



WOULD EARTH LAW CHANGE THE FACE OF ENVIRONMENTAL LAW IN ENGLAND?

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Abstract

This article aims to compare Environmental Law in England with the established body of Earth Law which currently exists internationally. It provides an analysis of English Law as it applies to marine protection, environmental permitting and wildlife conservation and critically analyses whether they are doing enough to ensure a conservationist regime. Further, it explores the Earth Law movement and how it might influence and change the application of Environmental Law in England. Particular attention is paid to academics and writers such as Christopher Stone, Rachel Carson and Cormac Cullinan. Examining the shift we as human beings must take from an anthropocentric stance to one of ecocentric and biocentric beliefs in order to support the Earth.

Introduction

The evolution of humans is one of the Universe's great wonders. The trouble with evolution is that often a species becomes so highly evolved that it becomes a danger to itself, according to the view of Peter Zappfe in the *The Last Messiah*.² The economic drivers of our society are built on a foundation of the capital and sustenance that nature provides. By that very notion, nature should be at the centre of the system which we have created and not taken for granted, either now or in the future. The environment is rapidly deteriorating and this is a present threat to humanity. In fact, we are living in and through the age of the Anthropocene. (Anthropocene comes from the Greek word for human ('anthropo') and new ('cene')). It was founded in the 1980s, then made popular in 2000 by the chemist Paul J. Crutzen and researcher Eugene F. Stoermer: '[T]he duo suggested that we are living in a

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² Philosophy Now, 'The Last Messiah' <https://philosophynow.org/issues/45/The_Last_Messiah> accessed 14 April 2022

new geological epoch.³

We are destroying and using the Earth's resources faster than they can be replenished and repaired: water systems are under threat (which is not helped by our ever-growing population), the air is becoming increasingly polluted, marine life and ecosystems are being destroyed and species are going extinct. It is clear the wellbeing and maintenance of our earth is not our highest or even (some would say) any priority; we are in the grip (inter alia) of the neo-capitalist era which places GDP above the sanctity of the earth. If we continue to ignore the growing threat of the Anthropocene, then it is very likely that we will see millions and possibly a few billion people wiped from the face of the earth; that, or we will see mass migration on a scale hitherto unknown. Our inattention and annihilation of the natural world and its resources is unjustifiable and not sustainable. We need radical change in the way we view, protect and preserve nature in order to remedy the deteriorating situation. Notable commentators have observed that human progression, whilst significant, 'threat[ens] [our] existence'.⁴ Whilst we have made great discoveries, developments and progression we have degraded and fragmented the 'biodiversity-rich ecosystems' to a point where they will never be restored.⁵

Environmental law in England goes some way towards recognising the need for a 'balance between environmental protection and economic development'⁶ but this has proved difficult because 'law making is almost entirely anthropocentric since...the culture in which the laws are made is also anthropocentric'.⁷ The concept of anthropocentrism derives from the 'ethical belief that humans alone possess intrinsic value'.⁸ The way in which the current laws are shaped wholly encapsulates an 'enlightened anthropocentrism'.⁹ This view looks at the relationship between humans and nature, highlighting how nature is something which humans can use and any form of environmental protection is based around the productivity

³ Natural History Museum, 'What is the Anthropocene and why does it matter?'

<<https://www.nhm.ac.uk/discover/what-is-the-anthropocene.html>> accessed 3 May 2022

⁴ Ian Sample 'Most threats to humans come from science and technology, warns Hawking' *The Guardian* (London, 19 January 2016) <<https://www.theguardian.com/science/2016/jan/19/stephen-hawking-warns-threats-to-humans-science-technology-bbc-reith-lecture>> accessed 14 April 2022

⁵ Patrick Greenfield 'World fails to meet a single target to stop destruction of nature – UN report' *The Guardian* (London, 15 September 2020)

<<https://www.theguardian.com/environment/2020/sep/15/every-global-target-to-stem-destruction-of-nature-by-2020-missed-un-report-aoe>> accessed 14 April 2022

⁶ UKELA, 'Wild Law: Is there any evidence of earth jurisprudence in existing law and practice?' (2009) PL 55

⁷ *ibid*

⁸ L. Goralnik, M.P. Nelson 'Anthropocentrism' (2012) ScienceDirect <<https://www.sciencedirect.com/topics/social-sciences/anthropocentrism>> accessed 14 April 2022

⁹ Ilona Cheyne and John Alder 'Environmental Ethics and Proportionality: Hunting for a Balance' [2007] *Env. L. Rev.* 2007, 9(3), 171-189

and progression of human beings: the whole concept aims to utilise nature for the benefit of mankind. Anthropocentrism is the antithesis of ecocentric and biocentric beliefs. Ecocentric beliefs encapsulate the view that nature is as important as, if not more so than, human beings.

The difficulty we face is that the societal, governmental and political structures which encompass and govern our existence and proliferation are constructed through and based upon anthropocentric ideals. In order to move away from this purview towards a future which is more environmentally engaged, we need to question the very constructs which we so vehemently hold to and cherish. There is a hierarchical structure which oppresses nature and this must change. Rachel Carson considered this many years ago, particularly the ethical issues surrounding the environment and the 'moral relationship between human beings and [the] natural environment.'¹⁰ One of the reasons for the lack of environmental protection can be adduced from the presumption that by allocating more protection to nature, economic growth will be stifled. But this is not the case (as evidenced by the 'net economic benefit' of the new clean energy sector)¹¹ and will be wholly irrelevant if our planet becomes uninhabitable.

This article aims to explain why, by inculcating and expanding Earth Law into English Environmental Law, the institutional frameworks which currently exist would change for the better. The focus will be on three main areas: Environmental Law in England, more specifically: marine protection, permitting and wildlife conservation; Earth Law (the origin and concept); and how Earth Law could change the face of Environmental Law in England. Reliance is placed upon references from academic articles, cases, statutes and books. The aim is to draw attention away from the current laws and focus instead on how the future of our legal system could look very different if Earth Law was a component part of English Environmental Law.

Law is an important and powerful instrument in a democratic or even an authoritarian society (as evidenced by the current conflict in Ukraine and the Presidential decrees passed by Putin). It affords the state, companies and individuals the opportunity to shape the way in which they/we live out our lives or defend an inalienable right. Sadly, as things stand, the Earth does not have a discreet voice and certainly there is no acknowledged corpus of Earth

¹⁰ Yuwa Wei 'Is China Prepared to Face the Looming Energy Crisis? The Facts and Laws' [2011] I.E.L.R. 2011, 7, 297-303

¹¹ Brandon Rosenbach, 'Earth Law Makes Economic Sense' (*Earth Law Centre*, 2019) <<https://www.earthlawcenter.org/blog-entries/2019/2/earth-law-makes-economic-sense>> accessed 18 April 2022

Law in England – or none that is expressly set out that way. Earth Law, if adopted or interwoven with the existing statutory regime and case law, could change things in a dramatic and profound way (and ecocide could be included under the rubric of Earth Law) by looking at the ‘legal, social, economic and scientific’ factors in a more holistic sense.¹² The current Environmental Laws focus on interdisciplinary work: science and law. It is clear that ‘science helps determine many legal standards’¹³ as it has always played a vital role in Environmental Law. But Earth Law would be multidisciplinary: drawing on science, academics, law and indigenous ideologies. The main barrier which the current laws face is that they require a great deal of certainty. For example, the principles which they rely upon, i.e. the precautionary principle. But it is clear and evident that ‘nature is unpredictable’¹⁴ and therefore even the most ‘preventative approaches [do] not... provide evidence of embracing precaution’.¹⁵

Humans have a responsibility to the planet that we inhabit. The Earth Law movement encapsulates the relationship between ‘human interests and those of the natural world’¹⁶ in highlighting that ‘nature has a value in its own right’.¹⁷ This concept has become established, gaining traction to the point that it is not now considered to be either novel or unusual. It has become very comprehensible that ‘[e]mpowering nature empowers communities’.¹⁸ This article assesses whether the implementation of Earth Law into the English legal system would change the approach to Environmental Law making in England. This matter is important set against the backdrop of the Government’s pledge to achieve net zero by 2050 and whether it is realistic, let alone achievable.¹⁹

The starting point for any discussion on Earth Law is the pioneering work of the late Professor Christopher Stone. He wrote the seminal article ‘Should Trees Have Standing? Law, Morality, and the Environment’ in 1972 which was a rally for the rights of nature movement. To take one example from his thinking in respect of the environment, he claimed that: *‘[T]he cycle of life is intricately tied up with the cycle of water ... the water system has to remain alive if we are to remain alive on earth.’*²⁰ These ideas mirror those of Earth Law and are a

¹² John McEldowney and Sharron McEldowney ‘Science and Environmental Law: Collaboration across the Double Helix’ [2011] *Env. L. Rev.* 2011, 13(3), 169-198

¹³ *ibid*

¹⁴ McEldowney (n 12)

¹⁵ *ibid*

¹⁶ UKELA (n 6)

¹⁷ *ibid*

¹⁸ Rosenbach (n 11)

¹⁹ GOV.UK, ‘Net Zero Strategy: Build Back Greener’ (19 October 2021)

<<https://www.gov.uk/government/publications/net-zero-strategy>> accessed 14 April 2022

²⁰ Christopher D. Stone, ‘Should Trees Have Standing?: Toward Legal Rights for Natural Objects’ (1972) *South California Law Review* 45, 450-501, 492

good place to start.

1 – Environmental Laws in England

Environmental Law is complex: it is drawn from a variety of sources including, statutes, directives, regulations and agreements/protocols. This level of complexity has prompted commentators to observe that: ‘International law, European Union (EU) law and domestic law...are increasingly interdependent’, mirroring the transboundary nature of some elements of environmental protection and noting the interconnectedness of natural systems.²¹ The EU has had a significant impact on the development of UK Environmental Law and, despite the rhetoric around the UK’s exit from the EU, ‘[has had] a significant and very positive influence on the environment’.²² Following the UK’s withdrawal, the position is subject to change. Despite the European Union (Withdrawal) Bill setting out the need to keep the law steady and continuous, the coming into law of the Environment Act 2021 altered the relationship between the EU and English Environmental Law, e.g. the independent oversight of statute implementation. Even with leaving the EU there are still obligations to uphold under ‘international treaties and agreements’²³, which can be seen in Part 1 of the Environment Act 2021, particularly s.1(3) which focuses on the priority areas such as air quality, water, biodiversity/resource efficiency, requiring targets to be set and achieved. Given the breadth of Environmental Law in England, the main focus of this section will be on the laws relating to marine protection, permitting and wildlife conservation.

1.1 Marine Protection

Despite the interconnectedness of the ocean, the United Nations Convention on the Law of the Sea 1982 (LOSC) divides it between territorial and jurisdictional responsibility. Territorial waters ‘extend to...12 nautical miles from the baseline of a coastal State’ and jurisdictional responsibility focuses on the laws and policies which a state may wish to implement.²⁴ The marine environment in England is protected and governed by the Marine and Coastal Access

²¹ Stuart Bell, Donald McGillivray, Ole W. Pederson, Emma Lees, Ellen Stokes, *Environmental Law* (9th Edition, Oxford University Press 2017) 94

²² UKELA, ‘Impact of EU Membership on UK’s Environmental Laws’ <<https://www.ukela.org/UKELA/ReadingRoom/Brexit/Impact-of-EU-Membership.aspx>> accessed 1 February

²³ *ibid*

²⁴ Porter. Hoagland, ‘Ocean Interfaces & Human Impacts’ (2019) Science Direct <<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/exclusive-economic-zone>> accessed 18 April 2022

Act 2009 (MCAA) which deals with 'marine functions and activities'.²⁵ The EU has greatly enhanced marine protection by imposing Directives, including for example the Bathing Water Directive, the Habitats Directive and, more recently, the Marine Strategy Framework Directive which was enacted in 2008 prior to the MCAA.²⁶ The MCAA was enacted to ensure positive marine management. Whether this has been achieved is debatable. Namely, it is clear the marine environment is in decline as a result of 'biodiversity loss, pollution, climate change and overfishing'.²⁷

The MCAA introduced (*inter alia*) the Marine Management Organisation (MMO), provisions which enabled the UK's declaration of exclusive economic zones (EEZ), marine licensing and marine conservation zones (MCZ). Amongst other intentional agreements, the legislation highlights the UK's commitment to the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), in which all of the UK's relevant marine areas are contained. The purpose of the MMO is to 'protect and enhance [the] marine environment'.²⁸ MMO's duty is paramount in ensuring 230,000 km² is managed effectively. The EEZ was established by an Order (The Exclusive Economic Zone Order 2013) and accepted by the MCAA as the United Kingdom had never imposed the EEZ's before.²⁹ This Order highlighted that the United Kingdom has jurisdiction over the 'natural resources'.³⁰ Schedule A and B identified the specific areas of the economic zones through longitude, latitude and line type following the point. Licences are required for activities to take place to enable, for example, marine development, which is dealt with by the MMO in England. These licences can often be applied as a defence to a prosecution, for example, if a discharge is made to controlled waters, unless that discharge is of a character that is controlled by the Environment Agency.

It was highlighted at the World Summit on Sustainable Development in 2002 that marine life

²⁵ Marine and Coastal Access Act 2009, Introductory Text

²⁶ Respectively, Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora; Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy.

²⁷ Millicent McCreath, 'Community Interests and the Protection of the Marine environment within National Jurisdiction' [2021] I.C.L.Q. 70(3), 569-603, 2

²⁸ Marine Management Organisation 'Our MMO Story – the next ten years' (2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901328/mmo_the_next_10_years_web.pdf> accessed 1 February 2022

²⁹ Marine and Coastal Access Act 2009, s.41

³⁰ R. Hannesson, 'Exclusive Economic Zone' [2013] Science Direct <<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/exclusive-economic-zone>> accessed 10 April 2022

was in crisis.³¹ When the Government implemented the MCAA it did so to lay the foundations for a 'clean, healthy, safe, productive and biologically diverse ocean'.³² The objectives were clear. They included effective marine management, stronger protection of marine resources and clear frameworks in place for decision-making when it comes to the marine environment. Evidently, if these targets were achieved, then it would be recognised on the world stage that 'resurgence of life in the sea' is possible and marine industries could still prosper.³³ However, despite the implementation of this progressive Act there are questions as to whether it has achieved very much. There are currently 91 marine conservation zones in England. In 2014 it was discovered that none of the 27 zones declared in 2013 had any form of new protection when compared to the previous position. Often measures which were imposed (on fisheries for example) were voluntary, putting the onus on individuals to apply a moral compass to act in the best interests of the environment (which often threatens the bottom line/profit). Despite there being 91 conservation zones, it is clear that even in 2022 there is still ineffectual protection. An example of which can be seen by the MCZ which is located as the South West approaches the Bristol Channel; this is off the north coast of Cornwall. This area is protected, as it holds 'fine sediments, coarser sediments, shell fragments, gravels, shingles and cobbles', which allow species such as 'worms, razor clams, anemones, sea cucumbers and sea urchins' to thrive.³⁴ Unfortunately, bottom trawling still takes place in this area, disrupting organisms which are filter feeding, as through churning the sediments up, carbon is put back into the water.

The MMO is responsible for the MCZs – as per the MCAA – but other designated Marine Protected Areas (MPAs) – inter alia, coastal Sites of Special Scientific Interest (SSSIs) or European Sites – are often governed by other bodies such as Natural England. MPAs are in place to aid 'recovery of marine wildlife and their habitats'³⁵ and deal with 'area[s] of intertidal or sub tidal terrain'.³⁶ MPAs are there to benefit species which have been exploited, enhance knowledge, diversify certain populations and conserve biodiversity.

³¹ World Summit on Sustainable Development, *Draft plan of implementation of the World Summit on Sustainable Development* (2002) 17

³² HM Government *UK Marine Policy Statement: A Draft for Consultation*, para 2.1

³³ Callum Roberts 'England's marine conservation network is worse than useless' *The Guardian* [2014] <<https://www.theguardian.com/environment/2014/jun/17/england-marine-conservation-zones>> accessed 2nd February

³⁴ Marine Conservation Society, 'Marine Protected Areas at Risk' <<https://www.mcsuk.org/ocean-emergency/marine-protected-areas/marine-protected-areas-at-risk/>> accessed 18 April 2022

³⁵ Marine Conservation Society 'Why Marine Protected Areas are important' <<https://www.mcsuk.org/ocean-emergency/marine-protected-areas/why-marine-protected-areas-are-important/>> accessed 6 February 2022

³⁶ Graeme Kelleher 'Guidelines for Marine Protected Areas' (1999) IUCN, Gland, Switzerland and Cambridge, UK, xxiv +107pp

However, despite this being a step in the right direction in terms of conservation, there are fundamental issues with this system, in particular, the integration of coastal management. Marine activities are managed by different bodies which will have different levels of supervision for Marine Protected Areas. Natural England can designate within territorial waters; the Joint Nature Conservation Committee advise the government on offshore MPAs; and the MMO are in charge of enforcing the MCZs. This system ultimately lacks integration and clarity, which has a knock-on effect when it comes to effectively protecting the environment.

MCZs protect certain habitats and species which are under threat.³⁷ However, the focus of the legislation is questionable: issues tend to arise when ‘balancing the protection of ecological interests against...economic activities’.³⁸ *Ipsa facto*, the effectiveness of this piece of legislation is ultimately restrained. This theme runs across many areas of environmental protection in England.

The original targets for MCZs had specific nature conservation purposes (rather than a broader focus – as per Marine Spatial Planning) but they were arguably “tentative and limited in impact.”³⁹ Scientists have said that the obfuscation around the MCAA is there to convey an ‘illusion of protection’⁴⁰ rather than meaningful change. In 2020 it was discovered that more than 97% of the areas in England which are under statutory protection (through being a protected zone) were in fact being dredged and trawled. This style of fishing is one of the most destructive and yet it is happening in ‘71 out of 73 offshore MPAs around the UK’.⁴¹ The reason given for this complete failure to protect areas of conservation was that the government could not impose tougher restrictions due to the EU’s fishing policy. That surely means that the UK’s provisions for MPAs/MCZs are ineffective and a waste of resources.

However, there are MPAs which are effectively protected on the global stage. An example of this can be seen through the work done by OCEANA. In October 2021 their long-standing campaign in New England was successful and an Order was signed by President Biden to ‘protect deep-sea coral areas from destructive fishing methods...as part of its “freeze the

³⁷ Marine and Coastal Access Act 2009, s.129A

³⁸ Lynda M. Warren, ‘New Approaches to Nature Conservation in the UK’ [2012] *Env. L. Rev.* 14(1), 44-52

³⁹ Anne-Michelle Slater and Jim Claydon ‘Marine spatial planning in the UK: a review of the progress and effectiveness of the plans and their policies’ [2020] *Env. L. Rev.* 22(2), 85-107, 2

⁴⁰ Roberts (n 33)

⁴¹ Karen McVeigh, ‘Revealed: 97% of UK marine protected areas subject to bottom-trawling’ *The Guardian* (London, 9 October 2020)

<<https://www.theguardian.com/environment/2020/oct/09/revealed-97-of-uk-offshore-marine-parks-subject-to-destructive-fishing>> accessed 9 February 2022

footprint” strategy.⁴² Further, the Marine Stewardship Council is an organisation which aims to tackle overfishing by helping fisheries with new methods to protect marine life. In 2017 it worked with fisheries in Chile to ‘better understand its impacts on deep sea habitats and ecosystems’.⁴³ Another example can be seen through the work done by the Blue Marine Foundation. They have had a very important impact on marine conservation; inter alia in 2010 they aided the creation of the MPA ‘around Chagos in the Indian Ocean’.⁴⁴ Greenpeace have also made great advances following their campaign to protect the MPAs: ‘[t]he government is proposing to completely ban bottom trawling in...Marine Protected Areas, including the Dogger Bank’.⁴⁵

The current environmental laws in England which govern marine protection show clear signs of moving towards a more conservationist regime. However, this protection needs to be more coherent, more ambitious and the system needs to move a lot faster if we, as a species, have any chance of dealing with the ‘climate emergency’.⁴⁶

1.2 Environmental permitting

The current Environmental Permitting (England and Wales) Regulations 2016 (EPR) were implemented to ensure the legislation holistically dealt with industrial pollution impacting the environment. It streamlined previous legislation, including the Environmental Protection Act 1990, transposing the Industrial Emissions Directive and the IPPC Directive, amongst others. This was done to create an integrated system to control pollution. The EPRs are a permitting and licensing scheme operated by the Environment Agency (EA). The EA is the expert body which determines which conditions are necessary to impose on operators (*Levy v EA*).⁴⁷ It can also review, revoke and refuse to grant a licence if it is unlikely that the operator would be able to meet the permitting requirements, as identified in the case of *R v SoS Environment & or v Wiltshire DC*.⁴⁸ An operator who wishes to use a ‘regulated facility’ will apply to the

⁴² OCEANA, Protecting the World’s Oceans ‘Victories’ <<https://oceana.org/victories/>> accessed 10 April 2022

⁴³ Marine Stewardship Council ‘Fisheries Improving’ <<https://www.msc.org/uk/what-we-are-doing/our-collective-impact/fisheries-improving>> accessed 10 April 2022

⁴⁴ Blue Marine Foundation ‘About us’ <<https://www.blumarinefoundation.com/about/impact/>> accessed 10 April 2022

⁴⁵ Greenpeace ‘What we know (and don’t know) about the government’s new ocean protection plans’ <<https://www.greenpeace.org.uk/news/bottom-trawling-marine-protected-areas-government/>> accessed 10 April 2022

⁴⁶ Karen McVeigh ‘UK to trial ‘highly protected marine areas’ in win for ocean *The Guardian* campaigners’ (London, 9 June 2021 <<https://www.theguardian.com/environment/2021/jun/09/uk-to-trial-highly-protected-marine-areas-in-win-for-ocean-campaigners>> accessed 15 February 2022

⁴⁷ [2002] EWHC 1663 (Admin)

⁴⁸ (1993) 65 P. & C.R. 137

Environment Agency (who will consult, as in *Edwards v EA*)⁴⁹ and then certain conditions/controls will be imposed upon them, to ensure the environment is not detrimentally affected, due to the regulated activity.

The EPRs deal with groundwater and surface water discharge (Regulation 12), pollution offences (Regulations 12 and 38) – *R v L*,⁵⁰ penalties (Regulation 39) – *R v Thames Water Utilities*,⁵¹ and clean up/prevention.⁵² Despite the EPRs bringing together the somewhat convoluted regulations and moving towards a more holistic approach, there has been evidence to suggest that these provisions protect ‘what is left of nature and natural habitats...[instead of looking at the]...protection and enhancement of nature in its own right’.⁵³ For example, in the recent fracking case in Lancashire (*Cuadrilla Elswick Ltd v Lancashire CC*)⁵⁴ a permit was granted to Cuadrilla to frack for shale gas; there is currently a moratorium in place on fracking in the UK. However, due to the current situation between Ukraine and Russia, the government has given the ‘British Geological Survey three months to assess any changes to the science around the controversial practice’.⁵⁵ Arguably, the framework itself focuses on ‘human preservation’⁵⁶ through the application of ‘human-centred, top-down governance instruments’,⁵⁷ rather than environmental protection.

The permits granted by the EA regulate the activity that is likely to cause environmental harm. The monies that are collected in return for a permit are often used to offset the ‘illegal activity that operates without one’.⁵⁸ If a permit is breached, the most likely cause of action would be a fine, especially when ‘punishing a company’,⁵⁹ as per *R v Thames Water Utilities Ltd*.⁶⁰ The EPRs have been enacted into the English legal system as a mechanism to effectively protect the environment, whilst humans operate certain activities which would otherwise cause environmental degradation. However, in practice they are often ineffective. There have been allegations that the EA does not do enough to deter companies/individuals from

⁴⁹ (*no. 2*) [2007] Env LR9

⁵⁰ [2008] EWCA Crim 1970, [2009] Env LR 7

⁵¹ [2015] Env LR 36

⁵² Environmental Permitting (England and Wales) Regulations 2016 (EPR), Regulation 44

⁵³ UKELA (n 6) 9

⁵⁴ [2017] EWHC 808

⁵⁵ ‘Business Secretary Kwasi Kwarteng orders scientific review of fracking impact’ *BBC News* <<https://www.bbc.co.uk/news/uk-politics-60999026>> accessed 2 May 2022

⁵⁶ UKELA (n 53)

⁵⁷ *ibid* 11

⁵⁸ Rachel Salvidge ‘Staff blow whistle on Environment Agency that ‘no longer deters polluters’ *The Guardian* (20 January 2022) <<https://www.theguardian.com/environment/2022/jan/20/environment-agency-cuts-staff-blow-whistle>> accessed 17 February

⁵⁹ Neil Parpworth, ‘Environmental Offences, the Sentencing Guideline and Custodial Sentences’ [2021] J.P.L. 9, 1063-1071

⁶⁰ [2019] EWCA Crim 1344

polluting. This is despite the £94m that the government put in place for the Agency to do protection work, although it must be highlighted that it used to receive £120m, which was cut. The 'precautionary principle' that the Agency is based on is being neglected.⁶¹ In January 2022, after the news broke about the pollution of UK rivers, it was discovered that the EA was trying to silence staff who wished to criticise the organisation. A further example can be seen by the recent case involving the River Tone. The EA cut down a bank of trees along the side of the river, as there was a risk of flooding which would cause damage to the properties. This case questions what kind of balance the EA is attempting to uphold between the prosperity of human beings and the importance of the environment. However, the EA has the power to impose considerable sanctions, which ultimately helps to protect the environment. An example of this is the case of *EA v Severn Trent Water Ltd.*⁶² Here the water company was fined £1.5m for discharging sewage illegally into the watercourses in the Worcestershire area.

The EPRs are focused and clear. In practice, they ensure the environment is considered when any decision is taken. However, the legislation lacks effective implementation, which questions the very nature of the impact they have in English law.

1.3 Wildlife Conservation

The final piece of English legislation which will be considered is the Wildlife and Countryside Act 1981 (WCA). The WCA deals with issues surrounding conservation, the killing or taking of wild animals, endangered species and sites of special scientific interest (SSSI). The WCA codifies certain parts of international law, including the Bern Convention⁶³ and the Ramsar Convention.⁶⁴ It has been amended to reflect the Habitats Directive, as it predates the Habitats Directive by 11 years.⁶⁵

There are 4,000 SSSIs in England, which in turn place a duty on the Council 'to notify...the local planning authority...every owner and occupier...[and]...the Secretary of State' that this is the case. Although there is a duty to notify the JNCC (Joint Nature Conservation

⁶¹ Salvidge (n 58)

⁶² [2021] Env. L.M.

⁶³ Council of Europe 'Presentation of the Bern Convention' <<https://www.coe.int/en/web/bern-convention/presentation>> accessed 10 April 2022

⁶⁴ Ramsar Convention 'About the Convention on Wetlands' <<https://www.ramsar.org/about-the-convention-on-wetlands-0>> accessed 10 April 2022

⁶⁵ European Commission 'The Habitats Directive' <https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm> accessed 9 April 2022

Committee), this is discretionary, as per *R v NCC exp London Brick*.⁶⁶ The notification must include the operations which are likely to cause damage. This can often be wide in scope, as per *Sweet v SoS & NCC*.⁶⁷ Once an SSSI is put in place there is a duty to act in accordance with it, and if there are any changes to the site then consent from a conservation body must be sought (s.28E(3)(a)). It must be done in accordance with a site management agreement (s.28E(3)(b)) and in accordance with a management scheme/notice to ensure there is full compliance with the SSSI (s.28E(3)(c) and s.28J and K).

The offences relating to SSSIs fall under s.28P WCA and they focus on, inter alia, breaching s.28E, intentionally or recklessly destroying a SSSI and any failure to comply with a notice. Penalties may amount to a large fine, as per the case of *R v Bellway*⁶⁸ where a building firm had to pay £600,000 for destroying a bat roost. This Act is more robust than previously. It has the potential, if used, to deter environmental threats. If there is any development near to or on an SSSI then an Environmental Impact Assessment (EIA) will be required, which ensures maximum protection for areas of sensitivity. The EIA process is dealt with under separate legislation and processes, but the point here is about the proximity to a protected site. Despite this thorough and clear framework, there will always be a threat from developments which have not been notified or had consent from the NCC (this is an offence under s.28E(1)). This Act 'promotes positive conservation action' and ensures those who commit wildlife crimes are held accountable.⁶⁹ This has promoted commentators such as Last to observe that 'the impact has been generally positive'.⁷⁰ However, it is important to consider whether the fundamental principles of the Act have been transposed into English law in the way they were originally intended.

After considering elements of English Environmental Law, it is necessary to consider whether the UK will adopt unilateral guidance from international jurisdictions, now that it has left the EU. The Environment Act 2021 identifies international principles, e.g. the integration principle, the prevention principle, the rectification at source principle, the polluter pays principle and the precautionary principle. But there are still concerns around the impact this legislation will have on economic and sustainable development. The relevance of the Environment Act 2021 being enacted is self-evident. European laws which have transcended and dictated the UK's position with regard to the environment are clear. It is important to say

⁶⁶ [1996] ENV. L.R. 1

⁶⁷ [1989] 1 WLUK 710

⁶⁸ [2021] EWCA Crim 2031

⁶⁹ RSPB, 'Law Commission review of wildlife law' <<https://www.rspb.org.uk/our-work/policy-insight/working-with-the-law/law-commission-review/>> accessed 20 February 2022

⁷⁰ Kathryn V. Last, 'Habitat Protection: Has the Wildlife and Countryside Act 1981 Made a Difference?' [1999] J. Env. L. 11(1), 15-34

that as soon as the UK left the European Union, ‘rules on nature protection, water quality, clean air and other environmental protections that originally came from Brussels were at risk’.⁷¹ Therefore, the Environment Act 2021 ensures ‘targets, plans and policies’⁷² are still in place to ensure strong environmental protection moving forward. It is arguable that the focus in England differs greatly from the international perspective – *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd.*⁷³ The Environment Act 2021 also highlights the importance of The Office of Environmental Protection.⁷⁴ It is the ‘new environmental watchdog’.⁷⁵ Despite the Environment Act 2021 being a positive step in the right direction, it does not match the world leading targets on environmental protection.⁷⁶

The Environmental Law matrix embedded in the UK is extensive and thorough. There is significant case law, which deals with the issues that the population are having to come to terms with apropos the ‘environment’. This case law is premised upon agency or ownership in respect of the loss or damage occasioned to either personal or community interests. However, the one area which seems to have been left out of the legislation, case law and academic commentary until relatively recently, is the recognition that the Earth is capable of having legal rights and/or personality. These rights need to be written into English Law because without them, the health of the Earth will continue to decline and make our existence difficult, if not impossible.

This section has prefaced the discussion on whether Earth Law would change the face of English Environmental Law by identifying the current systems in the UK. Focusing on three main areas of interest: marine protection, environmental permitting and wildlife conservation. It is evident that although this system is detailed, thorough and at times complex, it does not do enough to efficiently protect our planet in the way it should: *ipso facto*, it is in rapid decline. The next section will go some way to identify the origin of Earth Law: what it is, how it works in practice and whether it is effective.

⁷¹ Client Earth, ‘What is the UK Environment Act, and why do we need it?’ (1 April 2022) <<https://www.clientearth.org/latest/latest-updates/news/why-the-uk-environment-bill-matters/>> accessed 1 December

⁷² Environment Act 2021, Chapter 30

⁷³ [2021] 2 All E.R. 967

⁷⁴ The Office of Environmental Protection <<https://www.theoep.org.uk/office-environmental-protection>> accessed 10 April 2022

⁷⁵ Client Earth (n 71)

⁷⁶ Client Earth ‘The UK Environment Act - what's happening now?’ (1 April 2022) <<https://www.clientearth.org/latest/latest-updates/news/why-the-uk-environment-bill-matters/>> accessed 10 April 2022

2 – Earth Law

Earth law jurisprudence or the rights of nature movement has a multiplicity of sources. In 1962 Rachel Carson wrote her groundbreaking book *Silent Spring*. This book addressed the ‘industrial malpractice’⁷⁷ which was taking place with ‘chemical pesticides’.⁷⁸ Carson’s neoteric outlook drew attention from chemical companies, who attempted to discredit her. Throughout the book, Carson identified the old-fashioned ideologies which were taking place, i.e. that ‘nature exists for the convenience of man,’⁷⁹ which indirectly caused ‘destruction’⁸⁰ to the natural world. This publication was inspiring and was a catalyst for ‘ecological awareness’.⁸¹ *Silent Spring* highlighted how a powerful rhetoric can often incite meaningful change, so much so that ‘President Kennedy set up a...Science Advisory Committee to study the problem of pesticides’.⁸²

In 1972 Professor Christopher Stone wrote the seminal article, ‘Should Trees Have Standing?’ This was a contemporary of case law such as *Sierra Club v Morton* (1972). In *Sierra*, Disney wished to build a resort in the Mineral King Valley (Sierra Nevada Mountains) and the Sierra Club (a conservationist environmental group) wished to sue on the basis that it would spoil the natural beauty of the area. It was held that the Sierra Club lacked standing. Justice Douglas’s dissenting judgment highlighted that throughout history ‘[I]nanimate objects are sometimes parties in litigation’⁸³ and subsequently questioned why ‘voice[s] of the existing beneficiaries’⁸⁴ (i.e. the environment) were not being heard. Stone was an ambitious conservationist who highlighted the obstructionist nature of environmental protection. He took the same view as many indigenous tribes and intellectualised them into a profound way procedural lawmakers could use: ‘[H]umans are not superior to the land: the land sustains the people.’⁸⁵ Stone’s work was criticised for being out of touch with the reality of the legal world. However, Stone demonstrated the need for earth rights/laws in order to change our human-centred approach to resource extraction and traducing the environment.⁸⁶

⁷⁷ Robin Mckie ‘Rachel Carson and the legacy of Silent Spring’ *The Guardian* (27 May 2012) <<https://www.theguardian.com/science/2012/may/27/rachel-carson-silent-spring-anniversary>> accessed 5 April 2022

⁷⁸ The life and legacy of Rachel Carson <<http://www.rachelcarson.org/>> accessed 5 April 2022

⁷⁹ Rachel Carson *Silent Spring* (Fawcett Publications 1962)

⁸⁰ *Ibid* 149

⁸¹ Mckie (n 77)

⁸² Carson (n 79) 9

⁸³ *Sierra Club v Morton* 405 U.S. 727 (1972)

⁸⁴ *ibid*

⁸⁵ Christopher Rodgers ‘A new approach to protecting ecosystems: the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017’ [2017] *Env. L. Rev.* 19(4), 266-279

⁸⁶ *ibid*

In 1972 the United Nations Conference on the Human Environment was held in Stockholm. This was the first world conference which made 'the environment a major issue.'⁸⁷ It was at this conference that the Stockholm Declaration (containing 26 principles) was put together and an Action Plan created to deal with the degradation of the environment. The United Nations Environment Programme (UNEP) also came out of the conference; UNEP are a 'global authority that sets the environmental agenda'.⁸⁸

In 1999 Thomas Berry introduced the term Earth jurisprudence in 'The Great Work' where he looked at the relationship between humanity and nature.⁸⁹ Berry's work considered 'the interests of the environment'⁹⁰ in an incorporeal manner. He acknowledged the sentiment that '[T]o harm the Earth is to harm the human'.⁹¹ Berry's work is often considered spiritual/religious in nature, which deals with very poignant points, namely, he identifies the 'disconnection [between] the natural world'⁹² and humankind.

Since the pioneering work of Carson and Berry, other academics have been greatly influenced and continue to develop the Earth Law movement. Cormac Cullinan published *Wild Law: A Manifesto for Earth Justice*,⁹³ which was heavily inspired by meeting Berry. Cullinan is a practising environmental lawyer based in Cape Town and is a strong advocate for Earth Jurisprudence. He highlights that human governance must progress in a way which balances human rights and the rights of nature: 'there cannot be rights for some without there being rights for all'.⁹⁴ Cullinan moves away from the spiritual nature of Berry's work and focuses heavily on the community of the Earth as a whole; namely, 'plants, animals, rivers and ecosystems'.⁹⁵

Aside from academics and practitioners, there have been constitutional and public-led movements to protect and advocate for Earth Law. In 2004 The Wild Law Conference was held by the United Kingdom Environmental Law Association (UKELA). UKELA is a charity

⁸⁷ United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm <<https://www.un.org/en/conferences/environment/stockholm1972>> accessed 6 April 2022

⁸⁸ United Nations Environment Programme, 'About UN Environment Programme' <<https://www.unep.org/about-un-environment>> accessed 6 April 2022

⁸⁹ Ben Pontin, 'The Law and Ethics of "living with" Coronavirus from an Earth Jurisprudence Perspective' [2019] E.L.M. 31(5), 181-182

⁹⁰ Olivia Hamlyn, 'Reassessing Environmental Impact Assessment: A Role for Wild Law?' [2011] E.L.M. 23(1), 7-19

⁹¹ Thomas Berry, 'The New Story' (2003) <http://thomasberry.org/wp-content/uploads/Thomas_Berry-The_New_Story.pdf> accessed 30 March 2022

⁹² Thomas Berry, 'The Meadow Across the Creek' (1993) <<https://thomasberry.org/the-meadow-across-the-creek/>> accessed 5 April 2022

⁹³ Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (1st edn, Siber Ink 2002)

⁹⁴ *ibid* [97]

⁹⁵ Simon Boyle 'On thin ice' *The Guardian* (8 November 2006)

<<https://www.theguardian.com/environment/2006/nov/08/ethicalliving.society>> accessed 6 April 2022

which 'aims to make better law for the environment'⁹⁶ through 'commentating on relevant issues'.⁹⁷ Further, in 2006 the Centre for Earth Jurisprudence was founded: a 'team of lawyers working to advance legal principles that will protect nature.'⁹⁸ It is clear that many understand the need for fundamental legal change with regard to the environment.

However, despite all the steps which have been taken internationally to recognise Earth Law as a valid legal concept, alongside, say, human rights, it is still viewed more as a concept than an area of black letter law that can and should be relied on to ameliorate the worst effects of the Anthropocene. As stated in the introduction, anthropocentric views focus on human beings as being of central importance, above nature.

Earth Law focuses on an ecocentric perspective of the law; namely, supporting the environment in order for it to thrive and evolve. Earth Law makes the environment central to all decisions: it is not the same as Environmental Law, nor is it an extension of the law of tort or contract. Tort law ensures 'corrective justice',⁹⁹ a system where the injured party is restored back to their original position before the wrong was committed, which indirectly acts as a deterrent. This, naturally, overlaps with Environmental Law as many of the systems in place act as a deterrent in order to prevent environmental harm. Earth Law assigns rights to nature, in the same way legal persons, 'companies or charities' do.¹⁰⁰ The main limitation which is faced by individuals wishing to protect the environment is that when they bring a claim under Environmental Law they must prove that they have locus standi. Also, there must be evidence of damage to the claimant or their property. This is problematic. Earth Law provides a remedy for this by giving 'the environment...legal recognition and the right to act on its own behalf',¹⁰¹ acknowledging the metaphysical relationship that exists between humans and the environment. It also allows for stewardship or guardianship. A steward/guardian may be appointed during the implementation process in order to give the Earth direct representation. This perspective is present in England à propos children, where a *Guardian ad Litem* is appointed by the Court to look after a child or young person's rights/interests. It is a system which allocates rights to nature, in a similar way to many indigenous communities, and recognises the Earth as a living entity. In New Zealand The Te

⁹⁶ UKELA <https://www.ukela.org/UKELA/About_Us/What-we-do/UKELA/About-Us/What-we-do.aspx?hkey=4e0ff2dc-d41d-4b29-997f-1014c3fb1a7a> accessed 6 April 2022

⁹⁷ Ibid

⁹⁸ Centre for Earth Jurisprudence 'Who We Are' <<http://www.earthjurist.org/whoweare>> accessed 6 April

⁹⁹ Mark Latham Victor E. Schwartz Christopher E. Appel, 'The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart' [2011] Fordham Law Review, Volume 8, Issue 2, 11

¹⁰⁰ Rodgers (n 85)

¹⁰¹ Ibid

Urewera holds legal status. This constitutional change was based on the 'Maori belief system that regards people and their environment as one'.¹⁰² The main pillar of this belief system is that all organisms on earth are symbiotically responsible for maintaining and protecting the ecosystem.

There are further examples where internationally indigenous ideology has been transposed into legal systems to protect the Earth. In 2008 Ecuador was the first country to recognise rights for Pachamama, or 'Mother Earth' (a living being) in its Constitution. The Constitution states that: '[N]ature... has the right... for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes'.¹⁰³ This step was seen as revolutionary and novel. The structural progression in this field was imposed to 'develop governance systems that preserve ecological integrity and prevent ecosystem disruption'.¹⁰⁴ This constitutional change not only recognised the need to grant rights to nature, but to give nature the highest form of legal protection 'to equalise the balance between rights to use and responsibilities to preserve'.¹⁰⁵

In 2011 a case was brought before the Provincial Court of Justice of Loja¹⁰⁶ on behalf of the Vilcabamba river, by Richard Frederick Wheeler and Eleanor Geer Huddle (two 'foreign citizens who... [lived] in... Vilcabamba').¹⁰⁷ A development of the nearby road was causing large amounts of rocks and construction materials to enter into the river and in turn the water cycle, causing damage to the river's ecosystem. The Court granted 'a Constitutional injunction in favour of nature, specifically the Vilcabamba River'.¹⁰⁸ In this case, Wheeler and Geer Huddle acted as stewards for the river, in order to represent it in a legal setting.

Despite this progressive step it is important to highlight that '\$10bn (£7.6bn) of trade finance since 2009'¹⁰⁹ has been invested into oil from the Amazon by European banks. In 2020 there

¹⁰² Rodgers (n 85)

¹⁰³ Republic of Ecuador, Constitution, Chapter Seven Rights of nature" (2008) <<https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>> accessed 18 March 2022

¹⁰⁴ Harriet Harden-Davies, Fran Humphries, Michelle Maloney, Glen Wright, Kristina Gjerde, Marjo Vierros, 'Rights of Nature: Perspectives for Global Ocean Stewardship' [2020] *Marine Policy* 122, 104059 [3]

¹⁰⁵ *ibid* 8

¹⁰⁶ Natalia Greene 'The first successful case of the Rights of Nature implementation in Ecuador' [2011] <<https://www.garn.org/first-ron-case-ecuador/>> accessed 8 April 2022

¹⁰⁷ Sofía Suárez 'Defending nature: Challenges and obstacles in defending the rights of nature Case Study of the Vilcabamba River' [2013] <<http://library.fes.de/pdf-files/bueros/quito/10386.pdf>> accessed 8 April 2022

¹⁰⁸ Greene (n 106)

¹⁰⁹ Fiona Harvey 'European banks urged to stop funding oil trade in Amazon' [2020] <<https://www.theguardian.com/environment/2020/aug/12/european-banks-urged-to-stop-funding-oil-trade-in-amazon>> accessed 8 April

was a pledge made that investment into oil drilling would be halted. In Ecuador there are '500,000 indigenous people'¹¹⁰ and the commercial nature of the drilling threatens their indigenous and ecocentric views.

In 2021 Ecuador's highest court ruled that mining in a protected forest violated the rights of nature. This was a huge step in the Earth Law sphere, as it was a 'victory for the global rights of nature movement'.¹¹¹ One of the important areas of the Court's ruling was the focus on the 'precautionary principle'. It is clear through Environmental Law that it is often better to avoid certain risks of destruction rather than cause damage, which may be irreversible. The precautionary principle should be used 'to assist with decision-making under uncertainty'¹¹² and is often applied in conjunction with 'reasonable scientific certainty'.¹¹³ Absolute certainty of destruction of the environment in certain cases is often hard to ascertain. In the instant case, the Court determined that neither the government or the mining company had performed adequate research into the effects of the mining. Los Cedros (the endangered forest) has '2,700 types of plants, at-risk species like the jaguar, spider monkey and spectacled bear'¹¹⁴ and since 2000 approximately 96% of the forest has been lost. This loss not only impacts the animals which inhabit the forest, but it has interrupted the ecological chain which exists in every habitat within the forest. This is why the decision by the Constitutional Court is so important. They highlighted in their judgment that the rights of nature 'do not constitute only ideals or rhetorical declarations, but legal mandates.'¹¹⁵ However, it is questionable whether protecting the remaining 4% of the forest is any major victory.

In October 2021, Peruvian Kukama women filed a lawsuit demanding the government to recognise the Marañón river as a living being (*Ser Vivo*). For the indigenous Kukama people the river is more than just a water source: it provides water; food; transport and offers them spiritual solace. This lawsuit was against the entities who were contaminating their river with

¹¹⁰ *ibid*

¹¹¹ Katie Surma 'Ecuador's High Court Affirms Constitutional Protections for the Rights of Nature in a Landmark Decision' Inside Climate News (3 December 2021)

<<https://insideclimatenews.org/news/03122021/ecuador-rights-of-nature/>> accessed 20 March 2022

¹¹² Science for Environment Policy 'Future Brief: The precautionary principle: decision-making under uncertainty' [2017]

<https://ec.europa.eu/environment/integration/research/newsalert/pdf/precautionary_principle_decision_making_under_uncertainty_FB18_en.pdf> accessed 15 March 2022

¹¹³ Colin T. Reid, 'Precautionary Principle' [2021] S.P.E.L. 2021, 206, 92-93

¹¹⁴ Surma (n 111)

¹¹⁵ Case No. 1149-19-JP/21: Review of Judgment of Protection Action Los Cedros Protected Forest [2021] <<https://www.corteconstitucional.gob.ec/index.php/boletines-de-prensa/item/1262-caso-nro-1149-19-jp-21-revisi%C3%B3n-de-sentencia-de-acci%C3%B3n-de-protecci%C3%B3n-bosque-protector-los-cedros.html>> accessed 8 April 2022

oil spills and mining alike, including Petroperú (one of the companies). The specific rights which the women (represented by Huaynakana Kamatahuara kana, a woman's federation) wanted for the river were: 'the right to exist, to flow, to live free from contamination, to feed... be fed by its tributaries... to be protected, preserved, and restored'.¹¹⁶ The Peruvian constitution protects the rights of indigenous people, so the very nature of the claim calls into question the fundamental rights which each individual should be afforded. If the river was given rights and a guardian was appointed, it would ensure that they are represented both at a national level and domestically.

In 2010 Bolivia granted rights to nature to enhance 'diversity, water, clear air, equilibrium, restoration [and] pollution free living'.¹¹⁷ These laws originate from Andean indigenous views, which focus on the Earth being the most important entity.¹¹⁸ Despite, at the time, these rights being viewed as somewhat unrealistic, the law was enacted and seen as a valuable step towards a more ecological worldview. Not only does this act as a pillar in the Earth Law movement, but it demonstrates to the rest of the world that the relationship between humans and the earth does not need to be asymmetrical: we can coexist and create a symbiotic relationship which leads to prosperity and survival of both the planet and human beings. However, despite the imposition of this law, it was also commercially important to recognise that Bolivia secures '\$500m (£305m) a year from mining companies';¹¹⁹ therefore, there was uncertainty around the overall impact of this constitutional change.

Since 2008, Bolivia, Ecuador, New Zealand, India, Columbia and a number of US States have recognised the importance of the rights of nature and written them into their constitution. As stated above, rights of nature derive from indigenous beliefs. In New Zealand, The Te Urewera Act was passed in 2014 which gave the Te Urewera forest rights and powers which equate to those of a living person. The Te Urewera has a spiritual value that must be protected. In 2017 the government recognised the Maori tribes' 'spiritual ancestor, the river Whanganui'.¹²⁰ In Columbia in 2017 the "Constitutional Court granted legal personhood to

¹¹⁶ Earth Law Centre 'Kukama Women Say their Marañón River is a Living Being: Groundbreaking Lawsuit Filed in Peru' (12 October 2021) <<https://www.earthlawcenter.org/elc-in-the-news/2021/10/kukama-women-say-their-maran-river-is-a-living-being-groundbreaking-lawsuit-filed-in-peru>> accessed 18 April 2022

¹¹⁷ Harden-Davies (n 104)

¹¹⁸ John Vidal 'Bolivia enshrines natural world's rights with equal status for Mother Earth '[2011] <<https://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>> accessed 18 March 2022

¹¹⁹ *ibid*

¹²⁰ Client Earth 'Legal rights of rivers – an international trend?' (13 March 2019) <<https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates/legal-rights-of-rivers-an-international-trend/>> accessed 8 April 2022

the river Atrato'¹²¹ after illegal mining had caused destruction to the river. In 2018 the Amazon rainforest was recognised as having rights which should benefit from protection.

Further, in 2019 the Supreme Court in Bangladesh held that all rivers hold legal rights. This came after the case in 2016 concerning 'the pollution and illegal constructio[n] along the river' Turag.¹²² In this case, the environmental narrative shifted through the application of the common law doctrine of *parens patriae* (legal guardian): the National River Protection Commission (NRPC) was instructed as a guardian for the river. This progressive step is a clear example of Earth Law in practice, to ensure the 'net impact of humans strengthe[n] rather than weake[n] the web of life'.¹²³ However, there are issues around enforcement when it comes to the rights of nature and this can be seen clearly in Bangladesh: enforcement is always the best way to measure success.

Many governments are ill-equipped to enforce the new legal rights, especially in countries where thousands of individuals live off the entity they are trying to protect, e.g. 'fishing communities'.¹²⁴ Also, nature cannot be contained; it is transboundary in character, so it is not always possible to uphold certain rights when other states have not done the same. Further, a fundamental barrier is that bringing someone to justice costs money and is risky. There is often a disparity between the individuals bringing the case on behalf of the environment and the large corporations. An example of this can be clearly evidenced by the case concerning the Vilcabamba river, as outlined above. Despite the judgment, the defendants did not honour the ruling, due to their economic strength.

As clearly highlighted throughout this section, there is clear evidence that Earth Law in its procedural form exists and often enables the Earth to thrive. The best option would be for the environment to be restored, but the question remains: when is European Environmental Law going to catch up with the Earth Law perspective? The only example of ecocentric ideals at present is the Habitats Directive, as it goes so far as to include protection for 'hedgerows and rivers that connect...sites'.¹²⁵ However, despite the expansion that the Directive offers, it is incomparable to the Earth Law movement.

It is important to highlight that despite the focus of Earth law being around the rights and

¹²¹ Ibid

¹²² Client Earth (n 120)

¹²³ Robert Amos, 'Reassessing the role of plants in society' [2017] *Int. J.L.C.* 13(3), 295-315

¹²⁴ Kaamil Ahmed 'The river is our home': Bangladeshi boatmen mourn their receding waters' [2020] <<https://www.theguardian.com/global-development/2020/jan/20/the-river-is-our-home-bangladeshi-boatmen-mourn-their-receding-waters>> accessed 8 April 2022

¹²⁵ Rob Amos 'Assessing the Impact of the Habitats Directive: A Case Study of Europe's Plants' [2021] (*Journal of Environmental Law*, Volume 33, Issue 2, Pages 365–393)

benefits of the Earth, this works in tandem with the rights and benefits of humans. Human rights are directly interrelated with the rights of nature and that is why it is so important for the world to address the current conservation effort. It is acknowledged that this legal movement may seem simple conceptually but throughout history and as stated by Stone, 'until the right-less thing receives its rights, we cannot see it as anything but a thing for the use of us'.¹²⁶

When considering the genesis of Earth law, it is important to understand that it was not one academic that changed the landscape, nor a country, nor a single case. It is an agglomeration of events which are still taking place, leaving room for Earth Law to evolve and transpose in a way to which countries can adhere. The current 'environmental laws can legalise, rather than prevent, environmental harm' due to the procedural nature of them.¹²⁷ The environmental laws (discussed in section one) do not necessarily conserve or protect, but merely regulate and control. The sufficiency of that approach is thus subject to interrogation and analysis. There is a concern that our ecosystem and living world is in decline. Something needs to change. Earth Law could be that change.

The Earth Law movement recognises the non-anthropocentric connection between humankind and the Earth. It promotes the principle that the Earth is a legal entity with inherent rights. As highlighted by Stone, 'the rightlessness of the natural environment can and should change'.¹²⁸ Life on Earth is interconnected, which means the view that 'The Earth, and all things herein, are the general property of mankind' (as per William Blackstone, author of the Commentaries on the Law of England) would appear to be fundamentally at odds with this contemporary concept. The Earth Law movement has already gained traction in the United Kingdom with the work of the late Polly Higgins on Ecocide, Paul Powlesland (Lawyers for Nature) and non-governmental organisations (e.g. Harmony with Nature). Polly Higgins was an inspiring barrister in the United Kingdom, whose life work was to 'make ecocide an international crime'.¹²⁹ She also co-founded Stop Ecocide International. Paul Powlesland, also a barrister in the United Kingdom, co-founded Lawyers for Nature, who work to 'democratise access to legal support for those seeking to defend the natural world'.¹³⁰ Harmony with Nature is an international platform which works to 'promote... balance among the economic, social and environmental needs of present and future generations'.¹³¹

¹²⁶ Stone (n 20) 455

¹²⁷ Harden-Davies (n 104) 4

¹²⁸ Stone (n 20) 464

¹²⁹ Stop Ecocide, 'Who we are' <<https://www.stopecocide.earth/who-we-are->> accessed 8 April 2022

¹³⁰ *ibid*

¹³¹ Harmony with Nature, Programme <<http://www.harmonywithnatureun.org/>> accessed 8 April 2022

This section has identified and explained the origin and jurisprudence of Earth Law. From academics such as Rachel Carson and Christopher Stone to constitutional change in Ecuador/Bolivia, Earth Law is present and it is being advocated for globally. There is room for it on a political and societal level; we just need to find a way to implement it. It is clear that campaigning for Parliament to give the Earth legal rights will take time and the current Environmental Laws do not appear to do enough to act in a way which conserves and sustains the Earth. Some would say the current legal system in place is fighting a losing battle. It is important for individuals, organisations and academics alike to advocate for the Earth to gain legal status which is on a par with humans. Other countries have taken steps forward in this direction; they have recognised the likely catastrophe if they do not give Earth a voice against the continued exploitation of its resources and the pollution which humans have exacted across the whole of the biosphere. We must do the same: '[w]e need to keep fighting for nature in the courts, in the fields, and on the streets'.

3 – How would Earth law change the face of Environmental law in England?

Despite Earth Law appearing a novel concept, it is, in fact, a clear example of the 'genealogical link between all living things, including rivers and people'.¹³² There are distinct differences and similarities between Earth Law and Environmental Law, but what is clear is that they both recognise the need to protect our ecosystem. 'Environmental rights are human rights'.¹³³ This needs to be acknowledged and accepted both politically and socially, in order to progress.

Earth Law focuses on ecocentric ideals which could offer a potential solution to the current climate crisis. It has clearly been acknowledged in England that there is an urgent need 'at every level to combat climate change'.¹³⁴ But the acknowledgment does not deal with the issue. We need real and fundamental change, which pushes out the economic focus driving environmental destruction and focuses on what really matters: 'the rights of the whole "Earth community"'.¹³⁵ Earth Law would change the face of Environmental Law in England, as it would highlight that 'all life [and] all ecosystems on our planet are deeply intertwined'.¹³⁶

¹³² James D K Morris and Jacinta Ruru, 'Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous People' Relationships to Water?' [2010] Australian Indigenous Law Review (Volume 14, number 2) 58

¹³³ Friends of the Earth International 'Environmental rights are human rights' [2003] <<https://www.foei.org/environmental-rights-are-human-rights/>> accessed 11 April 2022

¹³⁴ Boyle (n 95)

¹³⁵ *ibid*

¹³⁶ Global Alliance for The Rights of Nature, 'What are Rights of Nature?' <<https://www.garn.org/rights-of-nature/>> accessed 14 April 2022

Despite the positive steps Environmental Law has taken (for example, the Environment Act 2021), it can often 'legalise, rather than prevent, environmental harm'.¹³⁷ Evidently Environmental Law is not effectively protecting our environment: '[t]housands of species face extinction... habitats are being lost daily.'¹³⁸ Often, '[s]ocial disasters reap profits which are then ploughed into environmental disasters'.¹³⁹ an example of which can be seen by the actions of Crispin Odey in February 2020. Odey, a hedge fund manager and 'one of the biggest donors to Boris Johnson's Conservative party'¹⁴⁰ enlarged 'his stake in...SLC Agricola, a corporation... [with] a stake in deforestation'¹⁴¹ after making £115 million on the COVID market crash.

Evidently, we need a 'green industrial revolution'.¹⁴² It is recognised that the current destruction done to the planet is not going to be reversed overnight, but we need to do something. Earth Law is logical, it already has an established legal regime (not in the UK) and it is effective. But there is clearly an issue with implementation within the UK. That issue is the western outlook and way of thinking: we need to make a 'huge shift' if it is ever going to work.¹⁴³

Earth Law would change the current law in the UK, but for it to be something attainable, we must first 'kill the corporation'.¹⁴⁴ To date, Earth Law has not found favour in the Western World because of the neo-liberal, capitalist narrative that has usurped any attempt to put nature on the same footing as the willingness to grant planning permission, develop land and authorise or allow pollution. When considering the thoughts put forward in David Whyte's book on Ecocide, it is clear that we (as a species) are causing destruction to our planet which in most cases is irreversible. This destruction more often than not goes without punishment. Ecocide would impose conditions on legality, for example, but Earth Law could change the landscape entirely. It would identify the 'rights of the Earth to well-being'.¹⁴⁵ The concept of well-being is extensive and could be discussed in full but it has been established that the well-being of humans is often heavily influenced by their environment, especially when

¹³⁷ Harden-Davies (n 104) 3

¹³⁸ UKELA (n 6) 51

¹³⁹ David Whyte 'ECOCIDE, Kill the Corporation Before it Kills Us' (Manchester University Press, first published in 2020) x

¹⁴⁰ Fiona Harvey 'Tory donor invested in firm linked to Amazon deforestation' *The Guardian* (3 March 2020) <<https://www.theguardian.com/politics/2020/mar/03/tory-donor-crispin-odey-invested-in-firm-linked-to-amazon-deforestation>> accessed 10 April 2022

¹⁴¹ Whyte (n 139)

¹⁴² *ibid* xi

¹⁴³ UKELA (n 6) 56

¹⁴⁴ Whyte (n 139) 175

¹⁴⁵ Harmony with Nature, 'Rights of Nature Law and Policy' <<http://www.harmonywithnatureun.org/rightsOfNature/>> accessed 10 April 2022

considering the Danish thinking of 'hygge', loosely defined as the feeling of contentment, although it often has different meanings to different individuals. There is a need for Earth Law to be implemented on the UK stage. But for this to be even considered at a governmental and/or political level, we must 'uproot established western concepts of property rights, individualism and ceaseless economic growth'¹⁴⁶ and move to a more biocentric worldview. The Earth is a finite resource which we benefit from, but if nature had 'a voice',¹⁴⁷ conventional environmental laws would look very different.

Earth Law's provenance is often viewed as 'an ethic',¹⁴⁸ but it would ensure the current societal culture moved away from its anthropocentric view of the world. Environmental Law has provisions in place to protect 'what is left of nature and natural habitats... [instead of looking at the] protection and enhancement of nature in its own right'.¹⁴⁹

A further observation which must be acknowledged is that '20 fossil fuel companies... can be directly linked to more than one-third of all greenhouse gas emissions'.¹⁵⁰ These large corporations clearly do not 'accept natural limits'¹⁵¹ which are imposed by the finite nature of natural resources, so it is not likely they would adhere to limits placed on them by the law. The current system which is in place punishes environmental crimes through the use of (mostly) fines and 'only in a very small proportion of cases... a convicted defendant receiv[es] a suspended sentence or [is] sent to prison'.¹⁵² Arguably these do not have the desired impact, because when compared to the revenue of the companies, they are negligible. Therefore, although a fine may be the 'most appropriate sentencing option',¹⁵³ the legal seriousness of the offence and the status of the offender is not always matched by the remediation. A clear example where the defendants received a fine when they could have been sentenced to a term of imprisonment is *R (on the application of the Environment Agency) v Lawrence*.¹⁵⁴ In this case the appellant was a director of a company who rented out skips. They stored waste which subsequently caught fire. They were warned of the

¹⁴⁶ Patrick Barkham 'Should rivers have the same rights as people?' *The Guardian* (25 July 2021) <<https://www.theguardian.com/environment/2021/jul/25/rivers-around-the-world-rivers-are-gaining-the-same-legal-rights-as-people>> accessed 11 April 2022

¹⁴⁷ UKELA (n 6) 5

¹⁴⁸ Penelope Ridings 'Redefining Environmental Stewardship to Deliver Governance Frameworks for Marine Biodiversity beyond National Jurisdiction' [2018] *ICES Journal of Marine Science*, 75: 435-443, 3

¹⁴⁹ UKELA (n 6) 9

¹⁵⁰ Mathew Taylor and Jonathan Watts 'Revealed: the 20 firms behind a third of all carbon emissions' *The Guardian* (9 October 2019) <<https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions>> accessed 10 April 2022

¹⁵¹ Whyte (n 139) 126

¹⁵² Parpworth (n 59) 1

¹⁵³ *ibid*

¹⁵⁴ [2020] EWCA Crim 1465

dangers of this by the EA, their insurer and a fire officer. They refused to deal with the waste after this fire and therefore another fire broke out, which was vast. This fire had a detrimental impact on the environment. The judge found the appellant negligent in relation to the first fire and fined him £270 but found him reckless for the second fire and imposed a suspended sentence of nine months for two years and 180 hours of unpaid work.¹⁵⁵ If Earth Law was implemented within the UK it would be paramount to ensure that the regulatory system in place is as strong as the punishment, in order to deter corporations from destruction, instead of simply paying for the damage.

It is clear that there are fundamental issues with Environmental Law and its true impact on the conservation of the Earth. However, it has been a clear step in the right direction. It is now an issue which is discussed globally and there are policies in place which did not exist 50 years ago. Nevertheless, we must learn from that system and implement it into a new way of thinking which will better serve the non-human world. Earth Law exists internationally and should be comprehensively included in all relevant law-making in the UK. What nature rights look like for one country, one river, one forest will be applied very differently elsewhere. But as long as it is established early on who is being protected and who is doing the protecting, then it will work. Society must move to a place where they understand that nature is a 'living, evolving, ecosystem that [is] intimately interconnected with the lives, culture, and health of the people who depend on' it.¹⁵⁶ Stone was correct when he alluded to the point that 'each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound... frightening or laughable'.¹⁵⁷ But the world is changing, society has evolved and we need to recognise that we are no longer the only entities who require strong, powerful and effective representation.

This section has aimed to answer the premise of this article: would Earth Law change the face of Environmental Law in England? Evidently, change is necessary; the rapid decline of our planet requires immediate change. But, what has also been identified is that the change must come through a greater emphasis at governmental level of the need to give the Earth a voice in the passing and implementation of laws. Also companies, as legal entities, must look at the directors' duties set out in s.172 Companies Act 2006 and consider the need to

¹⁵⁵ Matrix Chambers 'Sentencing Guidelines For Environmental Offences and The Categorisation of Harm (*Environment Agency v Lawrence*) – James Hodiola QC' [2020] <<https://www.matrixlaw.co.uk/resource/sentencing-guidelines-for-environmental-offences-and-the-categorisation-of-harm-environment-agency-v-lawrence-jamas-hodiola-qc/>> accessed 19 April 2022

¹⁵⁶ Megan Schmiesing 'Rights, Water, and Guardians: How Rights of Nature Movements are Reshaping our Current Environmental Ethics and What These Policies Need to be Successful' [2020] Pitzer Senior Theses. 108, 60

¹⁵⁷ Stone (n 20) 6

amend these in relation to the terms proposed by The Chancery Lane Project.¹⁵⁸ The core values which we base our society around – economic success and anthropocentric ideals – are what is causing the most damage. If we can change the outlook of the many, then we stand a fighting chance of changing the path that we are on. Imposing Earth Law into the current legal system is not going to turn back time and revoke the damage which has been done, but it may change the procedural prosperity of our framework and (hopefully) change the way in which human beings view our planet; namely, not as an entity to be used but as a body with legal rights that can be enforced on the same legal playing field as humans.

Conclusion

The purpose of this article has been to analyse Environmental Law in England and consider whether it is effective in ameliorating the worst effects of the Anthropocene when set alongside the Earth Law movement, which continues to develop internationally. In undertaking this exercise, it is apparent that English Law is falling behind best practice in protecting the non-human world. Arguably, despite the Government's assurances about net zero (which is only one of a number of pressing issues), unless we enact a form of Earth Law then the capitalist system, which is the driver of our economy, will continue to take precedence, to the detriment of the environment.

The anthropocentric basis upon which Environmental Law in England is built only fuels the neo-liberal, capitalist drivers of today's world which are causative of significant and long-lasting environmental degradation. There is a common rhetoric that protecting the environment will detrimentally affect economic prosperity. However, as has been discussed, this is not the case and is also an irrelevant argument, as environmental resources which are relied upon for economic gain will one day not exist. Businesses and humans need the environment to thrive. For example, the Colorado River 'runs through seven states, supports over 16 million jobs, accounts for \$1.4 trillion in yearly economic activity and plays a crucial role in the economy of the... United States'.¹⁵⁹ |However, it is currently facing a severe period of drought, which means that water flow drops and may never return. In South America the 13-year drought continues to cause detrimental damage, from Patagonia to Paraguay. The actions of humans are causative of these changes and yet we will not change our ways in order to prevent them.

Through acknowledgement of the escalating deterioration our planet is facing, it is important

¹⁵⁸ The Chancery Lane Project <<https://chancerylaneproject.org/>> accessed 21April 2022

¹⁵⁹ Rosenbach (n 10)

to establish whether the current laws are doing enough to protect it. The areas of interest in section one (marine protection, environmental permitting and wildlife conservation) are extensive and detailed, yet all three areas do not offer adequate protection in order to stop our Earth from the impending destruction it faces. Our oceans, which cover 70% of the Earth, are in decline. Although important for economies, jobs, food and ecosystems, they are treated as a dump for extensive pollution that is degrading the ecosystems and is a huge public health issue. As the population increases, the pressure on ocean resources intensifies. Sea levels are rising and ocean dead zones are becoming more common. Despite the enactment of the MCAA in 2009, the minimal integration of coastal management has meant that the system fails to protect our ocean sufficiently.

Similarly, the Environmental Permitting (England and Wales) Regulations 2016, although put in place to streamline pollution controls, regulated by the EA, often lack deterrent qualities. The fees which are paid for such permits are used to offset the environmental damage done. This does not solve the issue. As alluded to in section 3, many companies would rather pay a fine than change the way they operate, for fear of losing economic profit. There are procedural elements to permitting which reduce the impact they should have; for example, you can pollute if you pay a fine. Our wildlife is protected by the Wildlife and Countryside Act 1981 and as stated in section one, this is generally positive in the way it aims to conserve our wildlife in the UK. However, as the traction for this Act increases (with the number of SSSI's growing due to the discretion of the agency becoming wider in scope) one would expect the damage to wildlife to decrease. However, this is not the case. Wildlife in the UK is still 'threatened with extinction,' due to the 'industrialisation' that continues to escalate.¹⁶⁰

The legal system in England is detailed and complex but still there is no actual recognition of the non-human world as having legal personhood or standing. This is a failing which needs to be urgently addressed. The fundamental issues that plague the system is that the laws are based on the anthropocentric view, which unfortunately has a direct correlation with the outcome. A clear example can be seen through the current Prime Minister, voting against bills which could have aided the environment, and echoed by ministers beneath him. If humans continue to take and use in the same way time and time again, one day there will be nothing left to exploit. Unfortunately, as evidenced throughout this article, no country puts the environment above Gross Domestic Product (GDP), jobs or economic prosperity even though, without a habitable planet, these things would quickly become meaningless. That is

¹⁶⁰ Damian Carrington 'One in 10 UK wildlife species faces extinction, major report shows' *The Guardian* (14 September 2016) <<https://www.theguardian.com/environment/2016/sep/14/one-in-10-uk-wildlife-species-faces-extinction-major-report-shows>> accessed 19 April 2022

why any change to the system is a phenomenal task. England has an established corpus of environmental law, but as evidenced throughout, the existing legal framework does not adequately protect nature, due to the 'anthropocentric worldview'¹⁶¹ which stores the problems for future generations. It is clear, now more than ever before, that we need to move from a *de facto* recognition to a *de jure* one.

If Earth Law sat alongside a corpus of English law, or the laws enacted were done so in an 'Earth Law' manner from the beginning, then it would allow society to move forward in an environmentally conscious and conservationist manner. There is global evidence of Earth Law taking place and succeeding. Indigenous beliefs often derive from polytheism, which mean that individual non-human things have god-like qualities (in a similar sense to the way Christians worship God). It is about time that England took influence and inspiration from these views. If Earth law was the basis for enacting and enforcing all laws, there would be significantly better protection of nature. It would inject into the English legal system a new wave of fundamental ideologies which put profit and economical drivers aside and nature back at the centre of all decision-making, because most importantly, 'ecosystems have the right to exist, thrive, and evolve'.¹⁶²

¹⁶¹ Cullinan (n 93) 97

¹⁶² Earth Law Centre 'We Envision a Future in which Humans and Nature Flourish Together' <<https://www.earthlawcenter.org/>> accessed 10 December 2021