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Marginalising Africa: The 'New' Human Right to a Clean, Healthy and Sustainable Environment in International Law

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> *I try to consider human rights in their historical reality.*
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> ~ Michel Foucault[1]

Introduction

Does history matter? What value does history bring to (international) law? These questions have been repeatedly asked by legal scholars. Specifically, international law scholars are increasingly demanding more rigorous inquiry into disciplinary histories. Such calls include BS Chimni's invitation for a Third World historical analysis of the origins of international law. Other legal scholars have similarly admonished against 'the willed forgetting of international law's imperial past'. While these queries are not new, they offer a renewed understanding of the present-ness of history and its ideational and material value. Such an understanding is especially useful in the context of the recognition of 'the human right to a clean, healthy and sustainable environment' by the United Nations (UN) General Assembly on 28 July 2022 following the earlier 8 October 2021 resolution of the UN Human Rights Council recognising this right.

[1] Michel Foucault, *Wrong-Doing, Truth Telling: The Function of Avowal in Justice*, trans. Stephen W Sawyer (University of Chicago Press, 2014) 265.

The historical turn in international law is premised on the acknowledgement of the materiality of history as a methodological tool. Here, history is capable of uncovering, discovering, and even re-discovering ideas that have long existed and have been in use. It also represents a repackaging of pre-existing ideas in new forms for contemporary significance and application. History, then, is not simply an artefact but a process that is *always* materially present. Thus, in this respect, I explore the normative consequence of the 'history-making processes' on the right to a clean, healthy and sustainable environment.

I reflect on this question through Louis Althusser's analytical framework of interpellation and its treatment of silence and inconspicuousness in the production or influencing of power relations. I also adopt Michel Foucault's 'history of the present' analytical agenda in this Reflection to examine the normative significance of history in the making of this right in international law. I conclude by arguing that a historical analysis reveals legal constructs, practices, interpretations, and corresponding enforcements as manifestations of a continuum of historical ideations that are characterised as *novel*. This process of eviscerating or eliding prevailing knowledges and supplanting them with a dominant framing or ideology conceals particular histories and renders them invisible. Here, the narrative is that this right is *now evolving* or has *now emerged* through the UN system despite its long history in African jurisprudence.

The *Longue Durée* of the Right to a Clean, Healthy and Sustainable Environment

I have previously written about Africa's pioneering role in evolving this right and its role in laying the foundations for a global discourse on this subject. Environmental protection and sustainability under a human rights framework is described as 'an important precondition for the enjoyment of human rights'. The juridical and normative contexts underlying the African human rights system derive from African cultural perspectives on communitarianism. In a recent co-authored article, Obiora Chinedu Okafor and I emphasised the normative entrepreneurship of the African human rights system as the first regional human rights treaty to provide for a legally binding and enforceable right to a healthy environment under Article 24 of the 1981 African Charter on Human and Peoples' Rights (African Charter). In that study, we emphasised the normative relevance of this Article 24 jurisprudence and its enduring power and influence on the resulting global dialogue, which imbued the environment with the benefit of the language of human rights. We noted that this right was integral to Africa's regional (and global) efforts to redress colonial injustices and 'a corollary to the struggles of its peoples and leaders for resource sovereignty'.

As well, it is important to acknowledge that the binding character of this right emerged from the communitarian values, rights and obligations that are

embedded in African legal philosophy.[2] The African Charter and its implementation focused attention on the African legal and philosophical origins of environmental sustainability.[3] African environmental ethics, defined variously across Africa, share some common characteristics that emphasise harmony between the human and non-human world, a view that has been incorporated in the African Charter.[4] This viewpoint accords with the position adopted by African political leaders and scholars alike that Africa's regional human rights treaty, the African Charter, offers a distinctive African identity while still connected to other parts of the world by the human rights axis. In this sense, environmental protection as a legally binding right in the African human rights system reflects the African communitarian values and relationality (harmony between human and the non-human world) that continually shape Africa's engagement within the wider international system.[5] Lilian Chenwi confirms this point by noting that, this right, under Article 24 of the African Charter, invokes the 'potential for ensuring accountability for violation of the right to a satisfactory, healthy, and sustainable environment through prosecution at the African regional level'.

The history of the making of this (environmental) human right in Africa is at least forty years old. Its dispersal and globalised presence are observed in the monumental changes that have since ensued, with highlights including the adoption of an environmental (human) right in the 1988 San Salvador Protocol to the 1969 American Convention on Human Rights and the 2004 Arab Charter on Human Rights. A recent addition is the inclusion of human rights-leaning language in climate law, beginning with the adoption of the 2015 Paris Agreement. This new trajectory of the right confirms its capacity to continue evolving, even today. James Thuo Gathii reinforces this point by noting Africa's leading role in mainstreaming environmental rights into international law jurisprudence through its courts and other adjudicative tribunals.

Despite these significant accomplishments in the evolution of the jurisprudence on the right to the environment since its first incorporation in the African Charter, the UN Human Rights Council's recognition of 'the right to a clean, healthy and sustainable environment as a human right' in its resolution adopted on 8 October 2021 was celebrated as a novel idea and a major

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[2] Miyawa Maxwel, 'African Approaches to International Law: A Communitarian Ethic as a Cultural Critique of the Western Understanding of the Human Rights Corpus' in Frans Viljoen, Humphrey Sipalla and Foluso Adegalu (eds.) *Exploring African Approaches to International Law: Essays in Honour of Kéba Mbaye* (PULP, 2022) 145, at 161–164.

[3] Elsabé Boshoff, 'Rethinking the Premises Underlying the Right to Development in African Human Rights Jurisprudence' (2022) 31:1 *RECIEL* 27.

[4] It is in this sense that the interpretation of Article 24 of the African Charter takes an expansive view, incorporating other rights including health and development. See Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (OUP, 2019) 547.

[5] Benjamin Elias Winks, 'A Covenant of Compassion: African Humanism and the Rights of Solidarity in the African Charter on Human and Peoples' Rights' (2011) 11:2 *African Human Rights Law Journal* 447.

breakthrough in international law. Since then, there were frantic efforts to get the UN General Assembly to also recognise the right to a clean, healthy, and sustainable environment which eventually happened on 28 July 2022. With this momentous recognition, it has been suggested that we have reached a significant turning point in the history of global environmentalism since the world gathered at the first UN conference on the environment in Stockholm in 1972. What then seems to be left to do, for international lawyers, is the translation of this right into a binding and enforceable international legal obligation.

While all these developments are creditable strides to further spotlight the environment as a global public concern, the discourse treats this right as *new or novel*. This is partly due to the focus on its progression through the UN system (from the Human Rights Council to the General Assembly). However, African legal scholars have long argued for the UN to recognise this right in international law, thereby centering its African origin on a broader global scale. Therefore, it was expected that the UN would have credited this normative development to the African Charter and Africa's role in blazing this trail.[6]

The presumption of novelty is problematic in its reflection of the continuing peripheral treatment of non-Western ideas. Worse still, the ongoing discourse imitates and reproduces well-tested patterns of the absorptive capacity of international law to coopt non-Western ideas through purposeful reinvention. In this sense, a (re-)new(ed) interest in this normative development, which had long been a fixture in African human rights dialogue for more than four decades, suggests this right as *now* being forged in the crucible of UN discourse. Regrettably, the 'revival' of this right in international law discourse, interestingly with the participation (not resistance) of African states, may signal a downward spiralling of its appropriately African pedigree, meaning and substance. It also has the potential to mask Africa's human rights history and influence on this subject. All of this is happening despite the African experience influencing notable developments in international law, including advances in the Inter-American and European human rights systems.

Centering the Periphery: Presence through Non-Existence

The normative value of the history behind the making of this 'new' right has been obscured. This situation invites a critical review of the ongoing processes that have constructed the silence around the evolution of this right in the UN system, which conceals more than it reveals. This dynamic is akin to what Louis Althusser calls

[6] Basil Ugochukwu, 'When the T(W)AIL Wags Global Environmental Governance' in Frans Viljoen, Humphrey Sipalla and Foluso Adegalu (eds.) *Exploring African Approaches to International Law: Essays in Honour of Kéba Mbaye* (PULP, 2022) 239, at 248.

the intentional construction of invisibility.[7] His core argument is that we need to be conscious about what is left out or what is 'invisible' to the dimensions of a phenomenon under examination. In his classic work on interpellation, Althusser argues that human interaction with ideas creates a unique relationship with power that is rarely defined or informed by physical violence but rather by the invisible social acceptance of those ideas.[8]

For Althusser, an ideology can be socially constructed so that its outcome is generally accepted and internalised as a valid postulate. In this respect, interpellation is effective when it is less visible. An idea (or ideology) can thus seem acceptable as a natural consequence of its progress. When the present discourse on the right to a clean, healthy and sustainable environment is refracted through this theoretical lens, it is evident that if the present UN-led narrative is sustained, then the hard and prodigious work done over the years in regional centres of influence such as the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (and also to some extent in Latin America by the Inter-American Court of Human Rights) and their histories will be obliterated and supplanted by this *newly emerging* narrative. Thus, it is not so much which histories are eventually written *into* the evolutionary journey of this right, but what is critically important is the relevant histories that are written out of this 'globally' unfolding story.

Althusser's explanation is a perceptive way to observe the exclusionary politics embedded in the ongoing discourse that attends the movement of this right through the UN system, from the Human Rights Council to the General Assembly. Although no express attempt is made to obscure Africa's role in the progress, the loud silence that has greeted Africa's normative entrepreneurial endeavour demands further scrutiny. The risks of normalising 'the insularity of international law characterised by a limited set of locales and ideas' must be resisted thoroughly. Gathii's concept of 'limited idea and geography' in international law is relevant in exploring this question. As Gathii has explained, radical interventions advanced by African regional courts and other adjudicative tribunals are rejected or overlooked in the ideational corpus of international law. Such absences should interest international law scholars.

The silent exclusion of Africa's contribution and experience upon the recognition of the human right to a clean, healthy, and sustainable environment in the evolving processes in the UN system is not an accidental occurrence. It deeply reflects the politics of exclusion and inclusion dominating international law. For if

[7] Louis Althusser, 'Ideology and Ideological State Apparatuses (Notes Towards an Investigation)' in *Lenin and Philosophy and Other Essays* (New Left Books, 1971); Warren Montag, 'Althusser's Empty Signifier: What is the Meaning of the Word "Interpellation"?' (2017) 30:2 *Mediations* 63.

[8] Robert Knox, 'Subject Positions' (2021) 39 *TWAILR: Reflections* 1; John D Haskell, 'The Choice of the Subject in Writing Histories of International Law' in Jean d'Aspremont et al (eds.) *International Law as a Profession* (CUP, 2017) 244.

history in international law is not merely a collection of past events, then the normative import of the evolutionary cycle of this norm must be appropriately acknowledged. As well, the enduring influence of its norm-makers and shapers, including those from Africa, must be duly accounted for. This point resonates with what other critical international law scholars have since argued, that 'the decision to exclude is thus as significant an exercise of power as the decision to include. And what gets left out defines a field of knowledge as surely as what is included'.

The manifestation of this politics of exclusion and inclusion does not have to be demonstrably overt. Subtle references or omissions carry a similar influence. In this light, the evolution of the right to a clean, healthy and sustainable environment in the UN system, absent its representative history, is a civilising technology modelled on the Eurocentric influences within international law. Such concerns have been highlighted by Third World Approaches to International Law (TWAIL) scholars. It also confirms TWAIL concerns over the marginalisation and peripheralisation of non-Western knowledge within international law. The long-lasting effect of this kind of politics is that laws and policies that arise as outcomes of these international engagements are unrepresentative of the legal history that must play a central role in guiding the subsequent implementation of this right under international law.

This Reflection thus invites an excavation of neglected or peripheral histories and the consequent reinforcement of these peripheralised histories in the ongoing discourse on this subject. The value of history to the construction of legal essence should not be lost. If international law is often the outcome of the politics of ideas and attendant policies, then we must be mindful of what is written into and out of international lawmaking processes. As other scholars have similarly argued, only 'by focusing on what is left out of these laws, policies and frameworks can one assess their overall impact and direction as well as appreciate the version of human rights they espouse'. Analytical frameworks such as Althusser's theory of interpellation can, consequently, assist in illuminating Africa's missing radicalism in the emergence, evolution, and praxis on the right to a clean, healthy, and sustainable environment now making its way through the UN system.

Genealogy and the History of the Present

Althusser's theory is complemented by Michel Foucault's 'history of the present' framework. In Foucault's analysis, history is critically important to explain the present. Foucault's history of the present is connected with his study of knowledge and power, which is a genealogical inquiry. This genealogical investigation traces the development of a phenomenon up to the present.

Foucault's genealogical approach was his own response to the criticism levelled against his earlier work on the archaeology of knowledge. David Garland

noted that Foucault's work on archaeology was concerned with 'the structural order, structural differences and the discontinuities that mark off the present from its past. Genealogy seeks instead to show "descent" and "emergence" and how the contingencies of these processes continue to shape the present'. In this sense, Foucault argued that history produces knowledge, or knowledge emerges from its historical context. This is an invitation to critically review the cyclical reinforcement of history and knowledge as co-creators of each realm.

Foucault's central aim in his archaeological study was to understand scientific discourses and how those discourses invented specific outcomes. This discursive exercise is necessary to understand the genealogy of knowledge. Genealogy becomes even more important when seeking to challenge the silence(s) identified within Althusser's framework of analysis. Still, Foucault admonishes that the genealogy of knowledge must not be rigidly applied in the same way as unitary and universalising theories. Drawing on Foucault's genealogy, the tracing of the contemporariness of an idea from its origins, and through its evolution must not be undertaken in a totalising fashion. It must be done only to account for its contextual historicity.

Ultimately, reference to genealogy is 'a method of writing critical history: a way of using historical materials to bring about a "revaluing of values" in the present day'. It plays a significant role in reorganising knowledge and power away from unidirectionality. A history of the present resists classical knowledge and unlocks the transformative potential of subjugated *knowledges* and power operating within a wider assemblage of knowledges. In this sense, Foucault's theory can assist in explaining the current trajectory of the human right to a clean, healthy and sustainable environment as it permits a confrontation of, and resistance to the prevailing narrow global environmentalism shaped by Eurocentrism. This is possible if we re-engage with the subject in the hope of excavating Africa's particular values and substantive contributions to the emergence of the human right to a clean, healthy and sustainable development in international law as one of the multiple (or plural) efforts aimed at evolving this norm.

Conclusion

This Reflection challenges the making of the history of the right to a clean, healthy and sustainable environment. It asserts Africa's (and the broader Global South's) agency in environmental rights praxis. What this Reflection is not about is African exceptionalism. As Gathii noted, the idea of limited geography seriously threatens radical contributions to the development of the international law. This situation must be resisted to ensure that the pioneering efforts of Africa's continental lawmaking processes, regional and subregional courts, as well as other adjudicative tribunals, and related normative and practical developments, in the *longue durée* of this right, are appropriately accounted for.

The history of the right to a clean, healthy and sustainable environment cannot be written without Africa's profound contribution to the subject. This exclusionary politics has implications for the participation of Africa and the Global South in norm entrepreneurship in international law. My argument is thus not simply a call for a historical account but rather a critical reading of that history as integral to the present (and ongoing) construction of this right in international law. Here, a critical reading acknowledges Africa's praxis on the emergence, interpretation, and enforcement, as well as the global diffusion of this right beyond its African origins.

The argument is that Africa's place in the making of this right is significant in both the processual value and the substantive import of its jurisprudence. While the UN Human Rights Council in its 2021 resolution and the UN General Assembly in its 2022 resolution noted that variations of this right had been incorporated in national constitutions and other laws across the world, both failed to credit these developments to Africa and Article 24 of the African Charter. In this sense, Africa's material innovation in this respect has been obscured in the evolution of this right at international law. The recognition of this right by the UN General Assembly and connected developments in international law must draw on the foundational guidance and precedent-setting significance of the jurisprudence of Article 24 of the African Charter, which should be accorded its ideational and material role and place in this evolving *global* story.