



WILD LAW: IS THERE ANY EVIDENCE OF EARTH JURISPRUDENCE IN EXISTING LAW AND PRACTICE?

AN INTERNATIONAL RESEARCH PROJECT



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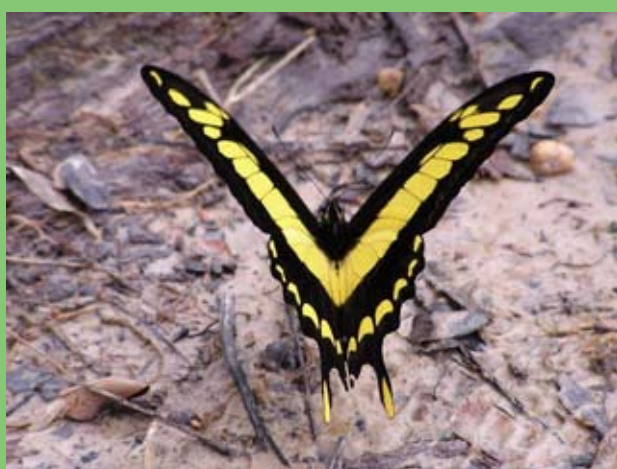
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- Prof Philippe Sands QC, barrister at Matrix chambers and professor of international law at University College London

PUBLISHED MARCH 2009

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UKELA: REGISTERED CHARITY IN ENGLAND AND WALES 299498; COMPANY REGISTERED IN ENGLAND
NUMBER 2133283

REGISTERED OFFICE: ONE WOOD STREET, LONDON, EC2V 7WS

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"It is a pleasure to endorse the efforts of the United Kingdom Environmental Law Association and the Gaia Foundation to report on, evaluate, and urge action on the progress of nations in declaring the inalienable rights of the natural world on behalf of an integral and sacred Earth community."

- Thomas Berry, cultural historian and geologist

"This report is a timely first step in the process of evaluating the adequacy of existing legal systems to safeguard the Earth Community to which we belong. The deficiencies which it identifies reveal why our governance systems are failing to prevent humans from degrading Earth and indicate what we must put right as soon as possible if we are to have a future within the Earth Community"

- Cormac Cullinan, director of the South African environmental law firm, Cullinan & Associates, and CEO of EnAct International, an environmental governance consultancy, author of "Wild Law"

"Earth Jurisprudence is the cutting edge idea whose time has come. This report is an essential guide to its possibilities for fulfilling the vision of human nature and harmony through practical law."

- Satish Kumar, environmentalist, ecologist and educator

"The dominant legal system, with its biases against the women, the poor, and nonhuman species, has run its course. A new jurisprudence is needed for living lightly and inclusively on the Earth as an Earth family. The Wild Law report provides such new thinking"

- Vandana Shiva, environmental activist, Director of Navdanya, India, and winner of the Right Livelihood Prize, 2004

WILD LAW: IS THERE ANY EVIDENCE OF PRINCIPLES OF EARTH JURISPRUDENCE IN EXISTING LAW AND LEGAL PRACTICE?

A UKELA AND GAIA FOUNDATION RESEARCH PAPER

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Acknowledgements

With special thanks to Professor Lynda Warren for her supervision of this project, and to the main authors, Begonia Filgueira, of the Environmental Regulation and Information Centre, and Ian Mason, of the Gaia Foundation and Surrey Chambers. Also thanks to Mary Munson, from the Center for Earth Jurisprudence, for her contributions on the USA section and to Carine Nadal, of the Gaia Foundation, for her work on the indicators and other sections.



Launch of the Wild Law research draft report in Derbyshire, September 2008. Left to right: Begonia Filgueira; Ian Mason; Lynda Warren

This research was prepared with the kind help of the following:

Anna Brookfield; Laura Bumpus; Covington Campbell; Claire Collis; Cormac Cullinan (Cullinan and Associates Inc.); Melesse Damtie; Jeunesse Edwards; Silvia Gomez; Sonia Hadj-Ayed; Maria Jones; Michael Keys; Scott Lo; Julian Rogozinski; Pat Siemen (Center for Earth Jurisprudence); Mike Rivett-Carnac; Diana Suarez; Amy Sullivan-Weekes; Nicola Wheen; Ceri Warnock

Translation from Spanish by Violeta D'Atri, of Arcadia Translations, Buenos Aires

Thanks also to the Wild Law Planning Group 2008:

Simon Boyle; Tom Brenan; Ruth Coffey; Vicki Elcoate; Lesley Fairbairn; Guy Fisher; Begonia Filgueira; Liz Hosken; Peter Kellett; Ian Mason; Carine Nadal; Elizabeth Rivers; Deborah Smith; Melanie Strickland

The authors are particularly grateful to Vicki Elcoate for indefatigable determination to see this project to fruition.

Cover photos: Amazon river (Brazil) and the Yatta elders in Kenya thanks to the Gaia Foundation. Mawddach estuary (Wales) thanks to Chris Swan.

The 2008 Wild Law workshop and the research was supported by:
Matrix Chambers, Argyll Environmental and the Network for Social Change.

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Published March 2009

Foreword

I first became aware of the interest in Wild Law when I was asked to speak at the UKELA/Gaia Foundation meeting on the subject in Brighton in 2005. I agreed to speak before I had read Cormac Cullinan's book *Wild Law* and I have to admit to approaching the meeting with some trepidation and unease because I found the concepts in the book so difficult to relate to. My difficulty with some of the concepts persists and is, I know, shared by many people. At the same time, however, I find myself going back to the book again and again and thinking about the ideas presented there.

What *Wild Law* brought home to me was the fact that our present environmental law framework, based as it is on traditional legal concepts of property rights and responsibilities coupled with more recent developments in human rights, is not well equipped for addressing the relationship between humans and the environment. We have not moved far away from thinking of the environment as just one more sectoral interest, despite all the rhetoric about sustainable development. The current fashion of referring to "ecological services" is a useful way of drawing attention to the value of the environment for society but only goes to reinforce the division between the environment on the one hand and people on the other. This anthropocentric approach would not matter if the results were environmentally favourable but they are clearly not. Degradation has continued apace; species have become extinct and others have joined the ranks of the threatened and endangered; and now we are faced with a truly global environmental challenge in the form of climate change. It is true that there have been some positive developments – many water bodies are much cleaner than they once were, for example, but these gains are insignificant in comparison with the losses suffered over the same time period.

I share with Cormac his view that something needs to be done but I fear there is no possibility that any government would take on board the earth jurisprudence messages advocated in his book. The acknowledgment of Wild Law principles in the Constitution of the Republic of Ecuador is a step in the right direction but there is a long way to go before this rhetoric is taken forward into practical legal measures. But this does not mean that the ideas are not worth considering further. This Research Paper reports on research undertaken under the auspices of UKELA and the Gaia Foundation to look at existing environmental laws from various countries and assess them in terms of their "wildness". We need to learn how we can make our environmental laws more effective and this research is a first step towards informing our understanding of the issues. From one perspective, it can be viewed as an attempt to develop a new philosophy of legal thinking but, at the same time, it is intended to provide some practical pointers to help shape the way we use law to protect the environment. Until such times as we can persuade human society as a whole to act less selfishly, this may be our best chance.

I would like to thank all those who have been involved in this project. My task as supervisor and editor, has been easy; all the work has been done by others. Notable in this respect are Begonia Filgueira and Ian Mason who have organised, dragooned, cajoled and otherwise persuaded volunteers to provide information on their jurisdictions. Some of these volunteers were complete strangers before the start of this project and it was no mean task to bring their efforts together for this paper. An earlier draft of this paper was presented at the UKELA Wild Law Workshop held in Derbyshire in September 2008. Discussions at that meeting have re-enforced our belief in the worth of this project and we are delighted to see that Wild Law work is being taken forward beyond this project.

Lynda Warren

Chapter One

Introduction to the Wild Law Project

The UK Environmental Law Association¹ (UKELA) became involved with Wild Law in 2005 when Liz Rivers, a professional mediator, recommended Simon Boyle to read Cormac Cullinan's book *Wild Law: A Manifesto for Earth Justice*². This book arose from a series of discussions and conferences involving the Gaia Foundation in London and its international contacts, including Cormac, a practising environmental lawyer in South Africa. Simon was struck by the book and, in his own words:

“began to understand that the societal values that we hold and which are reflected in our legal systems are based on an entirely anthropocentric world view which legitimises the unconstrained exploitation of the natural world with the (false) belief that our species rules supreme. The legal concepts that we have built (such as ownership of property) and the very language that we use, for example ‘resources’ and ‘stewardship’, are all based on the notion that man is omnipotent and can do as he wishes with the planet.”

Prompted by Simon's enthusiasm, and his colleague from Argyll Environmental Josie Gander, UKELA arranged a half day conference at the University of Brighton in November 2005, working closely with colleagues from the Gaia Foundation, who supported Cormac whilst he wrote his book, and the Environmental Law Foundation. UKELA Council has supported the debate over Wild Law ever since, without endorsing the ideas (which a broad membership organisation like UKELA would, of course, struggle to do). Together with the Gaia Foundation, UKELA held two more annual Wild Law events. In 2006, speakers included Cormac Cullinan and Satish Kumar, and in 2007 there was a full weekend event in Derbyshire. One of the ideas coming out of these meetings was that there was much existing legislation already consistent with Wild Law principles. The research reported in this paper was a first step in investigating this hypothesis. Preliminary results were presented at a fourth Wild Law event in the autumn of 2008.

Cullinan acknowledges that laws consistent with Wild Law principles might already exist in some jurisdictions, a

possibility which it is the purpose of this paper to explore. He does, however, call for a complete revision of legal and governance systems so that they become consistent with Earth Jurisprudence in all their aspects. It is doubtful whether any constitution or governance system in the world today meets that standard.

The main aim of this paper, then, is to explore the extent to which Wild Law already exists. In so doing it seeks to elaborate the principles of Earth Jurisprudence and assess their effectiveness in practice; and it goes on to assess the significance and usefulness of Earth Jurisprudence for practical law and policy formation. The authors regard this as a necessary first step in the process of identifying common principles that might be of use in drafting more effective environmental laws and interpreting existing laws in more sympathetic ways. As with the best analytical approaches, there were no underlying assumptions that the Wild Law approach was a good or bad one. That can come later.

An Overview of the Wild Law Philosophy

In *Should Trees have Standing?*³, the seminal work by Professor Christopher Stone, serious consideration was given, perhaps for the first time, to whether, in the context of US Supreme Court litigation, it might be wiser to give trees legal rights in the same way that minors or corporations are given artificial legal personalities. Astonishingly, the Supreme Court felt that there was some merit to his arguments⁴ (which may not be the case today, however).

In the *Great Work*⁵ published in 1999, Thomas Berry called for a new jurisprudence to re-define the relationship between the human community and the Earth community in which it lives. He wrote:

“As regards law, the basic orientation of American jurisprudence is towards personal human rights and towards the natural world as existing for human possession and use. To the industrial-commercial world the natural world has no inherent rights to existence, habitat, or freedom to fulfil its role in the vast community of existence. Yet there can be no

1 For further information on UKELA see www.ukela.org.

2 C. Cullinan. *Wild Law: A Manifesto for Earth Justice*. 2003, Dartington, Green Books.

3 C. D. Stone. *Should Trees have Standing?: and other Essays on Law, Morals, and the Environment*. 1996, New York, Oceana Publications Inc.

4 *Sierra Club v Morton* 405 US 727

5 T. Berry. *The Great Work: Our Way into the Future*. 1999, New York, Bell Tower.

sustainable future, even for the modern industrial world, unless these inherent rights of the natural world are recognised as having legal status. The entire question of possession and use of the Earth, either by individuals or by establishments, needs to be considered in a more profound manner than Western society has ever done previously. ...

“To achieve a viable human-earth situation a new jurisprudence must envisage its primary task as that of articulating the conditions for the integral functioning of the Earth process, with special reference to a mutually-enhancing human Earth relationship. Within this context the various components of the Earth – the land, the water, the air, and the complex of life systems – would each be a commons. Together they would constitute the integral expression of the Great Commons of the planet Earth to be shared in proportion to need among all members of the Earth community⁶.

Cormac Cullinan took up these ideas in his book and paid tribute to Christopher Stone. He sought to explain Earth Jurisprudence in formal legal terms and to explore whether we could integrate Earth Jurisprudence into our legal systems. Laws based on Earth Jurisprudence would be “Wild Laws” - wild not because they were irrational or out of control, but wild because they derived from the laws of nature.

The idea is that the universe itself is the primary reference and source of law because it is the great environment in which all activity takes place. In nature there is an intimate connection between every being and the universe, which determines time scales, life spans, seasons and temperature ranges and provides all of the elements on which all creatures, animate and inanimate, depend and from which they are formed. This being so, human laws, to have any real validity, should be designed to correspond with universal laws so as to produce a “mutually-enhancing” relationship.

Cormac argues that the study of the Earth takes two forms. More conventionally and derived from the modern Western mind is the objective, scientific approach of measurement, empirical observation and verifiable recording. The other form, more common outside the influence of Western philosophy and methodology, is the more intimate and sometimes intuitive experiential mode of connecting with the natural world and understanding it, as it were, from

within. This mode of learning is much more common among indigenous peoples whose own life is much closer to the natural world and whose law appears more as lore and custom than as formulated regulations.

Earth Jurisprudence aims to draw on the best of both methods to forge a new understanding of law, constitutionality and lawfulness which is conducive to establishing and maintaining a naturally mutually-enhancing relationship between the human and all other species. Earth Jurisprudence therefore draws its principles primarily from experience of that relationship, adapting the methodology of formal constitutions and law making to comply with those principles.

All this assumes that somehow the natural relationship between the human presence and the natural environment has been disturbed. It is not the purpose of this paper to consider the evidence for that. Existing legal systems have been unable to prevent or mitigate loss of biodiversity; environmental pollution; de-forestation; climate change; and the whole related range of human degradation of the planet. The reality is that legal systems treat the Earth as a “resource” and value it only as such when in fact it is the organism that sustains all forms of life. Earth Jurisprudence examines the legal relationship between humans and the Earth in that light.

This is what is meant by the term ‘Earth Jurisprudence’ which we define here as

the philosophy of laws and regulations that gives formal recognition to the reciprocal relationship between humans and the rest of nature.

The argument is that nature itself can enhance human freedom and well-being if the reciprocal nature of the relationship is fully recognised and allowed to be effective.

Cormac argues that:

[I]n order to change completely the purpose of our governance systems, we must develop coherent new theories or philosophies of governance (‘Earth jurisprudence’) to supplant the old. The Earth jurisprudence is needed to guide the re-alignment of human governance systems with the fundamental principles of how the universe functions (which I refer to as the ‘Great Jurisprudence’). Giving effect

6 *The Great Work* at p. 61.

to Earth jurisprudence and bringing about systemic changes in human governance systems will also require the conscious fostering of wild law.⁷

Rights based approach

At the heart of Earth Jurisprudence is a sense that nature deserves to be valued for its own inherent worth, not merely because it is valuable to human beings. This valuation comes naturally to many peoples who root their lives in nature and who treat nature with deep respect and reverence, directing their own lives and habits so as not to cause damage or distress to the natural world. Such peoples do not think in terms of nature having “rights” in the typical legal sense. The need to think in terms of “rights” arises because the natural reciprocal relationship has almost completely broken down in the modern West and is not supported by its legal systems. As Christopher Stone puts it:

“There is something of a seamless web involved: there will be resistance to giving things ‘rights’ until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it ‘rights’ – which is almost inevitably going to sound inconceivable to a large group of people”⁸.

The rights-based approach is largely for the purpose of redressing the balance between Man and Nature. It empowers those in the human community who are anxious to restore balance when they find themselves in conflict with powers and authorities who prefer to consider nature solely as a resource to be exploited for human ends.

Applying the language of rights to the natural world does require careful thought: it is not simply an extension of the notion of human rights to a wider sphere. As Thomas Berry puts it⁹:

“In the non-living world, rights are role specific: in the living world rights are species specific. All rights are limited. Rivers have river rights. Birds have bird rights. Insects have insect rights.

Humans have human rights. Difference in rights is qualitative not quantitative. The rights of an insect would be of no value to a tree or a fish.”

Rights for the natural world are equally a means of defining responsibilities of human beings towards nature and of securing the restraint on human behaviour necessary to re-establish and maintain a mutually enhancing relationship embracing both. Nor is Earth Jurisprudence simply a matter of conferring rights on nature. It is a means of giving legal recognition to nature’s inherent worth by recognising what is already there. Most modern environmental law starts from the opposite view – that nature is here to be exploited for human ends, but may have to be protected when the destruction of nature threatens human survival or some other human interest. Earth Jurisprudence starts from the proposition that nature is inviolable and goes on to consider the circumstances in which it is necessary and permissible for human beings to depart from that principle. In that sense it is a radical departure from the norms of modern legal thought.

Wild law is the rules, regulations and constitutional principles that give effect to Earth Jurisprudence. The questions behind this paper were “Is there any existing law which can be described as wild law?”, and “If so, how wild is it?”.



Cormac Cullinan leads discussions at the Wild Law Workshop in Derbyshire 2008

7 *Wild Law* p. 30.

8 Should Trees Have Standing: 25th Anniversary edition p6.

9 Evening Thoughts pp10/11 – see Appendix 3.

Approach to the Research

Indicators

The research project reported in this paper set out to test the hypothesis that there was much existing legislation already consistent with Wild Law principles. For the purposes of this paper Wild Law is taken to mean the practical measures in formal law, constitutions and regulations that give effect to principles of Earth Jurisprudence¹⁰.

There is, as yet, no definitive statement of these principles because the philosophy of Earth Jurisprudence is still in its infancy. Nevertheless, for the purpose of analysis, it was necessary to establish certain criteria, or indicators, of “wildness” in order to carry out a comparative exercise of degrees of wildness of individual laws.

The principal indicators¹¹ identified and used are:

1. Earth Centred Governance;
2. Mutually Enhancing Relations to promote the well-being of the whole Earth Community;
3. Community Ecological Governance.

Our approach to the research was to break down each of these principal indicators into a number of sub-indicators which could be used to assess individual laws. We found in practice that there is a degree of overlap between these sub-indicators which is an inevitable consequence of the breadth of the three principal indicators and had to be taken into account in the analysis.

¹⁰ The essential reasoning behind Cullinan’s exploration of Wild Law is set out at pages 204 and 205 of his book *Wild Law: A Manifesto for Earth Justice* and is reproduced at Appendix 2. Thomas Berry has since crystallised his own thinking on the “legal conditions for Earth survival” in *Evening Thoughts*, published in 2006 and his thoughts are reproduced at Appendix 3.

¹¹ Carine Nadal of the Gaia Foundation with assistance from Peter Kellett of UKELA, produced a set of indicators for the purposes of this research which has been used throughout the analytical process. Her paper, with its detailed notes, is reproduced at Appendix 4. The authors are most grateful for this preparatory work without which this Research Paper could not have been written.

Earth Centred Governance

The great difference between modern jurisprudence and Earth jurisprudence is the place where it is centred. Modern jurisprudence is anthropocentric, the assumption being that all laws are made entirely for the benefit of human beings. This attitude is exemplified by concepts such as human rights, public benefit and private ownership, which take no account of the ‘other-than-human’ world. Even environmental protection is frequently for the purpose of enabling some human scheme to continue and is not for the protection of nature for its own sake.

The first sub-indicator for Earth Centred Governance is respect for the intrinsic value of Earth and all its members/components. The essential point here is that the Earth is valued for what it already is, as provided by nature, and not for any particular human use or advantage.

The second sub-indicator of Earth-centredness is that the dominant rationale of a legal measure is environmental protection. Responsibility is thus placed on the human presence to act in a way that is consistent with maintaining the natural environment as far as possible in its natural state.

The third sub-indicator is that the measure, or the governance which flows from it, is informed by the laws of nature, that is, that laws are founded on ecological criteria including life cycles, diversity and ecological limits.

Lastly, to be truly Earth-centred, the measure would need to show respect for the three key Earth Rights of an Earth Community member. Thomas Berry suggests that these are:

“...the right to be, the right to habitat, and the right to fulfil its role in the ever-renewing process of the Earth Community”¹².

Mutually Enhancing Relations

The idea behind this indicator is that the human presence is as much part of nature as is anything else and that humans have a proper role to play in the unfolding evolution of the Earth Community. Hence there are mutually enhancing relations to promote the well-being of the whole Earth Community. For Thomas Berry the ideal is that the human presence should enhance the evolutionary project and be enhanced by it. This involves restraints in the excesses of

¹² See Appendix 3.

human activity and sympathetic engagement with natural processes so as to minimise the human imprint while allowing the fulfilment of human potential in the context of the continued well-being of the whole Earth Community.

Here six sub-indicators were identified, all of which can be brought to bear in analysing the “wildness” of particular laws. They are:

1. Recognition of the inter-connectedness between members/ components of the Earth Community;
2. Reciprocity;
3. Conflict resolution mechanism/ process for interests/rights of humans and those of non-human members (the “procedural indicator”);
4. Resolution of conflict for the whole Earth Community (the “substantive indicator”);
5. Restorative mechanism/ process to (re)establish mutually enhancing relations for the well-being of the whole Earth Community;
6. Adaptive mechanism/ process in light of evolving challenges to pursue mutually enhancing relations.

In practice we found it necessary to amalgamate the ‘procedural’ and the ‘substantive’ indicators so as to maintain a proper balance between the three main indicators in the scoring process.

Community Ecological Governance

Community Ecological Governance (CEG) is the practical expression of the intimate relationship between the human and natural worlds by which the human presence regulates its conduct so as not to cause irreparable damage to the environment and its ecosystems. Its essence is that the regulation of conduct comes from the communities most involved, i.e. the human communities living in the ecosystem affected by the law as well as the non-human Earth communities affected.

CEG involves learning to listen to nature and giving effect to nature’s voice when formulating laws which affect natural processes. Indigenous peoples in many places are adept at this skill, but all too often, decisions affecting the environment are taken in government offices far from the locations in question and without any real consultation of the people who live in those locations or understanding of local realities. The idea behind CEG is that those are the people who should make the real decisions in consultation with the environment they inhabit.

There are three aspects of CEG which would be found in laws which fully respect this principle and which can be identified as sub-indicators:

1. Participation of all members of the Earth Community in ecological governance;
2. Legal recognition of the three key rights of public participation, namely
 - (a) Access to information;
 - (b) Public participation in decision making;
 - (c) Right of access to justice.
3. Respect for other key issues of CEG including traditional knowledge, cultural heritage, human rights, equitable access and benefit sharing, community land rights, co-management, self-determination and democracy.

Methodology

This paper does not purport to be an exhaustive study of all possible wild laws. In fact it is highly selective. In order to test the hypothesis that there are Wild Laws already in existence and to benchmark the extent to which they individually demonstrate the elements of wildness, a team of researchers was recruited and allocated to a number of regions across the globe. These were largely selected on the basis that the authors had contacts with people with experience in the relevant jurisdictions who could act as regional supervisors and give the researchers pointers to possible wild laws for consideration and analysis. Cases, statutes, regulations and constitutional instruments from various parts of the world were then recommended by the regional supervisors.

The regions were:

- European Union
- Africa – South Africa and Ethiopia
- India
- Australasia – New Zealand
- United States
- South America – Ecuador and Colombia

Each region presented different challenges. The EU has the advantage that there is a considerable amount of environmental legislation in the form of directives and other EU instruments which apply across all Member States. It was only a matter of selecting some appropriate instruments and subjecting them to the analytical process.

Africa, of course, has no such unified jurisdiction and it was necessary therefore to select countries for examination. South Africa and Ethiopia were selected because of the promptness of response from regional supervisors and the availability of researchers. A number of other countries could have been included and only limitations of time and availability of researchers prevented their inclusion.

South America is under-represented due to difficulties with obtaining translations for researchers. However we managed to secure some information on Columbia and Ecuador, both of them countries where serious attempts are being made to address environmental crises effectively.

The original intention was to obtain and analyse laws applying to a series of topics in each geographical region to see the extent to which they demonstrate indicators of wildness. Those were:

- Mountains
- Forests
- Endangered species
- Sacred sites

In the event, this proved over-ambitious for the time available and in fact no region produced anything on the subject of sacred sites. A schedule of the laws actually analysed for the purposes of this paper, with their scores against the chosen indicators, is attached as Appendix 1.

Once identified the laws were analysed against a matrix based on the indicators set out above. Each law could score up to 24 points if it showed strong indications of wildness and, conversely, could score as little as minus 24 points if it lacked these attributes. A sample matrix is attached at Appendix 5. The matrixes were completed by the researchers and then reviewed by the authors who scored the laws in accordance with the scoring system set out in Appendix 4. In this way an assessment of the “wildness” of each provision was arrived at. The assessments are reported and commented on in the following chapters.



River in Colombia, South America. Copyright: the Gaia Foundation

Chapter Three

Wild Law in Europe

The Habitats Directive

The Habitats Directive¹ was adopted in 1992 in the face of deteriorating natural habitats throughout Europe and an increasing number of seriously threatened wild species, largely caused by development and agricultural intensification. It is the means by which the EC meets its obligations as a signatory of the Berne Convention on the Conservation of European Wildlife and Natural Habitats². The Directive applies throughout the EU, with the aim of promoting the maintenance of biodiversity by requiring Member States to take measures to maintain and restore natural habitats and wild species at a favourable conservation status and introducing robust protection of habitats and species designated as being of European importance.

The law (as amended since 1992) works by requiring Member States to introduce a range of measures including the protection of species; surveillance of habitats and species; designation of Special Areas of Conservation and Special Protection Areas (classified under the EC Birds Directive³); and to report every six years on the implementation of the Directive. There are currently 189 habitats and 788 species listed under the Habitats Directive.

The Directive applies a form of the precautionary principle to protected areas to the extent that projects can generally only be permitted if it has been ascertained that there will be no adverse effect on the integrity of the site. Projects may still be permitted if there are no alternatives and there are imperative reasons of overriding public interest but in such cases compensation measures are applied to ensure the overall integrity of the network of sites which is intended, *inter alia*, to preserve migration routes for bird species across Europe.

Over the range of 48 points between -24 and + 24 the Directive scored a total of + 1. The split was as follows:

1 EC Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, OJ L 206 22.7.92, p. 7.

2 UKTS 50 (1982), Cmnd. 8738.

3 EC Council Directive 9/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L 103 25.4.1979, p. 1.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+3
Mutually Enhancing Relations	+/- 10	+3
Community Ecological Governance	+/- 6	-5
Total Score	+/- 24	+ 1

Earth Centred Governance

This is where the Directive came closest to establishing Wild Law credentials. The recitals clearly indicate that the key value is the intrinsic value of nature for its own sake and the concern is deterioration *per se*, not in relation to any particular human purpose. Article 2 requires measures to take account of economic, social and cultural requirements but does not give them priority over the dominant rationale of conservation of nature. The aim⁴ is that a species should be protected at least until it attains “favourable status” which means that it is “maintaining itself on a long-term basis as a viable component of its natural habitats” – a test which is clearly determined by the needs of the species for self-sustainability.

All three of Berry’s fundamental Earth rights are protected, at least in relation to endangered species and habitats although there is provision for de-classifying where this is warranted by natural developments noted as a result of surveillance⁵. The Directive specifically recognises and respects the importance of the Earth’s components beyond Special Areas of Conservation (such as rivers with their banks, traditional systems for marking field boundaries, ponds and small woods)⁶ in the functioning of listed species and habitats. Even the right of alien species to exist within their own natural habitat is recognised, but the rights of

4 Art 2(1) Definitions.

5 Arts 11 and 19.

6 Art. 10.

native species prevail.⁷

Mutually Enhancing Relations

The Directive does less well under this heading largely because its “wildness” is more implied than express. This does give scope for opening up Earth Jurisprudence principles in argument, but the outcome of such argument would depend on the extent to which a judicial tribunal wanted to recognise the priority of nature over human interests. It is also the case that enforcement is generally left to Member States of the EU who are responsible for reporting to the European Commission every six years. This must result in a variable strength of enforcement over the affected jurisdictions and there is little that the individual citizen can do to secure observance of the principles of the Directive in particular cases.

The specific issues of interconnectedness and reciprocity are only dealt with by implication, although there is material from which they can be implied⁸. However, notice also has to be taken of Article 16 which allows derogation in appropriate circumstances and in particular recognises overriding property interests where crops, livestock, forests, fisheries and water are concerned. Indeed, this rather highlights the real weakness of provisions of this kind when measured against Earth Jurisprudence criteria. When it comes to it, this is a “fire-fighting” measure intended to protect what is left of nature and natural habitats; it is not directed to the protection and enhancement of nature in its own right. There is no reference to the whole Earth community and only very limited reference⁹ even to the general public. It is certainly helpful that it protects certain vital aspects of Europe’s natural habitats but the underlying attitude is that the human presence is assumed to carry on as always except where it has become so detrimental to nature that the last remnants are threatened. It is suggested that this does not really meet the test of mutual enhancement – it is more a matter of human preservation.

On the question of enforcement also, the Directive leaves a great deal to be desired. Essentially, enforcement is carried out at national government level with six-yearly reporting to the European Commission, and even this requirement has no active teeth. There are occasional references to consulting the general public “if appropriate”¹⁰ but that is all.

7 Art. 22.

8 Recitals and Art 12 read in the context of the 11th Recital.

9 Art 6(3)

10 E.g. Art 6(3)

Community Ecological Governance

Here too the Directive is very weak. There is no explicit provision for indigenous communities or non-human communities to participate in the designation process and very little for the wider public anywhere in the Directive. Even when it may be appropriate, there is no requirement to heed public opinion once obtained. The public has no rights of access to information other than to see the six-yearly reports of national governments. There is no direct means by which the public can engage in enforcing or giving effect to the Directive and little or no recognition of the significance of traditional knowledge, customary practices, human rights, co-management or any rights, human or otherwise, to self-determination. Indeed, it is fair to conclude that the Directive takes no real cognisance of any principles of Community Ecological Governance, and in particular of the need for habitat use and conservation to be an interactive process where local inhabitants are the key players.

The Birds Directive

The Habitats Directive was preceded by the Birds Directive¹¹. It aims to protect, manage and control all bird species naturally living in the wild within the European territory of the Member States (Art.1.1), including their eggs, nests and habitats (Art 1.2); and also to regulate exploitation of them (Art.1.1). Like the Habitats Directive it works by requiring Member States to create protection zones and biotopes¹², maintain existing habitats and restore destroyed biotopes, in order to maintain or restore the diversity and the area of habitats for all species of naturally occurring wild birds (Art.3). Subject to exceptions, deliberate killing or capture of wild birds; destruction or damage to their nests or eggs (Art 5); disturbance, detention and sale are all prohibited (Arts. 5 & 6) with special provisions for hunting designated species (Art.7) provided it is consistent with the overall purpose of the Directive. The Directive also began the process of establishing Special Protection Areas for certain species (Art.3) which was developed in the Habitats Directive to form the ecological network of protected areas known as Natura 2000. The main purpose of Natura 2000 is to maintain or restore the habitats and species at a “favourable conservation status” in their natural range.

11 EC Council Directive 79/409/EEC, adopted on 2 April 1979, OJ L103, 25.4.1979, p. 1

12 Biotope: ‘place where life is lived’ OED.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+ 3
Mutually Enhancing Relations	+/- 10	+ 2
Community Ecological Governance	+/- 6	- 4
Total Score	+/- 24	+ 1

Earth Centred Governance

Although there are unmistakeable aspects of Earth-centredness in the Directive, they tend to derive more from the subject matter than from an Earth-centred perspective or intention in the mind of the legislator. Bird species and their habitats, for example, are considered as a “common heritage”¹³ or “common heritage of the peoples of Europe”¹⁴. However, these references are tempered by references to “management” and “control”¹⁵ of natural resources whereas Wild Law would be directed to management and control of human activities. At best the Directive suffers from mixed motives. The first two recitals refer to the European call for specific action to protect birds in the face of the rapid decline in numbers of some species, while the Sixth recital adds:

“Whereas the conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary to attain, within the operation of the common market, of the Community’s objectives regarding ... a harmonious development of economic activities throughout the Community and a continuous and balanced expansion, but the necessary and specific powers to act have not been provided for ...”

13 Preamble: Third recital

14 Preamble: Eighth recital – why not all peoples?

15 Art 1. See also Preamble: Eighth Recital

Given that context, environmental protection does become a dominant rationale and the Directive can be said to be informed by laws of nature to the extent that wild bird populations are inevitably the product of natural ecological processes. There is, however, no real recognition of any intrinsic value in nature or of any need to respect natural processes for their own sake. Perhaps this is best exemplified by the creation of “special protection areas for the conservation of these species”¹⁶. Real Wild Law would create special development areas for human activity, assuming that nature would proceed uninterrupted everywhere else. In the same way, the three key Earth rights are recognised but only really to the extent that recognition is forced on the legislator by the rapid decline of numbers and the need to act to reverse that trend for those species specifically referred to in the Annexes to the directive.

Mutually Enhancing Relations

The Recitals and Articles certainly recognise that bird populations are important to the human experience and that human activities are affecting bird populations. The need, for example, to allow hunting within prescribed limits which secure the continuation of the hunted species (Art.7) recognises both the reciprocal nature and interconnectedness of human and bird life. Several Recitals and Articles require restraint on the part of humans but these are generally restricted to the Special Protection Areas. There is some provision for conflict resolution as between member states and the EU, but no provision whatever for conflict resolution between species except to the extent that Member States may derogate from certain Articles where there is no other satisfactory solution “for the protection of flora and fauna” (Art.9).

Community Ecological Governance

Like any European Directive, the Birds Directive is the product of a top-down approach to government which is the exact opposite of Community Ecological Governance. Provision for public participation¹⁷, is extremely weak and there is nothing beyond the requirement to maintain species at a viable level to suggest that the species themselves are the central consideration. There is no mention of access to information and no requirement to heed public opinion once it is obtained.

16 Art. 4(1)

17 Art. 6(3)

Comment on the Birds and Habitats Directives

The Birds and Habitats Directives do contain potential for opening up Earth Jurisprudence arguments and its intentions have clear Earth Jurisprudence foundations, save for the fact that the overriding interest is essentially anthropocentric. Their weakness as Earth Jurisprudence instruments lies in the fact that they create exceptions to the general rule of human priority without seriously affecting or challenging that general rule except in special instances. Equally, and consistently with this weakness, there is little scope allowed for community involvement, none for communities outside government designated areas, and no means of community level engagement or enforcement. The intentions place both Directives on the “wild” side of the balance, but only just.

The above criticisms are not intended to say that the Habitats and Birds Directives are not viable, and even enlightened, effective and necessary, environmental legislation. It is only being said that they are not really examples of Wild Law. The Directives are fundamentally human-centred top-down governance instruments; Wild Law would expect them to be a living expression of the culture of the communities and species most concerned.

Nor is this intended to say that there is no scope for Wild Law within the Natura 2000 scheme. The Directives do give scope for argument and even decision from a Wild Law perspective. Campaigners could usefully work for a much greater inclusion of communities in the formulation and implementation of laws of this kind. It may, however, be that what the legislation really reveals is the absence of a community culture which is supportive of Wild Law and understands Jurisprudence from an Earth Centred perspective. Hence the need for these blunt instruments as a sort of clumsy substitute for really understanding the natural world with sympathy and respect.

Lappel Bank Case

[Case C-44/95 – Judgement of the Court of 11 July 1996 – *Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds*]

Facts: This was a reference under Art.177 of the EC Treaty from the UK House of Lords to the European Court of Justice for a preliminary ruling on the interpretation

of Articles 2 and 4 of the Birds Directive¹⁸. The case concerned the Lappel Bank, an area of inter-tidal mudflat immediately adjoining the Port of Sheerness on the Medway Estuary on the north coast of Kent. The estuary is used by a number of wildfowl and wader species as a breeding and wintering area and as a staging post during spring and autumn migration and also supports breeding populations of avocet and little tern. Lappel Bank was an important component of the overall estuarine ecosystem and was designated part of the Medway Special Protection Area pursuant to Art.4 of the Birds Directive. However, the Bank was also the only realistic space for expansion of the Port of Sheerness which was urgently required on economic grounds and the Secretary of State decided to exclude the Bank from the Special Protection Area.

The questions referred to the European Court of Justice were (1) “Is a Member State entitled to take account of the considerations mentioned in Article 2 of the [Birds Directive ...] in classification of an area as a Special Protection Area and / or in defining the boundaries of such an area pursuant to Article 4(1) and 4(2) of the Directive?” If the answer was “no” then (2) “may a Member State nevertheless take account of Article 2 considerations in the classification process in so far as (a) they amount to a general interest which is superior to the general interest which is represented by the ecological objective of the directive ...; or, (b) they amount to imperative reasons of over-riding public interest such as might be taken into account under Article 6.4 of [the Habitats Directive¹⁹]”.

Decision: the ECJ did answer “no” to the first question on the grounds that (a) Art.4 lays down a protection regime which is specifically targeted at the species listed in Annex A and also at migratory species, and (b) there was no reference to Art.2 in Art.4. On the first part of the second question they decided that a Member State is not allowed to take account of economic requirements when designating a Special Protection Area and defining its boundaries as they do not constitute a general interest superior to that represented by the ecological objective of the Directive. On the second part of the second question they decided that economic requirements, as an imperative reason of over-riding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter consideration at the designation stage. However, they added that this did not prevent them from being taken into account at a later stage under Art.6(3) and

18 Council Directive 79/409/EEC – see S.2.1.2 above.

19 Council Directive 92/43/EEC of 21 May 1992 – see S.2.1.1 above.

(4) of the Habitats Directive.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	
Mutually Enhancing Relations	+/- 10	
Community Ecological Governance	+/- 6	
Total Score	+/- 24	NIL

Comment

The case is entirely interpretive and turns on the contents of the Birds Directive and the Habitats Directive which we have analysed above. It serves largely to underscore the tension between the good intentions of European legislators and the realities of practice. On the face of it, the case upholds the wilder credentials of the Directives by requiring the Lappel Bank to be included in the Special Protection Area. However, although it specifically excludes economic considerations from the designation stage in the process, it expressly endorses the view that this does not prevent them from being “taken into account at a later stage under the procedure provided for by Art.6(3) and (4) of the Habitats Directive”. The fact that the Lappel Bank had been converted into a car park before the decision was delivered indicates just how weak these provisions really are. There is no question but that human interests will prevail over those of nature in the absence of a much more deeply rooted cultural and legislative climate in favour of nature.

EU Mountain Farming Protocol 2006

The EU is a signatory to the Convention on the Protection of the Alps (“the Alpine Convention”)²⁰. The Alpine Convention is a framework convention that aims to preserve the natural ecosystem of the Alps and to promote sustainable development in the area protecting at the same time, both the economic and cultural interests of the resident population of the Alpine region. The Alpine Convention requires the contracting parties to pursue a comprehensive policy for the preservation and protection of the Alps based on principles of prevention, polluter pays and cooperation²¹. Article 2(2)g of the Convention requires the parties to take appropriate measures to deal with mountain farming with the objective “in the public interest, to maintain the management of land traditionally cultivated by man and to preserve and promote a system of farming which suits local conditions and is environmentally compatible, taking into account the less favourable economic conditions”.

Art. 2(2) is implemented in the EU by the 2006 Mountain Farming Protocol²² which has the additional aim “of recognising and securing the continuity of [mountain farming’s] essential contribution to maintaining the population and safeguarding sustainable economic activities, particularly by means of producing typical high-quality produce, safeguarding the natural environment, preventing natural risks and conserving the beauty and recreational value of nature and the countryside and of cultural life in the Alpine region”²³. The Protocol is therefore about the very human activity of farming, and is constrained by the anthropocentric nature of the Convention on which it is based, albeit with an emphasis on the natural environment, environmental compatibility and traditional cultivation. However, in the final analysis it is akin to a charter for the humane treatment of slaves: there is no suggestion that the slaves are entitled not to be slaves.

²⁰ For text of the Convention see www.alpconv.org/theconvention/index_en. The Convention was signed in November 1991 and came into force in March 1995.

²¹ Alpine Convention Art.2(1)

²² Protocol on the implementation of the 1991 Alpine Convention in the field of mountain farming “Mountain Farming Protocol”, OJ L271, 30.9.2006, p. 63.

²³ MFP Art.1

Indicator	Possible Score	Actual Score
Earth Centred Governance	- / +8	- 1
Mutually Enhancing Relations	- / +10	- 1
Community Ecological Governance	- / +6	- 2
Totals	- / + 24	- 4

Earth centred governance

This is essentially a human centred instrument. The preamble recognises that “by virtue of its wealth of natural resources, water resources, agricultural potential, historical and cultural heritage, value for quality of life and for economic and leisure activities in Europe and the transport routes crossing it, the Alpine region will continue to be of vital importance...” and clearly regards the region as a human “resource”. There is little to suggest respect for the intrinsic value of the region and its natural Earth community beyond a recognition “that extensively farmed countryside must fulfil an essential function as a habitat for Alpine flora and fauna”²⁴. The need to balance human interests with environmental requirements is recognised²⁵ however, and there are frequent references to “respecting nature and the countryside”, “farming which suits local conditions” and “environmental compatibility”²⁶ which clearly are directed at environmental protection within the context of a farmed landscape. To that extent too it can be said that the Protocol is informed by natural law, with references to “nature friendly farming methods”²⁷ and promoting “nature friendly production methods”²⁸ but that does not extend to applying natural law principles to the care of the region as a whole. There is no express recognition of key Earth rights for mountains themselves,

24 Preamble to MFP
25 Preamble to MFP
26 e.g. MFP Art.8
27 e.g MFP Art. 9 .
28 MFP Art. 9

for other landscape features, or for flora and fauna although it could be said that there is an underlying assumption of their right to exist in the generally protective tenor of the instrument.

Mutually enhancing relations

The references to “respect” and “environmental compatibility” referred to above indicate that the legislators did envisage that wild nature holds real benefits for the human community but there is little to suggest an expectation that the relationship is mutual or to show an appreciation of the interconnection between human well-being and a healthy environment. The preamble recognises that “farming methods and intensity exert a decisive influence on nature and landscapes and that extensively farmed countryside must fulfil an essential function as a habitat for Alpine flora and fauna” but there is nothing to enable specific action to be taken in the interests of the flora and fauna concerned for the well-being of the whole Earth community or to resolve conflicts between the interests of the human community and those of the mountains and their non-human inhabitants. Nor is there any explicit restorative mechanism – the Protocol appears to be designed to preserve the existing position of Alpine farmers more than anything else. There is the potential for an adaptive mechanism in the monitoring provisions in Art.20 which require regular reporting to a standing committee of the Alpine Conference²⁹ which has powers to make recommendations for adoption by the Alpine Conference³⁰ but nothing to require those provisions to pursue mutual enhancement of both human and non-human nature.

Community ecological governance

There is a promising start in the recitals: “Convinced that the local population must be able to determine its own social, cultural and economic development plan and take part in its implementation in the existing institutional framework”, but there is little support for this in the substantive provisions which follow. It is envisaged that farmers must be associated in the decisions and measures taken for mountain regions³¹ but otherwise the Protocol provides for cooperation between “institutions and regional and local authorities directly concerned so as to encourage solidarity of responsibility”.³² There is provision for public

29 MFP Art.20(1)
30 MFP Art. 20(4)
31 MFP Art.4
32 Art.5(1)

access to information³³ but no express provision for general public participation in decision making or for access to justice. There is some rather weak recognition of the existence of cultural heritage and traditional knowledge³⁴ but little is made of it in substantive provisions.

Comment

Commenting on the Protocol in wild law terms brings out one of the key tensions in the Earth Jurisprudence approach to law: how to reconcile the human and natural worlds without becoming hostile to human interests. Very often, indigenous peoples engage in very little farming, and certainly not enough to make a significant difference to the surrounding natural environment. Farms, or gardens, are small and have limited purposes within the context of naturally productive surroundings. But the valleys of the Alpine region have been extensively farmed for centuries and support a substantial human population.

Contemporary economic pressures and interests combined with the growing population of Europe and the economic demand for food products extending far beyond the region in which products are grown and produced, heighten this tension. The Protocol is directed to the human community with a view to containing it in spite of these pressures. From that perspective it is an excellent example of conventional environmental law. Its failure as a Wild Law instrument may be partly explained by the fact that it is directed to a situation in which wild nature has already been relegated to being a beautiful backdrop to an already largely humanised habitat. Returning such a habitat to a state of wild nature would have devastating implications for the human population and is unlikely to be possible or practical. Notwithstanding its limitations when measured against the chosen wild law indicators, it is not easy to see how a provision that did meet the wild law criteria could be framed in terms that are practical and capable of implementation in all respects or at any rate, what difference it would make.



Gentian, Switzerland copyright: Ruth Chambers

33 MFP Art.18

34 MFP Recitals and Art.1

Chapter Four

Wild Law in India

Three pieces of legislation and three cases were reviewed, covering three main topics: forests, rivers and biodiversity.

Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006

The Scheduled Tribes law¹ is a recent law which was passed in order to preserve the interest of the indigenous Scheduled Tribes in India. These tribes represent just over 8% of the total population² with almost 95% of these living in the State of Mizoram.

The law seeks to provide Tribes with rights over land which they have inhabited for centuries and of which they have been dispossessed. It also grants rights to Tribes to protect the biodiversity, flora and fauna but does not provide rights to hunt.

Overall this law scored 15 out of a total of 24 possible marks. The split was as follows:

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+3
Mutually Enhancing Relations	+/- 10	+7
Community Ecological Governance	+/- 6	+5
Total Score	+/- 24	+ 15

1 Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, Gazette of India, Extraordinary, Jan. 2 2007, Law No. 2 of 2007.

2 Indian Census 2001 (http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/scst.aspx).

Earth Centred Governance

This law recognises the interdependence of human life and forest life whilst acknowledging the need for reciprocal obligations between the parties. It envisages that a symbiotic relationship between the Tribes and the forest would result in the strengthening of the “conservation regime of forests”³. This is clearly a position advocated by Wild Law. However, respect for the ecological balance of the forests is not expressly said to be maintained to protect the Earth.

The law could be viewed to be anthropocentric in that its primary aim is to ensure the survival of Scheduled Tribes. However, when one considers that the rights granted under this law can be trumped by wildlife conservation⁴ we must withdraw this criticism. The law provides rights to Scheduled Tribes so they can secure their traditional livelihood but not at the expense of wild animals as in certain instances these have stronger rights. In places where co-existence of wild life and man is not possible and there is a risk of causing irreversible damage to wild life and their habitat, a Tribe will be moved out of the area which will be reserved for conservation. The Tribe would then rely on the Indian State to provide them with an alternative area where they could continue to live in the same manner as they had done previously⁵.

This law could have gone further and explicitly given rights to other members of the Earth Community. Instead it imposes a duty on right holders (the Tribes), the Gram Sabha⁶ and other village governing institutions to protect wildlife, the forest, biodiversity, water sources and their habitat in general⁷.

There is no express acknowledgment of the need for governance of the forest to be informed by the rights of nature or of respect for the three Earth Rights. The forest is there to serve the Tribes and the wildlife. This may be because the forest is not in danger or perceived to be so and thus the law prescribes solutions for the members of the Earth Community which locally are in need of protection.

3 See Preamble para. 2.

4 See Chapter III s 4(2).

5 See Chapter III s 4(2)(d).

6 The Gram Sabha is part of a system of local governance made up of all members of a village over the age of 18.

7 See Chapter III s 5.

Mutually Enhancing Relations

In terms of mutually enhancing relationships, the law recognises the Indian State's previous failure to protect the balance between the forest's ecosystem and its inhabitants⁸. It acknowledges wholeheartedly the interdependence between the "very survival and sustainability of the forest ecosystem" and the forest dwellers. This interconnectedness logically imposes reciprocal obligations, but only on forest dwellers whose rights encompass obligations "to use sustainably, conservation of biodiversity and maintenance of ecological balance"⁹.

Conflict is resolved at a forest community level initially by the Gram Sabha or village assembly composed of adult members of the village¹⁰. Further it is the duty of forest dwellers who are granted rights by this law to ensure that decisions are taken by the Gram Sabha that allow access to the resource of the forest whilst not adversely affecting "the wild animals, forest and the biodiversity"¹¹.

Here the law scores highly on Wild Law. Decision making is carried out at a local level where there will be an understanding of how it is possible for Tribes to live in harmony with the other members of the Earth Community with whom they share their habitat. Further, it is the duty of the holders of forest rights to ensure these decisions are compliant with the law. Appeals to decisions correct any wrong decisions made by the Gram Sabha. Could the law have achieved its aim better if it had granted rights to other members of the Earth Community and not only to humans? What the law has done may serve the same purpose as it makes it a duty to seek protection of the forest and perhaps this works in Tribes where human livelihood is so dependent on the surrounding environment. However, if the law had granted rights to the forest itself a wider group of people could have stepped in to protect the forests if the Tribes had not done so.

Community Ecological Governance

There is no restorative mechanism where harm has been done to the forest. The law focuses its protection on wildlife and humans. Protection is granted to wildlife above human life only where wildlife is in extreme danger of extinction¹².

8 See para. 3 Preamble.
9 See para. 2 Preamble.
10 See Chapter I s. 2(g).
11 See Chapter III s 5(d).
12 See Chapter III s 4 (2).

As seen above, members of the community are entitled to be involved in the Gram Sabha¹³. Local decision making, knowledge and understanding of the culture and way of life of the Tribes is essential to the functioning of forest Tribal society. This law recognises community land rights and respect for traditional knowledge and in this respect is in tune with Wild Law values.

There is no mechanism in the law for access to information but this may not be necessary in a close knit and interdependent community where decisions are made at a local level. There is also an Indian State law which grants rights to access to information. Human dwellers have a right to access justice for the forest but not for animals or plants or rivers¹⁴.

K.M. Chinnappa v. Union of India¹⁵

This case deals with a dispute over the extension of a mining lease granted to Kudremukh Iron Ore Co. Ltd who had been carrying out open cast iron ore mining in the Kudremukh National Park for the last 30 years. The Kudremukh National Park is one of the forest areas amongst "18 internationally recognised "Hotspots" for bio-diversity conservation in the world"¹⁶.

The case related to a long standing dispute concerned with environmental damage caused by mining waste. In 2001 the Supreme Court was asked to decide on the validity of a 1999 decision by the Central Empowered Committee¹⁷ which based its decision not to extend or grant a new lease to the Kudremukh Iron Ore Co. on the unique and rich biodiversity in the area. The decision required that the Iron Ore Co:

- cease its mining operation in the area in 2005 allowing it to honour a number of existing contractual commitments;
- make funds available for the government agencies to implement a plan of rehabilitation, reclamation

13 See Chapter I s. 2(g).

14 See Chapter IV s 6.

15 *K.M. Chinnappa v. Union of India*, WP 202/1995 (30.10.2002) AIR 2003 SC 724, 2003 (51) BLJR 324, available on line at www.elaw.org/node/2469.

16 *K.M. Chinnappa v. Union of India*, para. 1.

17 This Committee has jurisdiction over areas of special conservation.

and restoration of the mined area prepared by the appropriate government agency;

- pay yearly monetary compensation to be deposited in a separate account to be used for research, monitoring and strengthening the protection of the Kudremukh National Park and other protected areas of the Kudremukh State; and
- wind up and transfer all the buildings and other infrastructure to the Forest Department of the State of Karnataka at book value¹⁸.

The Court affirmed the validity of the Committee's decision and left the dispute over the value of the transfer of assets to be further agreed by the Ministry of Environment and Forests, the State Government and the Company, under the guidance and supervision of the Committee.

This case rated very high in the wild stakes, a total of 18 out of a possible +24 or -24 as shown below. It is likely that the low score on CEG has more to do with the nature of the case than the lack of participation in ecological governance, access to information or access to justice.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+8
Mutually Enhancing Relations	+/- 10	+9
Community Ecological Governance	+/- 6	+1
Total Score	+/- 24	+ 18

Earth Centred Governance

By endorsing the World Charter for Nature's¹⁹ statement that "mankind is part of nature and life depends on uninterrupted functioning of natural systems" the Supreme Court fully recognised that humans are part of a greater community. The Court went so far as to say that by "destroying nature man is committing matricide"²⁰ thus declaring that man comes from nature, is part of nature and has a duty of care to protect the environment.

Environmental protection is a duty enshrined in the Indian Constitution which is imposed not only on the State of India but on every individual citizen²¹. This duty is tempered with obligations to act in the public interest but public interest is not equated with commercial value or private gain²². The Court introduces a dual role for the State and its emanations to be proactive in the protection and improvement of the environment as a trustee of natural resources and of humans as a welfare state, recognising the need to balance these mutually serving relationships²³.

The case admits that the impact of human activity has led to an "alarming position"²⁴ and that indifference, lack of concern and lack of foresight - all Wild Law propositions - have contributed to the current state of affairs. And although the Court does not identify expressly the key Earth Rights of the Earth Community, it supports the principles contained therein by citing the wise Indian Chief Seattle²⁵ replying to the White Chief in Washington's offer to buy Indian land²⁶. This further engages the Court with the emotional aspect of our relationship with the Earth, e.g.: "...teach your children, that the rivers are our brothers, and you must henceforth give them the kindness you would give any brother.", one of the most controversial issues today in a rationalist based society and a *sine qua non* for Wild Laws.

19 The World Charter for Nature adopted by the United Nations General Assembly on 29 October 1982.

20 *K.M. Chinnappa v. Union of India*, para. 1.

21 Art 51-A(g).

22 *K.M. Chinnappa v. Union of India*, para. 40.

23 *K.M. Chinnappa v. Union of India*, paras 35 and 39.

24 *K.M. Chinnappa v. Union of India*, para. 1.

25 There are several extant versions of this speech in existence and the authenticity of all of them is in considerable doubt. What is not in doubt is that, whatever its origin, the speech does express a view entirely consistent with Earth Jurisprudence.

26 *K.M. Chinnappa v. Union of India*, paras 14 - 20.

18 *K.M. Chinnappa v. Union of India*, para. 7.

Mutually Enhancing Relations

By endorsing the words of Chief Seattle, the Court gives implicit unequivocal recognition of the interconnectedness and reciprocal obligations of the members of the Earth Community regarding respect and enjoyment of nature as a fundamental aspect of human life. Note, in particular, the following passages: “*This shining water [which] moves [in] the streams and rises is not just water but the blood of our ancestors ... The rivers are our brothers, they quench our thirst. The rivers carry our canoes and feed our children.*”; “*the air shares its spirit with all the life it supports.*”; and “*the ground beneath [your children’s] feet is the ashes of our grandfathers, ...*”.

The case of *Kendra v State of Uttar Pradesh*²⁷ is quoted as jurisprudence supporting the interconnectedness argument in advocating the use of natural resources in a way that cares for the environment and does not affect it in any serious way. Once these resources have been overexploited or violated, restorative measures are imposed by the Court. This case supports the Commission’s decision to require that the Kudremukh Iron Ore Co. ecologically restore the mined area and create a compensation fund to be used to research and monitor the environmental health of the affected area (the Kudremukh Wild Park). Further the restoration plan was to be State led and independently monitored. All of this, together with the full recognition of interconnectedness, fully squares with the Wild Law concept of moving beyond deterrents to restorative measures which mutually enhance the well being of all members of the Earth Community.

Community Ecological Governance

Albeit there is no express mention by the Court of Community Ecological Governance there is a right of access to the courts in environmental matters and there is also an Indian law on access to information.

Perumatty Grama Panchayat v. State of Kerala²⁸

This case heard by the High Court of Kerala is an administrative challenge to a decision by the Indian
27 *Kendra v State of Uttar Pradesh* (AIR 1987 SC 359) cited in *K.M. Chinnappa v. Union of India*, par. 36.
28 *Perumatty Grama Panchayat v. State of Kerala* (WP (C) No 34292 of 2003), decided on 16th December, 2003 (The Coca Cola Case) 2004 (1) KLT 731 (2003), available on line at www.elaw.org/node/1410.

Central Government which suspended a decision by the Kerala Government to revoke a licence granted to Coca Cola allowing unlimited water abstraction. The decision was based on the fact that Coca Cola’s water abstraction (three litres of water were needed to make one litre of Coca Cola) was an over-exploitation of resources which left the local population without sufficient water for their human and agricultural use. It is important to note that although the case was brought on jurisdictional grounds the Court gave judgment on substantive environmental matters. This case had a moderate wild content, with a total of 7 out of a possible +24 or -24 points distributed as follows:

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+4
Mutually Enhancing Relations	+/- 10	+1
Community Ecological Governance	+/- 6	+2
Total Score	+/- 24	+ 7

There was a very strong anthropocentric view of environmental protection but the court went out of its way to impose some form of environmental justice. The judge was inspired by the laws of nature as he ruled, without recourse to science, that if you unbalance a member of the Earth Community it will not be able to carry out its role and that will have an effect on other members of the Earth Community, mainly humans.

Earth Centred Governance

K Balakrishnan Nair J recognised the value of the components of the Earth and explicitly refers to natural resources and the need to protect ecosystems:

“Ground water is a national wealth and it belongs to the entire society. It is a nectar,

*sustaining life on earth. Without water, the earth would be a desert*²⁹.

But nature is not valued intrinsically for itself but as a resource necessary to maintain life on Earth. Principle 2 of the Stockholm Declaration³⁰, which is anthropocentric and based on principles of sustainable development, is also cited as authority in this case.

The dominant rationale in the Keralan Government's decision to revoke Coca Cola's licence was that of human protection. It was based on the excessive exploitation of groundwater resources by Coca Cola causing in turn acute scarcity of drinking water. This exemplifies an anthropocentric view of environmental protection:

*"... inaction of State in this regard will [be] tantamount to infringement of the right of life of people guaranteed under Art 21 [which protects the right to life] of the Indian Constitution"*³¹.

There was also some concern for the ecological imbalance to the river that over-extraction would cause in as far as it may not be able to provide water if interfered with.

The laws of nature or universal jurisprudence did play a part in the judgment. K Balakrishnan Nair J did not need to be convinced by scientific arguments that overexploitation of groundwater resources would interfere with the laws of nature creating an abnormal situation. The judge appealed to the laws of the universe and to logic:

"If there is artificial interference with the ground water collection by excessive extraction, it is sure to create ecological imbalance. No great knowledge of Science of Ecology is necessary to infer this inevitable result."

There was no explicit reference to Earth Rights save for those of humans. The need to protect the environment is

29 Para 13 *Perumatty Grama Panchayat v. State of Kerala*.

30 Principle 2 states: "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate" (for further information see www.unep.org/documents).

31 *Perumatty Grama Panchayat v. State of Kerala*, para. 34.

driven by human survival.

Mutually Enhancing Relations

The judgment recognises human dependence on sustainable water supplies and the interdependency between all life on Earth. Water is seen as a public good too essential to life for it to be the subject of private property. The State would be the trustee and the public the beneficiary.

This interdependence is the driver for the Public Trust Doctrine advocated by K Balakrishnan Nair J:

"The Public Trust Doctrine primarily rests on the principle that certain resources like sea waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public, rather than to permit their use for private ownership or commercial purposes."

In contrast, it is important to note that at the time of the judgment Kerala had no statutory limit to water abstraction and no requirement for a permit in order to dig boreholes. The law on exploitation of water resources was not in force, the Control of Groundwater Board was not a party to the action and Coca Cola had not even registered with this body albeit being active in the area for a number of years.

The action was not brought on the grounds of environmental protection as it was an administrative challenge by the State of Kerala to a decision by the Central Government. There were also no limits as to how much water one could extract. Despite this, the court found a way to redress the balance and intervene on the substance of the matter and prohibited abstraction of water by Coca Cola.

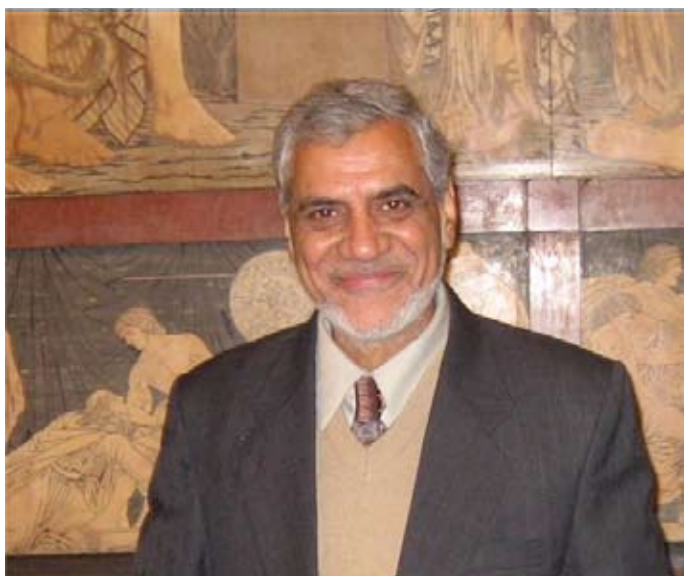
The judgment did not provide any remedy for the damage to the environment by the over-exploitation of water by Coca Cola nor did it even consider restorative justice programmes.

Community Ecological Governance

The theory of water being held in public trust does bring an element of community ecological governance into play. However, collective decision-making was not envisaged at a community level, only at Government level.

Given the nature of the case there was no mention of legal recognition of public participation in decision-making or access to justice. However, the judgment itself was partly based on environmental reasons. Further K Balakrishnan Nair J ordered that environmental studies (proposed by the Central Government) be carried out and that the media accompany the consultants in order to watch over the public interest and report on any illegal practices. This is an innovative approach to monitoring any potential wrongdoing and of allowing the public to be informed by non-governmental means.

M.C.Mehta (Ii) Vs Union of India (Kanpur tanneries case)³²



Indian environmental lawyer, M.C. Mehta

This is the second of a number of cases in the 1980s and 1990s that dealt with water pollution from tanneries along the Ganga River in Kanpur and Calcutta. The case was about protecting the water source for human consumption

³² *M.C.Mehta (Ii) Vs Union of India* (Kanpur tanneries case) and Others Writ Petition No. 3727 of 1985 (Venkataramiah, J.) 12.01.1988, [1988] 2 SCR 530, available online at www.elaw.org/node/1348 .

and environmental protection was incidental to the main goal.

This case rated poorly in Wild Law stakes, scoring a total of -1 out of a possible +24 or -24:

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	-3
Mutually Enhancing Relations	+/- 10	+1
Community Ecological Governance	+/- 6	+1
Total Score	+/- 24	- 1

Earth Centred Governance

The Court justified the need to stop polluting the river on the need to have clean water for human consumption - the need to avoid the spreading of disease is the motivating factor in this decision. At no point are the needs of the river or aquatic life taken into account although the definition of pollution in the Water (Prevention and Control of Pollution) Act 1974 is wider than harm to human health, encompassing plants and aquatic organisms:

“..such contamination of water ... as may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms”.

The purpose of this case was to save human lives and the only mention of the laws of nature informing governance is an understanding that if pollution continued without controls in place the river would die.

Mutually Enhancing Relations

The judgment admits the dependency of human life on the environment. The restoration of fish and other aquatic life appears as a secondary aim of pollution prevention, the main purpose being to continue to have a supply of safe drinking water:

“The benefits which result from the prevention of water pollution include a general improvement in the standard of health of the population, the possibility of restoring stream waters to their original beneficial state and rendering them fit as sources of water supply, and the maintenance of clean and healthy surroundings which would then offer attractive recreational facilities. Such measures would also restore fish and other aquatic life.”

In the first Kanpur Tanneries case, companies were required to install treatment plants within six months of the judgment or face closure. In this case the State was given a clear mandate to take immediate action against polluting industries and to take into account treatment of effluents when granting new licences to industry. However, although there are provisions in the Environment Protection Act 1986 which create environmental offences and common law provisions which allow for injunctions, no damages were awarded against the State for not fulfilling its duty to protect the environment nor any restorative measures put in place to clean the river³³.

Community Ecological Governance

The case was brought by a member of the public – M. C. Mehta, a public interest lawyer – and based on public nuisance. Therefore India does allow public interest litigation where the community as a whole is affected.

The Biological Diversity Act³⁴

The Biological Diversity Act had a good wild scoring with 12 out of a possible +24 to -24:

33 *M.C.Mehta (Ii) v. Union of India*, paras 6 and 16.
34 The Biological Diversity Act 2002 No 18 of 2003.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+3
Mutually Enhancing Relations	+/- 10	+7
Community Ecological Governance	+/- 6	+2
Total Score	+/- 24	+ 12

Earth Centred Governance

The Act promotes the protection of biodiversity, the fair distribution of biological resources and their sustainable use³⁵. Thus although there is some recognition of the intrinsic value of the Earth, biological diversity is seen as a resource to be exploited.

The Act is strong on conservation and thus environmental protection. It establishes a State Biodiversity Board and a National Biodiversity Fund to be used in conservation projects³⁶. There are incentives for research, training and education to increase the chances of long-term conservation³⁷. The recognition of ecological limits of habitats and the need to control the risks associated with the use of biodiversity are both prevalent in the Act. It also recognises the right of a species to exist by allowing its complete protection if threatened with extinction and the classification of special sites as biodiversity heritage sites³⁸.

Mutually Enhancing Relations

By promoting sustainable use of resources and conservation of biodiversity, the Act recognises the interconnectedness between the members of the Earth Community. The Central Government is obliged to assess the environmental impact

35 Preamble to the Biological Diversity Act 2002.
36 Sections 23 and 27.
37 Section 36.
38 Section 38.

of a project likely to have adverse effect on biodiversity as a measure of conflict resolution. There are penalties for contravention of conservation laws but no mechanisms to restore damage caused.

Community Ecological Governance

The Act recognises the need for equitable sharing of the benefits arising from use of biological resources. The public includes local people and the Act promotes respect for, and values local knowledge on, biological diversity by registration or other *sui generis* methods, but this is quite vague. There is legal recognition of access to justice but only for those who have been aggrieved.

Protection of Plant Varieties and Farmer's Rights Act 2001³⁹

The Act had a poor Wild Law scoring with -14 out of a possible +24 to -24:

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	-8
Mutually Enhancing Relations	+/- 10	-6
Community Ecological Governance	+/- 6	0
Total Score	+/- 24	-14

The name of this Act clearly sets out its main and only purpose, namely to protect the rights of farmers and their intellectual property rights over local plants and seeds. The protection of local biodiversity is exclusively motivated by anthropocentric needs.

³⁹ Protection of Plant Varieties and Farmer's Rights Act 2001 Act 53 of 2001.

Earth Centred Governance

The purpose of this Act is to protect the rights of farmer and plant breeders and to protect the interests of the seed industry in India. Environmental protection features only in the conservation of plant varieties likely to become extinct⁴⁰. The laws of nature are only considered in so far as plants are seen as distinct from each other for registration purposes⁴¹ and the acknowledgment that overexploitation by commercial agriculture can potentially destroy plant varieties.

Mutually Enhancing Relations

The Act recognises that commercial agriculture may cause environmental damage but provides no measures to prevent this⁴².

Breaches of this Act are punished with an injunction, a term in prison, damages or a share in any profit made by the breach. However there is no mention of restorative justice.

Community Ecological Governance

There is no mention of the Earth Community. Access to information is provided by requiring the publication of applications to register a variety of plant and the public inspection of plant registers⁴³.

Access to justice is concerned with unsuccessful applications for registering plants.

Comment on Indian Laws

There are many things in the above laws that indicate that Indian laws have an element of wildness, however the protection of human life was the common denominator in all Indian laws reviewed revealing their anthropocentric nature. In all the legal materials analysed there was a recognition that humans were dependent on the Earth for their survival. However, seldom was there an acknowledgment of the need to have a harmonious relationship with the planet. Environmental protection was always incidental to human needs with conservation

⁴⁰ Section 29.

⁴¹ Preamble of the Protection of Plant Varieties and Farmer's Rights Act 2001.

⁴² Section 29.

⁴³ Sections 21 and 84.

of biodiversity trumping only where there was a risk of extinction of a species.

Case law and the individual view of judges reflected a greater understanding of nature, that humans are part of nature and that they have a duty to protect it not only for their survival but also for its inherent worth and beauty. The judge in the *Chinnappa* case quoted extensively from Chief Seattle replying to the White Chief in Washington's offer to buy their land as an example of how we should

value the Earth for its own worth, thus seeking out old tribal values to protect nature. The need for education about protection of the environment was also advocated by judges and evident in some of the laws. In some cases public interest was linked to the interest of humans but not equated by commercial value or private gain, which is a positive view. In most cases the public was given a right to participate in environmental decision-making and justice.



istockphoto.com, A family of Asian Elephants in the forest. Bandipur, Karnataka, India.

Chapter Five

Wild Law in Africa

SOUTH AFRICA

Constitution of the Republic of South Africa: Act 108 of 1996

The Constitution of the Republic of South Africa was approved by the Constitutional Court in December 1996 and took effect on the 4th February 1997. It is the supreme law of the land and no other law or government action can supersede its provisions. Many consider it to be among the most progressive in the world. Chapter 2 of the Constitution contains a Bill of Rights and s.24 dealing with the environment begins with the phrase “Everyone has the right...” Environmental rights are in fact given solely to human beings and the whole tenor of the parts dealing with the environment is distinctly anthropocentric. The poor overall score reflects the fact that there is no real sense of an Earth community existing as a living entity in its own right. The Constitution is redeemed slightly by the fact that recognition of traditional communities, leadership and customary law brings a positive score for Community Ecological Governance.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	- 4
Mutually Enhancing Relations	+/- 10	- 6
Community Ecological Governance	+/- 6	+ 4
Total Score	+/- 24	- 6

Earth centred governance

The focus¹ is decidedly anthropocentric with the basic right to a healthy environment founded on human

1 Section 24

health² and use of natural resources³. Future generations are a consideration⁴ and one of the express purposes of environmental protection is the prevention of pollution and ecological degradation,⁵ which could imply some degree of recognition of the intrinsic value of the Earth since it does acknowledge the existence of the environment as a collection of ecosystems and a duty to prevent its degradation. Nonetheless, environmental protection is not the dominant rationale as evidenced by the fact that ecologically sustainable development and use of natural resources is to be combined with “promoting justifiable economic and social development”⁶. The law of nature is acknowledged to the extent that the importance of ecosystems is implied but that is as far as it goes and the key Earth rights can only really be said to feature as ancillary to the human purposes of s.24 and the fact that it deals with the environment.

Mutually enhancing relations

Although the effect of the state of the environment on human health and well being is recognised⁷, there is no corresponding recognition of the effect of human activities on the environment and other members of the Earth community let alone any reciprocal obligations or enforceable rights. There could be an opening in s.38⁸ for arguing Earth Jurisprudence principles under the umbrella of ‘public interest’ but the possibilities are limited by the obvious view that ‘persons’ empowered to approach the court are human or juridical persons and do not include non-human members of the Earth community (although they do include non-human members of the human community such as corporations and associations). There is no requirement to establish or maintain mutually enhancing relations and there is no mechanism for adapting to changing conditions or challenges.

Community ecological governance

Section 38(c) empowers anyone “*acting as a member of, or in the interest of, a group or class of persons*” to approach the court with an allegation that there has been a breach of their human rights. This provision could be used in conjunction with the right to a healthy environment to enable communities to establish protective measures for

2 Section 24(a)

3 Section 24(b)(iii)

4 Section 24(b)

5 Section 24(b)(i)

6 Section 24(b)(iii)

7 Section 24 (a)

8 Section 38 – Enforcement of Rights

traditionally healthy relationships with nature, which at least allows humans to participate in ecological governance although it does not give a direct voice to nature threatened by encroaching human interests. Access to information is a Constitutional right⁹ and public participation in policy making is “encouraged”¹⁰ while the wide definition of *locus standi* to include individuals¹¹ wishing to bring an action to protect a Constitutional right gives widespread access to justice to people although not to other members of the Earth community. A number of other Community Ecological Governance issues are recognised. The link between the state of the environment and human rights in the context of human health and well being is recognised and enshrined in S.24. Sections 30 and 31¹² protect the rights of communities to participate within their cultures and religions provided that doing so is not inconsistent with any provision of the Bill of Rights. Traditional leadership and customary law is recognised¹³ although the role of traditional leaders is left to be defined by national legislation¹⁴.

National Environmental Management Act 107 of 1998

The problem with this Act is that its primary aim is the management of the environment in the human interest:

“Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably”¹⁵.

The notion of the environment as an aspect of our heritage is recognised but only from an anthropocentric perspective. Nonetheless, the Act does have some redeeming features arising from the language chosen rather than from any particular intent on the part of the legislators. Expressions like “Sustainable development requires the consideration of all relevant factors including ... (v) that the use and exploitation of non-renewable natural resources is

9 Section 32 – Access to Information

10 Section 195(1)(e) – Basic values and principles governing public administration.

11 Section 38(1)

12 Section 30 – Language and culture; section 31 – Cultural, religious and linguistic communities

13 Section 211 – Recognition; section 212 – Role of traditional leaders

14 Section 212(1)

15 Section 2(2) - This prompted our researcher to comment that the title of the Act should really be the National Human Management Act!

responsible and equitable, and takes into account the consequences of the depletion of the resource”¹⁶ do leave scope for arguments based on consequences to nature as well as consequences to human beings.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	-5
Mutually Enhancing Relations	+/- 10	-5
Community Ecological Governance	+/- 6	+5
Total Score	+/- 24	- 5

Earth centred governance

As commented above, the Act is essentially anthropocentric and its interest in the Earth is only as a resource which serves human needs. Even the promotion of environmental education and the raising of environmental awareness is for the purpose of “community well-being and empowerment”¹⁷. The dominant rationale is management of the Earth to serve human interests so that, although sustainable development¹⁸ and the precautionary principle¹⁹ are recognised as relevant, pollution, degradation etc. are permitted, albeit to a minimum, where they cannot be avoided²⁰. As with many instruments dealing with the environment, some influence of natural law is inevitable. For example, the interconnectedness of the earth is recognised²¹ and must influence any management decision that may affect any component but this is entirely from an anthropocentric perspective. There is no recognition of any of the key Earth rights.

16 Section 2.(4)(v)

17 Section 2(4)(h)

18 Section 2(4)(a)

19 Section 2(4)(a)(vii)

20 Section 2(4)(a)(iii)

21 Section 2(4)(b)

Mutually enhancing relations

While the interconnectedness of ecosystems is recognised there is nothing mutual or reciprocal about the relationship envisaged. The sole purpose of care for the environment is to enhance the human experience and while power is granted to the State to intervene and impose obligations where environmental harm is being caused²², there is nothing to suggest that this provision has the interests or rights of the non-human community in prospect. There are no restorative provisions but the State (or Minister)²³ may make regulations to deal with matters as they arise.

Community ecological governance

The Act scores better in Community Ecological Governance terms although its anthropocentric nature remains foremost. Participation in the decision making process is required of “all interested and affected parties in environmental governance”²⁴ with particular regard being given to traditional (indigenous) communities, women and youth, a provision which may give scope for the interests of nature as well. There is extensive provision for access to information²⁵ and protection for whistle-blowers that act in good faith²⁶. Equitable access to the environment for all is required²⁷ and traditional knowledge is to be taken into consideration in the decision making process²⁸.

ETHIOPIA

Ancient Forests: Forest Development, Conservation and Utilization Proclamation No. 542/2007

In the late 1800s about 30% of Ethiopia’s land surface was covered in forest. As a result of clearances for agricultural use and fuel, this has been reduced to less than 4% and deforestation continues with forest land still in demand for coffee plantations. The result is that the 2007 Ethiopia Forest Proclamation reads a little like a panic measure with repeated references to “the alarming situation of forest degradation”. It is clear from reading it that the primary

- 22 Section 28(4)
- 23 Section 44
- 24 Section 2(4)(f)
- 25 Section 31
- 26 Section 31(4)
- 27 Section 2(4)(d)
- 28 Section 2(4)(g)

concern is to maintain forests as an economic resource for human use. While the measure itself scores positively on Earth Centred Governance and Mutually Enhancing Relations, it fails dismally on CEG resulting in an overall score of -1.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	0
Mutually Enhancing Relations	+/- 10	+ 2
Community Ecological Governance	+/- 6	- 3
Total Score	+/- 24	- 1

Earth Centred Governance

The preamble to the Proclamation begins by recognising the decisive role of forests in satisfying the needs of society and bases its respect for the Earth on economic benefits. To that extent this is an anthropocentric measure which really sees the Earth and its forests as a commodity and aims to preserve them for human use rather than for their own sake. Section 6(5) makes this clear:

“A system shall be established for the conservation of tree species having market demand, with a view to increasing their sustainable production and productivity”.

Further paragraphs, however, recognise the environmental benefits of forests and provide for protection of natural forests and forest lands for the purpose of environmental protection and conservation of history, culture and biodiversity. The rationale is therefore mixed, looking for economic development through sustainable use of forests for products and environmental protection. Parts of the Proclamation take full account of the value and importance of ecosystems, including water bodies, and also take

account of the three Earth Rights, particularly where rare and endangered species are concerned.

Mutually Enhancing Relations

The Proclamation recognises the inter-connectedness of the forests and natural processes such as desertification and the interdependence of human needs with the need to protect forests. It places responsibilities on humans to develop and use the forests in a sustainable manner and restricts the use of the forest in respect of endangered species. However, these provisions are of limited application and do little to prevent species becoming endangered in the first place. Section 8(4) assumes some form of conflict resolution but gives priority to the interests of the human community in accordance with existing land administration laws. There are serious penalties for non-compliance with provisions of the Protocol but no provisions for repairing the damage done.

Community Ecological Governance

The Proclamation does provide for management plans to be developed with the participation of local communities, although this provision is limited to unprotected forests. There is no indication of the level of involvement envisaged but the designation and demarcation of protected forest is to be undertaken with community participation. Other than that the Protocol only takes account of a limited number of key issues of CEG. There are no provisions taking account of human rights, equitable access and benefit sharing, community land rights, co-management, self-determination or democracy. However, s. 5(1) provides that

“indigenous or foreign knowledge, practices and technologies on the development, conservation and utilization of forest shall be prepared and disseminated to enhance the knowledge and skill of forest developers”,

thereby acknowledging and providing some space for traditional knowledge and practices.

Comment

This is really an emergency measure prompted by the rapid and devastating deterioration of Ethiopia's forests. Its relationship to Wild Law derives almost entirely from the fact that trees and forests require some recognition of natural processes if they are to continue to exist. Even the recognition of the environmental benefits of forests is

directed to “the development, conservation and utilisation” of forests and has little to do with either trees or forests in their own right. If a Wild Law regime were in place, measures of this kind would not be necessary.

Oromia Forest Proclamation No. 72/2003

The Oromia Forest Proclamation was adopted by the regional government of Oromia in south-west Ethiopia in 2003. It contains separate and distinct provisions for state owned, privately owned and community owned forest and starts from the view that “forest resources have a significant role in the strategy to bring fast and sustainable development based on the rural and agriculture.”²⁹ It is another of those laws which have an element of wildness resulting from the nature of the subject matter, rather than from any particular sense of the intrinsic value of nature for its own sake. The recognition of the need for a category of land ownership which protects the interests of communities is to be welcomed although it appears to be rather limited in the Ordinance. Although the recitals recognise the forests as a natural heritage and endorse the intergenerational principle, it clearly views the Earth's components as a natural resource and its dominant rationale is distinctly anthropocentric. As a result it does not fare particularly well when analysed against the adopted indicators.

However, the Ordinance does give some material for wild lawyers to build upon. It recognises the need for some forest to be protected although the mechanics for designation are not clear. It does seem to be trying to find a balance between anthropocentric forest use and development and the need to retain and replenish indigenous forests. It is also clear that there is an underlying sense that ownership and use of forests is accompanied by obligations and that man cannot be considered as an entirely free agent where forests are concerned.

29 Oromia Forest Proclamation 72/2003 – 1st Recital

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+2
Mutually Enhancing Relations	+/- 10	+3
Community Ecological Governance	+/- 6	-3
Total Score	+/- 24	+ 2

Earth centred governance

The recitals recognise the need for reforestation and also recognise the interests of future generations while the substantive provisions clearly see the need for protected forests “free from animal and human interference³⁰” and recognise the responsibilities of citizenship towards the environment. The dominant rationale is expressed to be “fast and sustainable development”, not environmental protection and that rationale breathes through the whole Ordinance. There is a provision that the utilisation of private forest shall be in such a way as not to influence the environment³¹, but this is considerably weakened by the following provisions which make it clear that much of the private forest is likely to be plantation and there are no apparent restrictions on what can be planted. There is little to indicate that the Ordinance recognises the existence of natural law except to the extent that forests are necessarily the product of nature. However, it does value and make provision for protection and even restoration of indigenous forests and forest species, including a specific requirement for the establishment of a tree seed bank and a prohibition on cutting or felling trees in protected forests³² and on clearing them for coffee or other plantations³³. The Ordinance offers mixed messages on respect for the three key Earth rights, all of which are recognised in some form but all of which are

- 30 Art. 2(3)
31 Art.10(2)
32 Art.14(1)(a)
33 Art.14(1)(b)

also substantially qualified.

Mutually enhancing relations

Recognition of interconnectedness follows from recognising the need for re-forestation and of the need to designate protected forest areas which are protected from both human and animal encroachment. Reciprocity appears in the provision recognising that “the responsibility of citizenship” includes “the necessity of reforestation through community participation ... so that the future generation will inherit its share”³⁴.

Regrettably there is nothing about conflict resolution or any form of adaptive mechanism to meet changing challenges but the Ordinance does provide a restorative mechanism by a requirement³⁵ to plant and develop indigenous tree species that have been over-utilised in state forests and by the establishment³⁶ of a tree seed centre.

Community ecological governance

The Ordinance fares badly when judged by CEG criteria. There is some recognition of community interest in forest use and development and there is a provision for designating some land as community land although this does not appear to be based on any traditional community rights or customs. There are no provisions in the Ordinance for access to justice for communities or giving any standing to communities or individuals to act to enforce its provisions in the interest of communities let alone of the forests themselves. Nor is there any indication of respect for any other Community Ecological Governance considerations.



The Umfolozi Game Reserve in Kwazulu-Natal, South Africa, Copyright Dave Jordan

- 34 Recital 2
35 Art 4(8)
36 Art.4(9)

Chapter Six

Wild Law in New Zealand

National Parks Act 1980¹

This law explicitly values the Earth for its intrinsic value and seeks a harmonious relationship between humans and the other members of the Earth Community. National Parks can be used by humans but conservation is in the main given priority.

This law scored 18 out of a total of +24 and -24:

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+6
Mutually Enhancing Relations	+/- 10	+7
Community Ecological Governance	+/- 6	+5
Total Score	+/- 24	+ 18

Earth Centred Governance

The National Parks Act is founded upon the principle that National Parks will be protected in perpetuity for their “intrinsic worth” in the national interest². However this purpose is also to be balanced with the public’s use and enjoyment of the Park. Some parts of Parks may be set aside for conservation only³ and other parts may be set aside for public amenities⁴. Thus the Act is strongly Earth Centred in its purpose without excluding human use.

The dominant rationale is environmental protection where National Parks are areas of conservation to be preserved

in perpetuity⁵. However, the Act is selective as to what ecological systems are in need of protection and of national interest, e.g. it safeguards local biodiversity by protecting indigenous plants and animals and not exotic species⁶.

There are both ecological and human interest governance values at play in this Act with ecological values predominating. Governance is informed by the laws of nature to the extent that the law mandates that Parks be preserved as far as possible “in their natural state”⁷ and be administered for their soil, water and forest conservation value⁸. This purpose is qualified by the recognition that certain “concessions” or activities will be allowed in the Parks including rights of public access, as long as these are not inconsistent with the conservation purposes of the Act.

Mutually Enhancing Relations

Interdependency between humans and nature is explicitly recognised in the Act as it promotes the entry and access to National Park areas so that the public “may receive the full measure of inspiration enjoyment, recreation, and other benefits that may be derived from mountains, forests, sounds, seacoasts, lakes, rivers, and other natural features”⁹.

The Act values nature for its own worth. However, it is difficult to find reciprocity in the Act unless an obligation to preserve nature is viewed as reciprocity. Ethical stewardship penetrates the Act by the requirement for respect of the relevant provisions of the Treaty of Waitangi¹⁰. This translates into the active protection of Maori rights, interests and customs including the active protection the environment, or *kaitiakitanga*, defined as “the exercise of guardianship by the *tangata whenua*¹¹ of an area in accordance with *tikanga* Maori¹² in relation to natural and physical resources”.

5 Section 4.

6 Section 5.

7 Section 4(2)(a).

8 Section 4(2)(d)

9 Section 4(2)(e)

10 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

11 Tangata whenua are the people who descend from those who first settled the land.

12 Tikanga Maori is Maori custom and encompasses the notion of doing what is right.

1 National Parks Act (New Zealand) no 66 Public Act, 17 December 1980.

2 Section 4.

3 Sections 12, 13 and 14.

4 Section 15.

Community Ecological Governance

To breach some of the provisions of the Act, including taking a plant or native animals out of a Park or damaging the Park in any way, can result in an offence¹³. Upon conviction a person is liable both to a penalty and to pay the cost of repairing or restoring any damage done to the Park in the course of committing an offence¹⁴. Thus the Act has a strong sense of restorative justice.

The Act provides for the review of management planning documents¹⁵ and the variation of the conditions of a concession where the variation is necessary to deal with significant adverse effects caused by the activity that were not reasonably foreseeable at the time the concession was granted¹⁶.

There is a huge amount of opportunity for involvement from the interested public to make suggestions as to the contents of national plans, comment on draft national plans and object to concessions. Thus this Act scores high in terms of public participation¹⁷.

Access to information is guaranteed by the Official Information Act 1982 but disclosure is subject to a wide range of exceptions including damage to the national security or economy; matters affecting privacy laws; ministerial responsibility and other constitutional conventions; legal professional privilege information; and damage to trade secrets¹⁸.

In terms of respect for other CEG issues, the Treaty of Waitangi¹⁹ principles – which include active protection of Maori interests and values such as traditional knowledge

13 S 60), The National Parks Act 1980.

14 S 60(6), The National Parks Act 1980.

15 S 47(1), The National Parks Act 1980.

16 Conservation Act, s 17ZC(3) which applies by virtue of s 49 National Parks Act 1980.

17 Sections 44, 45 and 49 National Parks Act 1980 and section 17U(1)(f) Conservation Act 1987.

18 Sections 6 and 9 Official Information Act 1982, n 156, 17 December 1982.

19 The Treaty of Waitangi is the founding document of New Zealand and is the record of the agreement made between the British Crown and the Maori chiefs or rangatira. Under the Treaty the Maoris agreed to cede sovereignty to the British Crown which was given exclusive rights to purchase any lands that the Maoris wished to sell. In return, the Maoris were given full rights of ownership of land, forests, fisheries etc. The Maoris were also granted the full rights and protection of British citizens. For further information see www.nzhistory.net.nz.

and practices and interests in or associations with land – are expressly incorporated via the Conservation Act.

The Conservation Act 1987²⁰

This is a general Act for the management of natural and historic resources for conservation purposes which applies to ancient forests, endangered species, mountains and sacred sites. The Act provides a management planning regime for natural resources held for conservation purposes and a permitting system for activities in conservation areas, reserves, and national parks.

This law scored 14 out of a total of +24 and -24 possible marks making it quite wild. The split was as follows:

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+4
Mutually Enhancing Relations	+/- 10	+4
Community Ecological Governance	+/- 6	+6
Total Score	+/- 24	+ 14

Earth Centred Governance

The functions of the government under this Act evolve around conservation, preservation and protection²¹. The relevant Minister is authorised to acquire and hold land for “conservation purposes”²². The Minister may declare any land or interest in land held under the Act for conservation purposes to be held as a conservation park, an ecological area, a sanctuary area, a wilderness area or

20 The Conservation Act 1987 (New Zealand) No 65 Public Act in force 31 March 1987.

21 Section 6.

22 Section 7(2).

for any other specified purpose²³.

The Act defines “conservation” as the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations”.

“Preservation” is further defined to mean:

“in relation to a resource ... the maintenance, so far as is practicable, of its intrinsic value”²⁴.

All of these three purposes (conservation, preservation and protection) are to be weighed against each other when making decisions. None of the three purposes (maintaining the intrinsic value of resources; providing for their appreciation and recreational enjoyment by the public; and safeguarding the options of future generations) takes absolute precedence, although recreational uses, for example, will not be allowed if inconsistent with the aim of conservation.

The qualifier “so far as is practicable” limits the maintenance of intrinsic value involved in preservation and conservation and moves away from the initial feel that the dominant rationale is environmental protection.

Finally, it can be argued that as the Act describes the subject of conservation as “natural and historic resources”, and defines preservation in relation to natural and historic resources, legislative language is not respecting the intrinsic value of nature but is tending towards anthropocentric arguments of sustainability.

Wilderness areas are those given the highest form of conservation status. For example, no machinery may be brought onto them, no building may be raised, and no roads, tracks or trails may be constructed on them²⁵. However, any of these acts may be done when there is danger to a person’s life or property²⁶. Protecting property over unique wildlife is anthropocentric.

Mutually Enhancing Relations

Within the definition of conservation the Act acknowledges human dependency on a functioning natural

ecosystem²⁷ but there is no clear link between promotion of human and other Earth members’ interests. There is also no explicit recognition of the ideas of trusteeship or duties/responsibilities to non-human members of the Earth Community.

However, active protection of Maori resources, interests and values is a relevant Treaty of Waitangi principle under s 4 of the Conservation Act. In the case of *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995]²⁸, the Court of Appeal of New Zealand observed both that “statutory provisions for giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed” and that the Treaty principles should not be limited to consultation:

“it has been established that the principles require active protection of Maori interests. To restrict this to consultation would be hollow”.

A key aspect of the relationship between Maori and the natural environment is the concept of kaitiakitanga, defined in the Resource Management Act 1991, s 2 as “the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship”.

The Act seeks to avoid conflict by requiring wide-ranging consultation and by calling for and receipt of submissions from ‘any person’ during the processes of preparing, reviewing or amending relevant management planning documents, and of granting applications for concessions to undertake activities in the conservation areas²⁹.

The only recourse for those seeking to challenge the decisions of these public authorities is judicial review. The legislation makes no provision for mediation or appeal on the merits of the decision. The Act provides for penalties for offences for breaches of its provisions, but more importantly is strong on restorative justice by providing for the payment of costs in order to restore the loss or damage “... arising from or caused by the ...

23 Section 18.

24 Section 2(1).

25 Section 20(1).

26 As above.

27 Section 2(1). “... and safeguarding the options for future generations.”

28 See *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

29 Sections 17F, 17G, 17H, 17T, and 49.

offence”³⁰.

The Act does provide for reviews of management planning documents³¹ and variations to the conditions of any concession on the grounds that the variation is necessary to deal with significant adverse effects of the activity that were not reasonably foreseeable at the time the concession was granted³².

Community Ecological Governance

The composition of the Conservation Authority which presides over conservation areas is representative of Maori interests, scientific, conservation and recreational interests. There is a huge amount of opportunity for involvement from the interested public to make suggestions as to the contents of national plans, comment on draft national plans and object to concessions. Thus this Act scores highly in terms of public participation³³.

Access to information is guaranteed by the Official Information Act 1982 but disclosure is subject to a wide range of exceptions including: damage to the national security or economy; matters affecting privacy laws; ministerial responsibility and other constitutional conventions; legal professional privilege information; and damage to trade secrets³⁴.

In terms of respect for other CEG issues, the Treaty of Waitangi principles – which include active protection of Maori interests and values such as traditional knowledge and practices and interests in or associations with land – are expressly incorporated via s.4 of the Act.

Resource Management Act 1991 ³⁵

This Act is again general in nature in that it is the primary statute governing all land, air and water in New Zealand. It therefore provides the legal governance for any mountains, sacred sites, ancient forests and the habitat of endangered animals, not in the National Parks or

30 Section 45.

31 Section 17H.

32 Section 17ZC(3).

33 Section 17U(1)(f).

34 Sections 6 and 9 Official Information Act 1982, n 156, 17 December 1982.

35 Resource Management Act (New Zealand) No 69 Public Act In force 1 October 1991.

Conservation Estate.

This law was quite wild in that it scored 13 out of a total of +24 and -24 possible marks. The split was:

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+4
Mutually Enhancing Relations	+/- 10	+6
Community Ecological Governance	+/- 6	+3
Total Score	+/- 24	+ 13

Earth Centred Governance

Within the Resource Management Act 1991, there is explicit mention of, and decision makers must take into account, the “intrinsic value of ecosystems” ³⁶and the need to sustain the “potential of natural and physical resources ... to meet the reasonably foreseeable needs of future generations”³⁷.

The dominant rationale in this Act is not exclusively environmental protection as it mandates the “use, development and protection of natural and physical resources” and does not establish a hierarchy between these particular values. To take an example, the Act regulates the use of water by express provision or by the grant of resource consents. In the case of freshwater, the water, heat, or energy can be taken or used for an individual’s reasonable domestic needs or the reasonable needs of an individual’s animals for drinking water, as long as that taking or use does not, or is not likely to, have an adverse effect on the environment. Once adverse effect to the environment comes into play consent is required. Whether that consent will be granted will depend on the principles set out in section 5(2) which define sustainable management:

36 Section 7(d).

37 Section 5(2)(a).

“sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.”

However case law has clarified that the word “while” is not a subordinating conjunction but rather a coordinating conjunction. Thus, the definition of sustainable management permits a balancing exercise to take place between anthropocentric needs and the ecosystem function of the Act. Anthropocentric and ecological values are treated equally in order for the decision maker to do justice on the facts of the case.

The Act explicitly refers to and directs decision makers to have “*particular regard to ... any finite characteristics of natural and physical resources*”³⁸ However, Part 2 of the Act sets up a primary purpose of “sustainable management” and then lists a hierarchy of principles for decision makers in determining what equates to sustainable management, one of these being natural laws. Still, the fundamental goal is always sustainable management. The Act also makes provision for economic instruments (taxes, levies, etc.) to be utilised to overcome natural limits³⁹.

The Act recognises that the “protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna” is a matter of national importance⁴⁰ and that all decision makers shall recognise and provide

38 Section 7(g).

39 E.g. section 24(h).

40 Section 6(c).

for them. However, the purpose of the Act is to promote sustainable development and the dominant rationale is anthropocentric.

Mutually Enhancing Relations

The Resource Management Act 1991 explicitly recognises the dependence of humans upon a functioning ecosystem⁴¹ but the purpose of the Act is to manage development:

*“The purpose of this Act is to promote the sustainable management of natural and physical resources”.*⁴²

The Act seeks to promote the well being of the Earth Community by placing a duty on all citizens to “avoid, remedy or mitigate” any adverse effects of their activities upon the environment⁴³. The concept of stewardship is also included in the Act⁴⁴ but it is not a value high in the hierarchy of competing values. There is also no clear admission of reciprocity.

There are a number of ways that the Resource Management Act 1991 seeks to promote conflict resolution including providing explicitly for mediation between those applying for consents to exploit resources and any persons who made submissions on the application⁴⁵ and alternative dispute resolution generally when matters go to the Environmental Court in order to encourage a settlement⁴⁶. The Act also mandates that any authority or person wishing to propose a change to a national resource plan or policy must prepare a report that considers all alternatives to, and benefits and costs of, the proposal and that an applicant for a permit must prepare an environmental impact statement (called an Assessment of Effects on the Environment)⁴⁷.

The Act makes extensive provision for compliance and enforcement (both via criminal offences⁴⁸ and civil remedies). Civil enforcement orders are extremely flexible and can be utilised for restorative justice to require the “restoration of any natural and physical resource to the state it was in before the adverse effect occurred”⁴⁹.

41 Section 5(2)(a), (b).

42 Section 5(1)

43 Section 17.

44 Section 7(aa).

45 Sections 99 and 99A.

46 Section 268.

47 Schedule 4.

48 Section 338.

49 Section 314 (4).

Pursuant to the Resource Management Act 1991 and in relation to resource plan making there are opportunities for public participation, including by NGOs, at all stages of the decision making process (e.g. in relation to the promulgation of plans there are extensive rules governing public notification; necessity reports; receipt of submissions from the public; re-consideration of plans post submissions; additional notification and submissions). Explicit mention is made for the need for planning authorities to consult with Maori in the preparation of plans⁵⁰.

In respect of applications for consents to use resources, the onus is upon full public notification although the Act does permit limited notification, encompassing only those likely to be directly affected by an activity (effectively shutting the general public out of decision making) in cases where the consent authority is “satisfied that the adverse effects of the activity on the environment will be minor”⁵¹. In reality the vast number of resource consents attract limited notification and if you are not notified, you cannot make submissions on an issue and cannot, save for in limited cases⁵², play a further role in the issue via the appeal process. In such circumstances the only recourse would be to apply for judicial review.

The Act allows for access to justice and the Environment Court has jurisdiction to hear matters *de novo*⁵³. Any person, who makes a submission in relation to an application decided at first instance by the local authority is entitled to appear and be represented as a party in the Environment Court⁵⁴. Further, if a person or NGO has not made a submission, they may still apply to become a party to any proceedings pursuant to s 274 (c) and (d) (“a person who has an interest in the proceedings that is greater than the public generally or a person representing a relevant aspect of the public interest”). Appeals on a matter of law are permissible to the High Court, Court of Appeal and Supreme Court of New Zealand (s 287). The potential award of costs against an unsuccessful party may well be a deterrent although incorporated societies will be protected with reference to financial liquidity (or otherwise) and the government does have a legal aid fund for environmental groups bringing actions in the public interest. The further remedy of judicial review is

available in relation to administrative decision making not covered by the Resource Management Act.

Respect for Community Ecological Governance appears as an explicit reference to the role that the indigenous people of New Zealand, the Maori, and Maori values have in decision-making. The concept of *kaitiakitanga*⁵⁵ has been used to empower local Maori to monitor and report upon the use of a resource by other entities. The Act also provides for the local authority to transfer any of its environmental decision making powers to *iwi* authorities⁵⁶. As an alternative, the Act provides for co-management between local authorities and *iwi* via “joint management agreements”⁵⁷. However, to date, no delegation has occurred nor joint management agreement entered into.

A further element of Community Ecological Governance is the aim of cultural well-being which appears in the definition of sustainable management, the purpose of this Act⁵⁸.

Conclusion

The selected New Zealand laws fared high in the wild law stakes. There are laws that recognised the intrinsic value of nature explicitly and acknowledge that respect for nature is in the national interest. Throughout the laws reviewed there is a very strong sense of Earth centred governance and the need to protect the Earth in its natural state.

Interdependency of humans and the other members of the Earth community is also noted, with laws seeking to balance the preservation of nature and its use and appreciation by the public. Public participation and access to justice is also prevalent in these laws, giving the public in general a right to participate whether they are directly affected by decision making or not.

The laws all have to respect Maori values particularly of stewardship of nature, thus acknowledging that it is possible to have a less westernised relationship with all members of the Earth Community. Where the laws show weaknesses is in qualifying nature as a resource thereby indicating that nature is still viewed in economic terms.

50 Section 61 (2a).
51 Sections 93 and 94.
52 Section 274.
53 Section 290 (1).
54 Section 274(1)(e).

55 Section 7(a).
56 The management authority that represents the Maori “iwi”, which is akin to a “tribe”; section 33.
57 Section 36 B.
58 Section 5(2).

Wild Law in the United States of America

US National Environmental Policy Act

The National Environmental Policy Act (NEPA)¹ is primarily a procedural law, requiring that an environmental analysis be undertaken for any “major federal action” significantly affecting the quality of the human environment.² The purpose is to ensure fully informed administrative decisions by requiring public disclosure of the environmental consequences of proposed actions and public involvement in the decision process.³ Referred to as the “basic national charter for protection of the environment,”⁴ its purpose is to “help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”⁵ The statute itself is quite brief, but extensive regulations and case law have built this law into a major legal tool to prevent activities that harm the environment.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+4
Mutually Enhancing Relations	+/- 10	+4
Community Ecological Governance	+/- 6	+3
Total Score	+/- 24	+ 11

1 42 U.S.C. §§4321 – 4347 (1994).

2 42 U.S.C. 4332(2)(c) (1994).

3 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

4 40 C.F.R. § 1500

5 *Id.* at 1500.1(c); *Fund for Animals v. Babbitt*, 89 F.3d 128, 130 (2nd Cir. 1996)

Earth centred governance

NEPA established a national policy of protecting the environment as a way of promoting human welfare and health⁶ so its stated justification is anathema to the concept of being Earth centred. However, in spite of its anthropocentric language, the implementing regulations make clear that “the NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”⁷ Imposing a burden on humans to take account of effects on the natural world indicates that the dominant rationale remains environmental protection, satisfying the second sub-indicator, and elevating the degree to which the intrinsic value of earth is respected (sub-indicator 1). The only reasons it does not score more highly are that these effects are only considered, but harm is not completely prohibited, and that the policies repeatedly charge agencies with protecting the “human” environment.⁸ Finally, Earth centred governance requires that the measure is informed by the laws of nature. This is not necessarily the case with NEPA. Courts must carefully review the record and be satisfied that the regulating agency makes a “reasoned decision” based on all the relevant factors and information.⁹

Mutually enhancing relations

In the “purposes” section of the statute, the “profound impact of man’s activity on the interrelations of all components of the natural environment” is recognised.¹⁰ The substance of the rest of the statute, regulations and case law bears out an attempt to incorporate recognition of interconnectedness and reciprocity. The purposes section acknowledges the need for reciprocity, stating that agencies must “use all practicable means and measures, ... to create and maintain conditions under which man and nature can exist in productive harmony...”¹¹ but reciprocity is less of a consideration since the law fundamentally allows humans to achieve benefits while avoiding harm to the Earth, rather than setting up a system that is designed to benefit both humans and the Earth. Conflict resolution mechanisms exist, but only in the event of disagreements between agencies, and are resolved by the President’s Council on

6 42 U.S.C. § 4321

7 40 C.F.R. 1500.1

8 40 C.F.R. 1500.2.

9 *Heartwood, Jim Bensman and Mark Donham v. U.S. Forest Service*, 73 F. Supp. 2d 962 (S.D. Ill 1999) *aff’d* 230 F.3d 947 (7th Cir. (Ill.)) (2000).

10 42 U.S.C. § 4331

11 42 USC § 4331(a).

Environmental Quality (CEQ).¹² NEPA also both requires and encourages adaptive management to improve the protection of natural resources by requiring that agencies “identify and develop methods and procedures ... which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations.”

Community ecological governance

The statute contains several provisions consistent with community ecological governance criteria. It requires that agencies request, not just allow, comments from Indian tribes, members of the public, and other interested parties.¹³ Agencies must make diligent attempts to involve the public and provide plenty of notice and opportunities for that participation.¹⁴ Members of the public can legally challenge the adequacy of the review if standing is established¹⁵ so that access to justice is adequate, but not ideal because no explicit provision is made for non-human interest to be represented. Other elements of community ecological governance are there, although enshrined in more “soft law” of written but less enforceable policies and directives. For example, agencies are advised that stakeholder involvement and public participation are critical to adaptive management procedures, important because it reduces the likelihood of conflict and provides opportunities for the resource manager to obtain additional information on the natural system and on stakeholder priorities.¹⁶ However, this guidance is informal and nonbinding. Because of this, this indicator merits only half its potential Earth Jurisprudence score. But given that the statute is one of the most progressive environmental laws in the U.S., it could be amended and refined to evolve into something far more powerful from an Earth Jurisprudence perspective.

US Endangered Species Act 1973

The US Endangered Species Act 1973 (ESA)¹⁷ is one of the major federal laws protecting species and the ecosystems on which they depend. Under the ESA, species of plants and animals at risk of extinction are listed as either ‘endangered’ or ‘threatened’¹⁸ and measures are required to protect the listed species and their habitats. It also implements international agreements to protect wildlife, prohibiting the unauthorised taking, possession, sale, and transport of endangered species.¹⁹ Over 1000 species are currently listed and the Act has been a powerful instrument in restraining commercial activities such as logging, mining and damming of watercourses in the interests of endangered species. The Act scores relatively highly on Earth centred governance and it is for now the best example of a U.S. law currently in use that embraces Earth Jurisprudence principles.

The Act sets up a process to identify and list endangered species, and “taking” such species is prohibited.²⁰ A key provision is § 7, which requires that Federal agencies ensure that “actions authorised, funded or carried out by them do not jeopardise the continued existence of, or result in the destruction or modification of habitat of such species.”²¹ Agencies must assess the effects of projects likely to affect endangered species by consultation with, or by obtaining a biological opinion from the Fish and Wildlife Service.²²

12 40 C.F.R. 1504.1

13 40 C.F.R. 1503.1

14 40 C.F.R. 1500.2

15 *Heartwood*, Op cit.

16 Council on Environmental Quality (CEQ), *The Relationship of NEPA, Adaptive Management, and Environmental Management Systems*, Draft, September 2006: A Handbook for Practitioners

17 16 U.S.C. 1531-1544

18 16 U.S.C. §1533

19 16 U.S.C. §1538

20 16 U.S.C. §1532 (14). “Taking” is defined as any harassment, hunting, shooting, pursuing, harming, wounding, trapping, capturing, or collecting of a listed species. 16 U.S.C. §1533 (19) (1988).

21 16 U.S.C. §1536.

22 16 U.S.C. § 1536(c). If the species is a marine species rather than a terrestrial one, consultation must be made with the National Marine Fisheries Service.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+5
Mutually Enhancing Relations	+/- 10	+4
Community Ecological Governance	+/- 6	+2
Total Score	+/- 24	+ 11

Earth centred governance

This Act, while it is not an ideal from an Earth Jurisprudence perspective, is arguably one of the closest of any U.S. law to being Earth centred. Its stated purposes reflect environmental protection as a dominant rationale, namely to “provide a means of conserving the ecosystems upon which endangered and threatened species depend; provide a program for conserving those species”.²³ With its focus on protecting non-humans, and maintaining their natural habitat, it merits a plus rating in both the “respect for the intrinsic value of nature” and its rationale being to protect the environment. In fact, when it was first passed in 1973, it was truly Earth centred - the Supreme Court affirming that Congress “has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favour of affording endangered species the highest of priorities, thereby adopting a policy of “institutionalized caution.”²⁴

The score is reduced, however, by changes to the law caused by weakening amendments and backlash via court challenges by private property owners – probably the best evidence that it remains relatively Earth centred and informed by the law of nature. The changes and lawsuits have been harmful, and exemptions and exceptions open the door for abuse to occur. The law now grants “categorical exclusions” to a category of actions that do not individually or cumulatively have a significant effect on the human

environment,²⁵ and contains many provisions establishing exemptions and waivers under specified conditions, including incidental take permits.²⁶ While the statute does not explicitly grant any of the three rights described by Thomas Berry, in effect the protection of the species itself, its habitat, and by implication its role, secures what can be described as corresponding rights. The only reason the score is not higher is because the law as implemented has not been extremely effective.

The ESA does begin to focus on non-human effects of human actions, but certainly prioritises animals over plants. Endangered plants are given protection, but at a lower level.²⁷

Mutually enhancing relations

The Act itself does not contain provisions directly supporting or acknowledging interconnections, reciprocity, or inclusion of the entire Earth community in conflict resolution, restoration and adaptation. However, upon closer scrutiny its provisions have been interpreted and implemented to advance significantly some of these principles. For example if a major development like a timber sale or oil drilling project is allowed under another U.S. law, the Act has been successfully used to stop, delay, or alter projects to make sure it is done in a way that protects wildlife.²⁸ In other cases, developers can build, but are required to implement a “Habitat Conservation Plan” (HCP).²⁹ Over the years, these HCPs have become powerful tools to protect large areas of habitat while allowing human activity.³⁰ The plans often require restoration of vanished habitat.³¹ For these reasons, the ESA is moving American society in small steps towards accepting projects that are mutually enhancing.

25 40 CFR 1508.4

26 16 U.S.C. § 1539

27 16 U.S.C. § 1539, 1541.

28 See, *TVA v. Hill*, op. cit. n. 24 (halted construction of Dam to protect snail darter); *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (DC Cir. 1997) (required alteration of hospital and power plant to protect fly habitat);

29 16 U.S.C. 1539(a)(2)(A)

30 See, U.S. Fish and Wildlife Service, *Habitat Conservation Plans: Working Together for Endangered Species* (2005) located at www.fws.gov/endangered/pubs/HCPBrochure/HCPsWorkingTogether5-2005web%20.pdf; *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985) (HCP required 793 acres of open space, funding for management to protect Mission Blue Butterfly).

31 U.S. Fish and Wildlife Service, *Op. cit.* n. 13 at 14, 22.

23 16 USC § 1531

24 *TVA v. Hill*, 437 U.S. 153 (1978)

Community ecological governance

The ESA certainly does not provide for participation of the entire Earth community in ecological governance, and at best enables federal agencies, or intervening environmental groups, to act on their behalf to protect them. This only merits a small, but positive, score for community participation. However, the ESA certainly enhances rights to access to information about the environment, since the procedural requirements are analogous to the U.S. National Environmental Policy Act³² (NEPA), the nation's premier disclosure law requiring assessment of environmental impacts of activities. Similar to NEPA, under the ESA, agencies must assess the effects of an action on endangered species.³³ The Act has some provisions that respect cultural heritage, human rights and other key community ecological governance issues. A Secretarial order declared that under the ESA, "the [Interior, Commerce] departments shall ... work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems" and "assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted ..." The departments shall "be sensitive to Indian culture, religion ... and make available to Indian tribes information related to tribal trust resources and Indian lands", and, to facilitate the mutual exchange of information, "shall strive to protect sensitive tribal information from disclosure", thereby addressing the implementation of the ESA and working with tribes.³⁴

US National Parks Organic Act

The National Park Service Organic Act (Organic Act)³⁵ is one of several laws guiding the federal government on how to acquire, manage and protect public lands. Because of the unique purposes of national parks, this is one of the federal lands laws that probably scores the highest as being consistent with Earth Jurisprudence principles. The Organic Act has also been referred to as a "model for preservation policy"³⁶ for other countries.

32 42 U.S.C. 4371 *et seq*

33 16 U.S.C § 1536(c)

34 Department of Interior Secretarial Order 3206 (1997): but note that the Act itself does not directly provide for this. Taken in isolation from augmenting provisions there is no real recognition of CEG in the Act.

35 16 U.S.C. 1

36 See, Keiter, Bob, Preserving nature in National Parks: law, policy, and science in a dynamic Environment, 74 Denv.U.L. Rev. 649 (1997). Prof. Keiter maintains that U.S. approach to park management enshrined in the Organic Act



Moose in Yellowstone National Park USA, Copyright US National Parks Service

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+5
Mutually Enhancing Relations	+/- 10	+5
Community Ecological Governance	+/- 6	+3
Total Score	+/- 24	+ 13

was a model for the Convention on Biological Diversity, citing Catherine J. Tinker, Introduction to Biological Diversity: Law, Institutions and Science, 1 Buff. J. Int'l Law 1 (1994).

Earth centred governance

The Organic Act's most substantive provision states that the overarching purpose of national parks is to "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such a manner ... as will leave them unimpaired for future generations".³⁷ It appears to be somewhat anthropocentric since it specifies that "enjoyment" of parks must be provided for – and that "enjoyment," although interpreted broadly, includes recreation and inspiration, but is solely *human* enjoyment. But court interpretations, Management Policies,³⁸ Directors Orders³⁹ and a clarifying amendment⁴⁰ have determined that this recreation mandate is subordinate to the mandate to conserve resources, and in the event of a conflict between [human] enjoyment and conservation, "conservation is to be predominant."⁴¹ This indicates that its dominant rationale is indeed environmental protection. (It also argues that conflict resolution gives substantive voice to nature, raising the score for the "mutually enhancing relations" sub-indicator relating to conflict resolution). The interpretation of this law satisfies the second sub-indicator by requiring that the laws of nature and ecological criteria inform actions. The Park Service's interpretation of its responsibilities under the Organic Act has led it to emphasise the primacy of long-term resource preservation.⁴² While the Organic Act fails to bestow specific rights to be, to habitat and to fulfil a natural role, its high standard of protection allows nature what can be characterised as a "right" to remain unimpaired. This also increases the score for this criterion.

Mutually enhancing relations

The Organic Act sets up a regime designed to enable humans to "manage" parks and the resources in them, and does so to benefit humans and future (human) generations. This enshrines the notion of human control over nature

rather than living with nature in a mutually enhancing manner. That said, the Organic Act's mandate to "conserve the scenery and the natural and historic objects and the wild life therein" has been interpreted to mean to require "natural resources" – defined as "natural resources, processes, systems, and values" – to be maintained as much as possible in their "natural condition" – defined as the "condition of resources that would occur in the absence of human dominance over the landscape."⁴³ The National Park Service interprets its Organic Act mandate as a requirement to "re-establish natural functions and processes in parks..." Although weakened by the caveat "unless otherwise directed by Congress,"⁴⁴ these non-intervention and restoration requirements for managers form one of the strongest laws on the books that force concrete action to protect and enhance nature, while humans receive benefits from the beauty and inspiration of nature in parks.

Community ecological governance

The Organic Act is not directly enforceable since it does not contain a citizen suit provision. However, under U.S. law, parties can challenge an action under the statute using the Administrative Procedure Act (APA),⁴⁵ allowing courts to set aside agency action that is not in accordance with law or procedure⁴⁶ and allows citizens to petition for relief. Thus, under the APA, many successful lawsuits have been brought under the Organic Act to protect nature in parks. Enforcement of protections is limited to humans – no U.S. statute yet has given non-human natural entities standing to sue⁴⁷ – but this does allow groups to sue on behalf of such entities, as long as they assert that they are actually harmed by the loss or impairment of those entities.

The Organic Act is again silent on community ecological governance, but its implementing policies speak strongly to those tenets. The National Park Service is required to consult with American Indian Tribes on proposed actions⁴⁸ and to pursue an "open, collaborative relationship"

37 16 U.S.C. 1

38 The highest of three levels of guidance policies in the NPS Directives System, designed to give NPS clear guidance on policies and required and/or recommended actions to carry out mandates.

39 Guidance issued by the Director of the National Park Service to clarify how the agency will carry out its mandates.

40 The Redwood amendment (16 U.S.C. §1a – 1)

41 See NPS Management Policies 2006 §1.4.1- 1.4.3 summarising the meaning and court interpretations of the Organic Act conservation, enjoyment and non-impairment mandates.

42 Bradley C. Karkkainen, *Biodiversity and Land*, 83 *Cornell L. Rev.* 1,39 (1997)

43 NPS Mgmt Policies 2006 § 4.1 and § 4.1.

44 NPS Mgmt Policies 2006 § 4.1.5.

45 5 U.S.C. §706(2)

46 It states: "[t]he reviewing court shall...hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] without observance of procedure required by law." 5 U.S.C. §706(2).

47 Although artificial entities such as corporations, trusts and government departments have long established rights.

48 Presidential Memorandum of April 29, 1994 and Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments).

with American Indian tribes to “help tribes maintain their cultural and spiritual practices and enhance the National Park Service’s understanding of the history and significance of sites and resources in the parks.”⁴⁹ National Park Service policies also acknowledge the importance of partnerships and require the agency to “embrace partnership opportunities that will help accomplish the Park Service mission.”⁵⁰ Policies also require the National Park Service to foster “collaborative relationships between the Service and American society ... a commitment to building and sustaining relationships with neighbours and other communities of interest.”⁵¹ These policies are not legally enforceable, but under Administrative law doctrines, they can be used as evidence of the Organic Act’s meaning, and on a day-to-day basis, these policies determine how the agency will act to fulfil its mandate, so are concrete indicators that the Organic Act accommodates partnerships and community collaboration. It is a participatory statute, and its implementation policies promote community ecological governance, but only so far. Communities of interest and partnerships are not those representing nonhuman interests, so the non-human community must rely on the agency to protect their interests, and the Park Service is subject to pressures and politics to prioritise human interests just as easily as individual humans.

Massachusetts v. Environmental Protection Agency⁵²



In this U.S. Supreme Court case, the Court decided 5-4 that the Environmental Protection Agency must regulate

carbon dioxide (CO₂) and other greenhouse gases as an air pollutant under the U.S. Clean Air Act.⁵³ Twelve states, three cities, one territory and thirteen organisations (including the Sierra Club, Greenpeace, and Environmental Defense) challenged the Environmental Protection Agency’s contention that it did not need to create emission standards for greenhouse gases in motor vehicles. The Clean Air Act defines an air pollutant” as “any air pollutant agent ... including any physical, chemical ... substance ... emitted into ... the ambient air.”⁵⁴ The Environmental Protection Agency argued that since Congress was considering other legislation to combat global warming, it intended the Environmental Protection Agency to refrain from regulating greenhouse gases emissions from motor vehicles. The court rejected this by stating that it must defer to the unambiguous statutory language. The Environmental Protection Agency also argued that it would be “unwise” to regulate these gases without more scientific proof that greenhouse gases caused global warming. This was also rejected by the Court, who ruled that the Clean Air Act applied to anything that can “reasonably be anticipated to cause or contribute to air pollution,” and in this case can avoid promulgating regulations of greenhouse gases only if the Environmental Protection Agency “determines that greenhouse gases do not contribute to climate change” or provides a reasonable explanation why it cannot or will not make that determination.

The Environmental Protection Agency also argued that regulating greenhouse gases would also require them possibly to set mileage standards for vehicles, which is the purview of another agency (the Department of Transportation). The Supreme Court rejected this also, stating that the unambiguous language requires the Environmental Protection Agency to regulate greenhouse gases, even if this overlapped with another agency’s mandate.

It was a narrow decision focusing on the scope of the definition of “pollutants” that the Clean Air Act protects against, and whether the plaintiffs had standing to bring the lawsuit. That said, it was a victory for the environmental side, and as would be expected it is possible to tease out some earth jurisprudence elements, and the overall score is positive.

49 NPS Mgmt Policies 2006 § 1.11-1.11.2.

50 NPS Mgmt Policies 2006 § 1.10

51 NPS Mgmt Policies 2006 § 1.7

52 No. 05-1120 Slip Op. (S. Ct April 2, 2007), 549 U.S. 497 (2007)

53 42 U.S.C. §7521(a)(1)

54 42 U.S.C. § 7602(g)

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+2
Mutually Enhancing Relations	+/- 10	+2
Community Ecological Governance	+/- 6	0
Total Score	+/- 24	+ 4

Earth centred governance

In this case the court interpreted the definition of pollutant in a way that favoured the Earth – that global warming gases should be defined as a regulated pollutant. Therefore, the dominant rationale was environmental protection. The opinion did not suggest that the court’s decision was based upon the intrinsic value of the Earth, nor was it based upon ecological criteria, since it was statutory language interpretation. In fact the court was interpreting the agency’s responsibilities under the Clean Air Act to regulate pollutants that are “reasonably ... anticipated to endanger public health or welfare,”⁵⁵ clearly focusing on human concerns rather than preventing pollution for the sake of the Earth community. Therefore this opinion earns a positive score for this Earth Jurisprudence criterion, but not a high one since by the nature of the decision it did not consider broader reasoning.

The Environmental Protection Agency, a party to the lawsuit, had argued that it would be “unwise” to regulate these gases without more scientific proof that greenhouse gases caused global warming.⁵⁶ This was also rejected by the Court, which ruled that the Clean Air Act applied to anything that can “reasonably be anticipated to cause or contribute to air pollution,” and in this case can avoid promulgating regulations of greenhouse gases only if the Environmental Protection Agency “determines that

greenhouse gases do not contribute to climate change” or provides a reasonable explanation why it cannot or will not make that determination.⁵⁷ In those narrow issues defining an agency’s role under the Clean Air Act, the court interpreted the law to require the agency to focus on the language about harm over extraneous concerns about politics or outside congressional action. Moreover, by affirming that greenhouse gases must be regulated as “pollutants” the Court recognized that the Clean Air Act contained, in effect, a “precautionary” approach in that it must regulate an agent unless it is proved not to cause or contribute to air pollution. This is very Earth-centred, inferring that the agency must err on the side of environmental protection in this important, albeit narrow, area.

Mutually enhancing relations

Again due to the narrow nature of the questions before the court, the court did not address many areas reflecting respect for the intrinsic values of Earth, nor was it informed by ecological criteria such as diversity and life cycles. But some of the dicta showed a recognition that is enormously positive to Earth Jurisprudence – recognition that global warming is a threat to Earth, not just humans, that must be addressed. The court stated in no uncertain terms:

*“The harms associated with climate change are serious and well recognized. The Government’s own objective assessment of the relevant science and a strong consensus among qualified experts indicate that global warming threatens, inter alia, a precipitate rise in sea levels, severe and irreversible changes to natural ecosystems, a significant reduction in winter snowpack with direct and important economic consequences, and increases in the spread of disease and the ferocity of weather events.”*⁵⁸

Furthermore, the court held that:

*“In sum -- at least according to petitioners’ uncontested affidavits -- the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real.”*⁵⁹

55 42 U.S.C. § 7521(a)(1)

56 *Massachusetts v. E.P.A.*, No. 05-1120 Slip Op. At 4 (S.Ct April 2, 2007)

57 *Id.* at 5

58 *Id.* at 3

59 *Id.* at 23

This is not a major fundamental shift in consciousness towards mutually enhancing relationships – but for US law it is a significant statement in a Supreme Court holding, and affirms that the law is responding to an indicator of Earth distress.

The decision implies that it regards the administrative legal process – the Environmental Protection Agency’s implementation of the Clean Air Act – as engendering an adaptive mechanism that can respond to evolving challenges. The court stated that agencies “do not generally resolve massive problems in one fell regulatory swoop ... “ and “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute ... [agencies] ... whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed.”⁶⁰ This does not necessarily mean they adapt to conditions to advance the interests of the whole Earth community, but is a positive indicator that the Environmental Protection Agency can evolve as Earth Jurisprudence principles become more accepted.

Community ecological governance

Very little of this opinion draws upon or affirms any principles that respect traditional knowledge, human rights or self-determination. But at first blush, it appears that it affirmed some degree of representation for the Earth community by granting the environmental groups standing to sue (the court was never even presented with a claim that non-humans could have standing). However, this holding was not ideal, since the court allowed environmental interests to sue only on the basis that if one party has standing, the case can proceed,⁶¹ and the State of Massachusetts was declared to have standing. It is a notable disappointment for Earth Jurisprudence interests that the court failed to use the opportunity to reinforce that public interest organisations that were plaintiffs had the right to sue on behalf of the environment. Over the years, U.S. federal

judges have been gradually eroding the standing doctrine, denying standing to environmental groups because the harm they allege is “too generalized” to be a “concrete and particularized injury” to the plaintiffs themselves or because the relief requested would not specifically address that harm (redressability).⁶² So while the outcome of the

60 Id. at 21

61 Id. at 15

62 The test for standing was articulated in *Lujan v. Defenders of Wildlife*, 504 US 555 (1992) as “plaintiffs must have a concrete, particularized, and actual or imminent injury-

case is positive, the failure to bring in any Community Ecological Governance principle, even when there was an opportunity to do so, reduces the score for this indicator to zero.

***Kootenai Tribe of Idaho et al. v. Veneman et al.* 313 F.3d 1094 (9th Cir. 2002)**

Kootenai Tribe of Idaho et al. v. Veneman (*Kootenai Tribe*) is a U.S. Court of Appeals decision that upheld the “Roadless Area Rule,”⁶³ a national forest regulation approved in 2001.⁶⁴ Several timber harvesting interests had challenged the rule, which prohibits road construction and timber cutting in 58.5 million acres of roadless areas in federally owned forests. Roadless areas contain some of the last remnants of ancient, unspoiled, old growth forests in the United States. In 2005, after Clinton left office, the Forest Service repealed the Roadless Area Rule. The repeal was challenged in court, and a District Court overturned the appeal (reinstating the “roadless rule”) in 2007.⁶⁵ Since appeals courts are the highest U.S. courts, just beneath the U.S. Supreme Court, *Kootenai Tribe* is now the controlling case speaking to the legality of the roadless rule. This case will be the centre of attention and controversy as the roadless rule continues to be a target of lawsuits by the timber interests in other District Courts.

Because this case reinstated the strongest protection of old growth forest areas in U.S. history, the case scores well on several aspects of Earth Jurisprudence indicators. Where it fails to meet the criteria are failures in the American system itself, which gives little “standing” to the Earth community, and depends upon human “altruism” to stand up in defence of the wider community.

in-fact that is causally connected to the action, and must be redressable.” See, in general, Van Tuyn, Peter, “Who do you think you are?” Tales from the trenches of the environmental standing battle, 30 *Envtl.L.* 41 (2000).

63 *Kootenai Tribe of Idaho et al. v. Veneman et al.* 313 F.3d 1094 (9th Cir. 2002). Technically the court overturned the District Court’s injunction that prevented the Forest Service from implementing the Roadless Rule. The Court of Appeals held that upon analysis, the balance of interests and lack of irreparable harm from implementing the rule required the injunction to be lifted. *Id.*

64 66 Fed. Reg. 3,244 (Jan. 12, 2001), 36 C.F.R. pt. 294

65 *People of the States of California ex rel., Bill Lockyer v. United States Dep’t of Agriculture*, 459 F. Supp.2d 874, 908-09 (N.D. Cal. 2006).

Indicator	Possible Score	Actual Score
Earth Centered Governance	- / +8	+ 5
Mutually Enhancing Relations	- / +10	+ 6
Community Ecological Governance	- / +6	+ 2
Totals	- / + 24	+ 13

Earth centred governance

The opinion merits a positive score for respecting the intrinsic value of nature, and having a dominant rationale of environmental protection. The respect for the intrinsic value flows from the Court's acknowledgement that the near ban on road building "is not the drastic measure the plaintiffs make it out to be" because, in part,

*"roadless areas ... help preserve the forest system's watersheds, the rivers, streams, lakes and wetlands that are the 'circulatory system of ecosystems, and water is the vital fluid... Roadless areas ... also provide important habitat for a variety of terrestrial and aquatic wildlife..."*⁶⁶

The court also acknowledged, in the most certain terms, that the case law and statute itself reflects that the National Environmental Policy Act (NEPA) "is first and foremost to protect the natural environment."⁶⁷ Since the case partially hung upon whether the procedures to approve the Roadless Rule were consistent with NEPA, this finding reinforced that the bottom line consideration must be environmental protection.

The third indicators, whether the opinion flows from the laws of nature, is also evident. The opinion itself turned upon the interpretation of statutes, which were found to require environmental protection. But the court

took notice of the ecological facts. Notably, the opinion stated, "we [the Court] cannot properly be unmindful of the fact that mountain lion, elk, wolverine, grizzly bears, wolves and other threatened species need roadless areas to survive."⁶⁸ Similar statements indicate that the court recognized the ecological realities.

The issue of whether the opinion respects the three key Earth rights ("to be, to habitat, to fulfil its role...") is less clear, since the opinion is silent about rights. The court's acceptance of the Roadless Rule is certainly consistent with the existence of these rights, but does not acknowledge or enhance them. This detracts from a "perfect" score.

Mutually enhancing relations

This criterion involves whether there is recognition of interconnectedness between members of the Earth community and reciprocity, and whether the measure includes conflict resolution mechanisms as well as restorative and adaptive mechanisms. In the court's analysis of the effects of the Roadless Rule, its discussion of the "balance of hardships" recognized that many species need the forests to survive, and that the rule will have "immeasurable benefits from a conservationist standpoint."⁶⁹ It refused to accept that incidental harms to other interests, (i.e. hardships to fire fighting access, economic harm to communities that rely on timber harvests), outweighed the need to protect forests in their natural state."⁷⁰ It was consistent with Earth Jurisprudence principles by acknowledging the adverse human effects on other communities and the need to protect against those effects.

The court opinion did not include discussion of the other criteria. But the Roadless Rule itself, which the court opinion upheld, is a model of good conflict resolution and mechanisms consistent with EJ principles. The rule resolves conflicts between the uses of certain old growth forests with a concrete edict: no roads allowed, therefore no mechanised access. This lack of access is a per se ban on human uses that could endanger these ecosystems. The result of upholding this rule is protection of forests in their unspoiled, pristine state – so natural adaptation and restoration (from harm caused by airborne pollutants, fire, loss of migrating species, etc.) can occur unhindered. For

68 313 F. 3d at 1125

69 313 F. 3d at 1124

70 313 F. 3d at 1124-25

66 313 F.3d at 1121

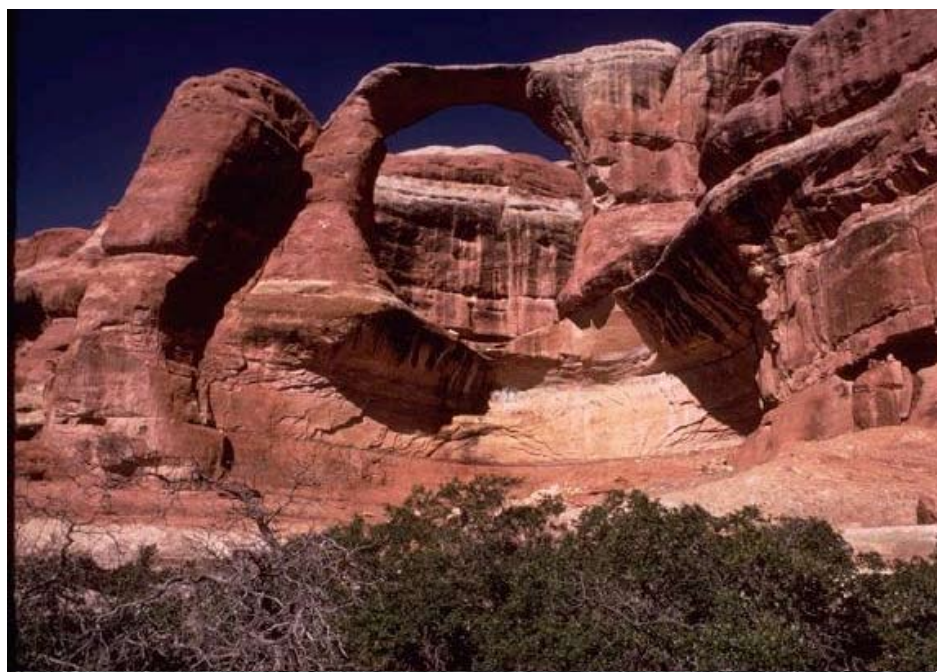
67 313 F.3d at 1123

those reasons, the opinion is consistent with the sub-indicators.

Community ecological governance

This criterion is evaluated based upon whether the opinion involves the communities most involved, i.e. the Earth communities living within the ecosystem. While not allowing the old-growth-dependent organisms to have standing, the Appeals Court did take a position that gave standing to groups that purported to represent those interests. The opinion declared that environmental groups could intervene to defend the roadless area rule, and the federal rules of civil procedure did not require that interveners “have a direct personal or pecuniary interest in the subject of the litigation.”¹ It relied on a case where a group was allowed to defend otters in Alaska by merely showing their members were Alaskan residents who

studied, observed, and enjoyed the otters in Alaska.² The opinion granted permissive intervention, acknowledging that its resolution “impacted large and varied interests.”³ While this is not an ideal case of allowing representation for the Earth community, this liberal standard allows humans to try to represent the Earth community, albeit in a backdoor way. This is a slight countervailing force to American judicial trends away from community ecological governance. Over the years, U.S. federal judges have been gradually eroding the standing doctrine, denying standing to environmental groups because the harm they allege is “too generalized” to be a “concrete and particularized injury” to the plaintiffs themselves or because the relief requested would not specifically address that harm (redressability).⁴ So while the opinion does not grant direct standing to the Earth community, it earns a positive score for tipping the scales in the Earth Jurisprudence direction.



Arches National Park USA, Copyright US National Parks Service

1 313 F.3d at 1100

2 Id., quoting *Beck v. United States Dep’t of the Interior*, 982 F.2d 1332, 1340-41 (9th Cir. 1992)

3 Id. at 1111. The interests were all human, but since the environmental groups attempted to represent the interests of the Earth community, there was at least an effect of allowing a voice for nonhuman interests.

4 The test for standing was articulated in *Lujan v. Defenders of Wildlife*, 504 US 555 (1992) as “plaintiffs must have a concrete, particularized, and actual or imminent injury-in-fact that is causally connected to the action, and must be redressable.” See, in general, Van Tuyn, Peter, “Who do you think you are?” Tales from the trenches of the environmental standing battle, 30 *Envtl.L.* 41 (2000).

Wild law in South America

ECUADOR

Constitution of the Republic of Ecuador 2008

While UKELA wild lawyers were meeting in Derbyshire for the launch of the first draft of this paper, the people of Ecuador were voting in a referendum to approve their new constitution. One chapter of the new Constitution, consisting of five Articles, is entitled Rights for Nature and creates a new regime of environmental protection. The environment is taken very seriously in Ecuador, where mining interests in particular have caused immense environmental damage with little consideration for anything else. The new provisions are bound to be controversial in practice and it remains to be seen how well they will work. Not surprisingly it scores very well indeed when measured against the matrix indicators and is certainly the best and probably the only example of an attempt to legislate wild law at this kind of level.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+6
Mutually Enhancing Relations	+/- 10	+8
Community Ecological Governance	+/- 6	+3
Total Score	+/- 24	+ 17

Earth centred governance

Under the new Constitution nature has a right to an integral restoration¹ which is presumed to mean that it is entitled to

1 Art.2

be restored to something close to its original state if for any reason it has been damaged by human activity. In addition to this the State is required to “motivate natural and juridical persons as well as collectives to protect nature”² and to promote respect to all the elements that form the ecosystem. The dominant rationale is clearly environmental protection. Art.2(2) requires the State to establish the most efficient mechanisms for restoration in cases of severe or permanent environmental impact while Art.4 requires the State to apply precaution and restriction measures in all activities that can lead to extinction of species, destruction of eco-systems or permanent alteration of natural cycles.

It is perhaps a little pedantic to argue that all this is not informed by natural law, but the preamble to the Chapter announces that “Nature is subject to those rights given by this Constitution and Law”. This is distinct from the Article recognising human rights which states that “Persons and people have the fundamental rights guaranteed in this Constitution”. The distinction is between rights recognised as existing and rights which are given by some human agency and which could, by the same reasoning, be taken away again. Article 1 asserts that “Nature, or Pachamama, ... has the right to exist” and although the other two key Earth rights are not specifically referred they are certainly protected by the terms of the Chapter.

Mutually enhancing relations

All the indicators recognising mutually enhancing relations are present except that there is no explicit mechanism for formal monitoring or reporting procedures to provide an adaptive mechanism or process to deal with evolving challenges other than the rights of citizens to bring proceedings for the protection of the environment. On this point a neutral score seemed appropriate.

Community ecological governance

It is fair to say that this document is not really informed by considerations of Community Ecological Governance (CEG) although its provisions leave scope for the development of CEG principles and practice. Participation of all members of the Earth community is secured by the right of citizens to demand recognition of the right to exist, persist etc.³ in the public organisms (which include courts and other public bodies) and access to justice is secured by the same right. However, there is no reference to other

2 Art.2

3 Art.1

key CEG issues such as community rights, traditional knowledge etc. which could only be asserted or protected to the extent that they can be linked to rights for nature.

Cotacachi Municipal Ordinance

The Municipal Council of Santa Ana de Cotacachi is responsible for an area known as the Toisan Natural Reserve which is part of the Toisan Mountain range. In September 2000 Cotacachi was declared an ecological canton by Municipal Ordinance and in 2008 the Council adopted the “Toisan Natural Area Ordinance” to give itself power to protect the Area from deleterious exploitation by substantial international mining interests. The area itself is defined by reference to natural features – the water divide of the Toisan Mountain range to the north and east; the water divide for the Nanguvi and San Pedro Rivers to the south. The recitals to the ordinance run to several pages and invoke the provisions of several international instruments including the Convention on Biological Diversity and the 1992 Rio Declaration on Environment and Development; numerous Human Rights instruments and several provisions of the Ecuador Constitution. In particular, it sees its own role, as an organ of State, as being

“to protect the natural and cultural patrimony of the country and its environment in addition to ensuring the enforcement of human rights”⁴.

The Ordinance⁵ creates three different zones, namely a preservation zone⁶, and a protection zone⁷ which between them account for two-thirds of the total area, and a sustainable use and exploitation zone⁸.

The Ordinance creates a management committee representative of many interests for integrated management of the Area⁹ which is sufficiently broadly phrased to at least allow for an argument that nature itself ought to be represented (“A representative of each and every community that is partially or fully located within the reserve area”¹⁰.)

Although sustainable development is a key consideration¹¹ in the Ordinance it also carries strong Earth Jurisprudence

- 4 Art.3
- 5 Art.5
- 6 Art.6
- 7 Art.7
- 8 Art.8
- 9 Art.10
- 10 Art.10(8)
- 11 Recitals; Art.1

influence and scores well on all three main indicators. Its overall score of +14 makes it one of the more fully developed Wild Law instruments we have seen.

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+5
Mutually Enhancing Relations	+/- 10	+6
Community Ecological Governance	+/- 6	+3
Total Score	+/- 24	+ 14

Earth Centred Governance

This ordinance is clearly based on respect for the intrinsic value of the Earth community. It specifically aims to preserve “the primary forest ... in a pristine and unaltered way”¹² in the preservation zone (the largest of the three) while the protection zone is “for the development of activities ... and the implementation of rules that allow the preservation of its current status, mitigating the environmental impact of activities carried on inside it”¹³. Even the ‘sustainable use and exploitation zone’ has as its main objective the creation of a buffer zone where “agricultural, sustainable forest management and eco-tourism activities will be developed under environmental care regulations”¹⁴. The dominant rationale is clearly environmental protection as even the sustainable development and human use provisions are subject to environmental considerations as evidenced by the strong reliance on the precautionary principal in the recitals. The very nature of the ordinance ensures that it is founded in natural law, although not expressly so, but it is interesting that although the rights recognised in the recitals are extensive, they are nearly all various forms of human rights. The idea of rights for nature in its own right is not express and there is little to suggest that the

- 12 Art.6
- 13 Art.7
- 14 Art.8

legislators had rights for nature *per se* in mind.

Mutually enhancing relations

The development and environmental needs of present and future generations are expressly recognised in the recitals¹⁵ and the Toisin Mountain Range is seen as having an ecological and cultural value that must be preserved¹⁶: “Ecologic value is due to the fact that [the Range] constitutes a generous source of clean water, and due to the presence of mixed primary forest and rich bio-diversity that allow for local, national and strategic environmental services, such as water supply for life, renewable energy production and generation, or discovery of endemic plants for medical or industrial purposes”. The management commission does not have express powers for conflict resolution but through its representative activities and annual reporting system must, by implication, be able to deal with conflicts. The Municipal Director of Police, acting in conjunction with other agencies, has power to impose sanctions following trial for specific offences but there is nothing of a specifically restorative nature. On the other hand, the joint management process¹⁷ gives considerable scope for developing restorative mechanisms and Article 11 provides for institutional policies to provide “physical, moral and economic incentives” to foster reforestation, especially with native species, as well as natural regeneration by supplying native plants to country families so that they can restore areas for forest conservation purposes.

Community ecological governance

The participation of all members of the Earth community is more to be implied than explicit – the transition arrangements¹⁸, for example, allow for the “participation of land owners, parish boards and every concerned and involved stakeholder”¹⁹. While this provision could allow for participation of persons acting purely on behalf of nature, that could equally be ruled out by judicial or administrative decision. Article 12 provides for “participatory management” involving communities, owners, organisations, local governments and the national environmental authority and the Management Commission itself²⁰ are widely representative. Legal recognition of the

right to access to justice is also more implied than explicit and there is nothing explicit for the more-than-human Earth community. Nevertheless, in one way or another, there is recognition of most CEG key issues in the Recitals if not in direct provisions.²¹

COLOMBIA

Establishment of Environment Ministry²²

This Act sets up a new Environment Ministry²³ as the governing entity for the administration of the environment and renewable natural resources in Colombia. It reorganises the public sector in Colombia with regard to the protection and conservation of the environment and renewable natural resources and creates a National Environmental System.

While the primary objective is sustainable development²⁴ upon which other policies such as social and economic policies are to be based, this is to be achieved on the basis of “universal principles included in the Rio Declaration on Environment and Development of June 1992”. While the legislators clearly place considerable emphasis on protecting the environment, the Act remains anthropocentric at its heart – the environmental protection it affords is for the benefit of human interests: it does not recognise Nature as a legal entity with an existence and intrinsic value of its own. It does, however, recognise the human dependence on nature and the need for excellent environmental care and protection in the human interest, hence its relatively high score against the indicators.

15 Citing Principle 3 of the Rio Declaration on Environment and Development

16 Right at the start of the recitals.

17 Arts.12 & 13.

18 Art.19

19 Reminding one of the example of ham and eggs where the hen is said to be ‘concerned’, the pig ‘involved’!

20 Art.12

21 Traditional knowledge, cultural heritage, human rights, equitable access and benefit sharing, community and rights and co-management, self-determination and democracy.

22 Ley 99 of 22 December 1993

23 Title II S2

24 Title I S1(1)

Indicator	Possible Score	Actual Score
Earth Centred Governance	+/- 8	+4
Mutually Enhancing Relations	+/- 10	+6
Community Ecological Governance	+/- 6	0
Total Score	+/- 24	+ 10

Earth centred governance

The Act begins by acknowledging that Colombia's biodiversity is "part of the national and world heritage" to be "carefully protected and exploited in a sustainable fashion"²⁵ and also sees the landscape as a common heritage²⁶. The Act applies the precautionary principle²⁷, encourages the incorporation of environmental costs²⁸ and the use of economic instruments for the prevention, correction and restoration of environmental deterioration and for the conservation of natural resources. There is explicit acknowledgment of the rights of future generations²⁹. The limiting capacity of the Earth is acknowledged by requiring the Minister to establish global quotas and to take into consideration the number and renewal capacity of species, natural forests and wild fauna and flora specimens for use by Regional Autonomous Corporations when granting exploitation permits, licences and authorisations³⁰. All this is based on sustainable development for human purposes, however. There is no explicit recognition of the rights of nature so that, although the over-riding objective is clearly environmental protection, its purpose is ultimately anthropocentric.

Mutually enhancing relations

- 25 Title I S1(2)
- 26 Title I S1(8)
- 27 Title I S2(6)
- 28 Title I S1(7)
- 29 Title II S3
- 30 Title II S5(43-45)

The new Environment Ministry is responsible for stimulating a "respectful and seamless relationship between men and nature"³¹ which explicitly recognises the inter-relatedness of people and nature so that even "urban centres, human settlements, and transportation, mining and industrial activities" are to be subject to minimal and general environmental regulations³².

The whole notion of sustainable development that suffuses the Act, as well as specific provisions³³, carry with them the recognition that people have obligations to the environment as well as rights over it. The Ministry has power to settle any sort of dispute that may arise between the National Environment System's entities, although this does not appear to extend to non-human members of the Earth Community and the State is required to encourage (but only to encourage) both the incorporation of environmental costs and the use of economic instruments for "the prevention, correction and restoration of environmental deterioration"³⁴.

The Act also requires the Minister to develop and undertake monitoring mechanisms so as to ensure that policies and regulations respond adequately to the environmental climate³⁵ and there is provision for the establishment of monitoring and control mechanisms for all matters affecting the environment³⁶.

Community ecological governance

The Act recognises "the right of every person to enjoy a healthy environment" and its otherwise ambivalent, and essentially 'top down', provisions for governance are mitigated by the words "and always assuring the participation of the community"³⁷. There is no express right of access to justice or recognition of any interest outside the human community but it is clear that the intention is that environmental administration shall be "decentralised, democratic and participative"³⁸. To that extent the interests of community are provided for, but not sufficiently to displace the anthropocentrism of the Act as a whole.

- 31 Title II S2
- 32 Title II S3
- 33 E.g. Title II S2(3) – requirement to prepare plans programmes and projects on environmental matters for incorporation into the national Development Plan etc.
- 34 Title I S1(7)
- 35 Title II S5(14-16)
- 36 Title II S5(21)
- 37 Title II S2(2)
- 38 Title I S1(12)

Conclusions

This paper is probably the first ever attempt to review existing substantive law from a Wild Law perspective. The exercise has thrown up numerous challenges and difficulties, particularly in coming to a deep and consistent understanding of the implications of Earth Jurisprudence and then applying the understanding to existing laws.

The first thing that is clear is that Earth Jurisprudence does bring a completely different perspective to understanding law; and the second thing is that we are probably some way from fully appreciating that perspective. A first recommendation thus is to further expand on the indicators at Appendix 4.

When selecting laws we chose laws with a “wild” subject matter such as forests or wild species. We did not review laws which governed subjects which are the product of human activity such as plantations, although one could argue that endangered species are a man made product.

By following this selection process it is possible that some indicators would have scored artificially high. For example, the analytical process through the indicators asks, among other things, whether governance is informed by the law of nature. Where the object of the law is to preserve or restore existing forests, nature imposes itself to the extent that the trees will not grow except in accordance with their own nature and that of the terrain in which they are planted. This brings about a necessary reference to natural law through the biology of trees: it does not necessarily imply a conscious recourse to the law of nature in the sense of realising that human will is constrained by a higher law of nature.

In a not dissimilar way, several laws took on an appearance of wildness from their context. The US Endangered Species Act, for example, attracted a relatively high score (+11) but this ignores the fact that it is directed to species that should not be endangered in the first place. The Act is aimed at cure, not prevention, whereas truly Wild Law would be law that applied to the whole of nature to ensure that there was no need for special provisions for species endangered by human excesses.

Wild Law in practice

The research did not discover a seriously Wild Law approach to legislation anywhere. Elements of Wild Law are apparent in some instruments and decisions but the review

has shown that modern lawmaking is anthropocentric in outlook because the underlying assumption nearly always is that both laws and nature are there for human benefit. The result is that it does not enter the minds of legislators to make deliberate provision for the voice of nature to be heard in either the legislative or the administrative process. Environmental protection is justified on sustainability principles, but not on the harmonious existence of man with nature and nature with man. There are exceptions. New Zealand, for example, fares well in the Wild Law stakes with some laws that value the Earth for its intrinsic value. However the Earth is still referred to as a resource and continues to be valued largely for its economic worth.

The review has shown that the interdependency of humans and the other members of the Earth Community is usually reflected in law, if at all, because the fact of interdependence has brought about the situation to which the law is directed. However, this is as far as it goes and there is no acknowledgment of other members of the Earth Community having rights except in extreme cases such as where a species is facing extinction.

In some cases, public participation in decision making is strong and more public access to justice was found than was expected. In a number of jurisdictions there was also encouragement for decisions to be made at a local level and traditional knowledge was sometimes respected. It is worth noting in this respect that although there was some reference to tribal communities in some places, they were rarely used as an example of how all people can or do relate to nature.

Community ecological governance

Of the three indicators of wildness used in this project, community ecological governance has generally scored lowest. This is surprising at first sight, given the positive attitudes towards public participation that we recorded. However, access to environmental information and the ability to become involved in decision-making do not, in themselves, ensure that decisions are made in the spirit of respect for other elements of community ecological governance.

Some explanation for this may come from the nature of the circumstances being addressed by specific laws and the possibility that the surrounding legal regime makes provisions which do not need to be reiterated in particular instruments. But the more telling fact is that there appears to be no legal culture in the world today, with the possible

exception of Ecuador, that seriously considers that nature itself may have rights which need to be spoken for and represented in human legal systems.

In *Should Trees Have Standing?*, Christopher Stone suggests that the idea of holding legal rights involves at least three things: “first that the thing can institute legal actions *at its behest*; second, that in determining the grant of legal relief, the court must take *injury to it* into account; and, third, that relief must run to the *benefit of it*”¹. We did not find any laws or legal regime which came close to meeting these criteria.

Mutually enhancing relations

The recognition of interdependency referred to above accounts for the relatively high score for mutually enhancing relations to promote the well-being of the whole Earth community. The relationships may be there, but whether this is to promote the well-being of the whole Earth Community is far less certain: in most cases this issue is not even addressed in the law.

Earth centred governance

The level of Earth Centred Governance was difficult to determine. Even where the law did appear to provide measures for environmental protection in its own right, it was not always possible to determine the underlying reasons for the law in question. Where we could do this, we usually found that there was an anthropocentric interest behind the measure. The reality is again that few laws were found which really began from an Earth centred perspective that treats the human community as subjects equal with nature in a legal regime which includes the whole of nature, human and other-than-human.

What next?

In spite of these criticisms, seventeen of the twenty-four laws analysed had positive scores. This suggests that Wild Law principles are not as alien, or as far-fetched, as some of us may originally have thought. Certainly, there is enough in what we have reviewed to suggest that a more deeply Wild Law jurisprudence is not a complete impossibility. The Ecuadorian constitution, and the decisions by the Indian Supreme Court, are good examples of what can be achieved.

Sustainable development

The study indicates a deep tension in modern legal cultures between human interests and those of the natural world. It is not really surprising to find that law making is almost entirely anthropocentric since most of the cultures in which the laws are made are also anthropocentric. Wildness in law-making tends to arise from extreme situations such as extinction of species, cataclysmic loss of forests or serious deprivation of human requirements such as water, but not from a predisposition towards valuing nature for its inherent worth.

Many statutes serve the notion of sustainable development but there is a clear distinction between this and Wild Law. Sustainable development is founded in the view that nature is a resource for human exploitation which has to be preserved for future human generations. Wild Law has its origin in the view that nature has a value in its own right which may actually inhibit development which appears to be desirable from a purely human perspective.

Most people working in the environmental field recognise the need for a balance between environmental protection and economic development – a balance that is at the core of the sustainable development agenda. The debates and arguments all tend to revolve around where this balance should be struck.

One question we are left with is whether the application of Wild Law principles in shaping and interpreting laws will enable us to avoid the need to carry out this difficult balancing act. This is also an area recommended for further study.

The above question also brings out a deeper dilemma in the developing philosophy of Earth Jurisprudence. First of all, nature does not make laws in the formal human sense. To that extent, all law-making is bound to have an anthropocentric element. We cannot actually make laws for trees, rivers, mountains or ecosystems – they already have and conform to their own natural laws. Human laws are inevitably directed to human beings and intended to shape and modify human conduct. It is equally inevitable that with today’s prevalent non wild and anthropocentric environmental philosophies human laws are only likely to succeed where they clearly benefit the human beings affected by them.

Wild Law is therefore only likely to succeed in the context of a culture that sees the relationship between the human

1 Christopher D Stone: *Should Trees Have Standing* – 25th Anniversary edition p8.

and natural worlds as intrinsically and uniquely mutually enhancing. That is the real motive for modifying human behaviour and law-making to take account of nature. It is not some kind of human self-abnegation that is sought, but a redefinition of the relationship which modifies human behaviour to the mutual benefit of nature and humankind.

The Way Forward – final thoughts and recommendations

Environmental law as it is currently framed has not served us well. Thousands of species face extinction, habitats are being lost daily, climate change threatens the fabric of the planet and humans the world over face the loss of a good quality environment, which is essential to human life on earth.

We see it every day. From the spreading of the deserts in China, to starvation due to drought on a massive scale in the Horn of Africa, to melting glaciers and loss of green space in the UK, it is clear how important the environment is to us. We damage it at our peril – and climate change has brought the biggest peril yet.

Wild Law offers a potential solution, although it requires a huge shift in thinking. That shift is already beginning to be seen, as this report shows. The new constitution for Ecuador shines a light on the potential for thinking differently about humans' relationship with their environment. Wild Law matters because, by putting humans into their environmental context, it becomes clear that, just as the human species suffers when its environment fails, it succeeds when nature is put right at the centre of things.

As with much legal philosophy, one of the barriers to the wider understanding of Wild Law is the language in which it is couched. But it is the principles that matter, not the way in which they are expressed. As a starting point for taking forward the thinking we offer the following practical suggestions as a baseline.

Some Practical Suggestions

- Use and interpret laws such as constitutions or general acts to establish Wild Law principles – that would make law making uniform and ensure that these principles were always taken into account when laws were made.
- Use and develop the arguments that enable existing provisions to give effect to Wild Law principles.

- Stop using the word 'resource' when we speak about nature – it implies that we value the Earth for its economic value only.
- Promote the enjoyment of nature – it should be the right of every human to have access to nature – the more we know about nature the more we will value it for itself– schools can have a large role to play.
- The right to protect and respect the environment should be part of the right to life which most constitutions recognise, thus acknowledging the interdependency of human life and the rest of nature. This may be more palatable to governments than granting rights to all members of the Earth community.
- Support the call for a Universal Declaration of the Rights of Nature. Greater balance between humans and the other members of the Earth community can be achieved by granting rights to all members of the Earth community. Where there is a dispute someone will be able to represent those other members and a balance can be achieved on an individual basis in a court of law.
- Support the call for a Nature's Rights Act at a national level akin to the Human Rights Act in the UK.
- Educate judges, lawyers and environmental professionals about the need to promote the interests of nature, environmental challenges we face and ancient societies' relationship with the Earth and how to integrate these elements into the decisions they make in their professional capacity. They will then be better able to make a judgment when trying to balance interests and they may engage emotionally with the subject.
- Promote the use of intuition as a valuable resource – we are part of nature and have something embedded within us that may allow us to make the right choice.
- Redefine public interest to include the interests of the other members of the Earth community.

Finally, this study is the first stepping stone in understanding the meaning of Wild Law and Earth Jurisprudence in practice. We would encourage all readers to continue to improve understanding of how we can better the world for humans and all other members of the Earth community by using Earth Jurisprudence principles.



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Appendix One

SCHEDULE OF LAWS ANALYSED

LAW	Country	Ch.	Score
<i>KM Chinnappa v Union of India</i> WP 202/1995 (30.10.2002) AIR 2003 SC 724.	India	4	+ 18
National Parks Act 1980 (New Zealand) No. 66 Public Act	New Zealand	6	+ 18
Constitution of the Republic of Ecuador 2008	Ecuador	8	+ 17
Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006	India	4	+ 15
Cotacachi Municipal Ordinance	Ecuador	8	+ 14
The Conservation Act 1987 (New Zealand) No.65 Public Act	New Zealand	6	+ 14
US National Park Service Organic Act 16 USC 1	United States	7	+ 13
<i>Kootenai Tribe of Idaho et al. v. Veneman et al.</i> 313 F.3d 1094 (9 th Cir. 2002)	United States	7	+13
Resource Management Act 1991 (New Zealand) No.69 Public Act	New Zealand	6	+ 13
The Biological Diversity Act 2002 No 18 of 2003	India	4	+ 12
US Endangered Species Act 1973 16 USC 1531-1544	United States	7	+ 11
US National Environmental Policy Act 1994 43 USC 4321-4347	United States	7	+ 11
Ley 99 of 22 December 1993 – Establishment of Environment Ministry	Colombia	8	+ 10
<i>Perumatty Grama Panchayat v State of Kerala</i> WP(C) No 34292 2003 (1) KLT 731 (2003)	India	4	+ 7
<i>Massachusetts v Environmental Protection Agency</i> (2007) No.5-1120 Slip Op. (S.Ct. April 2007).	United States	7	+ 4

Oromia Forest Proclamation No.72 / 2003	Ethiopia	5	+ 2
The Habitats Directive (EU Council Directive 92/43/EEC; OJ L206 22.7.92 p.7)	EU	3	+ 1
The Birds Directive (EU Council Directive 79/409/EEC)	EU	3	+ 1
Forest Development, Utilization and Conservation Proclamation No. 542/2007	Ethiopia	4	- 1
<i>M.C. Mahta(Ii) v Union of India</i> (Kanpur Tanneries Case) [1988] 2 SCR 530	India	4	- 1
EU Mountain Farming Protocol	EU	3	- 4
National Environmental Management Act 107 of 1998	South Africa	5	- 5
Constitution of the Republic of South Africa	South Africa	5	- 6
Protection of Plant Varieties and Farmer's Rights Act 2001 Act 53 of 2001	India	4	- 14
<i>Lappel Bank Case C-44/95</i> – Judgement of the Court 11 July 1996: R v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds	EU	3	NIL

CORMAC CULLINAN – THE ARGUMENT

(*Wild Law*: pp 204/205)

“From a legal perspective, one could say that the argument that I have presented in this book goes more or less as follows.

1. We humans are an integral and inseparable part of the earth system.
2. This essential unity means that humans and our social systems are inextricably embedded within and influenced by the context of the larger Earth Community.
3. Therefore, the way we govern ourselves must of necessity be consistent with this context and must have as its purpose to ensure that the pursuit of human well-being does not undermine the integrity of Earth, which is the source of our well-being.
4. Human fulfilment is unattainable outside of a web of healthy relationships with the wider community of life on Earth.
5. Only by creating a jurisprudence that reflect the reality that human societies are part of a wider Earth Community and must observe certain universal principles, will we begin a comprehensive transformation of our societies and legal systems.
6. In order to re-orient our governance systems to reflect this Earth jurisprudence we need to establish laws that are ‘wild’ at heart in the sense that they foster, rather than stifle, creativity and the human connection to nature.
7. To implement wild laws effectively, we will need to cultivate personal and social practices that respect Earth, and social structures based on communities and communities of communities, as found in nature.

THOMAS BERRY – EVENING THOUGHTS

(*Evening Thoughts*: pp 10/11)

“... I make the following set of proposals expressed in terms of rights that should be recognised in national constitutions and in courts of law. ... I propose that we recognise and accept the following statements concerning the origin and nature of the rights of the natural world.

1. The natural world on planet earth has rights that come with existence itself. These rights come from the same source from which humans receive their rights, from the universe that brought them into being.
2. Every component of the Earth community has three rights: the right to be, the right to habitat, and the right to fulfil its role in the ever-renewing processes of the Earth community.
3. In the non-living world, rights are role specific; in the living world rights are species specific. All rights are limited. Rivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights. Difference in rights is qualitative not quantitative. The rights of an insect would be of no value to a tree or a fish.
4. Humans do not cancel out the rights of other modes of being to exist in their natural state. Human property rights are not absolute. Property rights are simply a special relationship between a particular human owner and a particular piece of property, so that both might fulfil their roles in the great community of existence.
5. Since species exist only in the form of individuals, rights refer to individuals and to those natural groupings of individuals into flocks, herds and packs, not simply in a general way to species.
6. These rights as presented here are based on the intrinsic relations that the various components of Earth have with each other. The planet earth is a single community whose members are bound together with interdependent relationships. No living being nourishes itself. Each component of the Earth community is immediately or mediately dependent on every other member of the community for the nourishment and assistance it needs for its own survival. This mutual nourishment, which includes predator-prey relationships, is integral with the role that each component of the Earth has within the comprehensive community of existence.

INDICATORS OF EARTH JURISPRUDENCE

Developed by Carine Nadal

Condensed list of EJ Indicators

1. Earth Centred Governance

- 1.1. Respect for the intrinsic value of Earth and all its members/components
- 1.2. Dominant rationale is environmental protection
- 1.3. Governance informed by laws of nature
- 1.4. Respect for the 3 key Earth Rights of an Earth Community member

2. Mutually Enhancing Relations to promote the wellbeing of the whole Earth Community

- 2.1. Recognition of interconnectedness between members/components of the Earth Community
- 2.2. Reciprocity
- 2.3. Conflict resolution mechanism for interests/rights of humans and those of non-human members for the wellbeing of the whole Earth Community (procedural and substantive)
- 2.4. Restorative mechanism/process to (re)establish mutually enhancing relations for the wellbeing of the whole Earth Community
- 2.5. Adaptive mechanism/process in light of evolving challenges to pursue mutually enhancing relations

3. Community Ecological Governance (CEG)

- 3.1. Participation of all members of the Earth Community in ecological governance
- 3.2. Legal recognition of 3 key rights of public participation:
 - 3.2.1. Access to information
 - 3.2.2. Public participation in decision-making
 - 3.2.3. Right to access to justice
- 3.3. Respect of other key issues of CEG

1. Earth Centred Governance

Respect for the intrinsic value of Earth and all its members/components

- Yes (+2 points)
 - e.g. explicit recognition,¹ recognition of members of the Earth Community as subjects, and respect for Earth's common heritage² and respect for future generations of the Earth Community³
- Ambiguous (+1 to -1 point)
 - e.g. perception of Earth's components as 'natural resources', objects, commodities⁴ or property,⁵ indirectly through education⁶
- No - rather for its instrumental value⁷ (-2 points)

1.2. Dominant rationale is environmental protection

- Yes (+2 points)
 - e.g. main objective,⁸ via environmental legal basis⁹

1 E.g. Preamble, 1st recital *Convention on Biological Diversity (CBD)* is '[c]onscious of the intrinsic value of biological diversity...' Preamble, recital 3(a) *World Charter for Nature* states '[e]very form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action.'

2 E.g. The *Water Framework Directive (WFD)* states that '[w]ater is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such.' (Preamble, 1st recital, *WFD*); and Preamble, 8th recital *Habitats Directive* acknowledges that 'threatened habitats and species form part of the Community's natural heritage.'

3 E.g. Endorsement of the intergenerational principle. The oft cited definition is '[Development that] meets the needs of the present without compromising the ability of future generations to meet their own needs.' (Brundtland Report 1987). The *WFD* implicitly endorses the principle through one of its objectives: the promotion of 'sustainable use of water based on a long-term protection of available water resources' (Article 1(b)); and the *Habitats Directive* through the obligation to maintain or restore biodiversity at a favourable conservation status, defined by the 'long-term natural distribution, structure and functions as well as the long-term survival of [a habitat and] its typical species' and the 'long-term distribution and abundance of... [a species]'... populations (Articles 1(e) and (i) respectively).

4 E.g. Article 9(1) *WFD* pursuant to which 'Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance with the polluter pays principle.' On the one hand this perception can promote sustainable use and protection of nature e.g. Article 9(1) further requires that by 2010 Parties shall ensure 'that water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive...' On the other hand this perception advocates the instrumental value of Earth which suggests disrespect for its intrinsic nature. However, in the case of the *WFD* the later perception is to some extent mitigated by a finding that there is no breach of the Directive for non-application of Article 9 obligations (regarding recovery of costs) where this does not compromise achievement of the *WFD*'s objectives (Article 9(4)).

5 Note how while the perception and treatment of nature as property is inherently anthropocentric, if used for the benefit of public ecological interests e.g. land ownership by conservation organisations, it can be a means of ensuring respect for nature (0 to +1 point). Conversely, if such perception is for the benefit of private anthropocentric interests then this is suggestive of disrespect for nature (0 to -1 point).

6 E.g. Article 3(a) *CBD* requires Parties to '[p]romote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes.' However, it is unclear whether or not education will specifically promote the intrinsic nature rather than instrumental value of the Earth.

7 For example for health as clearly illustrated by Article 1 *Drinking Water Directive* which states that its aim is to 'protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean.'

8 E.g. Preamble 7th recital *Habitats Directive* states '...the main aim of this Directive being to promote the maintenance of biodiversity...' with Article 2(1) explaining further how, that is, 'through the conservation of natural habitats and of wild fauna and flora in the European territory...' Further Article 1 *WFD* states that '[t]he purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which' specifically prevents further deterioration of and protects and enhances the status of aquatic and terrestrial dependent ecosystems; aims at enhanced protection and improvement of aquatic environments, *inter alia*, through progressive reduction of pollution particularly of priority substances and in ground waters; promotes sustainable use of water and contributes to the mitigation of the effects of floods and droughts.

9 E.g. Article 174 *European Community (EC) Treaty* which calls for the 'preservation, protection and improvement of the

- Ambiguous (+1 to –1 points)
 - e.g. mixed rationales,¹⁰ endorsement of environmental principles e.g. integration principle,¹¹ sustainable development,¹² precautionary principle,¹³ rectification of environmental damage near the source¹⁴ or mechanisms e.g. environmental impact assessments¹⁵
- No - instead anthropocentric¹⁶ (-2 points)

1.3. Governance informed by laws of nature

- Yes (+2 points)

quality of the environment’ (e.g. cited in Preamble, 11th recital *WFD*).

10 E.g. The *Flood Risk Directive* endorses numerous aims, one of which is protection of the environment. Article 1 aims ‘to establish a framework for the assessment and management of flood risks, aiming at the reduction of the adverse consequences for human health, the environment, cultural heritage and economic activity associated with floods in the Community.’ Moreover, the direct aim appears procedural, that is establishment of a framework for assessment and management of risks, rather than substantive i.e. environmental protection.

11 E.g. ‘The objective of [**Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (*SEA Directive*)**] is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.’ However, integration of environmental interests is weakened given that the requirement of an impact assessment is limited to certain plans and programmes ‘which are likely to have significant environmental effects’ (Article 3(1), see generally Article 3 for the scope of application) but does not extend to plans or programmes having less than a significant effect or for higher levels of decision making of policies or legislation. Further in the absence of a provision to prohibit the carrying out of plans and programmes that risk having significant environmental effects, any integration of environmental considerations is limited to a procedural, rather than extending to a substantive, requirement (Note Preamble, 9th recital of the *SEA Directive* qualifies that the ‘Directive is of a procedural nature’). Accordingly, environmental considerations risk constituting a mere consideration to be taken into account, and thus subordinated to or marginalised by more dominant economic interests in practice, rather than serving as an overarching goal to be realised.

12 E.g. Preamble 7th recital *Habitats Directive* states that ‘[w]hereas the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development...’ However, given dominance of economic and social interests in practice, there remains a risk of the marginalisation of the main objective of environmental protection in favour of pursuing the goal of sustainable development.

13 E.g. The *WFD* calls for implementing the precautionary principle in identifying priority hazardous substances relying in particular on the determination of any potentially adverse effects of the product and on a scientific assessment of the risk (Preamble 44th recital). While this principle presumes for environmental protection, there are different degrees of endorsement – strong e.g. Article 11(b) *World Charter for Nature* which requires that ‘where potential adverse effects are not fully understood, the activities should not proceed’ or weak e.g. Preamble, 9th recital *CBD* which states ‘...that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.’

14 E.g. Article 174 *EC Treaty* requires that ‘environmental damage should, as a priority, be rectified at source’ (cited in Preamble, 11th recital *WFD*).

15 E.g. The Preamble, 4th recital *SEA Directive* explains how ‘[environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.’ Similarly, Article 6(3) *Habitats Directive* requires an ‘appropriate assessment’ of [a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect... in view of the site’s conservation objectives.’ However, the extent to which environmental interests are upheld in practice vis-à-vis dominant economic interests is questionable for the reasons mentioned above regarding the integration principle.

16 E.g. Article 1 *Drinking Water Directive* aims to ‘protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean.’

- e.g. by ecological limits,¹⁷ ecological units,¹⁸ ecological criteria,¹⁹ natural time lags,²⁰ ecological processes,²¹ life cycles,²² local/regional diversity²³ and transboundary nature²⁴ and interconnectedness of the environment²⁵

- Ambiguous (+1 to –1 points)

- E.g. anthropocentric modification of laws of nature²⁶

- No – human centred governance (-2 points)

- E.g. anthropocentric based criteria for environmental protection,²⁷ requirement of causation

17 E.g. Article 10(a) and (d) *World Charter for Nature* assert that '[l]iving resources shall not be utilized in excess of their natural capacity for regeneration' and that '[n]on-renewable resources which are consumed as they are used shall be exploited with restraint, taking into account their abundance...and the compatibility of their exploitation with the functioning of natural systems.'

18 Note for example the *WFD's* approach of integrated river basin district water management (Article 3) of all waters including surface, ground and coastal waters (Article 1); or conservation under the *Habitats Directive* for establishment of a 'coherent ecological network of special areas of conservation' (Preamble, 10th recital and Article 3)

19 E.g. Determination of the *WFD's* environmental standard of 'good ecological status' for all waters (Article 4) based on ecological criteria of e.g. biological community, hydrological and chemical characteristics (Annex V); or designation of protected areas (SACs) under the *Habitats Directive* (Article 3(2) cf ecological criteria listed in Annex III).

20 E.g. Noting that surface and ground waters are in principle renewable resources, the *WFD* states that '[s]uch natural time lag for improvement should be taken into account in timetables when establishing measures for the achievement of good status of groundwater and reversing any significant and sustained upward trend in the concentration of any pollutant in groundwater.' (Preamble, 28th recital).

21 E.g. The *Flood Risk Directive* is guided by the ecological principle of 'giving rivers more space', including by retaining and restoring natural floodplains (e.g. Preamble, 14th recital; Article 7(3)).

22 E.g. The *Habitats Directive* extends prohibitions on certain modes of capture, interference, trade or killing, and thus protection, of animal and plant species to all stages of their life cycles (Articles 12(3) and 13(1) respectively).

23 E.g. The *Flood Risk Directive* requires a preliminary flood risk assessment to assess '...the potential adverse consequences of future floods for [*inter alia*] ... the environment...taking into account as far as possible issues such as the topography, the position of watercourses and their general hydrological and geo-morphological characteristics, including floodplains as natural retention areas...and long-term developments including impacts of climate change on the occurrence of floods.' (Article 4(2)(d)). It also requires that '[f]lood risk management plans should therefore take into account the particular characteristics of the areas they cover and provide for tailored solutions according to the needs and priorities of those areas, whilst ensuring relevant coordination within river basin districts...' (Preamble, 13th recital)

24 E.g. Article 3 *CBD* recognises that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' The *Flood Risk Directive* also states 'Member States should refrain from taking measures or engaging in actions which significantly increase the risk of flooding in other Member States, unless these measures have been coordinated and an agreed solution has been found among the Member States concerned.' (original emphasis omitted, Preamble 13th recital).

25 The *Flood Risk Directive* also requires that '[f]lood risk management plans shall take into account relevant aspects such as... environmental objectives of Article 4 of Directive 2000/60/EC [regarding water quality and protected areas], soil and water management...land use, nature conservation...(Article 7(3)) and that '...preliminary flood risk assessment shall be undertaken to provide an assessment of potential risks...[including]... 'long-term developments including impacts of climate change on the occurrence of floods' (Article 4(2)(d)). From a broader structural perspective, the *WFD* advocates integrated water governance which reflects the interconnections in nature. The *WFD* asserts that Community water policy requires a 'transparent, effective and coherent legislative framework' (Preamble 18th recital), and explicitly contributes to the implementation of other water related legislation at the international and EC levels, such as the *Drinking Water Directive*, *Habitats Directive*, *Urban Waste Water Directive* and *IPPC Directive*. Integrated water governance is also promoted by the recent EC *Flood Risk Directive* which must be coordinated with the *WFD* in relation to the development of integrated river basin management plans, exchange of information and provision of opportunities for public participation (Preamble, 17th recital and Articles 9 and 10 respectively *Flood Risk Directive*).

26 E.g. Consider the use of economic, scientific or technical instruments e.g. water pricing (Article 9 *WFD*) by seeking to overcome natural limits to finite non-human components (resources) e.g. water, can on the one hand ensure protection of the environment for the future (+1 point/0 point). Conversely, attempts to overcome natural limits of Earth's components can be considered as arrogant and disrespectful of the intrinsic value of nature, and exemplify human centred governance (0 to –1 point).

27 E.g. The *Drinking Water Directive* sets minimum standards for water quality based on human health criteria and not ecological criteria e.g. Article 4(1) states that 'States shall take the measures necessary to ensure that water intended for

1.4. Respect for the 3 key Earth Rights of an Earth Community member

- Yes (+2 points)
 - right to exist
 - e.g. via protection of genetic viability,²⁸ protection of endangered habitats and species,²⁹ prohibition of killing³⁰
- to habitat (i.e. to have the basic conditions necessary for its wellbeing)
 - e.g. a river's right to ecologically healthy and unpolluted waters,³¹ uninterrupted and plentiful flow³² and to flood³³
 - freedom of species from disturbance during reproductive and migratory cycles,³⁴ or pollution or destruction of their habitats³⁵
- fulfil one's function in the Earth Community
 - e.g. to maintain the ecological health of ecosystems and species dependent upon it³⁶
 - to contribute to local and global life cycles e.g. carbon, water and biological
- Ambiguous (+1 to -1 points)
 - e.g. only implicit respect of Earth Rights via imposition of obligations; respect only of certain members of the Earth Community,³⁷ or an overriding respect for Earth Rights of certain non-human members

human consumption is wholesome and clean...[that is, water]...(a) is free from any micro-organisms and parasites and from any substances which, in numbers or concentrations, constitute a potential danger to human health, and (b) meets the minimum requirements set out in Annex I, Parts A and B [regarding microbiological and chemical parameters].

28 E.g. The 2nd general principle of the *World Charter for Nature* asserts that '[t]he genetic viability on the earth shall not be compromised; the population levels of all life forms, wild and domesticated, must be at least sufficient for their survival, and to this end necessary habitat shall be safeguarded.' In this way, the building block of existence is protected.

29 E.g. Article 3 *Habitats Directive* respects the right to existence by designating sites as Special Areas of Conservation (SAC) for the conservation of habitats and species of 'Community interest', essentially those that are endangered, vulnerable, rare or endemic (see re: habitats Article 1(c) and Annex I, and re: species Article 1(g) and Annexes II, IV and V). Furthermore, the Directive requires maintenance and restoration of habitats and species at 'favourable conservation status' (Article 2(2) cf Articles 1(e) and (i) respectively) which is determined by ecological criteria including stable (or increasing) habitat/specie distribution and population, existence of structures and functions necessary for long-term maintenance, and long-term survival.

30 E.g. Articles 12 and 13 *Habitats Directive* ensure respect of life of plant and animal species by providing strict protection, including prohibition of 'all forms of deliberate capture or killing of specimens of these species in the wild' (Article 12(1)(a) and 'deliberate destruction or taking of eggs from the wild' (Article 12(1)(c)).

31 E.g. Article 4(1) *WFD* implicitly respects such a river's right by imposing environmental objectives on Parties to enhance water quality of surface waters and ground waters to good status by 2015 and reduce pollution particularly from priority substances.

32 E.g. Article 4(1)(b)(ii) *WFD* implicitly respects such a right through the obligation to 'balance between abstraction and recharge of groundwater'.

33 E.g. The *Flood Risk Directive* explicitly acknowledges the need for 'giving rivers more space' and obliging Member States to 'consider where possible the maintenance and/or restoration of floodplains' (Preamble, 14th recital, Article 7(3)).

34 E.g. Article 12(1)(b) *Habitats Directive* prohibits 'deliberate disturbance of [Annex IV (a) listed animal] species, particularly during the period of breeding, rearing, hibernation and migration' and Article 13(1)(a) prohibits 'deliberate picking, collecting, cutting, uprooting or destruction of [Annex IV (b) listed] plants in their natural range in the wild'.

35 E.g. According to Article 6(2) *Habitats Directive*, 'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.'

36 E.g. The *WFD* recognises this function by aiming to enhance water quality status which 'prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems' (Article 1(a)).

37 E.g. A Party's obligations under the *Habitats Directive* relating to conservation of biodiversity, and thereby respect of the Earth Rights of habitats and species, do not apply to all species and habitats but only to those listed as of 'Community interest' which fall within the 'European territory of the Member States to which the Treaty applies' (Article 2(1)) and which are endangered, vulnerable, rare or endemic. Thus habitats and species falling beyond this scope are not protected, and thus their Earth Rights not guaranteed, under the *Habitats Directive*.

over those of other non-human members³⁸

- or qualification of Earth Rights by qualified anthropocentric interests³⁹
- No (-2 points)
 - e.g. denial of Earth Rights by overriding anthropocentric interests⁴⁰

2. Mutually Enhancing Relations to promote the wellbeing of the whole Earth Community

Recognition of interconnectedness between members/components of the Earth Community

- Yes (+2 points)
 - e.g. interdependency of human needs upon the wellbeing and reciprocal protection of non-human members/components;⁴¹ recognition of human causation of the latter's destruction/deterioration/exploitation⁴²
- Ambiguous (+1 to -1 points)
 - e.g. partial recognition and predominantly for anthropocentric advantage (0 to -1 point)⁴³
- No (-2 points)

38 E.g. The *Habitats Directive* appears to compromise respect for the Earth Rights of non-native species in favour of those of native species by requiring that Parties 'ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction (Article 22(b)).' Further, Article 4(3)(a)(i) *WFD* foresees the compromise of a river's right to ecologically healthy and unpolluted waters by the Earth Rights of the wider environment, by providing for the designation of water body as 'artificial or heavily modified' and thus subject to the achievement of a lower environmental objective of 'good ecological potential' (Article 1(23) cf relevant provisions of Annex V), 'when the changes to the hydromorphological characteristics of that body which would be necessary for achieving good ecological status would have significant adverse effects on...[*inter alia*]...the wider environment'.

39 E.g. Article 16 *Habitats Directive* foresees that '[p]rovided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions [for the strict protection of species]...' on grounds of, *inter alia*, 'public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment' (Article 16(1)(c)) and 'for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants'.

40 E.g. Albeit subject to fulfillment of certain conditions, the *WFD* envisages 'Member States will not be in breach of this Directive when: failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities (Article 4(7)).

41 The World Charter for Nature states that '[m]an is a part of nature and life depends on the uninterrupted functioning of natural systems (Preamble, recital 2(a) and 4(a)) and that '[c]ivilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement, and living in harmony with nature gives man the best opportunities for the development of his creativity, and for rest and recreation (Preamble, recital 2(b)). Note also Principle 1 Rio Declaration that '[m]an is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth.' Conversely, the *Habitats Directive* acknowledges the dependency of non-human members upon, and potential benefit of, human intervention for environmental protection, explaining that '...the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities' (Preamble, 7th recital).

42 E.g. As recognised by Preamble, 2nd recital *Flood Risk Directive* that 'some human activities (such as increasing human settlements and economic assets in floodplains and the reduction of the natural water retention by land use) and climate change contribute to an increase in the likelihood and adverse impacts of flood events.'

43 E.g. The *Drinking Water Directive* acknowledges human dependency upon the Earth for anthropocentric interest, 'in view of the importance of the quality of water intended for human consumption for human health (Preamble, 6th recital) and fails to simultaneously acknowledge human causation of environmental damage.

- e.g. no explicit recognition of interconnections, no acknowledgement of human causation of environmental damage

2.2 Reciprocity

- Yes (+2 points)
 - e.g. explicit recognition that human interests/activities are limited by reciprocal responsibilities to non-human members of the Earth Community,⁴⁴ obligations for e.g. environmental protection, abstention from destruction/ deterioration/pollution of Earth,⁴⁵ duties upon a wide range of trustees⁴⁶
- Ambiguous (+1 to –1 points)
 - e.g. qualified duties,⁴⁷ sustainable use of Earth's components/non-human members,⁴⁸ limited scope of trustees of the Earth⁴⁹
- No – no trustee obligations (-2 points)

2.3. Conflict resolution mechanism for interests/rights of humans and those of non-human members for the wellbeing of the whole Earth Community (procedural and substantive)

- Yes (+2 points)
 - e.g. mechanism and requirement for conflict resolution in a manner beneficial for the wellbeing of the whole Earth Community⁵⁰
- Ambiguous (+1 to –1 points)
 - e.g. provides for a mechanism/process⁵¹ but unclear whether conflict will be resolved for the wellbeing of the Community;⁵² presumption of resolution in favour of environmental interests rebuttable only by strictly

44 E.g. The *Aarhus Convention* enshrines reciprocity by stating that ‘every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations’ (Preamble, 7th recital). Further, Preamble, 15th recital *Habitat Directive* recognises that ‘conservation of priority natural habitats and priority species of Community interest is a common responsibility of all Member States...’

45 For examples see notes on Indicator 1.4. regarding respect of Earth Rights.

46 Preamble, 13th recital *Aarhus Convention* recognises ‘the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection’.

47 E.g. Recall possible exceptions to duties for enhancement of water quality status (Articles 4(3) - (7) *WFD*).

48 E.g. Whether or not man's sustainable use of non-human components ensures/respects reciprocity largely depends on whether or not man respects Earth's natural limits. The 4th general principle of the *World Charter for Nature* is a good example of reciprocity for its requirement that ‘[e]cosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist.’ By contrast, promotion of reciprocity is unlikely through sustainable use of biological diversity unqualified by an explicit recognition of natural limits e.g. Article 1 *CBD*'s aim for ‘...the sustainable use of its components [of biological diversity]...’ or Article 1(b) *WFD*'s aim to provide a framework which ‘promotes sustainable water use based on a long-term protection of available water resources’.

49 E.g. The *Habitats Directive* fails to impose obligations other than on Member States to other trustees of non-human members of the Earth Community e.g. the general public and private persons.

50 E.g. Article 8(i) *CBD* requires Parties to ‘[e]ndeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components.’

51 E.g. At the international level note the dispute resolution mechanism pursuant to Article 14 *United Nations Framework Convention on Climate Change (UNFCCC)* which provides for settlement by negotiation, before the International Court of Justice (ICJ) and/or arbitration tribunal, or if this fails, by conciliation.

52 The *SEA Directive* requires consideration in an environmental report of alternatives where a plan or programme is likely to have significant environmental effects (Article 5(1) cf Annex I(h)). However, absent of an explicit presumption it is unclear how a conflict between environmental and economic interests would be resolved. Even where the conflict resolution is clear, absent of a clear qualification it may not necessary be in favour of the wellbeing of the whole Earth Community. Note for example Preamble, 19th recital *Flood Risk Directive* refers to the *WFD*'s conflict resolution mechanism whereby ‘[i]n cases of multi-purpose use of bodies of water for different forms of sustainable human activities (e.g. flood risk management, ecology, inland navigation or hydropower) and the impacts of such use on the bodies of water, Directive 2000/60/EC [*WFD*] provides for a clear and transparent process for addressing such uses and impacts, including possible exemptions from the objectives of “good status” or of “non-deterioration” in Article 4 thereof...’

qualified anthropocentric interests⁵³

- No (-2 points)
 - none exists, or if one does there is an irrebutable presumption in favour of anthropocentric interests⁵⁴

2.4. Restorative mechanism/process to (re)establish mutually enhancing relations for the wellbeing of the whole Earth Community

- Yes (+2 points)
 - e.g. non-compliance mechanism,⁵⁵ obligation to restore ecological status,⁵⁶ mitigate adverse impacts,⁵⁷ feedback/corrective measures,⁵⁸ mediation between victim/ their representative and perpetrator
- Ambiguous (+1 to -1 points)

53 E.g. The *Habitats Directive* presumes priority for environmental interests while taking into account economic, social and cultural interests. The Directive aims and requires that '[m]easures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest' (Article 2(2)). Further that 'the competent national authorities shall agree to the plan or project ['not directly connected with or necessary to the management of the site but likely to have a significant effect thereon'... 'in view of the site's conservation objectives] only after having ascertained that it will not adversely affect the integrity of the site concerned...' (Article 6(3)). The Directive also takes into account economic, social and cultural interests, regional and local characteristics (Article 2(3)) but their priority is subject to fulfillment of strict qualifications. Article 6(4) *Habitats Directive* foresees that '[i]f, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected...' Further that '[w]here the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.' Accordingly, by presuming for environmental interests, upon which anthropocentric interests depend, the Directive guarantees a fundamental component for the wellbeing of the whole Earth Community.

54 Refer to notes for indicator 1.4 regarding denial of respect of Earth Rights for more information.

55 E.g. Article 18 *Kyoto Protocol* to the *UNFCCC* requires establishment of 'appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance.' This mechanism includes a Compliance Committee consisting of Facilitative and Enforcement Branches. Article 15 *Aarhus Convention* provides for a more participative non-compliance mechanism, requiring Parties to establish 'optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.'

56 E.g. Article 11(d) *World Charter for Nature* requires that '[a]reas degraded by human activities shall be rehabilitated for purposes in accord with their natural potential and compatible with the well-being of affected populations.' Article 4(6)(d) *WFD* requires Parties, upon temporary deterioration in status of water quality caused by natural causes or *force majeure*, to take all practicable measures 'with the aim of restoring the body of water to its status prior to the effects of those circumstances as soon as reasonably practicable'.

57 E.g. Upon failure to achieve the required environmental objective in water quality status, Article 4(7)(a) *WFD* requires Parties to ensure 'all practicable steps are taken to mitigate the adverse impact on the status of the body of water'.

58 Article 11(5) *WFD* provides feedback or corrective measures by requiring that, where data from monitoring indicates Article 4's environmental objectives are unlikely to be achieved, Parties 'shall ensure that the 'causes of the possible failure are investigated' and 'additional measures as may be necessary in order to achieve those objectives are established, including where appropriate, the establishment of stricter environmental quality standards...'

- e.g. punishment of the offender,⁵⁹ compensation of the victim,⁶⁰ access to court⁶¹
- No – none provided for (-2 points)

2.5. Adaptive mechanism/process in light of evolving challenges to pursue mutually enhancing relations

- Yes (+2 points)
 - e.g. amendments to regulation,⁶² taking into account climate change⁶³
- Ambiguous (+1 to -1 point)
 - e.g. monitoring⁶⁴
- No – none provided (-2 points)

3. Community Ecological Governance (CEG)

3.1. Participation of all members of the Earth Community in ecological governance

- Yes (+2 points)
 - e.g. broad definition of the Earth Community as inclusive of all human members, particularly indigenous and local communities, and other members of the ‘public affected or likely to be affected by, or having an interest in, the environmental decision-making’;⁶⁵ and also non-human members through their guardians or representatives.⁶⁶
- Ambiguous (+1 to -1 point)

⁵⁹ Mutually enhancing relations and the wellbeing of the whole Earth Community are more likely to be (re)established where the offender’s actions are addressed through a restorative approach (+1 to 0 point) e.g. where penalties for breach of the WFD are ‘effective, proportionate and dissuasive’ (Article 23) rather than retributively (-1 to 0 point).

⁶⁰ E.g. Principle 13 Rio Declaration requires that ‘States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage...’ However, whether or not the non-human member/component can be restored depends on various factors including whether the compensation is ring fenced for the harmed non-human member/component of the Earth Community (+1 or 0 point) e.g. Article 6(4) *Habitats Directive* which requires that ‘...the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected ...’ or not (0 to -1 point) e.g. UK tort law where compensation is instead payable to the property owner as sees fit. Other factors to consider include the regeneration capacity of the Earth and its components (+1 to 0 point) versus the irreversibility of damage and inability to replace the intrinsic value of non-human members/components e.g. the extinction of an endangered species (-1 to 0 point).

⁶¹ Note how on the one hand bringing a legal action before a court offers the possibility for a legal remedy to address the harm to the victim (+1 point). On the other hand the proceedings are likely to be antagonistic and not conducive to (re) establishing mutually enhancing relations (0 to -1 point).

⁶² E.g. Article 19 *WFD* requires the European Commission to present yearly proposals on future Community measures ‘having an impact on water legislation’ and ‘review this Directive at least...[by 2019]...and propose any necessary amendments to it.’ Article 20 also provides for adaptation of certain of its Annexes in light of ‘technical and scientific progress’.

⁶³ E.g. Article 14(2) *Flood Risk Directive* requires a preliminary flood risk assessment ‘[b]ased on available or readily derivable information, such as records and studies on long term developments, in particular impacts of climate change on the occurrence of floods...’ and further that ‘[t]he elements of flood risk management plans should be periodically reviewed and if necessary updated, taking into account the likely impacts of climate change on the occurrence of floods.’

⁶⁴ E.g. Article 8 *WFD* requires that ‘Member States shall ensure the establishment of programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district’ for surface waters, ground waters and protected areas, the latter of which will be supplemented by those specifications under relevant EC legislation. Important factors for evaluation include whether monitoring is accompanied by an obligation to take appropriate action in response to the results (see notes above for examples e.g. Article 11(5)(d) *WFD*); and whether the rationale for monitoring extends beyond addressing non-compliance of obligations to ensuring mutually enhancing relations between members of the whole Earth Community (+1 to 0 point).

⁶⁵ Article 2(5) *Aarhus Convention*.

⁶⁶ E.g. Article 2(5) *Aarhus Convention* allows participation of ‘non-governmental organisations [NGOs] promoting environmental protection...’ by deeming them to have the interest of a ‘public concerned’ and thus entitled to the rights of access to information, public participation in decision-making and access to justice.

- e.g. ‘all interested parties’⁶⁷ or participation of only certain members of the Earth Community⁶⁸
- No – non-inclusion/exclusion of participation of members of the Earth Community (-2 points)⁶⁹

3.2. Legal recognition of 3 key rights of public participation:

3.2.1. Access to information

- Yes (+2 points)
 - e.g. as a ‘right’⁷⁰ with opportunities to access a wide range of environmental information,⁷¹ without a specific interest having to be stated,⁷² free of charge and available in a non-technical summary⁷³
- Ambiguous (+1 to -1 point)
 - e.g. only implicitly and indirectly via obligations imposed on other actors,⁷⁴ access in theory but limited access in practice⁷⁵
- No legal recognition (-2 points)⁷⁶

3.2.2. Public participation in decision-making

- Yes (+2 points)
 - e.g. in ecological governance⁷⁷ as a ‘right’⁷⁸ with opportunities for participation at all levels of

67 E.g. Article 14(1) *WFD* and Article 9(3) *Flood Risk Directive*. Without explicit restrictions to the contrary, this term is broad enough to include all members of the Earth Community, including non-human members (+2 to +1 point). However, in the absence of an EJ rationale or culture of legislative interpretation, and explicit provision for the participation of guardians or representatives for the environment, it is more likely that the narrow interpretation of ‘interested parties’ would prevail, that is, participation of only human and not non-human members of the Earth Community.

68 While the Article 14 *WFD* and Articles 9 and 10 *Flood Risk Directive* provide for public participation, absent of an explicit provision for the participation of guardians or representatives for the environment, such as NGOs, there is no or limited guarantee of the participation of non-human members of the Earth Community in ecological governance. Furthermore, in the absence of specific reference to vulnerable groups such as the poor, ethnic minorities, indigenous peoples, elderly, young and women, inclusion of such actors in decision-making cannot be guaranteed in practice. For limited resources, particularly in terms of time and finance, combined with the dominant voices of actors such as industry increase the likelihood of their indirect exclusion from participatory processes.

69 E.g. **Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (*Birds Directive*)** fails to provide for the participation of the public, let alone of non-human members, in the conservation of birds.

70 E.g. The *Aarhus Convention*, couched in rights discourse, explicitly acknowledges and seeks to guarantee for ‘every person’ ‘rights of access to information... in environmental matters...’ (Article 1).

71 E.g. Article 2(3) *Aarhus Convention* adopts a broad definition of ‘environmental information’ to include information about (a) ‘state of elements of the environment’, (b) environment plans, programmes, policies and legislation and (c) ‘conditions of human life, cultural sites and built structures... affected by the state of the elements of the environment...’ Exceptions are to be interpreted restrictively (Article 4(4) *Aarhus Convention*).

72 Article 4(1)(a) *Aarhus Convention*.

73 Article 6(6) and (d) *Aarhus Convention* respectively.

74 E.g. The *WFD* and the *Flood Risk Directive* do not explicitly recognise a ‘right’ of the public to access information but instead impose obligations on Parties to provide access to information relevant for preparation of a river basin management plan (see Article 14(1)(a), (b) and (c) *WFD*) and preliminary flood risk assessment, the flood hazard maps, the flood risk maps and the flood risk management plans (see Articles 9(1) and (2) and 10(1) *Flood Risk Directive*).

75 E.g. It is unclear whether the qualification pursuant to Article 10(1) *Flood Risk Directive* for Parties to, ‘[i]n accordance with applicable Community legislation... make available to the public the preliminary flood risk assessment, the flood hazard maps, the flood risk maps and the flood risk management plans’ would be interpreted as requiring compliance with the strong provisions on access to information under the *Aarhus Convention* (see notes above, and note particularly, the *Aarhus Convention*’s requirements that information is free of charge and available in a non-technical summary, which are essential to ensure access to information in practice).

76 E.g. *Birds Directive*.

77 E.g. Principle 10 *Rio Declaration* acknowledges that ‘[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level...’ and Preamble, 13th recital *WFD* that ‘[d]ecisions should be taken as close as possible to the locations where water is affected or used’.

78 Article 1 *Aarhus Convention* explicitly acknowledges and seeks to guarantee for ‘every person’ ‘rights of... public participation in decision-making... in environmental matters...’

decision-making,⁷⁹ throughout the decision-making process from its development, review to updating,⁸⁰ ‘early public participation, when all options are open and effective public participation can take place’,⁸¹ deliberation, ‘due account is taken of the outcome of the public participation’⁸² including interests of non-human members of the Earth Community, and reasons given for the decision⁸³

- Ambiguous
 - e.g. only implicitly and indirectly via obligations imposed on other actors,⁸⁴ limited participation e.g. consultation,⁸⁵ late participation,⁸⁶ limited effect on the substance of the decision⁸⁷
- No provision for public participation (-2 points)

3.2.3. Right to access to justice

- Yes (+2 points)
 - e.g. as a ‘right’⁸⁸ of the public, including NGOs,⁸⁹ to a ‘review procedure before a court of law and/or another independent and impartial body established by law’⁹⁰ for non-compliance with obligations relating to access to information,⁹¹ public participation in decision-making,⁹² and environmental obligations under

79 E.g. The *Aarhus Convention* provides for public participation in decisions on specific activities (Article 6), plans, programmes and policies relating to the environment (Article 7) and ‘during the preparation of executive regulations and/or generally applicable legally binding normative instruments’ (Article 8).

80 E.g. Article 14(1) *WFD* requires Parties ‘to encourage active involvement of all interested parties in the implementation of the Directive, in particular in the production, review and updating of the river basin management plans.’ Such participation is also required with respect to flood risk management plans under Article 10(2) *Flood Risk Directive*.

81 Article 6(5) *Aarhus Convention*. Preamble, 46th recital *WFD* also foresees ‘the involvement of the general public before final decisions on the necessary measures are adopted.’

82 Article 6(8) *Aarhus Convention*.

83 Article 6(9) *Aarhus Convention*.

84 E.g. The *WFD* and *Flood Risk Directive* do not recognise a public’s ‘right’ to participation explicitly but rather implicitly and indirectly by imposing obligations on Parties to ‘encourage active involvement of all interested parties’ (Article 14(1) *WFD* and Article 10(2) *Flood Risk Directive*).

85 E.g. Articles 9 and 10 *Flood Risk Directive* predominantly relate to access to and exchange of information and ‘consultation’ and Article 14(1) and (2) *WFD* provide opportunities for the public to ‘comment’ on specified information in ‘consultation’. Public participation in consultation is limited to a one-way exchange of information rather than deepen to a two-way dialogue or deliberation, which serves to reinforce an instrumental rather than promote an intrinsic rationale of public participation.

86 E.g. The aspirational language of Article 7 *Aarhus Convention* and thus weak obligation upon Parties to ‘endeavour to provide opportunities for public participation in the preparation of policies relating to the environment’ means that the right to participation at this earlier stage of the decision-making process is not guaranteed. (Note also the weak obligation of ‘strive to promote’ public participation during the preparation of regulations under Article 8 *Aarhus Convention*). Thus participation is essentially postponed to the later stage of decision-making on siting the activity. However the recent case of *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 would suggest that in practice the obligation for early consultation in policy making on new nuclear build is not illusory. Sullivan J, explicitly citing Article 7 of the *Aarhus Convention*, held that consultees should be given a ‘proper opportunity’ for consultation *before* the underlying policy decision has been taken (see paragraphs 90 –117). Further that ‘a promise of anything less than ‘the fullest public consultation’ would [not] have been consistent with the Government’s obligations under the *Aarhus Convention*’ (paragraph 50).

87 E.g. Articles 9 and 10 *Flood Risk Directive* and Article 14 *WFD* do not oblige Parties to take into account the comments of the public or give reasoned decision for not doing so. Accordingly the ability for the public to influence the substance of the decision is limited.

88 Article 1 *Aarhus Convention* explicitly acknowledges and seeks to guarantee for ‘every person’ ‘rights of... access to justice in environmental matters...’

89 E.g. Article 9(2) *Aarhus Convention* which deems *locus standi* requirements for NGOs subject to certain qualifications (see notes below for further information).

90 E.g. Article 9(1), (2) and (3).

91 E.g. Article 9(1) *Aarhus Convention*.

92 E.g. Article 9(2) *Aarhus Convention* which provides access to ‘challenge the substantive and procedural legality of any decision, act or omission.’ Note also recent amendment of the *EIA Directive* by Article 3 Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (*Participation Directive*) which inserts an access to justice provision (Article 10(a)) to bring the *EIA Directive* in line with requirements under

domestic law;⁹³ with ‘adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.’⁹⁴

- Ambiguous (+1 to -1 point)
 - e.g. limited access to justice in practice owing to qualifications particularly having to show *locus standi*/standing,⁹⁵ and also financial barriers⁹⁶
- No legal recognition (-2 points)⁹⁷

3.3. Respect of other key issues of CEG

- Yes (2 points)
 - e.g. traditional knowledge,⁹⁸ cultural heritage,⁹⁹ human rights,¹⁰⁰ equitable access and benefit

the *Aarhus Convention*.

93 E.g. Article 9(3) *Aarhus Convention* provides persons with ‘access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.’

94 Article 9(4) *Aarhus Convention*.

95 E.g. Article 9(2) *Aarhus Convention* qualifies the right of access to justice by *requiring that persons have* ‘sufficient interest and impairment of a right [which] shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.’ Notwithstanding the latter qualification, EC case law has persistently adopted a restrictive approach to the right of access to justice through its narrow interpretation of the *locus standi* criteria in Article 230 EC Treaty for ‘individual concern’ (see Case 25/62 *Plaumann v. Commission* [1962] ECR 207 which required the ‘measure to affect the applicant’s position by reason of certain attributes peculiar to it, or by reason of a factual situation which differentiates it from all other persons and distinguishes it individually’, followed by a long line of cases, most recently in T-94/04 *European Environmental Bureau v. Commission*, 28 November 2005. See the Advocate General Jacobs’ Opinion in ECJ *UPA* case for strong criticisms of this test and suggestions for its reinterpretation to one where “the measure has, or is liable to have, a substantial adverse effect on his interests’ (para 60), which was followed by the CFI in *Jego-Quere* case, paragraph 51. Note calls for more liberal standing requirements in *actio popularis* or public interest cases has consistently been rejected in UK case law e.g. *EEB* case but is recognised in India.

96 In the UK, the access to justice debate has largely centred upon the prohibitive cost of legal action for environmental cases. Lord Justice Carnwarth in 1999 stated that “[l]itigation through the courts *is* prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds.’ Legal requirements that the loser pays the court costs of the winner and that entitlement to legal aid is subject to fulfilling strict criteria further limit access to justice.

97 E.g. Article 14 *WFD*, Articles 9 and 10 *Flood Risk Directive*, *Habitats Directive*.

98 E.g. Article 8(j) *CBD* requires Parties to, ‘[s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.’

99 E.g. Preamble, 12th recital *CBD* ‘[r]ecogniz[es] the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources...’ In EC law, the *Habitat Directive* also recognizes the role of cultural heritage in ecological governance by having as its ‘main aim ... to promote the maintenance of biodiversity, taking account of...cultural...requirements’ (Preamble, 7th recital) and requires that ‘[m]easures taken pursuant to this Directive shall take account of...cultural requirements...’ (Article 2(3)). In African Jurisdiction, Article 22(1) African Charter on Human and People’s Rights states that ‘[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

100 E.g. The *Aarhus Convention* is notable for linking human rights with environmental protection recognising that ‘every person has the right to live in an environment adequate to his or her health and well-being’ (Preamble, 7th recital) and that ‘adequate protection of the environment is essential to

human well-being and the enjoyment of basic human rights, including the right to life itself.’ In the context of water management, the *Flood Risk Directive* ‘respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union’ (Preamble, 22nd recital).

sharing,¹⁰¹ community land rights,¹⁰² and co-management, self determination and democracy,¹⁰³ customary lore, laws and practices

- Ambiguous (+1 to -1 point)
 - e.g. indirect respect,¹⁰⁴ partial link to CEG¹⁰⁵
- No respect (-2 points)

101 The *CBD* is notable for addressing issues of equity, with one of its three principal aiming for the ‘...fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies’ (Article 1). Article 15 elaborates on obligations relating to access to genetic resources and Article 15(5) requires that ‘[a]ccess to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.’

102 E.g. Partially acknowledged in Article 24 African Charter on Human and People’s Rights states that ‘[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.’

103 E.g. Preamble, 9th recital *Aarhus Convention* recognises that participation will ‘give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns’ and ‘contribute to strengthening democracy’ (21st recital). Preamble 10th recital also foresees the role of participation to ‘further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment.’

104 E.g. Regarding respect of human rights, the *Aarhus Convention* does not go as far as directly guaranteeing the substantive ‘right of every person of present and future generations to live in an environment adequate to his or her health and well-being’ but only indirectly through protection of the procedural rights of access to information, public participation in decision-making and access to justice in environmental matters ‘[i]n order to contribute to’ it (recall Article 1).

105 While the *Flood Risk Directive* aims to reduce the adverse impacts of flooding on cultural heritage through flood risk assessment and management (recall Article 1) it does not go so far as recognizing or promoting the role of cultural heritage in ecological governance.

Appendix Five

APPENDIX 5: SAMPLE MATRIX

<u>UKELA & Gaia Foundation Wild Law</u> <u>International Research Project 2008</u>					
<u>EUROPE</u>					
<u>Indicators</u>		<u>Subject – ENDANGERED SPECIES</u>			
		<u>HABITATS DIRECTIVE: E U Council Directive 92/43/EEC</u>			
		Reference relevant passage/s article, section, etc of law cited	Cite relevant passage/s of law	Analysis (how did the law fare against the indicator - you need to justify your score in words by reference to the indicator)	Score
<u>1. Earth Centred Governance</u>	1.1. Respect for the intrinsic value of Earth and all its members/ components.				
	1.2. Dominant rationale is environmental protection.				
	1.3. Governance informed by law of nature.				
	1.4. Respect for the 3 key Earth Rights of an Earth Community member.				
	TOTAL SCORE	Leave Blank			

	<u>2. Mutually Enhancing Relations to Promote the Wellbeing of the Whole Earth Community.</u>				
	2.1. Recognition of				
	2.2. Reciprocity				
	2.3. Conflict resolution mechanism for interests/ rights of humans and those of non-human members for the wellbeing of the whole Earth Community (procedural and substantive)				
	2.4. Restorative mechanism/ process to (re)establish mutually enhancing relations for the wellbeing of the whole Earth Community.				
	2.5. Adaptive mechanism/ process in light of evolving challenges to pursue mutually enhancing relations.				

TOTAL SCORE		LEAVE BLANK			
<u>3. Community Ecological Governance</u>	3.1. Participation of all members of the Earth Community in ecological governance.				
	3.2.1. Legal recognition of access to information.				
	3.2.2. Legal recognition of public participation in decision-making.				
	3.2.3. Legal recognition of the right to access to justice.				
	3.3. Respect of other key issues of CEG.				
	TOTAL SCORE	Leave Blank			
<u>GRAND TOTAL SCORE</u>		Leave Blank			

BIOGRAPHICAL NOTES ON TEAM MEMBERS

Lynda Warren is a marine biologist and environmental lawyer and has worked for most of her career as a university academic. She is presently Emeritus Professor of Environmental Law at Aberystwyth University. Her research interests are in the relationship between law and science in relation to environmental policy and she has focused on two main areas – radioactive waste management and nature conservation.

She is Deputy Chair of the Joint Nature Conservation Committee which is the statutory advisor to the UK Government on UK wide and international nature conservation issues and has previous experience as a Board member of the Countryside Council for Wales. In the wider environmental field, she is a member of the Royal Commission on Environmental Pollution which is a standing commission appointed by the Queen to produce authoritative advice in the form of reports on a wide range of environmental issues. Current reports include novel materials and climate adaptation. She was previously a Board Member of the Environment Agency where she had special responsibility for fisheries and was also Conservation Champion.

She is a member of the Committee on Radioactive Waste Management (CoRWM) and chairs its Working Group on Public and Stakeholder Engagement. She has been involved in a number of government advisory committees on radioactive waste management for a number of years and works as a consultant on law and policy for radioactive waste management.

She has been a member of UKELA for more years than she cares to remember and is a long-standing member of the Nature Conservation Working Party.

Begonia Filgueira has worked as an environmental lawyer for over ten years and is qualified both as a solicitor and Spanish advocate. Her background is as a City solicitor working for magic circle law firms Freshfields Bruckhaus Derringer and Simmons & Simmons.

She is the UKELA Council member with responsibility for Wild Law, the London Meetings and Access to Justice. Begonia is also on IEMA's experts' panel as an environmental law expert.

Begonia advises on environmental law and liabilities at an EU and International level working mainly in the regulatory, energy, water, nuclear and waste sectors. Begonia has developed a particular expertise in implementing EU law into the UK jurisdiction, drafting consultation papers and regulatory impact assessments. She is a consultant to the DOE Northern Ireland.

Begonia is also a director of Eric, the Environmental Regulation and Information Centre Ltd (previously Gaia Law) which provides a space where environmental law, science, business, policy and philosophy come together through the foremost experts in these fields. Eric is about expert blogs, news and opinions, discussion, e-learning, seminars, compliance advice, and publications.

She has taught planning law and environmental law at Cardiff's Planning Law School and teaches on City University's LLM course. She also edits and updates LexisNexis Encyclopedia of Forms and Precedents' Environment volume.

Ian Mason was called to the Bar in 1978 and spent some twenty years at the criminal Bar before joining leading housing law chambers where he developed his present expertise in housing, environment, public and property law. In 2007 he moved to Surrey Chambers in order to take advantage of expanding opportunities in environmental and property law and to further his interest in the development of Earth Jurisprudence. He is currently a co-opted member of the UKELA Council.

Ian has worked for several years in close association with the Gaia Foundation and is now Director of the Earth Jurisprudence Resource Centre, established by the Gaia Foundation to be an international base for developing and

advancing Earth Jurisprudence. As Director Ian provides seminars and workshops on Earth jurisprudence, advises on developing law, especially property law, to take account of EJ principles and writes widely on Earth Jurisprudence and related issues. The Resource Centre's website is currently being developed and will become the world's first comprehensive online resource for EJ research and development in 2009.

Ian is also Principal and Head of Law and Economics in the School of Economic Science where he has studied philosophy, law and economics and lectured for many years on the relevance of natural law to contemporary economics and law.

Designed by Kim Elcoate May

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