, pp. 1337–1407); and Martti Koskenniemi (2005, pp. 329–341).
3. UN General Assembly Resolution, ‘The human right to a clean, healthy and sustainable environment’ (28 July 2022) A/RES/76/300.
4. UN News, ‘UN General Assembly declares access to clean and healthy environment a universal human right’, July 28, 2022, <https://news.un.org/en/story/2022/07/1123482>.
5. UN Development Programme, Human Development Report 2020: The next frontier. Human development in the Anthropocene (New York, 2020), p. iii.
6. The notion of historical alternatives is a recurring theme in Marcuse’s *One-Dimensional Man*, and he summarised it as follows: ‘the way in which a society organizes the life of its members involves an initial choice between historical alternatives [...] The choice itself results from the play of the dominant interests’, Marcuse, *One-Dimensional Man* (1964 edition) 14.
7. See e.g. Antony Anghie (2006, pp. 739–753); Antony Anghie (2023, pp. 7–112, at pp. 82–111); Makau Mutua (2016, pp. 165–183).
8. See e.g., Nelson Maldonado-Torres (2017, pp. 117–136); Elena Blanco and Anna Grear (2019, 86–117); Colin Samson (2020).
9. E.g. Stephen J. Turner et al. (2019); Mario G. Aguilera (2023); Mónica Feria-Tinta (2022, pp. 172–194); Jorge Calderón Gamboa and Julie Diane Recinos, (2022, pp. 86–121); Armando Rocha and Rômulo Sampaio (2023, 1–11).
10. E.g. Emily Jones (2021, pp. 76–102); Jérémie Gilbert (2023, 48–68); Malavika Rao (2022, pp. 63–81), and Dina Lupin (2023).
11. See also, e.g., Herbert Marcuse and Douglas Kellner (2005).
12. See e.g. Charles Reitz (2000); Miles Malcolm (2011); Malcolm Miles (2016, pp. 1–17); Ryan Gunderson, Diana Stuart and Brian Petersen (2019, 696–715); Terry Maley (2021, pp. 107–129); Nick Stevenson (2021, pp. 211–226); Charles Reitz (2021, pp. 87–106); Oliver Marchart (2021, pp. 131–142); Charles Reitz (2022); James Miller (2022, pp. 397–408).
13. see also World Bank, ‘Global Wealth Has Grown, But at the Expense of Future Prosperity: World Bank’, *Press Release* (27 October 2021).
14. This idea was already present in Marcuse’s earlier work, see Marcuse, *Negations*, 46.
15. See also, Herbert Marcuse (2009, p. 43).
16. See also anticipating this idea in his 1955 book, *Eros and Civilization*, 100–101.
17. Comte, *General View of Positivism*, 9.
18. Positivism remains the dominant methodology in legal studies. Its original points of reference are Hans Kelsen, whose chief work *Pure Theory of Law*, was first published in 1934; and H.L.A. Hart (1961).
19. Article 2(1)(a) 2015 Paris Agreement.
20. See article 7 of the Paris Agreement.
21. Article 8(1), Paris Agreement.
22. See e.g. article 2(1) paragraphs (b) and (c), and article 6(4), 2015 Paris Agreement.
23. See e.g. recital 4, preamble, Paris Agreement.
24. Article 1, CBD.
25. UN, Convention on Biological Diversity: text and annexes, *Secretariat for the Convention on Biological Diversity* (2011), p. 1.

26. Article 7 and Annex I of the CBD.
27. As Stephen Turner put it referring to international environmental law, ‘currently, our existing approaches do not deal with the “root causes” of the problem but attempt to superimpose solutions upon the symptoms.’ Stephen Turner (2014), section 3.4.2.
28. UN News, ‘COP28 talks open in Dubai with breakthrough deal on loss and damage fund’ (30 November 2023).
29. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, ‘The right to a clean, healthy and sustainable environment: non-toxic environment’ (12 January 2022) A/HRC/49/53, para. 2.t
30. Aya Betrawy and Rebecca Hersher, ‘Climate activists struggle to be heard at this year’s U.N. climate talks’, *NPR* (12 December 2023).
31. See an express call in the UNGA Resolution, article 4. Prior to the UN General Assembly Resolution, the Special Rapporteur John Knox had adopted the framework principles that ‘reflect the application of existing human rights obligations in the environmental context’, see UN General Assembly, Annex to the ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (24 January 2018) A/HRC/37/59.
32. Human Rights Council, Resolution 48/13 ‘The human right to a clean, healthy and sustainable environment’ (8 October 2021).
33. UN website, ‘Special Rapporteur on human rights and the environment: purpose of the mandate’, (undated) available here <https://www.ohchr.org/en/special-procedures/sr-environment> (last accessed on 31 January 2024).
34. UN Environmental Programme (UNEP) website, ‘The Climate Emergency’ (undated), available here <https://www.unep.org/climate-emergency> (last accessed on 31 January 2024).
35. It is commonplace for the UN for example to refer to a ‘triple planetary crisis’ comprising climate change, pollution and biodiversity loss. See e.g. UN, ‘Ambitious Action Key to Resolving Triple Planetary Crisis of Climate Disruption, Nature Loss, Pollution, Secretary-General Says in Message for International Mother Earth Day’ (21 April 2022) SG/SM/21243.
36. UN Media Centre, Statement by Michelle Bachelet: ‘The right to a clean, healthy, and sustainable environment - what does it mean for States, for rights-holders and for nature?’ (16 May 2022).
37. This expression echoes the groundbreaking work of Donna J. Haraway (2016).
38. This is not to say that there are reports and prominent voices saying exactly this, but they do not permeate to the level of UNGA resolution or similar platforms that can serve as catalysts of qualitative change. They are relegated to subaltern protests. On the imbalance of the impact of climate change, see Fin-Jasper Langmack (2021, pp. 19–45).
39. Action 9(j).
40. Michelle Farrell, presentation at the seminar *International Law and Transformation: Environmental Justice* (19 - 20 May 2022) held at the University of Essex (UK).
41. Werner Heisenberg cited in Frans De Waal (2016, p. 7).
42. Advocating to challenge the centrality of humans as subject and matter as object, see Emily Jones (2021, pp. 76–102, 85); also Usha Natarajan (2022, pp. 200–228, 221–227); Jérémie Gilbert, Elizabeth Macpherson, Emily Jones and Julia Dehm (2023, pp. 48–68).
43. Marc Pallemaerts (1996, pp. 623–676), cited in Sumudu Atapattu (2002, pp. 65–126, 78). Pallemaerts was referring to the 1992 Rio Declaration, principle 1, which says that ‘human beings are at the centre of the concerns for sustainable development’.
44. See UN Committee of the Rights of the Child, ‘Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019*,**’ *Chiara Sacchi et al v. Argentina et al.* (11 November 2021) CRC/C/88/D/104/2019, paras 10.5, 10.7, 10.10, 10.20 and 11. For a commentary, see Margaretha Wewereinke-Singh, ‘Between Cross-Border Obligations

- and Domestic Remedies: The UN Committee on the Rights of the Child's decision on *Sacchi v Argentina*, *Leiden Children's Rights Observatory* (October 2021).
45. The three cumulative conditions are: causal link, effective control, and reasonable foreseeability, see *Chiara Sacchi et al v. Argentina et al.*, para. 10.7.
 46. IACtHR, Advisory Opinion OC-23/17 Requested by the Republic of Colombia: The Environment and Human Rights (15 November 2017), para. 102.
 47. Chiara Sacchi et al v. Argentina et al., paras 10.20 and 11.
 48. ECtHR – Grand Chamber, *Duarte Agostinho and others v. Portugal and 32 Others*, Application no. 39371/20 (9 April 2024) para. 194.
 49. For a commentary on the decision, see Corina Heri, 'On the Duarte Agostinho Decision', *Climate Law: A Sabin Center Blog* (16 April 2024).
 50. ECtHR – Grand Chamber, *Duarte de Agostinho and others v. Portugal and 32 others*, 'Final Submissions of the Applicants on Admissibility and Merits' (5 December 2022) Application no. 39371/20, paras 66-67.
 51. Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 1997) 10, 206-215, 235.
 52. ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, application no. 53600/20 (9 April 2024).
 53. Making this argument in relation to Buen Vivir, see Rosemary J. Coombe and David J. Jefferson (2021, 177–204, 188).
 54. See also Gilbert, MacPherson, Jones and Dehm, 52-53.
 55. Bueno de Mesquita (2024, pp. 90–115); Claiton Fyock (2022, pp. 40–62, 41); Diana Stuart, Ryan Gunderson and Brian Petersen, 65-79; Giorgos Kallis (2018, pp. 85–115).
 56. On how international law codes Western legal systems, see Fyock, 44 and 51.
 57. ICJ, Gabčíkovo Nagymaros Project (*Hungary/Slovakia*), Judgment, ICJ Reports 1997, para. 140.
 58. ICJ, Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, para. 80; and Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment, ICJ, Reports 2010, para. 177.
 59. Gilbert, MacPherson, Jones and Dehm, 53.
 60. UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development', A/RES/70/1 (21 October 2015), para. 3.
 61. The UNGA Resolution reaffirms its adherence to the 2030 Sustainable Development Agenda, see preamble, recitals 5 and 8.
 62. Our Common Future, Annex 1: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law, 'General Principles, Rights, and Responsibilities', para. 1.
 63. UN General Assembly, Resolution 45/94 'Need to ensure a healthy environment for the well-being of individuals' (14 December 1990).
 64. UN General Assembly, 'Report of the United Nations Conference on Environment and Development' A/CONF.151/26 (Vol. I) (12 August 1992), principle 1.
 65. UN Commission on Human Rights, Resolution 2003/71, 'Human Rights and the Environment as Part of Sustainable Development', E/CN.4/RES/2003/71 (25 April 2003); UN Commission on Human Rights, 'Human rights and the environment as part of sustainable development' E/CN.4/RES/2005/60 (20 April 2005).
 66. Human Rights Council, Resolution 7/23, 'Human rights and climate change' (24 March 2008); and Human Rights Council, Resolution 10/4, 'Human rights and climate change' (25 March 2009).
 67. Human Rights Council, Resolution 16/11, 'Human rights and the environment', A/HRC/RES/16/11 (12 April 2011), para 2.
 68. Human Rights Council, Resolution 19/10, 'Human rights and the environment' (19 April 2012) A/HRC/RES/19/10, recital 12, emphasis added.
 69. *Ibid.*, para. 2, emphasis added.
 70. Report of the Special Rapporteur on Human Rights and the Environment, 'Right to a healthy environment: good practices', A/HRC/43/53 (30 December 2019), para. 13.

71. Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), article 24.
72. Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'), 17 November 1988, article 11(1).
73. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), article 1.
74. League of Arab States, *Arab Charter on Human Rights* (15 September 1994), article 38.
75. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú: 4 March 2018), article 1.
76. Special Rapporteur on Human rights and the Environment, 'Right to a healthy environment: good practices', Annex II, para. 10.
77. Article 24(1) of the Greek Constitution, revised by Resolution of November 25, 2019; article 69(1)(a) Constitution of Kenya, 2010; Uganda, on the one hand, recognises that '[e]very Ugandan has a right to a clean and healthy environment' and, on the other, that the Parliament shall provide measures intended 'manage the environment for sustainable development', see, respectively, articles 39 and 245(b) of the Constitution of Uganda, last revised in 2018; article 73 of the Constitution of Zimbabwe, last amended in 2018.
78. Article 39 of the Constitution of Azerbaijan, last amended in 2016; article 27 of the Constitution of Benin; principle 21 of the Constitution of Cameroon, last amended in 2008; article 40 of the Constitution of Fiji; section 20 of the Constitution of Finland, last amended in 2018; article 35 of the Constitution of South Korea, last amended in 1987; article 40, paragraph 4 of the Mexican Constitution, as last amended in March 2024; the Nicaraguan Constitution says in article 60 that 'Nicaraguans have the right to live in a healthy environment, as well as the obligation to maintain and preserve it. The supreme and universal common good, and a precondition for all other goods, is mother earth; she must be loved, cared for, and regenerated. The common good of the earth and of humanity requires us to understand the earth as a living entity and subject of dignity. She belongs to the community of all which inhabit her and to the totality of the ecosystems'; article 45 of the Spanish Constitution; article 41 of the Constitution of Togo, last amended in 2007; article 53 of the Constitution of Turkmenistan, last revised in 2016; article 50 of the Constitution of Ukraine, updated to 2019; article 43, Constitution of Vietnam, last revised in 2013.
79. Article 41 of the Argentinian Constitution, last amended in 1994; article 30(II)(10) and article 33 of the Bolivian Constitution; article 70(1) of the Constitution of Cape Verde, last amended in 1999; article 35(1) of the Constitution of Romania, last revised in 2003; article 43(2) of the Constitution of Thailand; and article 61(1) of the Constitution of Timor-Leste.
80. E.g. International Covenant on Civil and Political Rights, article 19.
81. See Human Rights Committee, 'General Comment no. 34: Article 19: Freedoms of opinion and expression', A/55/40, Vol. I (July 2011) para. 21.
82. Andrés Bermúdez Liévano, Andrew Lehren and Adiel Kaplan, 'Powerful U.S. Political Family Linked to Copper Mining in the Colombian Rainforest', *Pulitzer Center and NBC News* (14 June 2023).
83. Andrés Bermúdez Liévano, 'Una poderosa familia de EE.UU., tras una mina de cobre en la Amazonia colombiana', *El Espectador* (14 June 2023).
84. For the report of the panel see Agencia de la Universidad Nacional de Colombia, 'Minería en Putumayo: comunidades advierten sobre daños ambientales irreversibles' (14 November 2023).
85. Cited in *ibid.*, (own translation from Spanish).
86. Referred to in Andrés Bermúdez Liévano, 'Una poderosa familia de EE.UU.', *El Espectador*.
87. Quoted in Ian Harris, 'The Green Energy Future is the Corporate Strategy', *Liberio Copper* (August 2023), 14, available here https://liberocopper.com/_resources/presentations/corporate-presentation.pdf?v=0.308 (last accessed on 2 February 2024); see also, Juliana

Valentina Arenales, ‘Colombia tiene todo el potencial para ser la Arabia Saudita de las energías limpias’, *La República* (11 May 2023).

88. Quoted in Ian Harris, ‘The Green Energy Future is the Corporate Strategy’, 14.
89. Alejandra Bernal, Joerg Husar and Johan Bracht, ‘Latin America’s opportunity in critical minerals for the clean energy transition’, *IEA* (7 April 2023).
90. Quoted Stephen Gennaro and Douglas Kellner, ‘Under surveillance: Herbert Marcuse and the FBI’, 304.
91. See e.g. Deborah McGregor (2018, pp. 279–296); Linda T. Smith, Te Kahautu Maxwell, Haupai Puke and Pou Temara, (2016, pp. 131–156); André Nunes Chaib (2022, pp. 82–104); Alberto Gomes (2012, pp. 1059–73).
92. See e.g. Bueno de Mesquita (2024) and Fyock (2022).

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