



e-law

Better law for the environment

May/June 2016 | Issue 94



Welcome to the May/June edition of elaw. The theme for this edition is wild law.

This weekend, a group of wild law enthusiasts will embark on a weekend of discussion and reflection with like-minded people amongst beautiful scenery in the Lake District. On Saturday, the group will walk through Ennerdale and hear about the Wild Ennerdale project. On Sunday, Simon Boyle and Angus Middleton

will lead a ridge walk up Haystacks and along the tops to High Stile and Red Pike.

The term 'wild law' will be well known to those who are, or have been, members of the Wild Law Special Interest Group, or who have participated in one of their events. However, for some, 'wild law' may be a concept they have heard of, but remains unclear. This could be due to a lack of opportunity or perhaps due to a perception that it was not relevant to their work. The aim of this edition is to help de-mystify the concept and encourage anyone with an interest to explore it further.

Wild laws are laws that express principles of Earth jurisprudence. It is a burgeoning area which recognises that nature has rights and that all life on earth is interconnected. Rather than treating nature as property, those who advocate 'Rights of Nature' acknowledge that nature in all its forms has the 'right to exist, persist, maintain and regenerate its vital cycles'.

In '[Rights to Nature: Why do we need them?](#)', Mumta Ito highlights problems with the way existing laws are structured and explains how rights to nature can pave the way towards a more sustainable approach to law. Mumta is the new convener of UKELA's wild law special interest group. She succeeds Simon Boyle, who founded the group in 2005 and successfully championed its growth over the last decade.

Find out more about Mumta in her [60 Second Interview](#).

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Mumta's article is followed by two pieces which demonstrate wild law's accelerating transition from theory to the courtroom:

- [Earth Jurisprudence and Rights of Nature Tribunals](#) – Dr Michelle Maloney discusses the work of the world's first International Tribunal for the Rights of Nature and Mother Earth. A civil society creation, the Tribunal examines alleged violations of nature's rights - using the Universal Declaration of the Rights of Nature as its source of law. She explains its status, what it has achieved and its value as an alternative legal forum in giving a 'voice to the voiceless'.
- [A practical test for Wild Law: Ecuador's Rights of Nature](#) – James Southwood examines the experience of Ecuador, which in 2008 became the first country in the world to adopt wild law principles in its constitution. Despite this high level of legal recognition and some promising jurisprudence, there remains significant hurdles to the realisation of the rights of nature in Ecuador.

And finally, on matters in practice, Jeremy Phillips and John Jolliffe, remind us in their article [POCA Face: what to do when the chips are down](#) of the application of confiscation orders under the Proceeds of Crime Act 2002 (POCA) to environmental offences, and offer some practical responses when advising clients in this area.

Best wishes,

Hayley Tam

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Words from the Chair

UKELA – International and Interconnected



Turkish Nobel laureate, Orhan Pamuk, has written eloquently about the interconnectedness of everything and everyone in the world.

In *Snow*, Pamuk's portentous story of clashes between the spiritual East and the materialistic West, the protagonist is a poet called Ka. He experiences a "vision of extraordinary power" which convinces him that "everything on earth [is] interconnected" and that he too is "inextricably linked to this deep and beautiful world" (p.299, Faber & Faber). It is this interconnectedness that reminds us why it is so important to look beyond the local and always to recognise and value the international dimension and perspective. By better appreciating the interrelatedness of things, we can secure a deeper understanding of the environmental challenges faced by communities around the world, including our own.

There is much for us to learn from other jurisdictions, including devolved administrations across the UK, in the field of environmental regulation. As other countries develop and refine their environmental regulations, we have an opportunity to determine how to do things better in our own back yard. Likewise, I believe that we all have a responsibility to impart our experience and expertise with others who share our interest in environmental law – fellow travellers, as it were, on the long road to a more sustainable future.

Brighton

As I write this piece it is early May and I can report that, after a welcome spell of warm weather, the beech trees in the Ashdown Forest are in full leaf and the first cuckoo has been heard.

It reminds me that one of the highlights of the UKELA year, our summer Conference, is fast approaching. Thanks to our fabulous organisers, including my excellent Vice Chair, Ben Stansfield, we have a superb programme of speakers and events for delegates based around UKELA's theme for 2016: the international dimension of environmental law and regulation.

A growing number of our members will be travelling to Conference using the most sustainable modes of transport. The Recyclists will be heading down to Brighton via East Sussex and the coast. A group of us, led by Lord Carnwath, will walk the last few miles of the journey up and over the South Downs where we will enjoy the breath-taking views over the Weald and the English Channel.

Full details of our conference programme – and the walk and the ride – are available on [our website](#).

Cementing relations

I was absolutely delighted to hear from my friend Stephen Tromans that, as he was going to be in South Korea in April, he would like to help UKELA to reinforce relations with the newly formed People for Earth Forum following their visit to London in February.



From left to right: Professor Siwon Park; Ms Kang Kumsil; Stephen Tromans and Mr. Jisseok Kim. Former UKELA Chair, Stephen Tromans QC, meeting representatives of South Korea's People for Earth Forum in Seoul, 19th April 2016.

A meeting in Seoul was organised for 19 April where Stephen duly met Ms Kang Kumsil, the Forum's Executive Director and former Justice Minister of South Korea; Professor Park of [Kangwon National University](#), the leading law school teaching environmental law; and Jisseok Kim, Senior Climate Change Officer at the British Embassy in Seoul.

Our friends at the Forum greatly appreciated the discussion with Stephen and are keen to learn from and collaborate with UKELA. From this meeting various mutual opportunities have arisen:

- the Forum is keen to join UKELA as an international member;
- working parties will have opportunities to carry out comparative work in areas such as air quality (a real issue in South Korea, as indeed it is in many cities in the UK);
- there is an open invitation for UKELA members who visit Seoul to meet up and discuss areas of mutual interest with members of the Forum; and
- South Korean academics, such as Professor Park, and practitioners may wish to contribute to eLaw.

Stephen and I will encourage a closer dialogue with the Forum over the coming months. I hope that this will prove to be the first of many rewarding international collaborations. The experiences that UKELA has accumulated over the past 30 years can be used to help groups in other parts of world to make a difference by improving their own environmental laws.

Africa

I would like to thank Helen Bowdren, Senior Associate at Dentons, and Richard Honey of Francis Taylor Buildings for contacting me after reading March's eLaw with kind offers to open doors for UKELA – in this, our international year – in various countries in Africa, including Sierra Leone and South Africa.

Brexit

As trustees of an educational charity, UKELA's Council is fiercely protective of our association's independence and non-alignment with matters of a political nature. We do not take a stance on such matters.

With regards to Brexit, UKELA's Council has taken a careful and considered approach to ascertain what a withdrawal would mean for our environmental laws. With the Council's support, I have just written to the official leave and remain campaigns to ask them about their future vision for environmental law if the UK stays within the EU, as well as the implications for environmental law in the event of a withdrawal. We have set up a website on the [EU Referendum](#) where any feedback will be published as we receive it.

I am always very keen to hear from anyone who has ideas which can help us to further strengthen our association so do please drop me a line if you have any questions or suggestions.

Regards,



Stephen Sykes
UKELA Chair

News

UKELA Council Elections

The deadline has now passed for nominations to stand for UKELA's Council. Thank you to all who have put their names forward. As the number of candidates exceeds the number of vacancies, an election will be held. This will be administered on UKELA's behalf by an independent body who will contact you directly with voting details. As in previous years, this will be by means of an electronic vote. Please take the time to have your say on who represents you on our Board of Trustees.

Working party news



Rosie Oliver, UKELA's Working Party Adviser

UKELA's Working Parties have been hard at work planning sessions for the Brighton conference, on topics ranging from marine conservation to the Basel Convention and the Circular Economy.

Recent events include a Climate Change and Energy Working Party and Government Legal Service Environment Group joint seminar on 21 March on the Paris COP21 conference. The event, chaired by the CCEWP's co-convenor Stephen Hockman QC, provided insider views on the negotiations as well as analyses of key provisions of the Paris Agreement and what it means for UK practitioners. The Waste Working Party met on Wednesday 27 April 2016 at the Environment Agency's offices in Bristol. Jenny Scott of the Environment Agency gave a presentation on "Definition of waste and the circular economy package – closing the loop at last?" Also on 27 April, the Scottish Waste Topic Group met for a discussion and site visit to Changeworks Recycling in Edinburgh. Our new Noise Working Party held its inaugural meeting at Francis Taylor Building on Friday 29 April. The group discussed plans and priorities and heard from guest speaker John Stewart, chair of UK Noise Action and HACAN ClearSkies, about noise issues connected to the expansion of Heathrow airport.

On the influencing side of things, the Waste Working Party responded in March to the Environment Agency's consultation on proposals for Fire Prevention Plan Guidance to deal with fires at waste management site. The group is concerned, amongst other things, about the prospect for overlapping and conflicting regulation of this area by the Environment Agency and Fire & Rescue Authorities. The Environmental Litigation Working Party responded in May to the Sentencing Council's consultation on a proposed Reduction in Sentence for a Guilty Plea Guideline. The response suggested that the Guideline distinguish between general criminal matters, where it is often obvious to the defendant whether they are guilty, and regulatory matters which can be very complex, technical and expert-dominated.

You'll find details of all past and future activities – including events and consultation responses – [on the Working Parties' website](#).

Students news

UKELA Andrew Lees Essay Prize 2016

The deadline for submissions for the Andrew Lees Essay Prize 2016 passed on 11 April. Good luck to everybody who submitted an entry! The winner will be announced on the [Andrew Lees Essay Prize webpage](#) in due course.

UKELA Student Vocational Bursary Scheme 2016

Applications for the UKELA Student Vocation Bursary Scheme have now closed. Thank you to all students who submitted an application. The successful applicants will be announced on the [Student Vocational Bursary Scheme webpage](#) in the coming months.

Annual UKELA Careers Evening: 23 November

Make sure to save the date for this year's UKELA Careers Evening: once again, kindly hosted by Francis Taylor Building Chambers in London, it will take place on 23 November. This is a great evening aimed at students and anyone interested in a career in environmental law. There will be opportunities to meet and chat to a wide range of professionals. In past years this has included barristers, private practice lawyers, Government lawyers, NGO lawyers and consultants.

UKELA events

Wild Law weekend (Lake District, near Keswick): 27-30 May

At the time of writing, we have very limited availability. If you are interested in attending, please [get in touch](#) as soon as possible.

UKELA West Midlands: Brexit seminar (Birmingham): 15 June

A seminar on the theme of 'Final Countdown for Brexit – Should We Stay or Should We Go' will be held on Wednesday 15 June at 5pm at the BLM offices in Birmingham. Guest speaker Anita Lloyd Director, from the Environment team at Squire Patton Bog, will be reflecting on some of the more practical issues arising from a UK exit from the EU. She will be joined by Professor Robert Lee from Birmingham University who will be discussing how the EU is a force for globalisation. To register, please [email](#) Jill Crawford.

UKELA Scotland: Enforcements Undertakings workshop (Edinburgh): 28 June

Following last year's consultation on SEPA's new enforcement policy and guidance, here is another opportunity to hear about an enforcement undertakings case study to demonstrate how the use of enforcement measures might work in practice in Scotland. For more information, visit our [website](#).

Annual Conference 2016 (Brighton): 1-3 July

Don't miss out on a place at this year's Annual Conference. This year the theme is 'From Global to Local' – how international environmental law affects UK practice in energy, infrastructure, nature conservation, planning, marine and regulation. For more information, visit the Annual Conference [website](#).

Garner Lecture (London): 16 November

We are delighted to let you know that this year's Garner lecture will be on Wednesday 16 November at 6pm. Our speaker is Pamela Castle OBE, former Chair of UKELA and founder of the successful series of Castle Debates. The theme of Pam's lecture will be 'Environmental Science, Law and Policy – challenges and opportunities.' The evening will be chaired by Bishop James Jones, who many of you will remember as our after dinner speaker at last year's Liverpool conference. We are most grateful to Freshfields for once again hosting. There will also be the opportunity to join in at venues around the UK via videolink. Note the date in your diary – booking details coming later in the year.

Non-UKELA events

Castle Debate (London): 10 June

'Farming and Climate Change' – Impacts and Solutions. For more information, visit the Castle Debates [website](#).

UKELA Diary Dates

- London meeting on Air Quality: **19 September**
- Waste Working Party meeting: **12 October**
- Annual Garner lecture: **16 November**
- Student Careers evening: **23 November**

The e-law 60 second interview



Mumta Ito, Wild Law Special Interest Group Convenor

What is your current role?

Founder and Executive Director of Rights of Nature Europe and the International Centre for Wholistic Law. Currently succeeding Simon Boyle as Convenor of the UKELA Wild Law Group.

How did you get into environmental law?

Life. I was a structured finance lawyer in the City – although outwardly very successful, I felt deeply unfulfilled. I left law to enter into a period of deep spiritual reconnection and healing. It was during this time that I was approached by the Chief Conservation Officer of the British Virgin Islands to advise on a case to protect an ecosystem of global ecological importance that was facing imminent destruction.

What are the main challenges in your work?

Co-creating a new paradigm in law – written and living. Moving from a paradigm that is anthropocentric, mechanistic and adversarial to one that is based on restoration, reparation and healing of all our relationships – including our relationship with the rest of nature.

What environmental issue keeps you awake at night?

The suffering imposed on other species by human beings breaks my heart. Other species are not objects – they are living beings and our right to life is interdependent with theirs. It's time our jurisprudence took this into account.

What's the biggest single thing that would make a difference to environmental protection and well-being?

Recharacterising ecosystems and other species as rights bearing subjects of the law. Making nature a rights bearing subject of the law brings nature into the system – which is the first step towards a whole systems approach. It also brings in a duty of care, obligations towards nature and paves the way for ecological governance that aligns with how ecosystems operate. This is a fundamental and systemic transformation in environmental law which is necessary to meet the challenges of our time.

What's your UKELA working party of choice and why?

Wild Law Special Interest Group because it is aligned with my work – although I would say that a rights based approach needs to be mainstreamed, not just of special interest!

What's the biggest benefit to you of UKELA membership?

In the context of rights of nature, the opportunity to co-create and innovate legal solutions with like-minded environmental lawyers in the UK.

Environmental law headlines

March-April 2016

A selection of recent environmental law news and updates prepared by the teams at [LexisPSL Environment](#) and [Practical Law Environment](#).

Energy Act 2016

LexisPSL Environment

The Energy Bill received Royal Assent on 12 May 2016, and is now partially in force as the [Energy Act 2016](#). It introduces the following key changes relevant to environment practitioners:

- *Formal establishment of the Oil and Gas Authority (OGA)*: the OGA is responsible for the asset stewardship and regulation of domestic oil and gas recovery. The OGA was first established on 1 April 2015 as an Executive Agency of DECC. However, the Energy Act 2016 formally establishes the OGA as an independent Government Company and sets out new powers as recommended by the [Wood Review](#) into UK offshore oil and gas recovery and its regulation. These provisions are not yet in force.
- *Early closure of the Renewables Obligation (RO) to new onshore wind projects in Great Britain as of 12 May 2016*: The Energy Act 2016 sets out the early closure date and grace periods for new onshore wind projects in Great Britain. It also enables the Secretary of State to make provision to restrict the use of renewables obligation certificates relating to new onshore wind in Northern Ireland.
- *Removal of the need for the Secretary of State's consent for large onshore wind farms (over 50MW) under the Electricity Act 1989*: instead, local planning authorities/Welsh Ministers in England and Wales will be the primary decision-makers for planning applications in respect of new onshore wind farms, including those with a capacity greater than 50MW. The effect of this provision and associated changes is to transfer the consenting of new onshore wind farms into the planning regime in the Town and Country Planning Act 1990. These provisions are not yet in force.

Shale gas fracking safeguards brought into force

Practical Law Environment

The Infrastructure Act 2015 (Commencement No. 5) Regulations 2016 (*SI 2016/455*) brought section 50 of the Infrastructure Act 2015 fully into force on 6 April 2016. Section 50 inserts sections 4A and 4B into the Petroleum Act 1998 to provide for safeguards for licensing onshore hydraulic fracturing (fracking) in England and Wales.

Section 4A of the Petroleum Act 1998 requires that a well consent:

- prohibits associated fracking at a depth of less than 1,000 metres;
- requires Secretary of State consent for associated fracking at a depth of 1,000 metres and below (a hydraulic fracturing consent).

A hydraulic fracturing consent can only be issued by the Secretary of State if all the 11 environmental and health and safety safeguards specified in the table in section 4A are met (including well consent conditions, environmental impacts, monitoring, consultation and provision of public information).

Fracking within protected groundwater source areas and other protected areas is also prohibited, unless it is carried out more than 1,200 metres beneath the surface. These areas are defined by the Onshore Hydraulic Fracturing (Protected Areas) Regulations 2016 (*SI 2016/384*), which also came into force on 6 April 2016.

For more information, see [Legal update, Regulations bring shale gas fracking safeguards fully into force](#) and [Legal update, Regulations made defining protected areas where shale gas fracking is prohibited](#).

Flood risk activities brought into Environmental Permitting regime

Practical Law Environment

The Environmental Permitting (England and Wales) (Amendment) (No. 2) Regulations 2016 (*SI 2016/475*) came into force on 6 April 2016. They extend the Environmental Permitting (EP) regime to include flood risk activities, to replace the previous flood defence consent regimes regulating activities on or near watercourses.

The Regulations introduce a new Schedule 23ZA into the Environmental Permitting (England and Wales) Regulations 2010 (*SI 2010/675*). The Schedule contains the detailed permitting requirements for flood risk activities, including key definitions for which activities require a permit and conditions that can be included in a permit.

The Environment Agency has published guidance and standard rules for flood risk activities in the EP regime.

For more information, see [Legal update, Environmental Permitting No. 2 Regulations 2016 include flood risk activities in EP regime](#), [Legal update, Environmental Permitting: new guidance for flood risk activities published](#) and [Legal update, Environmental Permitting: new standard rules for flood risk activities published](#).

ECJ decides that allocation of free EU ETS allowances for Phase III (2013-20) was invalid

Practical Law Environment

On 28 April 2016, the Court of Justice of the European Union (ECJ) delivered an important judgment concerning the free allocation of EU allowances (EUAs) in Phase III (2013-2020) of the EU Emissions Trading Scheme (EU ETS) (*Borealis Polyolefine (Judgment) [2016] EUECJ C-191/14 (Joined Cases C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14)*).

The ECJ declared that the European Commission's determination on the maximum annual amount of free EUAs for Phase III, known as the correction factor, was invalid. The correction factor is used to correct the provisional allocations of free EUAs made by EU member states to EU ETS installations. The ECJ gave the Commission ten months to establish a new amount.

The decision does not affect free EUAs that have already been allocated.

For more information, see [Legal update, European Commission's allocation of free EU ETS allowances for Phase III \(2013-20\) invalid \(ECJ\)](#).

Minimum energy efficiency standards for landlords (MEES): guidance and draft Regulations on exemptions

Practical Law Environment

On 24 March 2016, the government published guidance for domestic landlords under the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (*SI 2015/962*) (MEES Regulations 2015). The guidance explains what a tenant must do when preparing a consent request for a landlord to authorise energy efficiency improvements and steps for a landlord when considering a tenant's request.

The government has not yet published guidance on the related MEES requirements for landlords to ensure that their domestic and non-domestic private rented property meets minimum energy efficiency requirements.

On 14 April 2016, the draft Energy Efficiency (Private Rented Property) (England and Wales) (Amendment) Regulations 2016 (draft MEES Regulations 2016) were introduced into Parliament to amend the MEES Regulations 2015. The draft MEES Regulations 2016 will delay the dates from which landlords may register an exemption from minimum energy efficiency requirements for private rented properties from 1 October 2016 to 1 April 2017 (non-domestic) and 1 October 2017 (domestic). This addresses the potential increase in exemptions due to closure of the Green Deal to new business in 2015.

For more information, see [Legal update, MEES: guidance for domestic landlords and tenants on energy efficiency improvements](#) and [Legal update, MEES: draft regulations to delay landlords registering exemptions introduced into Parliament](#)

Environmental Audit Committee finds EU membership beneficial for UK environment

LexisPSL Environment

On 19 April 2016, the Environmental Audit Committee published its [report on EU and UK Environmental Policy](#). The Committee concluded that the UK is no longer the 'dirty man of Europe', with EU membership having been a crucial factor in shaping the UK's environmental policy on air and water pollution. The report says the overwhelming majority of witnesses to its inquiry also believed that membership of the EU has improved the UK's approach to biodiversity and environmental protection, and has ensured the UK environment has been better protected.

For more information, see [LexisNexis: LNB News 19/04/2016 64](#), and the free to download report on the LexisNexis Purpose Built Blog: [Brexit: Make or break for environmental law?](#)

Government responds to National Infrastructure Commission consultation

LexisPSL Environment

On 18 May, the government published [a response](#) to its consultation on the operation of the National Infrastructure Commission (NIC), and how its recommendations would relate to National Policy Statements (NPSs).

The respondents generally agreed with each of the government's proposals. Key points include:

- the NIC should be a non-departmental public body, with a general duty in legislation for the NIC to be transparent about the impact of its policy recommendations;
- National Infrastructure Assessments (NIAs) should be laid before Parliament and the government should respond within a specific timeframe. The government will 'endeavour' to respond within six months but the statutory limit will be 12 months. The NIC should produce one NIA per five-year Parliament;
- regulators should 'have regard' to 'Endorsed Recommendations', which are the NIC's recommendations that are endorsed by the government and the NIC is required to produce an annual report on government progress in delivering Endorsed Recommendations;
- the NIC should work in the context of a broad remit set by the Chancellor, set via a letter;
- the government will set out a timetable for reviewing an NPS in its response to the NIC's recommendations, on a case by case basis. The government will amend the National Planning Policy Framework as necessary following legislation to give decision makers clarity on how Endorsed Recommendations should be taken into account;
- Ministers will be able to intervene in local decision making where there is a risk to the delivery of an Endorsed Recommendation.

For more information, see LexisPSL News Analysis: [Government responds to National Infrastructure Commission consultation](#).

Housing and Planning Act 2016

LexisPSL Environment

The Housing and Planning Bill received Royal Assent on 12 May 2016 as the Housing and Planning Act 2016. The Bill was introduced to make provision about housing, estate agents, rent charges, planning and compulsory purchase. See: [LNB News 14/10/2015 49](#).

The Housing and Planning Act 2016 introduces a range of changes to the planning system, including:

- a requirement for local planning authorities to provide 20% of new housing as discounted starter homes for first-time buyers;
- the introduction of 'permission in principle'—an automatic consent for sites identified in local and neighbourhood plans and new brownfield registers, subject to further technical details being agreed by authorities; and
- provisions to allow the Secretary of State to intervene in local plan preparation and measures to boost self and custom build housing.

Wild law

Rights of Nature: Why do we need them?



By Mumta Ito, Wild Law Special Interest Group Convenor

Reproduced with thanks to Permaculture Design Magazine and published in Permaculture Design Magazine (Issue 99 (Feb 2016) pp 48-51)

At a glance

- Despite hundreds of environmental laws, nature is still in decline. Agencies tasked with protecting ecosystems consistently do not act. Also, the laws themselves are failing because they are based on the premise that nature is property to be consumed.
- Laws carve out minimal protections against this consumption, but they are piecemeal, reactive, and for the most part an observable failure as the latest State of Nature report demonstrates.
- We face a choice as a society: either we further commodify nature, price it and sell it on the financial markets, or we establish nature as a defensible presence within our legal system.
- Granting rights to nature subverts the property paradigm. Nature is fully protected as a subject of the legal system capable of bearing rights. An acceptable level of human activity – economic and leisure – is then settled on. But this activity must not threaten the functional integrity of the ecosystem in question.
- Nature rights establishes a duty of care towards nature and embeds the reality of our relationship with nature in law.

Our planet Earth in its present mode of fluorescence is being devastated. This devastation is being fostered and protected by legal, political and economic establishments that exalt the human community while offering no protection to the non-human modes of being. There is an urgent need for a system of governance which recognizes that the well-being of the integral world community is primary, and that human well-being is derivative – an Earth Jurisprudence.¹

Introduction

In the last 40 years alone – the time from which the first major environmental laws were enacted – we have extinguished 50% of the populations of all species on earth, climate change is upon us and the world's ecosystems are collapsing, according to WWF's [Living Planet Index](#). One of the key reasons this is happening is because our laws – designed around an economic paradigm that is coupled with the destruction of nature – legitimise it.

In my career as a lawyer I have advised multinationals, investment banks and governments as well as grassroots communities and NGOs working to protect the environment. One thing I learned was that our current structure of law is inadequate to face the challenges of our time. At best it can slow the rate of destruction but it cannot prevent or reverse it. This is why I set up [Rights of Nature Europe](#) – to bring in new innovative structures of law that can do just that.

Outdated paradigms

Our modern legal system operates within the following outdated paradigms:

- Mechanistic (i.e. viewing the world as made up of separate unconnected objects – like items in a shopping cart – rather than a complex interconnected whole – like a human body – which gives rise to a siloed approach);
- Anthropocentric (i.e. viewing the world as existing solely for the use of human beings – this is where ideas about 'natural resources' and 'natural capital' derive basing nature's value on its utility to humanity rather than on its intrinsic value); and
- Adversarial (competitive/retributive model where one party wins at the expense of another).

None of these paradigms reflect the full scientific reality of how natural systems operate. This gives rise to the illusion of a 'power-over' relationship with nature which has led to our current predicament.

Law facilitates economics

In ancient times law facilitated human values: today law facilitates economics. The problem is that it is facilitating an economic paradigm of perpetual growth that is coupled with the destruction of nature.

Our economic paradigm is based on one key concept of the utility value of nature – valuing nature as a resource for human consumption – which is where ideas like "natural resources" and "natural capital" come from. However, nature is infinitely valuable because it is the source of life. Our health and wellbeing is integral to the health and wellbeing of the earth. We cannot have a viable human economy that destroys the earth because one derives from the other. The logical conclusion is societal collapse.

The European Union has committed to strive towards an absolute decoupling of economic growth from

environmental destruction.² To achieve this we need innovative laws that recognise the intrinsic value of nature; because if we are changing the game – we also need to change the rules that govern the game.

Utility value translates in law as nature being an “object” under the law – either property or fair game unless special rules apply. However, this approach – which in the past has been applied to slaves, indigenous people, women and children who were also deemed by law to be “objects” – has several practical drawbacks that make it almost impossible for people and governments to protect nature using the law.

The problem with our current structure of law

The law does not recognise a relationship between us and the rest of nature. Law governs relationships – but only between “subjects” of the law – the prima facie position is one of no obligations or legal duty of care towards nature. As a result anybody has the right to destroy nature that does not belong to anyone, and property owners have the right to destroy ecosystems on their property – unless the law specifically says otherwise. This leaves nature “outside” the system, fundamentally unprotected. So we are left with the impossible task of reactively legislating to carve out protections, rather than proactively creating the legal frameworks needed to create true sustainability.

The end result is piecemeal protection and a reductionist approach. This ignores the uncertainty and unpredictability involved in dealing with interconnected living systems. A good example of this is our endangered species protection system that relies on listing the species that are under threat, which takes years of scientific research. However, according to the UN Environment Programme, scientists say [we are losing 150-200 species each day](#) – in the time it takes to update the lists it is already too late. Also, in a radically interconnected world, who is to say which species is a VIP – and what the loss of a seemingly insignificant species would have on the ecosystem as a whole?

Another consequence is that environmental issues are dealt with almost exclusively by the planning and administrative courts. This means that only technical arguments about decision making processes can be put forward rather than an examination of all of the wide ranging issues involved with dealing with interconnected living systems. In the case of local development, the only conversation that can happen in court is whether the correct planning procedure was followed and the outcome is simply a referral back to the planners. There is an implicit assumption in our system that development is beneficial but environmental impact has to be quantified and proven – even though scientists agree that it is impossible to do so because of the complexity and

unpredictability of interconnected living systems – favouring a precautionary approach.

The only avenue left in law is if a disaster happens and people litigate, the courts will compensate people for proven monetary loss. There is no obligation to restore the damage to nature because there is no relationship in law between us and the rest of nature. There are also problems with enforcement, piercing the corporate veil, the lack of flexibility in sanctions and the fact that a model of law that is adversarial and retributive does little to uncover the root cause of the problem and co-create solutions. Finally, it leads to a cultural attitude of separation from nature which is at the root of our environmental crisis.

Our current system of law is missing an overarching framework that puts our existence on this planet into its proper context – the earth system being primary because our existence on this planet depends on its healthy functioning – and our human systems (like the economy) being secondary to that as they are derivative. This means that there is no legal requirement for governments to formulate policies that prioritise the health of ecosystems and integrate this requirement across all levels and sectors of society.

Accordingly, environmental decisions are made exclusively at the micro-level under individual planning cases – with no regard to the cumulative effect of such decisions in eroding ecosystem and earth system resilience as a whole. Scientists say this is dangerous because ecosystems can suddenly shift state when certain stress levels are reached and there is no guarantee that the new state will support human life.

Financialisation of nature

It is evident in the growing trend towards the financialisation of nature that our governments and banks recognise that regulation has failed to halt the destruction. However their ‘solution’ is to leave the future of our ecosystems – and therefore the lives of our future generations – in the hands of market forces.

Realising that the value of nature has been left out of economic equations, the components and functions of nature, including biodiversity, are now being priced according to their utility value and assigned an economic value which forms the basis for the creation of financial instruments that can be traded on the primary and secondary capital markets. The instruments are acquired by corporations to offset their overuse, degradation or pollution of the environment and they can further profit from trading them. Pollution permits, natural capital bonds, biodiversity banks and offsetting already exist. Essential prerequisites for financialisation are pricing nature, characterising nature’s functions as “ecosystem services” and redefining nature as “natural capital”.

This approach has several drawbacks that could seriously accelerate the rate of destruction:

- Ecosystems are living systems – each one is unique and interconnected. It is not possible to destroy one and mitigate by restoring another somewhere else without destabilising the whole.
- Offsetting speeds up the planning process – it is based on the assumption that the damage to biodiversity can be reduced or even eliminated, and that it does not matter where damage occurs. This is a reductionist approach that is out of alignment with the radically interconnected and unique nature of ecosystems.
- Segregation and pricing of the interconnected components of an ecosystem is an artificial construct. It does not reflect the reality of how ecosystems operate, their cumulative function or their true value in the web of life.
- The system favours the status quo by legitimising environmental destruction. Instead of encouraging corporations to change their ways, it allows the same actors to make additional profits through financial speculation.
- Decision rights over how to live in a territory and manage the ecology there are increasingly transferred from the local sphere to multinationals and financial institutions. This could lead to profit driven speculation. If a company stands to profit from the price of clean air going up, then it will invest in activities that ensure that clean air is scarcer and in high demand in the future. In the case of biodiversity, investors can profit from speculation on the extinction of species, as if it were a game.
- All markets are susceptible to crashes – in the case of nature based financial products, crashes could have disastrous consequences for the underlying “conservation” project when the land is repossessed.
- Conservation policy is decided by what is more profitable rather than what is best for the ecology as a whole.
- Carbon credits and Reducing Emissions from Deforestation and forest Degradation (REDD) (similar mechanisms) have been ineffective in halting climate change or deforestation.

There have been different forms of the commoditisation and privatisation of biodiversity throughout history – such as the policies that privatise biodiversity itself and other tools like intellectual property mechanisms that lay claim to genetic or biochemical elements. Today we are witnessing a new wave of privatisation through the invention of natural capital. In this context, large corporations are pushing for reforms in international and national policies to enable their control of biodiversity. This new wave of privatisation of nature cannot be controlled under the existing structure of law. We need the fundamental

and systemic transformation that rights of nature offer as a powerful counterbalance to corporate excess.

How Rights of Nature change the game

Rights of nature shifts the paradigm by reversing the structure of law that treats nature as an object separate to us – which is at the root of the problem – by recognising nature as a rights-bearing subject of the law equal to humans and corporations. This is the game-changing step that brings nature into our governance system as a stakeholder in its own right and transitions us into a whole-systems framework of law. Instead of reactively legislating to carving out protections, we start with the premise that all of life is protected and we carve out the level of human activity that is acceptable to maintain the dynamic balance.

On a practical level, rights of nature would bring the following changes to our legal system:

- It provides an overarching context for our existence as part of the earth as a whole, enshrining interdependence in law – and a legal requirement for this context to be embedded in all levels of society. It recognises that the economy is a subsystem of human society which is a subsystem of the earth.
- It empowers people to pro-actively reject governmental actions, which permit unwanted and damaging development to occur, by enabling us to assert the rights of those ecosystems that would otherwise be destroyed.
- It goes to the heart of our economic system by valuing nature intrinsically. Property rights are no longer absolute: they are qualified by the rights of the ecosystems and species living there.
- It creates a relationship in law with the rest of nature – a legal prerequisite for a duty of care. This enables obligations towards nature, including the obligation to restore damage.
- Rights are a legal tool for addressing power imbalances (e.g. slaves, indigenous people, women and children). Currently the imbalance is between the corporations, financial institutions and everyone else. It is the only effective counterbalance in the face of policies that concentrate corporate power such as TTIP and financializing nature.
- It creates a fundamental basis for the human right to life because without nature we cannot exist.

Paving the way to a different approach to law

Rights of nature is a holistic framework of law underpinned by the principles of [Earth Jurisprudence](#) – the purpose of which is to return to a mutually enhancing presence on earth through embedding these principles in all aspects of our lives and society.

Earth Jurisprudence can be distilled into the following key principles:

- **Wholeness:** the earth is a living being – a single Earth Community webbed together through interdependent relationships. All life is sacred with inherent value and the earth has her thresholds and limits. The well-being of each member of the Earth Community is dependent on the well-being of the earth as a whole.
- **Lawfulness:** the earth is part of the universe, which is ordered and operates according to its own laws – which govern all life including human beings. We need to discover nature’s laws and comply with them for our own wellbeing and for the wellbeing of the whole.
- **Duty of Care:** earth jurisprudence is a living law – a way of life, guided by moral responsibilities. We have a duty of care to all present and future members of the Earth Community to contribute to its integrity and well-being. If we create imbalance, then we cause disorder in the Earth’s dynamic equilibrium which we have a duty to restore.
- **Rights of Nature:** the earth and all of the Earth Community have three inherent rights – the right to exist, the right to habitat, and the right to fulfil its role in the ever-renewing processes of life.
- **Mutual Enhancement:** relationships within the Earth Community are reciprocal – a cycle of giving and receiving. Our role is to participate and contribute to the health and resilience of the Earth Community. That which does not enhance the whole will ultimately not enhance us either.
- **Resilience:** all healthy living systems have the ability to grow, evolve and adapt to change and disturbance, without losing inner coherence. By complying with the laws that maintain life’s health and vitality, we strengthen Earth Community resilience as well as our own. To learn from nature and understand its laws, we must become eco-literate and engage other ways of knowing – feeling, sensing and intuition.

Practising this approach to law requires that we prioritise the interests of the whole and of future generations, over short term self-interest.

How feasible is it?

Given that our current legal and the economic models have been ineffective in halting the widespread destruction of the biosphere, more and more countries are looking at rights for nature as a sensible way forward. It is the new emerging paradigm in environmental law and here are some of the examples:

- **National level:** Ecuador (Constitutional recognition of the rights of nature and holistic concept of “wellbeing”); Bolivia (Law and Ombudsman for Mother Earth).
- **Court Decisions:** New Zealand, Ecuador, India, Argentina. These decisions expand our jurisprudence by recognising the concept that an organism or a manifestation of nature such as a river has inherent rights that can be recognised in law. In Ecuador a successful injunction was sought by the community against the government to stop polluting a river through defending the river’s rights in court,³ and in India the case of *T.N Godavarman Thirumulpad Vs. Union of India & Others* (2012) is known for the opinions of Judges K.S. Radhakrishnan and Chandramauli Kr. Prasad who asserted that environmental justice could be achieved only if we drift away from anthropocentric principles.
- **Local/Municipal level:** over 36 USA municipalities including Santa Monica which created a [Sustainability Rights Ordinance](#); Pittsburgh, New Mexico state; also Mexico City and a municipality in Spain have created by-laws and ordinances that recognise the inherent rights of nature. In the USA these laws recognise the rights of communities and the rights of ecosystems side by side, and they subordinate corporate interests. Such laws in the USA have successfully banned fracking locally.
- **Customary law:** Legal recognition of indigenous governance and sacred sites – mainly in Africa (e.g. [Benin Sacred Forest Law 2012](#) – which protects the living law and promotes community ecological governance).
- **UN level:** The UN has a Harmony with Nature Department to promote rights of nature. In 2010 Bolivia presented a Universal Declaration for the Rights of Mother Earth. Since then there have been various UN resolutions moving in this direction.⁴

How can we make this happen?

Historically, legal rights have never been granted easily from those in power. It has to be claimed by the people. In Europe we have the beginnings of participatory democracy – Regulation 211/2011 (the “European Citizens Initiative”) is the first instrument in the world that allows citizens to propose laws at a trans-national level. One million statements of support across 7 Member States will enable us to put the collective rights of nature on the legislative agenda of the EU. We are bringing a European Citizens Initiative to do this.

Our team has produced [a draft Directive](#) to show how a framework for rights of nature and ecological governance could work at the EU level. We focus on collective rights, which includes ecosystems, species and the atmospheric climate – also pioneering a new paradigm for climate protection. Although society has talked about sustainability for decades, there is no current legal framework which has achieved this. In our rights of nature framework, we include the human right to a healthy environment, the rights of future generations, an Ombudsman for nature, alternative

court systems, rewilding, ecological governance and more. In Europe, participatory democracy mechanisms also exist at the local and national level in several European countries and so we are also working to support people to start initiatives.

If you would like to find out more about our work, support us or get involved please contact us at: info@rightsofnature.eu.

Conclusion

The EU set out a vision in its environmental policy of a circular economy that brings peace and prosperity for all. To achieve this, we need a new paradigm of law that operates in harmony with nature.

There are natural universal laws that govern all of life. When our laws are aligned with these, we create peace, prosperity and harmony for all. When our laws are not aligned with these we create a spiral of destruction as we are seeing in the world today. All societies that have ignored this truth have perished. We have a choice.

Mumta Ito is one of the world's leading experts on rights of nature. She is the founder of Rights of Nature Europe and the International Centre for Wholistic Law, and a Director of the Association for the European Citizens Initiative. Previously in her career as a lawyer, she advised investment banks, multinationals, and governments, as well as NGOs and grass-roots organisations. She also set up an NGO in the Caribbean to create a peoples' movement to save an island of global ecological importance.

Endnotes

- 1 Thomas Berry, extract from talks at the Gaia Foundation, 2003.
- 2 Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' OJ L 354/171, para 18.
- 3 *Wheeler v. Director de la Procuraduria General Del Estado en Loja, Juicio*, No. 11121-2011-10 (2011).
- 4 These legal precedents can be found at: <http://www.harmonywithnatureun.org/rightsofnature.html> and <http://www.gaiafoundation.org/earth-law-precedents>.
- 5 *R. v May* [2008] UKHL 28.
- 6 *R. v Del Basso (Luigi)* [2010] EWCA Crim 1119 at [46].
- 7 *R v Harvey* [2016] 2 WLR 37.
- 8 *R v Boyle Transport* [2016] EWCA Crim 19.

Wild law

Earth Jurisprudence and Rights of Nature Tribunals



Dr Michelle Maloney, Australian Earth Laws Alliance

At a Glance

- The world's first International Tribunal for the Rights of Nature and Mother Earth was held in 2014 in Quito, Ecuador.
- It is a civil society creation, which hears cases regarding alleged violations of the rights of nature and makes recommendations about appropriate remedies and restoration.
- The Tribunal uses the Universal Declaration of the Rights of Mother Earth (and other national legal instruments which recognise the rights of nature) as its source of law – based on ideas associated with wild law and earth jurisprudence.
- The Tribunal has since been held around the world and a number of regional chambers have also been held to examine violations of nature's rights, such as the plight of the Great Barrier Reef.
- These fora give a voice to the voiceless by allowing advocates to speak for nature and challenge normalised destructive practices, critique and draw attention to anthropocentric laws and growth-driven policies; helping to contribute to a paradigm shift in legal culture.

Introduction

In January 2014, members of the Global Alliance for the Rights of Nature held the world's first International Tribunal for the Rights of Nature and Mother Earth in Quito, Ecuador. Since that time, the International Tribunal has met in Lima, Peru and Paris, France, in parallel with the Conference of the Parties for UN climate change negotiations, and Regional Chambers of the International Tribunal have been held in the USA and Australia. Given the International Tribunal has emerged from civil society rather than state-centred international law and given countries like Australia and the USA do not recognise in State or Federal law, the intrinsic rights of plants, animals or ecosystems to exist, what possible benefits do Rights of Nature Tribunals offer the natural world? In this article I outline the creation and ongoing hearings of the International Tribunal and its Regional Chambers, and suggest that like many 'people's tribunals' before them, Rights of Nature Tribunals offer a powerful alternative narrative to that offered by western legal systems regarding environmental destruction. They also have the potential to play a role in transforming existing law and offer a welcome, cathartic contribution to the burgeoning field of Earth jurisprudence.

The International Tribunal for the Rights of Nature and Mother Earth

The International Tribunal is comprised of lawyers and ethical leaders from indigenous and non-indigenous communities around the world.¹ The objective of the Tribunal is to hear cases regarding alleged violations of the rights of nature and make recommendations about appropriate remedies and restoration.

The Tribunal's sources of law include the Universal Declaration of the Rights of Mother Earth (UDRME) and for cases from Ecuador and Bolivia, the Tribunal can refer to the Ecuadorian Constitution and Bolivia's Framework Act for the Rights of Mother Earth and Holistic Development to Live Well 2012 respectively, as these existing domestic legal instruments explicitly recognise the rights of nature.²

The UDRME was drafted at the World People's Congress on Climate Change and the Rights of Mother Earth, held in Cochabamba, Bolivia in 2010. It has been estimated that 30,000 people from more than 100 countries attended the gathering and played a part in drafting the Declaration.³ This Declaration is not presently recognised in formal international law but it represents the agreed values of thousands of members of civil society. The Declaration was submitted to the UN shortly after the meeting in Cochabamba and was formally considered at the April 2011 UN Dialogue on Harmony with Nature. It featured prominently at the June 2012 UN Conference on Sustainable Development (Rio+20) and the Final Declaration of the Rio+20 People's Summit called on 'governments and people of the world to adopt and implement the UNDRME'. While the final UN consensus document did not reference the UDRME, it did refer to the recognition of 'rights of nature' in the governing system of some of its member states.⁴

As the health of ecological communities continues to deteriorate around the world, due to human impacts including climate change, the International Tribunal is an important forum, both for drawing attention to an international audience about environmental atrocities and for reclaiming any notion of 'justice' for these state sanctioned violations of the rights of nature. But in practical terms, what impact can such a Tribunal have in legal systems that do not recognise the rights of nature? To answer this question, it is first necessary to outline 'Earth jurisprudence', the theoretical framework from which the Rights of Nature

movement, and the Tribunals, have emerged.

Earth jurisprudence, 'Wild Law' and the Rights of Nature

Earth jurisprudence, a term coined by cultural historian and 'Earth scholar' Thomas Berry is an emerging theory of Earth-centred law and governance.⁵ Advocates for Earth jurisprudence propose that the primary cause of the ecological crisis is anthropocentrism – a belief by people in the industrialised world that we are somehow separate from, and more important than, the rest of the natural world. Berry argues that this anthropocentric world view underpins all the governance structures of contemporary industrial society – economics, education, religion, law – and has fostered the belief that the natural world is merely a collection of objects for human use.⁶ In contrast, Earth jurisprudence suggests a radical rethinking of humanity's place in the world, to acknowledge the history and origins of the evolving Universe and to see our place as just one of many interconnected members of the Earth community.⁷ By 'Earth community' Berry refers to all human and 'other than human' life forms and components of the planet – animals, plants, rivers, mountains, rocks, the atmosphere – our entire Earth.⁸ Berry and the broader Earth jurisprudence movement acknowledge the inspiration and guidance that indigenous cultures and indigenous wisdom can provide to industrialised societies and the development of Earth jurisprudence. He suggests that 'our great work' is to transform human governance systems to create a harmonious and nurturing presence on the Earth.⁹

Responding to Berry's work, Cormac Cullinan's *Wild Law: A Manifesto for Earth Justice* was a direct call to shift our legal and governance systems to support the Earth community.¹⁰ Wild Laws are laws that express principles of Earth jurisprudence and are derived from the laws of nature. They can be seen as one sub-set of the broader Earth jurisprudence philosophy; as the 'legal thread' that weaves together with so many other aspects of governance – including economics, institutional structures and politics – to give expression to Earth jurisprudence. In his book Cullinan discusses law, regulation and governance, acknowledging that all these concepts need to be made 'wild' and Earth centred.¹¹

One of the many elements making up the complex web of Earth jurisprudence is the legal recognition of the rights of nature.¹² Many advocates of Earth jurisprudence have argued that the Earth community and all the beings that constitute it have 'rights', including the right to exist, the right to habitat or a place to be and the right to participate in the evolution of the Earth community.¹³ Berry argued that "nature's rights should be the central issue in any ... discussion of the legal context of our society."¹⁴ From

this view, nature deserves to be valued for its own inherent worth. This contrasts with the dominant legal system, treats plants, animals and entire ecosystems, as human property and only grants rights to humans and human-created constructs such as corporations. Granting rights to nature is a radical rethinking of the role of our anthropocentric legal system, and yet the idea appears to be taking hold in many jurisdictions. The legislation mentioned above, in Ecuador, Bolivia and the United States, move Earth-centred ideas from merely a theory, to a practical framework for action. It should be noted that a rights-based approach is not just about conferring rights on nature. It is a means of giving legal recognition to nature's inherent worth by recognising what is already there. In operational terms, it is largely for the purpose of redressing the balance between humans 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 see nature as solely a resource to be exploited for human ends."¹⁵

Many of the key elements of Earth jurisprudence and eco-centrism have long been debated in environmental philosophy and human ecology, and eco-centrism in the law has been explored by many writers, including Christopher Stone,¹⁶ Roderick Nash¹⁷ and Klaus Bosselmann.¹⁸ The work of Berry and Cullinan builds on this body of work, but I would argue that it also offers something new. In addition to being a critical theory stimulating a growing body of literature,¹⁹ Earth jurisprudence and Wild Law are increasingly becoming practical and constructive tools as well. This is reflected in the growing international movement of people and organisations who are advocating for the Rights of Nature – and, more broadly, Earth-centred law and governance – and who are explicitly building their movements on the work of Berry and Cullinan.²⁰ This has been demonstrated by inspiring, real-world examples of social change and Earth-centred law and governance, such as Ecuador's 2008 Constitution, Bolivia's 2010 legislation²¹ and the 150 local level Rights of Nature ordinances that now exist in the United States.²² It has also been demonstrated through recent initiatives in Great Britain and Europe. The European Citizen's Initiative on the Rights of Nature is working to introduce a proposed Directive to recognise and enforce the Rights of Nature,²³ and Rights of Nature policies have been adopted by the Scottish Greens Party and the Green Party of England and Wales.²⁴

The Global Alliance and its creation of the International Rights of Nature Tribunal

The Global Alliance for the Rights of Nature (GARN)²⁵ was formed in 2010, by an international group of Earth lawyers and Earth advocates who attended the World People's Congress on Climate Change and the Rights of Mother Earth, held in Cochabamba Bolivia. The

lawyers who comprise the founding members of the Alliance played an important role in drafting the UDRME²⁶ and agreed to create a permanent network of people committed to implementing Earth Jurisprudence and the Rights of Nature. GARN is made up of around 70 organisations around the world, including groups from the 'global north', 'global south' and First People's nations.

The International Tribunal was created at a GARN Summit in Ecuador in January 2014. It was a response to the perception by local Ecuadorians that the Correa administration was not implementing the Rights of Nature provisions in the Ecuadorian Constitution and was instead allowing the rights of nature to be violated. The Tribunal was created to hear both Ecuadorian and international cases, and it was decided that each meeting of the Tribunal would have two functions: to admit new cases for later consideration and to make final decisions and recommendations about cases admitted at earlier hearings.

The first cases presented to the Tribunal were: British Petroleum's pollution of the Gulf of Mexico; Hydrofracking in the USA; the Chevron/Texaco case in Ecuador; the case of the failed attempt to protect Yasuni-ITT, Ecuador; the Condor Mine, Mirador, Ecuador and the Great Barrier Reef Case, presented by the Australian Earth Laws Alliance, Australia.²⁷ Two further issues were presented for advisory opinions – the danger to life on Earth presented by genetically modified organisms (GMO) and a special case presented on behalf of 'defenders of nature' who had recently been persecuted by the Ecuadorian government.²⁸

The international panel of judges sitting on the Tribunal included lawyers and ethics experts from around the world, and these are listed on the Global Alliance website.²⁹ Further International Tribunals, held in Lima in late 2014 and Paris in December 2015, drew attention to environmental destruction in countries around the world, and provided Earth laws judgments and recommendations for restorative actions for the cases presented.³⁰

Regional Chambers of the International Rights of Nature Tribunal

Since hosting the first International Tribunal, GARN members have held three 'Regional Chambers' of the International Tribunal and a fourth Tribunal is scheduled in Australia in October 2016. The role of the Regional Chambers is the same as the International Tribunal – to examine and make formal observations about ethics and violations of nature's rights with regard to issues that have remained outside the consideration of formal government institutions. In addition to examining the plight of ecosystems and

other members of the Earth community, Regional Chambers also place on trial current legal and economic systems that legalize and monetize the destruction of nature.³¹

In the USA, Rights of Nature Tribunals were held in October 2014, charging the Chevron Refinery in the Bay Area with violations against the rights of nature³² and in April 2016, examining the plight of the San Francisco Bay-Delta.³³ In Australia, a special Rights of Nature Tribunal was held for the Great Barrier Reef in October 2014, to bring together further evidence for the case being heard by the International Tribunal.³⁴ A one day Rights of Nature Tribunal will be held in Brisbane on 22 October 2016, marking the beginning of a Permanent Tribunal in Australia that will hear cases on an ongoing basis.³⁵

What do Rights of Nature Tribunals offer the natural world?

As the western legal system does not recognise the rights of nature, what can the Tribunals offer jurisprudence, environmental activism or the natural world?

One of the key reasons the International Tribunal was created was to give a voice to the voiceless: to allow us to speak for nature and challenge the destructive practices that industrial society has normalised throughout the 20th Century. By offering an alternative, Earth-centred legal analysis, the International and Regional Tribunals cast light on specific injustices inflicted on the Earth community, injustices that are currently legal and morally endorsed by nation states and vested interests. Further, by critiquing the foundations and impact of the current legal system, the Tribunals draw attention to the flawed and devastating outcome of our anthropocentric laws and growth-obsessed government policies.

While the Tribunals decisions are not part of international law or enforceable in any nation state's legal system, it has been argued that decisions like those from the Tribunal will have "performative significance as a forum in which an alternative 'rights of nature' legal discourse can be articulated and developed".³⁶ Further, such alternative jurisprudence "compel us to interrogate existing legal principles, practices and findings ... through a wild law lens and can contribute to a paradigm shift in existing legal systems."³⁷

The potential for the Tribunals to contribute to a paradigm shift was particularly obvious during the Regional Chamber of the Rights of Nature Tribunal, held in Brisbane on 15th October 2014. The expert witnesses, and decisions by the Tribunal members, involved a fascinating mix of discussions about existing environmental laws and normative legal

structures based on an Earth-centred approach, recognising the rights of nature. This melding of conceptual analysis was extremely valuable, not least because the lawyers involved in giving evidence, the Tribunal members involved in giving their opinions and the audience involved in interpreting and later sharing these ideas, were all engaged in an act of creative extrapolation: critiquing existing law in order to pull it apart, lay it bare, reframe it and begin building something new.

While this powerful 'alternative jurisprudence' does not offer immediate, increased protection for our beloved Earth community, it empowers environmental lawyers and activists with new concepts, a new vocabulary and a vision for how the legal system should work to the Reef and all ecosystems on Earth.

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Endnotes

- 1 For information about the International Tribunal for the Rights of Nature, please visit the Global Alliance for the Rights of Nature website: <http://therightsofnature.org/>.
- 2 Ecuador's 2008 Constitution can be found at <http://pdpa.georgetown.edu/Constitutions/Ecuador/english08.html>. Bolivia's Act can be found in Spanish at <http://www.lexivox.org/norms/BO-L-N300.xhtml>; An English version of the original proposal for the law can be found at <http://www.cambioclimatico.org.bo/derechosmt/082012/cartillaLME.pdf>.
- 3 A copy of the Universal Declaration for the Rights of Nature and Mother Earth can be found at <http://pwccc.wordpress.com/programa/>.
- 4 Linda Sheehan, 'Nature's rule of law through rights of waterways' in Christina Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge University Press, 2013) p.230.
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- 14 Berry, *The Great Work*, p80.
- 15 Lynda Warren, Begonia Filgueira and Ian Mason, 'Wild Law: Is there any evidence of Earth jurisprudence in existing law and practice?' (Gaia Foundation, 2009).
- 16 Christopher Stone, 'Should Trees Have Standing? Law, Morality and the Environment' (1972) 45 *Southern California Law Review* 450.
- 17 Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press, 1989).
- 18 Klaus Bosselmann, 'Governing the Global Commons: The Ecocentric Approach to International Environmental Law' in *Droit de l'environnement et développement durable* (Limoge, 1994).
- 19 Cullinan, *op cit*; P Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011); Michelle Maloney and Peter Burdon, *Wild Law in Practice, Law, Justice and Ecology* (Routledge, 2014).
- 20 For example, see the Global Alliance for the Rights of Nature website, which lists organisations from around the world advocating for Rights of Nature and Earth centred governance – <http://therightsofnature.org/founding-organizations/>.
- 21 See endnote 3.
- 22 For an overview of the legal ordinances being drafted by local communities in the USA see www.celdf.org.au
- 23 See <http://www.wholistic-law.org/european-citizens-initiative-for-the-rights-of-nature/>
- 24 See http://www.theecologist.org/News/news_round_up/2987304/greens_commit_to_rights_of_nature_law.html.
- 25 For information about the Global Alliance, please see <http://therightsofnature.org/>.
- 26 See <http://pwccc.wordpress.com/programa/>.
- 27 For a detailed overview of the Great Barrier Reef case, see M Maloney 'Finally Being Heard: The Great Barrier Reef and the International Rights of Nature Tribunal', (2015) 3(1) Griffith Journal of Law and Human Dignity 40.
- 28 For further details about the cases, including the organisations and lawyers who brought the cases to the Tribunal, see the website for the International Rights of Nature Tribunal – <http://therightsofnature.org/rights-of-nature-tribunal/>.
- 29 See <http://therightsofnature.org/rights-of-nature-tribunal/>.

- 30 The International Tribunal's judgement for the Great Barrier Reef case can be found here – <http://www.earthlaws.org.au/world-ethics-tribunal-for-the-rights-of-nature-and-mother-earth/>.
- 31 Video footage from the Regional Chamber is now available on the AELA website (www.earthlaws.org.au) ,and includes the summing up by Judge Brendan Mackey.
- 32 For more information, see <http://therightsofnature.org/events/bayareatribunal/>
- 33 For an overview of the Delta Tribunal, see <http://www.dailykos.com/stories/2016/5/2/1522252/-Tribunal-Considers-Rights-of-Nature-in-Imperiled-San-Francisco-Bay-Delta>.
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Wild law

A practical test for Wild Law: Ecuador's Rights of Nature



James Southwood, MSc student in Environment and Sustainable Development at UCL

At a glance

- Ecuador's rights of nature are an unprecedented move towards constitutionalising wild law.
- The case of *Wheeler vs. Loja Province* represents the first known vindication of non-human rights, however the enforcement of the ruling can be called into question.
- The government remains intent on extractive activities despite its constitutional obligations.
- The rights-inspired Yasuni-ITT initiative was the first to seriously address the root causes of our environmental challenges.
- Ecuador's rights of nature have opened up important policy space from which to better integrate conservation and development.

We hereby decide to build new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay (Preamble to the 2008 Constitution of Ecuador)

'The world's first environmental constitution'

More than a generation ago, in a bold normative article – *Do Trees Have Standing?*¹ – American law professor Christopher Stone speculated on what it might be like to recognise 'rights' for nature. His thinking has been championed by wild lawyers who stress that humans are part of a wider earth community, calling for the restoration of a harmonious balance with nature. In 2008, Ecuador made this possible, becoming the first constitution in the world to adopt wild law principles. This marks an important legal and political milestone where the greenest of environmental ethics has been taken out of theory and put into practice.

Ecuador has the second worst rate of deforestation in South America, a classic resource curse and is entangled in a costly and enduring legal case against the oil giant Chevron. Encoding the rights of nature in the constitution was seen as an important step in tackling these longstanding issues. The rights were supported with the ecologically-orientated code of behaviour; 'sumak kawsay' or 'good-life'. This mind-set shares remarkable similarities to wild law principles. It is founded on intrinsic respect for the surrounding environment and challenges a neoliberal economic doctrine that would otherwise treat the environment as an externality. Combined with the rights of nature, the good life ambitiously sought to rebalance the

raison d'être of both state and society and transform environmental protection.

The Rights

The rights of nature are articulated in Articles 71 to 74 (chapter 7) where liberal values are stretched to include non-human entities in the constitution.² Article 71 forms the backbone of the rights regime and is ground-breaking in its holistic understanding of environmental protection:

Nature, or Pachamama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.

Article 71 is a clear articulation of earth jurisprudence. With the emphasis on functions, natural cycles and all elements comprising of an ecosystem, there is a strict eco-centric understanding of nature. Article 71 recognises not only the inherent worth of nature, but the full scope of what wild lawyers would call the 'earth community'. Chapter 7 is in effect, the manifestation of the environmental holism that wild law demands for effective policy.

Citizens are able to call upon the public authorities to protect the rights in line with a secondary provision that reverses the burden of proof of environmental damage at Article 397. This qualification in inciting the rights of nature is remarkably proactive. In these cases, the defendant must prove they did not cause environmental damage in the first instance. This constitutes an unparalleled regulatory mechanism which works towards full-bodied ecological protection.

Applying the Rights of Nature

Most advocates of wild law will accept that rights should provide a practical function and should be 'workable'. However, they will also stress that to base the success of wild law entirely in terms of concrete outcomes would be misplaced. For example, non-human rights can forge new initiatives and modes of action which are less easily measured but better addresses the dysfunctional relationship between man and nature. We can see if this is indeed true by looking at the most prominent cases concerning the rights of nature.

Case 1: Wheeler vs Loja Province – A workable legal framework

On 30 March 2011, Richard Wheeler asked for constitutional protection against the widening of the Vilcabamba-Quinara highway. The operation was devoid of an environmental permit and large quantities of extraction material had been deposited in the Vilcabamba river. This had upset its natural course and flooded the surrounding area. The Provincial Court ruled in favour of nature, particularly the Vilcabamba River in the Granted Constitutional Injunction 11121-2011-0010.

As a precedent, the Wheeler case is historic as the first known vindication of non-human rights. The rights of nature were applied via the *acción de protección* (protective action). This clause works as a mechanism through which to realise the constitutional rights. The Wheeler case forged another substantive norm, succeeding in reversing the burden of proof. Instead of the applicant, it was the respondent (the Loja Government), which had to prove no environmental damage. However, with large rock debris in the river bed and flooding in the area, they failed in doing so and the court made an order to restore the environment.

Whilst these are important precedents, the efficacy of the judicial remedy can be questioned as the injunction has not been adhered to.³ Within thirty days of the settlement deadline, there was no clear remediation of the environmental damage and in 2016, an environmental permit still has not been attained. It remains unclear whether this context has changed, but those that advocate non-human rights will typically underplay this enforcement issue or simply fail to mention it at all.⁴

For *Wheeler vs Loja* then, rich substantive and precautionary wild law norms were set. However, we can't ignore that the inertia over the remedial plan has limited its enforcement. It is conceivable that enforcement will improve with time as secondary provisions are put in place to bolster the rights regime. Most importantly, whilst practical effects have been limited, this case provides evidence that the rights of nature offer a workable legal framework.

Case 2: Condor-Mirador Mine Case – The Limits of Normative Law

In 2012, the Global Alliance for the Rights of Nature invoked the rights to contest a large scale mining contract given to Ecuacorriente SA (ECSA). The contract enabled the open-pit exploration and production of copper in an area of unique and endemic species in the Cordillera del Condor rainforest. The planned pit was to extend 2895 hectares and reach a depth of 1.25km, 10 times deeper than the height of Quito's Basilica church.

Despite conclusive proof that the development would cause species extinction,⁵ the court ruled in favour of the mining company, using the 'exceptional' Article 407, which states:

Activities for the extraction of non-renewable natural resources are forbidden in protected areas... Exceptionally, these resources can be tapped at the substantiated request of the President of the Republic and after a declaration of national interest.

The issuing of the Mirador Mine contract is indicative of a new extractive imperative in Ecuador that – paradoxically – seeks to overcome Ecuador's resource dependency via a long term plan that is initially resource intensive. In its national development plan built towards economic growth, the government states it will "use the extraction of raw materials in order to stop the extraction of raw materials": to give effect to the motto, "planting petroleum"⁶

The concept of planting petroleum stands in direct conflict with the rights of nature. With such large financial sums at stake, the court heard that civil society was protecting a private interest in conservation whereas the private company Ecuacorriente was protecting a public interest in 'development'.

Cases such as these show the difficulty of moving beyond anthropocentric thinking and operationalising wild law on a national scale. When questioned over the environmental damage of the project, the Ecuadorian President famously commented, "we can't afford to be beggars sitting on a pile of gold".⁷ The combination of this attitude from the executive and the 'exceptional' clause 407 has led to the enablement of Ecuacorriente's mine, in direct contradiction of the 'good-life' which would restrict it. This case has brought many to question the sincerity of the Correa administration in meeting the new constitutional commitments.

Case 3: Yasuni Initiative – An undisputed Pioneer Proposal

The idea of intrinsic value, which lies at the heart of both wild law and the 'good life', has been crucial in the establishment of the international proposal to protect the Amazonian rainforest. The focus was on the Yasuni National Park, singularly one of the most important sites for biodiversity anywhere in the world, but home to 20% of Ecuador's oil reserves. The Yasuni-ITT initiative proposed to leave this oil underground and conserve the area by raising half the value of the underground oil from the international community, estimated at \$3.6billion.

With oil remaining un-tapped, this value was justified chiefly by unrivalled biodiversity and uncontacted indigenous cultures under the environmental justice remit of shared but differentiated responsibility. These funds were to be invested in a long term development

plan which would help reconfigure Ecuador's energy matrix from oil towards renewable energy sources. With the 2008 constitution stressing non-negotiable environmental rights, the idea of intrinsic value could be institutionalised and taken directly to the U.N. However, despite generous financial sums offered from Germany and Norway, on 9 January 2010, the original Yasuni-ITT initiative was abruptly discontinued by President Correa on the grounds of neo-colonialism and insufficient funds. He blamed the 'great hypocrisy' of nations who emit most of the world's greenhouse gases.

Despite being discontinued, the Yasuni-ITT proposal is a valuable outcome of the rights regime. By demonstrating the high trade-offs for oil extraction and striving to keep oil in the soil, Yasuni-ITT has presented a novel conservation platform. Globally, 82% of oil must be left underground to avoid going above 2°C of warming (the target established at Paris).⁸ Mainstream carbon trading proposals only acknowledge released atmospheric carbon, whereas the Yasuni-ITT was to trade its value as non-emitted CO₂. This ambitious thinking, geared around addressing 'peak oil' is exactly the kind needed to make meaningful progress on Paris commitments.

The Yasuni-ITT shows how Ecuador's rights regime has been crucial in forging new initiatives to address our dysfunctional relationship with the natural world. With remarkable conceptual narrowness in tackling environmental damage, this proposal is likely to pave the way for better integrated conservation and development policies in the future.

Summary

Those that advocate the rights of nature do not dismiss the great obstacles to its realisation. As expected, codifying the rights of nature and implementing these principles in concrete policy and practice are two different things. For example, the Mirador case shows that even with a non-human rights regime, anthropocentric, growth based development is still very much prioritised over conservation in Ecuador.

In spite of this, the rights regime is still very much in its infancy and many important supporting structures are not yet in place to realise its potential. The next step must be to empower civil society and judges to properly recognise and support this new way of thinking. As things stand in Ecuador, the rights of nature are more appropriate for local contexts. If they are to be effective practically, capacity building must start here.

Wild law thinks creatively about how legal instruments can protect environmental rights and Yasuni showed how economic mechanisms can ensure robust valuations of ecosystems. We have only just begun to think about how these two can interact with each

other. By proposing to leave oil in the soil to maintain the intrinsic value of the natural world, Yasuni-ITT has begun a serious conversation over properly addressing our climate commitments.

It seems that even with mixed results, the rights of nature are powerful as a new way to think about how we interact with our environment. Codified in the enduring legitimacy of a constitution, they serve as a constant reminder that rather than being 'beggars', we can be much richer for 'sitting on piles of gold' and seriously acknowledging our ecological limits.

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Endnotes

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Matters in practice

POCA Face: what to do when the chips are down



By Jeremy Phillips and John Jolliffe, with significant assistance from Charles Streeten, Barristers in Francis Taylor Building

In the second of a series of occasional articles Jeremy Phillips and John Jolliffe, with significant assistance from Charles Streeten, consider the use of criminal confiscation orders in the field of environmental law.

At a glance

- POCA applies to regulatory offences including environmental crime. Where the conditions of s 6 are met the court **must** proceed under POCA.
- The recoverable amount will be the gross benefit from the crime. In 'criminal lifestyle' cases the court will assume that all property transferred to the defendant within the past six years was obtained as a result of criminal conduct
- The potential for the court to make a confiscation order should inform tactical decisions at an early stage. It may be possible to negotiate an agreed figure for the 'benefit' with the prosecuting authority.

For many the term 'proceeds of crime' calls to mind the ill-gotten gains of serious and organised criminals: a gangster's gold plated Kalashnikov or a drug dealer's blacked-out limousine. In the eyes of the law, however, and under the Proceeds of Crime Act 2002 ('POCA'), these are no different from any other benefit obtained as a result of criminal conduct. That includes environmental crime.

On the face of it this may seem harsh, but on reflection there is an obvious logic to depriving all criminals of an illegal gain. Firstly, it is hard to divine a principled reason for allowing convicted criminals, regulatory or otherwise, to retain a benefit they obtained illegally. Secondly, a key policy objective behind POCA is to discourage people from committing crimes for financial gain. As a class, environmental and regulatory crimes are frequently carried out with entirely financial motives. Good sense dictates that POCA should apply. Criminal sanctions have been imposed specifically to protect the environment and POCA adds an additional layer of protection, guarding against those who hope to profiteer from its damage.

How it works

The Crown Court **must** proceed under s 6 of POCA if two conditions are met. The first requirement is that the defendant has been:

- a) convicted in the Crown Court;
- b) committed to the Crown Court for sentencing; or
- c) committed to the Crown Court with a view to a confiscation order being made.

The second requirement is that the prosecutor requests, or the court believes it would be appropriate to make, a confiscation order.

The court must then decide on the balance of probabilities whether the defendant has a criminal lifestyle. Should the court decide the defendant **does** have a criminal lifestyle it will apply the four assumptions outlined in paragraph 11 below. If the court decides the defendant **does not** have a criminal lifestyle it will proceed to determine the 'recoverable amount'.

Under s 7(1) of POCA the recoverable amount is an amount equal to the benefit from the conduct concerned. By way of environmental example, in *R v Morgan* [2013] EWCA Crim 1307 the Court of Appeal upheld a confiscation order for £156,500 against a defendant who had committed an offence under s 33 of the Environmental Protection Act 1990. Whilst the defendant had received no payment for disposing of the waste in question, he had, by engaging in *unlicensed* waste disposal, gained a pecuniary advantage from evading landfill tax, not paying for a waste management licence and avoiding other costs involved in disposing of waste lawfully. This justified a confiscation order for the full amount of £156,500.

Thus, whilst it is hard to take exception to the fact that POCA applies to environmental offences, the scope of confiscation under the Act might well raise an eyebrow. POCA recoups more than just criminal profits, under s 7(1) the 'recoverable amount' is 'an amount equal to the defendant's benefit from the conduct concerned.' The key word is 'benefit' and the

court's approach should be heard loud and clear: POCA applies to the benefit gained not the benefit retained.⁵

Criminal 'benefit'

The case of *Del Basso* perhaps represents a high water mark for POCA confiscations. In that case the court made clear that the benefit to be confiscated was calculated on the basis of "gross receipts" which "may greatly exceed personal profits."⁶ The case concerned land which, in breach of a planning enforcement notice, was used to provide a park and ride service for spectators at Bishop's Stortford Football Club. Notwithstanding that the service was provided for an apparently altruistic motive; namely providing financial support to the Club, and that 'virtually all' of the income from the scheme was consumed by necessary running expenses, the court found that POCA applied to all proceeds of the crime, however spent, and deemed the company's turnover to be in excess of £1.8m. Having regard to the financial circumstances of the case the court therefore made an order for £760,000 against Mr Del Basso.

This approach has recently been considered by the Supreme Court in *Harvey*⁷. Whilst Lords Neuberger and Reed, in their combined leading judgment, affirmed the *Del Basso* approach in relation to corporation tax and to expenses incurred in running a criminal business, he held that VAT which has been accounted for to HMRC falls into a different category, not least because under European law it is regarded as being collected on behalf of HMRC. They held that construing the word 'obtained' harmoniously with A1P1 of the ECHR VAT which has been accounted for to HMRC cannot be included within the recoverable amount.

Criminal lifestyle

In a regulatory context a defendant will have a 'criminal lifestyle' under s 75 of POCA if they have benefited from the conduct which constitutes the offence(s) of which they are convicted and: commits an offence over a period of at least six months, or is convicted of three or more offences, or on two separate occasions within a period of six years ending on the day when proceedings were started.

Where a defendant is held to have a criminal lifestyle the court will apply four assumptions. The first is that any property transferred to the defendant at any time within the preceding six years was obtained as a result of general criminal conduct. The second is that any property held by the defendant at any time after the date of conviction was obtained as a result of criminal conduct. The third is that any expenditure incurred by the defendant within the past six years was met from property obtained from criminal conduct and the fourth is that (for the purposes of valuation) the defendant received any property free of any other

interests in it. These are draconian assumptions and it is for the defendant to demonstrate that they should not apply.

Proportionality

However, the Supreme Court in *R v Waya* [2012] UKSC 51 made clear that whilst the Crown Court has no discretion in making an award under POCA, the penalty must be a proportionate interference with the individual's peaceful enjoyment of his possessions under Article 1 Protocol 1 of the European Convention of Human Rights. An order can only be made insofar as it is proportionate to the legitimate aim of depriving criminals of the pecuniary proceeds of their crime. This rows back somewhat on the *Del Basso* position. *Waya* concerned a mortgage fraud. The court held, on the basis of the above principle, that Mr Waya's benefit amounted only to his equity in the property. The proportion of the property that had never vested in him and had remained in the lender's possession could not properly be characterised as criminal benefit. In defending a POCA confiscation order, it may therefore be possible to argue for a reduction in the recoverable amount on the basis that a confiscation order for an amount equal to gross receipts constitutes a disproportionate interference with an individual's A1P1 rights under the ECHR.

Causal connection

Another potential line of defence is to argue that the benefit has not been "obtained as a result of or in connection with" criminal conduct. This requires close attention to the specific statutory regime under which a defendant's conduct is 'illegal'. In *Sumal and Sons Ltd v Newham London Borough Council* [2012] EWCA Crim 1840 the Court of Appeal held that there was not a sufficient causal connection between rent earned from an unlicensed property, and the offence of having control of or managing such an unlicensed house. Reading the Housing Act 2004 as a whole, the rent was not obtained as a result of criminal conduct. In particular the court relied on the fact that the landlord could lawfully seek to recover the rent of an unlicensed house. The causal connection between the offence and any purported benefit should therefore be scrutinised closely. If it can be suggested that a benefit was not obtained "as a result of or in connection with" the criminal conduct in question, this may provide a complete defence to confiscation proceedings.

In this regard it is also relevant to note the recent decision of the Court of Appeal in *Boyle Transport*⁸ regarding the circumstances in which the Crown Court will pierce the corporate veil in confiscation proceedings. Davis LJ made clear that the civil rules on piercing the corporate veil applied in the context of confiscation proceedings. Whilst the court must assess the reality of the matter that does not confer a licence to depart from established legal principles regarding

the status of a limited company. The test for piercing the corporate veil is not 'justice' and the court should be circumspect about invitations to take a broad-brush approach. Practitioners should therefore be alert to such submissions from Prosecutors and attempts to confiscate the assets of limited companies controlled by the defendant but not themselves guilty of any wrongdoing.

Thinking tactically

The very significant financial consequences of a confiscation order under POCA for environmental offences, illustrated by cases like *Morgan* and *Del Basso*, highlights the importance of thinking tactically from an early stage. Whilst plea must always ultimately be left up to the client, it is vital to stress that pleading guilty may reduce the fine imposed but it will not reduce the recoverable amount. POCA can significantly skew the 'risk / reward ratio' involved in deciding whether or not to defend a prosecution. Where the potential for a confiscation order under POCA exists and an acceptable recoverable amount cannot be agreed in principle by prior negotiation, clients may prefer to take the chance and fight charges to which they would otherwise have been prepared to plead guilty and accept a fine.

Similarly, the potential for subsequent confiscation shall influence decisions relating to the venue for offences triable either way. Whilst the Magistrates' Court must, under s 70 of POCA, commit the defendant (even for a summary offence) to the Crown Court with a view to confiscation proceedings if asked to do so by the prosecutor, unlike the Crown Court, the Magistrates' Court cannot commence confiscation proceedings of its own volition. It may therefore be that by keeping a case out of the Crown Court the risk of a confiscation order can be avoided or at least reduced.

Practical responses

There will be cases where a confiscation order is inevitable. In such circumstances the aim will be to minimise the recoverable amount. A pragmatic, 'upfront' approach to negotiating with the prosecution goes a long way to achieving this. If credible evidence is provided demonstrating the benefit actually obtained from an offence the prosecution may well accept this as the recoverable amount. In the wake of *Wayu*, rather than incurring the expense of arguing A1P1 proportionality prosecutors are sometimes inclined to accept a sum much closer to the 'net' figure. In the authors' experience this can result in the prosecution agreeing to settle at a figure almost 50% lower than that originally proposed.

The key to success is often the defendant's credibility. If the prosecution trust the defendant's figures they are much more likely to accept them. If possible

detailed accounts should therefore be prepared and submitted to the prosecution. The more cooperative the defendant can be and the better the evidence demonstrating the profit made as well as the expenses incurred, the more likely that the prosecution will agree a figure.

A final practical consideration is the timeframe for payment. Under s 11 of POCA, the amount to be paid under a confiscation order is payable on the date the order is made. The court has discretion to extend this by up to six months. Where the recoverable amount is agreed with the prosecution it is also possible to agree the timeframe for payment. This is especially likely where doing so gives the defendant the opportunity to avoid incurring an additional loss. Again full disclosure of the defendant's financial situation will help persuade a prosecutor that an extension of time is reasonable.

Conclusion

Confiscation orders have become an increasingly important consequence of prosecutions for regulatory offences, including in environmental law. The regime under POCA is explicitly draconian. Despite the requirement that orders comply with A1P1 of the ECHR and only interfere proportionately with an individual's possessions, confiscation proceedings can have devastating consequences. The potential for an order under POCA should be considered at the earliest stage and should guide tactical decisions. Where an order becomes inevitable a 'cards on the table approach' will often achieve a better result than trying to defeat the prosecution outright in a game of courtroom POCA.

Jeremy Phillips is co-author of the leading work in this area [The Law of Regulatory Enforcement and Sanctions – A Practical Guide](#), which examines the potential impact of the Regulatory Enforcement & Sanctions Act 2008. His involvement in major environmental and health and safety criminal cases has been both as prosecution and defence counsel.

John Jolliffe acts for operators and regulators in a range of environmental proceedings, including regulation and enforcement matters and associated civil proceedings. He is a council member of UKELA and is recommended for his environmental law work by the legal directories.

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UKELA in Sierra Leone

By Richard Honey, Barrister in Francis Taylor Buildings



In Issue 93 of *Elaw*, the UKELA chairman, Stephen Sykes, explained the goal of extending the reach of UKELA internationally. He spoke of contacts with South Korea and Brazil and explained that UKELA wanted “to reach out to the international community, both sharing our expertise and experiences and learning from others”. It is now proposed that UKELA joins with the UK Sierra Leone Pro Bono Network to do this in Sierra Leone.

Sierra Leone has suffered immeasurably from the Ebola outbreak but has now been declared Ebola-free. As the country tries to rebuild its economy, there is now all the more reason why the UK legal community should seek to assist the country in its efforts to uphold the rule of law and strike an appropriate regulatory balance between protecting the environment and exploiting the country’s natural resources – which include minerals and oil and gas, as well as land which could be used for large-scale agricultural projects.

The UK Sierra Leone Pro Bono Network is an informal umbrella group for UK legal professionals and organisations interested in providing pro bono legal assistance to Sierra Leone. It is chaired by Dame Linda Dobbs DBE, who stood down early as a High Court Judge in 2013 in order to pursue her interests in international legal and judicial training.

The Network seeks to act as a focus for demand from Sierra Leone for assistance (from both the Government of Sierra Leone and legal professionals and bodies), to

set out a long-term programme of work aimed at meeting that demand, and to co-ordinate UK lawyers to deliver that programme. As well as individual judges and barristers, and experts such as HMCTS staff, the Network is supported by solicitors from firms such as Herbert Smith Freehills, Eversheds, Hogan Lovells and White & Case, and local and central government bodies.

The Network has developed a proposal for a co-ordinated, long-term plan of work in Sierra Leone, focussing on the priorities in the country’s post-Ebola recovery strategy. The plan includes assisting with the strengthening of legal institutions, a capacity building training programme for lawyers and the judiciary, and remote advice and assistance. Organisations already involved include the Advocacy Training Council, the Association of Law Teachers, the British and Irish Association of Law Librarians and the Chartered Institute of Arbitrators.

UKELA members would recognise not only the legal system in Sierra Leone, being based on England’s legal system prior to independence in 1961, but also much of the law which applies today. This covers both common law topics, such as toxic torts and judicial review, and also legislative provisions. The town and country planning, wildlife conservation and minerals regimes would not look too unfamiliar to UK lawyers. Sierra Leone also has environmental impact assessment laws modelled on the European EIA Directive.



Law Students from the University of Makeni, Sierra Leone, December 2015

The problems which exist in the management and regulation of the environment in Sierra Leone do not arise from a lack of law. They arise from the lack of implementation of, compliance with, and enforcement of, the law. In truth, whilst the system exists, it barely works in practice. But sustainable environmental protection is a key part of the Government of Sierra Leone's Agenda for Prosperity plan, including an effective environmental management system and responsible natural resource exploitation.

UKELA's work in Sierra Leone is at the very earliest stages of planning, but – with volunteer support from our members – it could involve legal and technical members of UKELA providing in-country and remote support to bodies such as for example the Sierra Leone Environmental Protection Agency, the National Protected Area Authority or the National Minerals Agency. It could also involve providing in-country and remote training to lawyers and others working in environmental law, and undertaking case work with NGOs dealing with for example the environment, nature conservation, water, fisheries, forestry, natural resources or land rights.

If you are interested in getting involved in UKELA's work in Sierra Leone please contact Stephen Sykes at stephen@ukela.org. You can also find out more about the UK Sierra Leone Pro Bono Network by visiting their [website](#).

Richard Honey is a barrister at Francis Taylor Building in the Temple, specialising in public and environmental law. He is chairman of the steering group of the UK Sierra Leone Pro Bono Network and has visited the country to provide pro bono advice and training four times between 2012 and 2015. He plans to return again later this year.



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The editorial team is looking for quality articles, news and views for the next edition due out in July/August 2016. If you would like to make a contribution, please email elaw@ukela.org by 13 July 2016.

Letters to the editor will be published, space permitting.

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