From Civil Rights to Human Rights: The Pandemic’s Aftermath Requires Environmental and Reproductive Justice Mechanisms to Reinforce Global Public Health

Elena D. Gartner

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From Civil Rights to Human Rights: The Pandemic’s Aftermath Requires Environmental and Reproductive Justice Mechanisms to Reinforce Global Public Health

Elena D. Gartner*

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Introduction

Environmental law has antiracist work to do. This work requires integrating reproductive justice into environmental advocacy, dissolving mainstream disciplinary distinctions in order to center racial justice in environmental law. Environmental issues — which are essentially issues of public health — are inextricable from race, class, and fundamental rights. In the era of COVID-19, public health is the paramount global concern from the grassroots to the international level, and the growing awareness of linkages between environmental issues, social injustices, and health emergencies could create the political will necessary to push for international legal change that can amplify grassroots campaigns around the world.

Thus, the current global political climate presents a window of opportunity for environmental lawyers to work with reproductive justice advocates to advance new international legal levers in order to facilitate future environmental litigation that addresses the multiple dimensions of social inequality. Global mechanisms, like an international agreement on global health and an updated Rio Declaration, should incorporate rights-based environmental and reproductive justice provisions which litigators can refer to in crafting legal arguments on behalf of grassroots clients.

Part I of this Article argues that environmental justice and reproductive justice lawyers share common goals, and Part II shows that the time has arrived for international environmental law to embrace this new framework. Part III proposes an international and intersectional response to public health crises through a rights-based approach.

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1 SisterSong Women of Color Reproductive Justice Collective (a network of eighty grassroots organizations) defines reproductive justice as “the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.” SISTERSONG, https://www.sistersong.net/reproductive-justice (last visited July 20, 2020).

2 Madeleine Somerville, Want to Help Fight Climate Change? Start with Reproductive Rights, THE GUARDIAN (May 31, 2016), https://www.theguardian.com/lifeandstyle/2016/may/31/climate-change-women-reproductive-rights-birth-control (citing then-Chilean president Michelle Bachelet’s remarks at the 2014 UN Climate Summit regarding the vulnerability of women in the event of a global climate crisis, given that women and children are 14 times more vulnerable than men in floods or droughts; women are more likely to die in natural disasters; women are more likely to become caregivers for the sick or wounded; and women have so much more to lose in the event of environmental catastrophe — particularly in the realm of unwanted pregnancies and access to reproductive services); Bailey Borchardt, Fighting for the Future of Our Planet is Reproductive Justice, REWIRE NEWS (Oct. 9, 2019, 1:16 PM), https://rewire.news/article/2019/10/09/climate-change-reproductive-justice/.

3 Law professor Kimberlé Crenshaw coined the term “intersectionality” over 30 years ago and recently described it as “basically a lens, a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other.” Steinmetz, Katy, She Coined the Term ‘Intersectionality’ Over 30 Years Ago. Here’s What It Means to Her Today, TIME (Feb. 20, 2020), https://time.com/5786710/kimberle-crenshaw-intersectionality/.

Thus, bringing an intersectional lens to environmental litigation would draw from intersectional feminist approaches and de-center white environmentalist thought throughout the litigation process.
I. There Are Shared Strategic Interests Between Environmental and Reproductive Justice Movements.

Environmental and reproductive justice lawyers share overlapping goals. They both want to stop harmful pollution and stabilize the climate for the well-being of future generations, increase public participation, transparency, access to lawyers, and proper dissemination of data and medical research.⁴

Even prior to COVID-19, advocates from the environmental and reproductive justice fields have called attention to the intersectional relationship between reproductive health and environmental harms.⁵ Already, a growing body of scientific data reveals how structural and environmental

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⁴ See, e.g., NYLPI, https://nylpi.org/our-work/ (last visited July 20, 2020) (“NYLPI works to eliminate the unfair burden of environmental hazards borne by low-income communities and communities of color, and to create a more equitable and sustainable city.”); EARTHJUSTICE, https://earthjustice.org/ (last visited July 20, 2020) (describing Earthjustice as the “legal backbone for the environmental movement, representing [its] clients free of charge” since 1971 because “the earth needs a good lawyer.”); If/WHEN/How, https://www.ifwhenhow.org/ (last visited July 20, 2020) (describing the mission of the organization, which has chapters in law schools across the United States, being to “transform the law and policy landscape through advocacy, support, and organizing so all people have the power to determine if, when, and how to define, create, and sustain families with dignity and to actualize sexual and reproductive wellbeing on their own terms”); Abigail Abrams, ‘We Are Grabbing Our Own Microphones’: How Advocates of Reproductive Justice Stepped Into the Spotlight, TIME (Nov. 21, 2019, 7:33 AM), https://time.com/5735432/reproductive-justice-groups/ (The framework demands consideration of all the ways reproductive health can be affected by other factors, from race, religion or sexual orientation to financial, immigration or disability status to environmental conditions.”); Borchardt, supra note 2 (discussing how one way to ensure that anyone can raise their families in safe, sustainable communities is “addressing major issues like climate change through a reproductive justice lens . . . .”). Health lawyers have also recognized important lessons from environmental and reproductive justice. Lindsay F. Wiley, Health Law as Social Justice, 24 CORNELL J. L. & PUB. POL’Y 47, 53-63 (2014) (encouraging health law to look to the fields of environmental justice and reproductive justice in reimagining the goals and boundaries of the subject).


factors lead to marginalized populations being among those most susceptible to and harmed by COVID-19, such as Black, brown, and Indigenous communities in the United States7 as well as around the world, such as in the socially excluded populations of Singapore and Peru.8

In the United States, infectious diseases like COVID-19 are just one of many health hazards rooted in environmental problems in non-white communities that the law has failed to address. Specifically, Black and brown women have disproportionately suffered the harms of chemical spills, toxic waste, and air pollution due to environmental racism;9 these harms are compounded

that the University of Wisconsin Population Health Institute’s analysis of County Health Rankings conducted before Coronavirus determined that “high levels of segregation” is why “white Chicanos had an average life expectancy of 8.8 years longer than [B]lack residents”); Rebecca Nagle, Native Americans Being Left Out of US Coronavirus Data and Labelled as “Other”, The GUARDIAN (Apr. 24, 2020), https://www.theguardian.com/us-news/2020/apr/24/us-native-americans-left-out-coronavirus-data (discussing the problems with categorizing Native Americans under the “other” label in many of the state health departments’ released racial demographic data that analyzes Coronavirus’ impact).


by other factors such as interpersonal prejudice, lack of legal representation, and poorly functioning or nonexistent legal protections.\textsuperscript{10}

II. The Reproductive and Environmental Justice Movements Breathe Life into International Environmental Legal Efforts.

The environmental concept of “sustainable development,” while historically instrumental in bringing about a shift in understanding\textsuperscript{11} has long been criticized for lacking inclusivity — in contrast, grassroots movements based in the global south or led by communities of color have been using the terms “environmental justice” and “reproductive justice.”\textsuperscript{12} While environmental lawyers have historically operated in institutional silos led by predominantly white and privileged lawyers based in Europe and North America, a new approach is needed given persistent growing global inequalities.

Thus, international environmental law needs an update in order to align with grassroots movements and meet the needs of this current moment. Historically, public support has fueled the development of this area of law: environmental law rode a wave of momentum in the 1970s in the United States and international environmental law experienced a similar groundswell of support through the 90s and 2000s.\textsuperscript{13} But recently, the Trump Administration’s dismantling of domestic legal protections

\begin{footnotes}
\item[12] \textit{See} Samantha Willis, \textit{Black Women Are Leading the Way in Environmental Justice}, ESSENCE (Jan. 11, 2019), https://www.essence.com/news/black-women-are-leading-the-way-in-environmental-justice/ ("what began in 1982 as a small group of Black men and women protesting the construction of a hazardous-waste center in their Warren County, North Carolina, community is now widely regarded as the catalyst of the environmental-justice movement"); \textit{see also} Borchardt, \textit{supra} note 2 ("[B]y addressing major issues like climate change through a reproductive justice lens, our solutions can be all-encompassing."). These movements are transnational and deeply understand the interrelationships between environmental issues and reproductive justice. \textit{See e.g.} \textit{Realizing Sexual and Reproductive Justice} (last visited August 14, 2020), http://resurj.org/pages/about-us ("Our members [are feminist activists] . . . working for sexual and reproductive justice through national, regional, and international advocacy and movement building strategies in Africa, Asia, Pacific, Latin America, Europe, and the Middle East . . . [and] are engaged in different movements . . . for example, women, youth, human rights, HIV, development, economic ecological and environmental justice. . .").
\end{footnotes}
has captivated the public gaze and caused U.S. lawyers to focus their advocacy inwards. Yet, the COVID-19 pandemic brings into sharp focus how international environmental health issues intersect with existing inequalities to devastating effect, highlighting the need for stronger international coordination and safeguards.

III. Tackling Global Health, Environmental, and Reproductive Injustice Is Possible Through an International Rights-Based Framework.

The pandemic reveals the gulf in life experiences between those who are protected by environmental laws and those who the law systematically leaves behind. The growing body of scientific evidence that links environmental pollution with issues of women’s health, fertility, and morbidity will aid in making legal arguments for redressability and damages for environmental harms. The technical expertise of environmental law can complement efforts to improve public health infrastructure for women. Doing so would allow lawyers to build cases that push for changes in international law to address this gulf. For instance, lawyers experienced with environmental torts cases that require a high bar for medical evidence to prove causation can contribute to reproductive justice arguments that relate to broader environmental health problems such as air pollution.

Amidst the COVID-19 pandemic, countries may be more willing to enter into a binding treaty that provides for tort-like liability framed around public health, but that explicitly addresses race, gender, and class. Environmental and reproductive justice lawyers should advocate for new international legal instruments to complement existing advocacy at the grassroots level and growing public awareness of the ties between legal disempowerment and uneven public health outcomes. For example, imagine an international public health treaty that closes the legal gaps that created the structural conditions for the pandemic’s disproportionate impact on communities of

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16 See, e.g. Sterling v. Velsicol Chemical Corp., 1988 U.S. App. LEXIS 6957, at *58 (6th Cir. 1988) (finding that calculations of plaintiffs’ damages on increased susceptibility to cancer and other diseases after drinking contaminated water needed to be based upon a reasonable medical certainty that the future disease or condition would occur) (emphasis added).
color. Such a mechanism would create institutional space and financial resources for lawyers to provide services to the most vulnerable communities affected by environmental pollution, and perhaps the associated harms of climate change. This instrument would create legal hooks for domestic litigation and an impetus for national governments to enact legislation that implements the treaty and strengthens domestic law. Litigators could bring cases complaining of tangible and localized harms to their environmental and reproductive rights, citing the treaty and any implementing legislation, for damages or injunctive relief.

To do this, governments should negotiate a mechanism that utilizes a rights-based framework and strengthen the ones that already exist. A rights-based approach has already proven useful in the realm of international environmental law, particularly in the Inter-American system. Human rights instruments such as the Convention on the Elimination of Discrimination against Women and the Escazú Agreement on Environment and Human Rights, will be instructive in helping lawyers craft provisions into new international law. Additionally, the upcoming 50th anniversary of the Stockholm Convention in 2022 provides an opportunity for international environmental lawyers to push for a binding Rio Declaration that includes similar provisions. For now, environmental lawyers must play the right cards in the immediate aftermath of COVID-19 — including reaching out to and strengthening bonds with reproductive justice lawyers. The public health challenges facing society are intertwined and our response must be similarly unified.

17 See David Hunter et al., INT’L ENVTL. L. 1323 (Foundation Press, 5th ed. 2015) (discussing the interrelationship between human rights and the environment in international law).