Human Rights and the Environment:
Redefining Fundamental Principles?

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At the end of this century we are witnessing an unprecedented increase in legal claims for both, human rights and the environment. Never before have so many people raised so many demands for human and environmental protection. Like human rights, environmental law touches upon all spheres of human activity. Quite obviously, human rights and the environment are closely related.

But how close? Is the environment a mere good or value to be added to the list of individual demands? This is the approach of individual environmental rights. Or is the environment a condition of life, therefore requiring limitations to individual freedom? This is the ecological approach to human rights.

This paper discusses both approaches as they have emerged in international and national law. A human right to a healthy environment has been promoted for more than twenty years and can today be seen as a right *in statu nascendi*. The notion of ecological limitations to human rights, on the other hand, is more recent[1], not implemented anywhere and in need of some definition. It refers to the fact that individual freedom is not only determined by a social context - the social dimension of human rights-, but also by an ecological context. In ethical terms, the anthropocentric, utilitarian understanding of human rights would be complemented or replaced by an ecocentric understanding which holds that the natural environment has intrinsic value, not just instrumental value.

Considering the far-reaching consequences of linking human rights to environmental ethics for the vision of a sustainable society, a debate on ecological human rights seems timely[2]. The following chapter (1) looks at international human rights law and recent developments in European and other countries. The second chapter (2) discusses the increasing crticism on anthropocentric limitations associated with present environmental rights, and the final chapter (3) presents the new ecological approach.

1. International environmental rights

The purpose of this chapter is to consider what difficulties international human rights theory poses for the introduction of *ecological limitations* into international human rights law.

From the outset, three important points of comparison can be made between protection of human rights within municipal systems and the international system.

The first is that international concern for human rights is a relatively recent phenomenon. It was only after the conclusion of the Second World War and the completion of the 1945 United Nations Charter that it became possible to identify a clear international consensus that the protection of human rights was no longer the sole concern of individual states, but that of the whole international community. As a consequence, international human rights law is, in many respects, not as developed as its municipal eqivalent.

The second point is that the juridical nature of human rights in international law is still a matter of debate.[3] This is a result of the historical development of international human rights, together with the influences of the different political ideologies (in particular, liberal and marxist) that gained predominance after the Second World War.

Thirdly, there are direct and important connections between human rights protection at the municipal and international levels. Disputes about the origins of human rights theories aside, it seems clear that modern concepts originate from the English, French and American revolutions of the seventeenth and eighteenth centuries.[4] Furthermore, implementation and

enforcement of international human rights are, at first instance, dependent upon municipal constitutional systems. It is only once these internal systems fail that international mechanisms activate to secure the protection of rights. Finally, as will be seen, developments at either the municipal or international level are often mutually influential.

Since the middle of the 20th century there is a general acceptance of the principle, rather than the content, of human rights, despite the often conflicting theories underpinning human rights.[5] However, this simple statement hides a great deal of disagreement about some basic definitional, and functional, questions. As Weston points out:[6]

Some of the most basic questions have yet to receive conclusive answers. Whether human rights are to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, custom, social contract theory, principles of distributive justice, or as prerequisities for happiness; whether they are to be understood as irrevocable or partially irrevocable; whether they are to be broad or limited in number and content - *these and kindred issues are matters of ongoing debate and likely to remain so as there exist contending approaches to public order and scarcities amoung resources.*

Despite this lack of consensus, Weston has identified a number of broadly accepted postulates which assist in the task of defining human rights. They are as follows:[7]

(i) regardless of their ultimate origin or justification, they represent individual and group demands for the shaping and sharing of power, wealth, enlightenment and other important values in community process. They limit

state power;

(ii) human rights refer to a wide continuum of value claims ranging from the most justiciable to the most aspirational. They represent both the "is" and the "ought";

(iii) a human right is general or universal in character, equally possessed by all human beings everywhere;

(iv) most, but not all, are qualified by the limitation that the rights of any particular group or individual are restricted as much as is necessary to secure the comparable rights of others and the aggregate common interest;

(v) human rights are commonly assumed to refer, in some vague sense, to "fundamental" as distinct from "non-essential" claims.

It should be recalled that none of these postulates are unconditionally accepted, for example, the fifth is particularly contentious. What is meant by "fundamental"? Does it refer to human rights assumed to exist prior to the UN Charter? Or does it refer to rights which are not, in any circumstances, inviolable?[8] In short, the lack of concensus regarding a definition of human rights means that the creation of rights can be a long, slow and contentious process sometimes resulting in unsatisfactory compromises and ongoing disagreement.

For the question of an ecological approach to human rights, one of the most important postulates identified above is (iv); the restriction or qualification of human rights. Generally speaking, international human rights documents employ several different techniques to define the boundaries of rights. One technique is to prescribe a right together with duties, so that the limits of the rights will be determined by the duties.[9] Another technique is to use the concept of abuse of rights. Here the declaration of a right is followed by the qualification that one must not abuse his or her rights in a way that deprives others of their rights. Finally, one of the most commonly used techniques is to prescribe general boundaries around all rights or specific boundaries around specific rights. The Universal Declaration adopts the second and third of these techniques (general limitations). Article 29 of the Universal Declaration states:[10]

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The Universal Declaration is slighty unusual in that it does not create specific limitations in respect of specific rights, but rather uses only the above general limitations and reference to duties. Other treaties specifically define the boundaries of each right. Sieghart identifies three important and independent components of the formulations typically used: (1) the limitation must be provided for by law; (2) that law must be *necessary* as opposed to useful or desirable; and (3) it must protect one or more of a limited set of

public interests such as national security, public safety, public order, public health, public morals, and the rights and freedoms of others.[11]

With respect to the interpretation of these limitations, it is recognised that they should be given a strict and narrow construction. Specifically, there is a burden to produce the exact law involved, to demonstrate its necessity, and that it in fact protects the specified interest(s).[12]

Two useful examples for illustrating limitations and restrictions are those accompanying the right to freedom of movement and the right to freedom of thought, conscience and religion. Article 12(3) of the ICCPR states that the right to liberty of movement...

(3) ... shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

As regards the right to freedom of thought, conscience and religion, Article 18(3) of the ICCPR states that it shall be subject only to limitations prescribed by law, necessary to protect "public safety, order, health, or morals or the fundamental rights and freedoms of others." In comparison, some rights, such as the freedom from torture, are declared to be without any kind of restriction, limitation, and without the possibility of derogation.[13]

The above discussion demonstrates that limitation or restriction of human rights in legally prescribed circumstances, particularly in the *common*

interest, is an accepted practice in international human rights theory. However, consistent with concern for human social ethics and disregard for the environment, these restrictions reflect only social ethics. The extent to which these restrictions might be extended, to include *ecological limitations* consistent with recognition of an environmental ethic(s) will be discussed now.

One step towards a recognition that human rights have an environmental dimension is the ever increasing support for a right to a healthy environment. Since 1968 an increasing number of international declarations and statements have, with growing specificity, recognised the fundamental connection between environmental protection and respect for human rights. In 1968 the UN General Assembly passed a resolution identifying the relationship between the quality of the human environment and the enjoyment of basic rights.[14] This was followed in 1972 by the landmark Stockholm Declaration, which stated that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his wellbeing and to the enjoyment of basic rights - even the right to life itself", and that " [m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing...".[15] More recently the Hague Declaration stated that "[t]he right to life is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all States throughout the world."[16] In 1990 the UN General Assembly declared that "all individuals are entitled to live in an environment adequate for their health and well-being".[17] The United Nations Commission on Human Rights also adopted a resolution in 1990, entitled "Human Rights and the Environment", which again reaffirmed the relationship between preservation of the environment and the promotion of human rights.[18]

In 1990 the Ukranian delegation made a proposal for ecological human rights, to the Commission on Human Rights. The proposal was innovative, but was essentially limited to human interests. However, proposals such as this could be usefully expanded upon by clearly elaborating what is required to adequately protect an maintain the ecological balance of nature. The Ukranian proposal included: (1) the right to ecologically clean foodstuffs; (2) the right to ecologically harmless consumer goods; (3) the right to engage in productive activities in ecologically harmless conditions; (4) the right to live in ecologically clean natural surroundings; (5) the right to obtain and disseminate reliable information on the quality of foodstuffs, consumer goods, working conditions, and the state of the environment.

In the build-up period to the 1992 Rio Conference on Environment and Development there have been many proposals to institutionalize a right to a decent environment. The Draft Earth Charter is one of them[19], however, the eventually adopted Rio Declaration relates the rights issue to the broader issue of sustainable development. This is expressed in Principle 1: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." In contrast, the right to development is clearly spelled out[20].

At the European level recognition of an environmental human right is more emphatic. The Organisation for Economic Cooperation and Development ("OECD") stated that fundamental human rights should include a right to a "decent" environment.[21] More recent is the Charter on Environmental Rights and Obligations drafted by the United Nations Economic Commission for Europe ("UNECE"), which affirms the right of everyone to an environment adequate for general health and wellbeing and the responsibility to protect and conserve the environment for present and future generations.[22] The Council of Europe has also considered various

proposals which would add an environmental human right to the European Convention on Human Rights. Other proposals have focused on changes to the European Social Charter. However, none of these proposals have yet succeeded.

A number of commentators have increasingly come out in favour of an international environmental human right. Falk, for example, contends that human rights must include:[23]

[T]he rights of individuals and groups (including those of unborn generations) to be reasonably secure about their prospects of minimal physical well-being and survival (and) the duty of governments and peoples to uphold this right by working to achieve sustainable forms of national and ecological security.

In the face of all this evidence of state practice the standard view in international environmental law is, however, that no independent right to the environment has yet become part of customary international law.[24] In Crawford's opinion:[25]

So far as claims such as the right to...the environment are concerned, the difficulty is that there is as yet no level of articulation of consequences of those rights, failing which they can only be said to have been accepted as pleasant-sounding formulae.

This comment reflects a common criticism, that present formulations of the

right are too vague and general in terms of their content, scope and enforcibility. Those express rights which do exist are considered, by some commentators, to be largely aspirational, expressing national goals and intents, rather than justiciable rights.[26] However, it is recognised that a number of environmental rights exist, "derived from other existing treaty rights, such as life, health, or property."[27] At present these environmental rights may serve as a "surrogate protection" against environmental harm.[28]

An important indicator of the development of an environmental human right is the extent to which it has emerged in national constitutions. A number of studies exist which list these constitutional provisions.[29] Generally speaking they reveal that more than national constitutions, from a variety of legal traditions, include an environmental human right[30]. As two commentators point out, virtually every consititution revised or adopted since 1970 has addressed environmental issues.[31] One of the most frequently cited constitutional provision is from the new Brazilian Constitution, which states that: "[e]verybody has a right to an ecologically balanced environment, an asset for common use by the people, and essential to the wholesome quality of life. This imposes upon Public Authorities and the community the obligation to defend and preserve it for present and future generations."[32] Similar provisions are to be found in the new constitutions of Slovakia, Slovenia, Hungary, Poland and South Africa.

Article 66 of the Constitution of the EU Member State Portugal is also notable:

1. All have the right to a human, healthy and ecologically balanced human

environment and the duty to protect it.

2. The State is obliged, through its agencies and by appeal and support of popular initiatives:

(a) to prevent and control pollution and its effects and harmful forms of erosion;

(b) to organize territorial space so as to establish biologically stable zones; and

(c) to create and develop natural and recreational parks and reserves.....

(d) to promote rational enjoyment of natural resources while safeguarding their responsibility and ecological stability.

This Article is of particular interest because it breaks down the usual vertical, heirachical relationship between citizens and authorities, and replaces it with a horizontal relationship. The state is obliged to fulfill its duties by appealing to and acting in concert with, citizen initiatives.[33] The Portuguese example is illustrative of a common trend in the formulation of environmental human rights; the imposition of both individual rights and duties, together with the imposition of a more extensive role for authorities.[34]

Other states with explicit environmental rights provisions include Turkey and numerous Middle/American, African and Arab States.

In a broader approach, many EU Member States have recently adopted environmental duties and state obligations to provide environmentally sound

conditions. Among these are Germany, the Netherlands, Sweden, Finland and Greece. The 1993 amendment to the German constitution included a new Article 20a which defines care for coinditions of life and for future generations as a state obligation. This amendment was achieved as a political compromise. The conflict between antropocentristm and non-anthropocentrism was seen as an open problem in need to further investigated in academic and political debate[35]. Other constitutional amendments to accommodate environmental responsibilities include France, Belgium and Luxembourg.

Michael Bothe summarizes the present situation in the EU Member States as follows[36]:

There is a clear trend towards a constitutional recognition of environmental values. On the one hand, this recognition does not necessarily mean that affirmative rights to the protection of the environment are granted. The constitutional recognition of environmental values is a basis for protection against infringements and repressions.

2. Ecological critique in legal literature

There is very real concern amongst many commentators over the inherent anthropocentricity of an environmental human right. In the view of many the very existence of environmental human rights reinforces the idea that the environment and natural resources exist only for human benefit and have no intrinsic worth. Furthermore, they result in creating a hierachy, according to

which humanity is given a position of superiority and importance above and separate from other members of the natural community.[37] More specifically, the objectives and standards applied are human-centred. Humanity's survival, living standards, and continued use of resources are the objectives. The state of the environment is determined by the needs of humanity, not the needs of other species.

This human-centred character of an environmental human right leads to a philiosophical tension between deep and shallow ecologists. As a result of this tension, some commentators wholly reject human rights proposals,[38] others offer a compromise position.[39]

Those who condemn the human rights approach raise the following concerns. First, anthropocentric approaches to environmental protection are seen as perpetuating the values and attitudes that are at the root of environmental degradation. Second, anthropocentric approaches deprive the environment of direct and comprehensive protection. For example, "human" life, health, and standards of living are likely to be the aims of environmental protection. Thus the environment is only protected as a consequence of, and to the extent needed to protect human well-being. An environmental right thus subjugates all other needs, interest and values of nature, to those of humanity. Environmental degradation as such is not sufficient cause for complaint, it must be linked to human-wellbeing. Third, humans are the beneficiaries of any relief for infringement of the right. There is no guarantee of its utilization for the benefit of the environment. Nor is there any recognition of nature as the victim of degradation. Fourth, environmental protection is dependent on human protest.

On the other hand, a number of arguments are put forward which may, to

some extent, mitigate these concerns. First, it is suggested that a degree of anthropocentrism is a necessary part of environmental protection. Not in the sense of humanity as the centre of the biosphere, but because humanity is the only species, that we know of, which has the consciousness to recognise and respect the morality of rights and because human beings are themselves an integral part of nature. In short, the interests and duties of humanity are inseparable from environmental protection. Shelton argues as follows:[40]

[H]umans are not separable members of the universe. Rather, humans are interlinked and interdependent participants with duties to protect and conserve all elements of nature, whether or not they have known benefits or current economic utility. This anthropocentric purpose should be distinguished from utilitarianism.

Shelton goes on to argue that an environmental human right could be complementary to wider protection of the biosphere which recognises the intrinsic values of nature, independent of human needs. As Birnie and Boyle point out, this approach would only work to the extent that it successfully "de-emphasizes the uniqueness of man's right to the environment and conforms more closely to the characterization of this relationship as a fiduciary one not devoted solely to the attainment of immediate human needs."[41] They see the implications of the issue as being largely structural, requiring the integration of human rights claims within a broader decision-making framework capable of taking into account, amongst other factors, intrinsic values, the needs of future generations and the competing interests of states. In their view, human rights institutions are too limited in their perspective to be able to balance these factors, "[s]ome alternative institutional machinery would be needed, able to take a more holistic view,

however difficult this may be to achieve in practice."[42]

Rolston also advocates a compromise position. He accepts the paradigm of human rights for protection of human needs for environmental integrity, but in addition suggests the elaboration of human responsibilites for nature.[43] According to Nickel, human rights play a "useful and justifiable role in protecting human interests in a safe environment and in providing a link between the environment and human rights movements."[44] He labels his approach as "accomodationist", arguing that anthropocentrism is not a significant objection if "it can be supplemented by other norms that will address other issues."[45] In other words, it could be seen as a useful part of "the normative repertory of environmentalism."[46]

In the short term, these approaches might be useful in assisting environmental law to transform from an essentially anthropocentric perspective to an ecocentric perspective. However, in the long term the existence of an environmental human right could be seen as self-contradictory. A better option is the development of *all human rights* in a manner which demonstrates that humanity is an integral part of the biosphere, that nature has an intrinsic value and that humanity has obligations toward nature. In short, ecological limitations, together with corollary obligations should be part of the rights discourse.

Attempts to overcome the anthropocentric approach are plentiful. Among these, the concept of nature's rights has been well documented since its rise to prominence in 1972, following the publication of Christopher Stone's article "Should Trees Have Standing?"[47] Over the last twenty years the concept has been widely debated amongst lawyers, philosophers, theologians and sociologists. This debate has lead to the pronouncement of

a wide variety of ethical and legal approaches including: legally enforecable rights for nature (as envisaged by Stone); so-called "biotic rights" (being moral imperatives which are not legally enforceable); moral "responsibilities"; and "rightness" (a norm which perscribes a need for a proper healthy relationship between humanity and nature). What is common to each, is an attempt to give concrete and meaningful recognition to the intrinsic value of nature. They differ in how this should be achieved. Some commentators advocate that it should be done within the context of legally enforceable rights, others argue for recognition through annuniciation of values or status, which requires humanity to take into account the interests of nature and to accord these interests a priority that they might not otherwise be granted.

Giagnocavo and Goldstein, have argued that the concept of nature's rights is tantamount to a "quick legal fix", which, like many other legal solutions, precludes the deep questions necessary for genuine world change.[48] In particular, they have challenged the theory that "rights" are an appropriate method of *social reform*, leading us to change our attitudes and value entities (in this case nature) to which "rights" are ascribed. Giagnovcavo and Goldstein reject this theory as a "false claim". In their opinion, legal "rights" give the holder some advantages (as discussed by Stone), but this only amounts to valuing by legal institutions, not society at large.[49]

Stone himself recognises the limitations of his "rights" theory and in the final pages of his article discusses the importance of a changed environmental consciousness. He states that legal reform, together with attendant social reform will be insufficient without "a radical shift in our feelings about "our" place in the rest of Nature."[50] Stone has never considered "rights" as an end in themselves but rather as *a* means to an end[51].

It will be sometime before we see a major international treaty reflecting a legal position beyond anthropocentrism. The fate of the United Nations "Earth Charter" perhaps best illustrates this. The Earth Charter document was to be a "short, uplifting inspirational, and timeless expression of a bold new global ethic."[52] However, as the negotiating process dragged on it ended up being called the "Rio Declaration", which many criticise as being little more than declaratory of the social and political conflicts which infused all UNCED negotiations. NGO's took up the challenge when UNCED was seen to fail in its objective and drafted their own "Earth Charter". The NGO Earth Charter does not shy from the task of accepting responsibility for nature and defines it in ecocentric terms[53]. The Preamble states "We accept a shared responsibility to protect and restore Earth and to allow wise and equitable use of resources so as to achieve an ecological balance and new social, economic and spiritual values."[54]

In the absence of a clear statement of a new ethic, in an international document such as the proposed UN "Earth Charter", developments in the area of environmental human rights may produce some flow on effects for the creation of nature's rights. In considering constitutional entrenchment of an environmental right, those states most concerned to avoid the anthropocentricity of such rights are likely to explore, in some detail, the notion of nature's rights.[55] In addition, municipal developments which take into account the differing moral and legal traditions of indigenous peoples, as these traditions apply to nature, may also have some influence on the international legal system. The international legal system, like municipal systems, is becoming increasingly cognisant of the wisdom of indigenous cultures.

Whether or not the concept of nature's rights is ever implemented by international or municipal law, the very existence of the debate contributes to the development of ecological rights. It helps develop consciousness beyond the prevalent anthropocentric ethic by suggesting what to many might have formerly been the "unthinkable".[56] Gradual acceptance of moral responsiblities toward nature may lead to a point where we begin to accept the idea of ecological limitations on the exercise of our rights or, more directly, agree to re-definition of the content of certain rights (eg; property rights).[57] On the other hand, the limitations of the nature's rights debate must also be born in mind. We must guard against its over-extension. This can be achieved by seeing nature's rights within an appropriate context. Thus when legal processes are involved we must acknowledge the limitations of these processes. However, these limitations do not necessarily deprive rights of their usefulness as a tool in the process of transition. Their use, in conjunction with other changes in society, may result in the creation of certain reasonances in all social systems which will in turn lead to enduring change. This context also includes recognition that other important parallel changes must also occur, for example, a change in consciousness. Law and pleas for new morality can not and do not exist in vaccums, nor can we rely on them to provide solutions to our deepest and most complex problems.

3. The ecological approach

Many environmental lawyers have questioned the fundamentally anthropocentric character of environmental law. They are calling for an ecocentric turn-around. Some have argued, therefore, that we should not

view environmental issues through a human rights focus, entailing a form of 'species chauvinism' (Günther Handl). We should instead think either of nature's rights or of limitations of human rights with respect to the 'intrinsic values' of the environment.

The former idea of rights for nature has been described as the "strong rights-based approach", the latter idea of intrinsic values as the "weak rights-based approach"[58] which is what is advocated here. There is little to believe that an ecocentric turn-around can be achieved just by adding rights of nature to the catalogue of the rights of humans. AS seen above, there are a number of difficulties with 'rights' thinking, the most important being that we would only foster the anthopocentric and individualistic tradition of rights, which represents the very mind set that has caused the global environmental crisis in the first place.

The project of ecological human rights[59] attempts to reconcile the philosophical foundations of human rights with ecological principles. The aim is to link the intrinsic values of the humans with the intrinsic values of other species and the environment. As a result, human rights (such as human dignity, liberty, property, development) need to respond to the fact that the individual not only operates in a social environment, but also in a natural environment. Just as much as the individual has to respect the intrinsic value of fellow human beings, the individual also has to respect the intrinsic value of other fellow beings (animals, plants, ecosystems).

The reference to "respect" for others as the determining factor for individual freedom is not incidental. In both, the literature on environmental ethics and the literature on human rights there is certain common ground. Ethical considerations on our relationship with the environment often use the

category of respect like, for instance, Paul Taylor in his influencial work *Respect for Nature* (1986) or Tom Regan in his recent discussion of moral and legal obligations[60]. Indications are that the contemporary ethical debate recognizes intrinsic values as the basis for moral considerability and respect as the basis for personal obligations[61]

Similarly, we find in human rights theory the concept of 'respect' expressed as the basis for human rights. McDougal, Lasswell and Chen in their standard text on human rights (1980), for example, define respect as the "reciprocal honoring of freedom of choice". They suggest that using this universal principle, it is possible to cover all aspects of life requiring protection by formulations of rights. John Rawls' *Theory of Justice* may not be far from this with its emphasis on a universal principle which needs to be accepted by all in order to create a just society[62]. The respect for the intrinsic value of life could guide both, the relationship between the individual and society on the one hand side and the relationship between humans and the environment on the other.

Structurally, human rights can be limited by ecological considerations in the same way as they are presently limited, namely by social and democratic considerations. Human rights are not absolute, but subject to a variety of limiting factors. There are general and specific limitations to individual rights. The variety of limitations can be illustrated with some of the fundamental rights under the German constitution:

Article 1 - Protection of Human Dignity

(1) The dignity of the human being is inviolable. (...)

(2) The German people acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

Article 2 - Right of Liberty:

(1) Everyone shall have the right to the free development of his/her personality in so far as he/she does not violate the rights of others or offend against the constitutional order or the moral code.

(...)

Article 5 - Freedom of Expression:

(...)

(3) Art and science, research and teaching shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.

Article 14 - Property:

(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.

(2) Property imposes duties. Its use should also serve the public well-being.

A general reference often used in legislation defining limitations to human rights are the "reasonable limits prescribed by law as can be demonstrably justified in a free an democratic society". This phrase is used, for instance, in the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the Canadian Charter of Rights and Freedoms or in the New Zealand Bill of Rights. Typically, any limitation to an individual right has to pass a proportionality tests of necessity, lowest possible impairment and balance of conflicting rights.

There is, of course, a considerable variety as to how the balancing is actually achieved. For example, civil law countries and the United States follow an 'absolutist approach' under which there is heavy emphasis on the supremacy of law, particularly the Constitution, and an attempt to avoid substantive issues. On the other hand, countries like Britain, Australia or New Zealand follow a 'balancing of interests' approach which attempts to weigh up the various interests. However, the bottom line is the same throughout all these jurisdictions. It is always the concern for the rights of all members of society which ultimately determines to what extent the rights of the individual may be limited.

This bottom line can be referred to as the "social dimension of human rights "[63].

This being so would allow for a closer inspection as to what the essence of human rights and fundamental freedoms is. The essence appears to be the

attempt to define the freedom of the individual in interaction with other individuals. Thus, it is the social sphere of human existence which human rights are concerned with, not the biosphere. The biosphere (environment) is presently taken for granted and has no legal quality. Human rights are historically and systematically created to protect citizens against the state, in other words to protect humans from each other; they contain no provision to stop humans from exploiting nonhumans and fundamentally changing the conditions of life. As long as human rights are not impinged on we are free to destroy the environment and all life around us.

The only existing restriction in this respect is our anthropocentric morality which may require not to torture animals, not to turn a beautiful landscape into a moonscape or to limit genetic engineering to those areas beneficial to us humans. The limits are always drawn by our concern for human welfare to the exclusion of the welfare of other life forms. The dilemma is, of course, that we cannot survive without a concern for the welfare of life as a whole. This is the harsh reality discovered by ecology.

The anthropocentric limitations of our value system are ethical ones. However, what makes them so dangerous, literally life threating, is that they are also forming our legal norms. The law cements the view that only humans have intrinsic value and the environment just instrumental value. This necessarily leads to the superiority of human rights over any moral concerns for the environment.

To rectify this situation of grave imbalance I see two options. Either we manage the ethical paradigm shift in society and don't worry about human rights doctrines. We may simply assume that these doctrines would follow sooner or later. Or we promote the ethical paradigm shift at all social levels

including the constitutional and legal level.

Without discussing to what extent the law can make a difference to social behaviour, both of the two classic views appear to be wrong. Neither the traditional liberal view is true which holds a profound difference between legal norms and social reality, nor is the marxist view appropriate which denies any difference between legal norms and social reality. The law is both purely reflecting and actively influencing the way in which society operates. That is why it matters whether ecological reflections exist in legal norms or not.

For concept as revolutionary as the non-anthropocentric concept of human rights, the burden of proof is, if course, with the those advocating it. What then is the advantage of ecological human rights? Would they make any difference for the real outcome of decision-making? One exampkle should illustarte this. It will demonstrate why it would not be sufficient to purely rely on the social dimension of human rights.

The example is the law related to biotechnology.

At international level, biotechnology became subject of international law through the 1992 Convention on Biological Diversity[64]. Along with a general trend in recent international environmental law, the Biodiversity Convention takes the approach of ecosystem protection (i.e. protecting entire habitats rather than individual species as such)[65]. It does so by introducing (in its Preamble) an "intrinsic value of biological diversity", in addition to "the ecological, genetic, social, economic, scientific, educational,

cultural, recreational and aesthetic values of biological diversity and its components." This is the recognition of the distinction between (ecocentric) intrinsic values and (anthropocentric) instrumental values of the environment.

In fact, many recent environmental treaties have adopted an ecocentric focus. Examples include the 1991 Protocol on Environmental Protection amending the 1959 Antarctic Treaty, the 1982 World Charter for Nature, and the 32 so-called Alternative Treaties which several hundred Non-governmental Organisations negotiated at the 1992 Earth Summit in Rio. Interestingly, Article 4 of the Draft International Covenant on Environment and Development from 1995 (intended as a model for the long-debated UN Earth Charter) establishes the principle of respect for all forms of life. We can today say that environmental treaties are increasingly displacing the anthropocentric approach of simply valuing the environment in terms of immediate human utility by an ecocentric approach recognizing respect for the intrinsic values of the environment.[66]

Article 19 of the Biodiversity Convention calls for the Contracting States to take legislative measures towards controlling biotechnological research activities. The problem is that the Convention, like most treaties, leaves the means of implementation totally to the discretion of states.

At municipal level, several countries have introduced such controlling legislation, among them Germany with its Gentechnikgesetz (Gene Technology Law) of 1990. Such legislation regulates details of notification and licensing of genetically modified products (like e.g. the release of those products into the environment), but it always do so on the basis that there is a fundamental right to conduct genetic engineering in the first place. The

principle of free production and sale is the rule, any restrictions are the exception. The burden of proof, therefore, is not with the producer introducing a new risk potential, but with the general public (represented e.g. by expert commissions such as the Environmental Risk Management Authority in New Zealand or various comissions in the United Kingdom). Whether or not activities of genetic engineering are acceptable, is determined by weighing up social costs and benefits. The problem is that such social costs and benefits are exclusively determined by values of human utility. There are no intrinsic values of ecosystems and their components to be considered.

Quite obviously, there is a gap between the ecocentric approach of the Biodiversity Convention and its implementation through the anthropocentric approach of municipal legislation. To close this gap, one could imagine a simple legislative act to impose the burden of proof to the producer (or importer) with the consequence that any remaining doubts go against the applicant. However, such radical interpretation of the polluter pays and precautionary principle has not been made anywhere and is unlikely, indeed impossible to be made on the basis of our current anthropocentric concept of human rights.

Research, development and commercial application of genetic engineering are considered free up to a point where the rights of others may be impinged on. Such affected rights may include consumer rights (like the right to make informed choices), rights of health protection (i.e. against human health risks associated with genetically modified products), perhaps human dignity or the right to personal identity and self-determination. However, once these concerns are met nothing could stop genetic engineering from fundamentally altering the genetic structure of which nature is made up. That is why, for example, cloning of humans may be seen as restricted by

the principle of human dignity or the right to personal identity and self-determination, but cloning of animals and plants is not. This would be purely an issue of utilitarian considerations. If the 'Dolly experiments' appear useful to humans and their immediate needs, they will be considered lawful[67]. Sheep, like all animals and plants, are at the receiving end of our anthropocentric morality.

It may be, of course, that our morality will change over time and that, one day, ethical committees have the wisdom and power to stop genetic engineering going mad. At the moment, ethical committees are guided by absolute freedom of research on the one hand side and utilitarian cost-and-benefit analysis on the other. Since both principles are firmly enshrined in our human rights concept, the long-term ecological implications of genetic engineering will not count.

A closer examination of current case law reaveals that ecological human rights would have altered the outcome. For instance, with respect to property rights German courts have increasingly acknowledged that land and resource use is restricted by requirements of the 'public weal' (Article 14). This lead, for example, to restrictions in the use of chemical fertilizers and pesticides on farmland, to protection against overgrazing caused by too many cattle or a ban of certain hazardous substances. However, in all cases the restrictions were ultimately determined by human health standards, not ecological concerns. As the German Federal Constitutional Court (in a case of 1982 regarding ground water levels) stated: "Private land use is limited by the rights and interests of the general public, to have access to certain assets essential for human well-being such as water"[68]. Respect for the intrinsic value of life (other than human life) would have lead to much more stringent restrictions than securing water supply for people. However, to quote from another decision, this time of the German Federal Administrative

Court (1987): "The law cannot provide for the health of ecosystems per se, but only in so far as required to protect the rights of affected people."[69]

A notable exception to this anthropocentric reductionism (and proving the rule) is the protection of animals. Various European countries have, in the past few years, altered the legal status of animals. They are not regarded as "things" anymore which can be possessed and used like cars, but as "creatures" in their own right. Consequently, there are now a number of cases penalizing "inhumane" treatment of animals (e.g. banning certain means of killing them or requiring a minimum cage size for poultry). So, the recognition of, at least, a rudimentary form of intrinsic value of animals has made a significant difference. Apparently, the animal rights movement of the 1970's and 1980's is bearing fruit.

Some legal commentators now speak of a remarkable "spill-over effect" caused by the international trend towards a human right to a decent environment and towards recognition of animal rights. Both clearly anthropocentric, in nature, the "spill-over effect" is, nevertheless, clearly there. To quote Catherine Redgwell "The dam of anthropocentrism has clearly been breached. Given the increasing awareness of the interconnectedness of human beings and the environment and of the intrinsic value of the latter (...), nature is unlikely to simply be ignored; rather, the problem is one of reconciling a diverse environmental (agenda) and human rights agenda."[70]

The reconciliation of these two agendas can be achieved by implementing the principle of the "respect for the intrinsic value of life" into our understanding of human rights. Human rights would therefore be shaped by limitations drawn from their social and ecological context. Some examples -

using the same German fundamental rights as shown above - can illustrate the implimentation of this new principle of respect[71]:

Article 1 - Protection of Human Dignity

(1) The dignity of the human being is inviolable. (...)

(2) The German people acknowledge inviolable and inalienable human rights *and the respect for the intrinsic value of life* as the basis of every community, of peace and justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

Article 2 - Right of Liberty:

(1) Everyone shall have the right to the free development of his/her personality in so far as he/she does not violate the rights of others, *ignore the respect for the intrinsic value of life* or offend against the constitutional order or the moral code.

(...)

Article 5 - Freedom of Expression:

(...)

(3) Art and science, research and teaching shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.

Article 14 - Property:

(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.

(2) Property imposes duties. Its use should also serve the public well-being and *the respect for the intrinsic value of life.*

The importance is not the exact wording[72], but the intention or, more precisely, the dynamics carrying the ecological interpretation of human rights.

Historically, the idea of human rights was shaped by two major political ideologies. First by 18th century liberalism (establishing the idea of individual freedom, French: liberté) and second, by 19th and 20th century democractic and social principles (adding the ideas of equality and solidarity; French: egalité and fraternité). It makes perfect sense to define the human being, as conceptualized by the modern idea of human rights, as an individual in a free, democratic society.

It should not be forgotten though, that it was the experience of social injustice which created the social dimension of human rights. If we, today,

experience environmental injustice as an additional, far-reaching threat, then it is only logical to discover the ecological dimension of human rights.

This discovery may well be the greatest challenge for postmodern constitutionalism[73]. There is no point of prolonging the life of *homo economicus occidentalis*.. This species should vanish together with all the ideas of anthropocentrism, individualism and materialism. Postmodern constitutionalism should cater for the emerging species of *homo ecologicus universalis*. [*] Associate Professor of Law, University of Auckland, Faculty of Law, Private Bag 92019, Auckland/New Zealand.

[0] As "Ökologische Grundrechtsschranken" promoted by the Grünen and several Länder during the German constitutional reform between 1987 and 1993; see K.Bosselmann, *Im Namen der Natur - Der Weg zum ökologischen Rechtsstaat,* Munich 1992, 195-202 and *When Two Worlds Collide - Society and Ecology*, Auckland 1995, pass.

[2] Described by P. Cliteur as "one of the most important revolutions of our time in the field of human rights"; What Developments Can We Expect in the Field of Human Rights for the Coming Decades?, 13 *Rechtstheorie* 2/96, 177 at 183.

[3] B.H.Weston, Human Rights, 6 *Human Rights Quarterly* (1986)257, 262.

[4] S.Davidson, *International Human Rights*, Oxford 1994, 2.

[5] Weston, above n 3, 262.

[6] Weston, above n 3, 262 (emphasis added).

[7] Weston, above n 3, 262-263.

[8] Davidson, above n 4 39-40.

[9] For example, a right may provide that everyone has the right of freedom of speech, but a duty not to slander the state, P.Sieghart *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* , Oxford 1985, 79.

[10] See also Article 30.

[11] Sieghart, above n 9, 80.

[12] Sieghart, above n 9, 80-81.

[13] Article 4, ICCPR.

[14] UNGA Resolution 2398 (XXII), 3 December 1968.

[15] Declaration of the United Nations on the Human Environment (1972) 11 ILM 1416, Preamble and Principle 1.

[16] Declaration of the Hague (1989) 28 ILM 1308, Preamble.

[17] UNGA Resolution 45/94, 14 December 1990.

[18] Resolution 1990/41, 6 March 1990.

[19] Draft Earth Charter, 26 August 1991; H.Hohmann (ed), *Basic Documents of International Environmental Law*, 1992, vol.3, 1748.

[20] Principle 3: "The right to devlopment must be fulfilled as to equitably meet developmental and environmental needs of prsent and future generations."

[21] Organisation for Economic Cooperation and Development, Responsibility and Liability of States in Relation to Transfrontier Pollution, 13 *Environmental Policy and Law* (1984), 122.

[22] Draft UNECE Charter on Environmental Rights and Obligations, adopted October 29-31, 1990, quoted in D.Shelton, Human Rights, Environmental Rights, and the Right to Environment, 28 *Stanford Joornal of International Law* (1991), 103 at fn 84.

[23] R.Falk, Human Rights and State Sovereignty (1981) quoted in E.Brown Weiss, The Planetary Trust: Conservation and Intergenerational Equity, 11 *Ecology Law Quarterly* (1984), 495, 558. See also M.L.Schwartz, International Legal Protection for Victims of Environmental Abuse, 18 *Yale Journal of International Law* (1993), 374 and J W Nickel, The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification" (1993) 18 *Yale Journal of International Law*, 281.

[24] P.W.Birnie and A.E.Boyle, *International Law and the Environment*, Oxford 1992, 192.

[25] J.Crawford, The Rights of Peoples: Some Conclusions, in J.Crawford (ed), *The Rights of Peoples,* Oxford, 1988),159, 172.

[26] Schwartz, above n 23, 374.

[27] Birnie and Boyle, above n 24, 192.

[28] Schwartz, above n 23, 375.

[29] E. Brown Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* ,Tokyo 1989, Appendix B. See also *Human Rights and the Environment.Second Progress Report*, UN Doc.E/CN.4/1993/7; the Special Rapporteur conducted an extensive study of national constitutions and jurisprudence. Forthcoming 1998 is M.Bothe, *The Right to a Healthy Environment in the European Union*, Kluwer Law International.

[30] See Final Report of Fatma Zohra Ksentini, *Economic and Social Council*, UN Doc. E/CN.4/4.Sub.2/1994/9.

[31] A.Kiss and D.Shelton, *International Environmental Law*, Transnational Publ 1991, 27.

[32] Article 225 of Chapter VI.

[33] Kiss and Shelton, above n 31, 27.

[34] Kiss and Shelton, above n 31, 26-27.

[35] See K.Bosselmann, *Ökologische Grundrechte*, Baden-Baden 1998, 32-38.

[36] M.Bothe, above n 29, 12.

[37] Birnie and Boyle, above n 24, 193.

[38] N.Gibson, The Right to a Clean Environment, 54 *Saskatchewan Law Review* (1990), 5, and C. Giagnocavo and H.Goldstein, Law Reform or World Re-form, 35 *McGill Law Journal*(1990), 346.

[39] See generally Shelton, above n 22, and Nickel, above n 23.

[40] Shelton, above n 22, 110.

[41] Birnie and Boyle, above n 24, 194.

[42] Birnie and Boyle, above n 24, 194.

[43] H.Rolston III, Rights and Responsibilities on the Home Planet, 18 *Yale Journal of International Law* (1993) 251, 259-262.

[44] Nickel, above n 23, 282.

[45] Ibid., 283.

[46] Ibid., 283.

[47] 45 *Southern California Law Review* (1972), 450. See also C Stone

Earth and Other Ethics: The Case for Moral Pluralism , New York 1987 and *Should Trees Have Standing? Marking the 25th Anniversary*, Los Angeles 1997.

[48] Giagnocavo and Goldstein, above n 38.

[49] Ibid., 357.

[50] Stone, above n 47, 495. See generally 489-501.

[51] See also K.Bosselmann, Introduction to C.Stone, *Umwelt vor Gericht* (German trans. of Should Trees have Standing?), 2nd ed. München 1993.

[52] M Grubb (et al) *The Earth Summit Agreements: A Guide and Assessment* , London 1993, 83.

[53] As an negotiator of the NGO Earth Charter I was surprised to see an undisputed commitment to ethical ecocentrism among the ca. hundred NGO's represented at these negotiations in Rio.

[54] The Earth Charter is published in Pacific Institute of Resource Management (ed.), *Commitment for the Future: The Earth Charter and Treaties agreed to by the International NGOs and Social Movements*, Wellington 1992. The first principle states: We agree to respect, encourage, protect and restore Earth's ecosystems to ensure biological and cultural diversity."

[55] See Stone's discussion of the *Seehunde v. Bundesrepublik Deutschland* (in which an action was taken on behalf of seals suffering from chemical pollution of the Baltic sea, in K.Bosselmann, *Im Namen der Natur*, above 1, 181-189 and C.Stone, *The Gnat is Older than Man: Global Environment and Human Agenda* , Princeton 1993, 85-86.

[56] Stone, above n 47, 453-57.

[57] J.A.Nash, The Case for Biotic Rights, 18 *Yale Journal of International*

Law (1993), 249.

[58] C.Redgwell, A Critique of Anthropocentric Rights, in Boyle and Anderson, *Human Rights Approaches to Environmental Protection* , Oxford 1996, 71, at 73.

[59] Bosselmann. *Ökologische Grundrechte*, above 35, 5-16.

[60] T.Regan, Does Environmental Ethics Rest on a Mistake?, *Monist* 75 (1992), 161-182.

[61] See R.Elliot (ed.), *Environmental Ethics*, Oxford 1996, 15.

[62] The individualistic approach of Rawls' liberalism is, of course, a different matter; for a general critique see K.Bosselmann, Taking Nature Seriously: Building Blocks for Theory of Environmental Justice, in: K.Bosselmann and B.Richardson (eds.), *Environmental Justice and Market Mechanisms*, forthcoming Kluwer 1998.

[63] Which is the common term used in German theories on fundamental rights; on the relation between social and ecological rights see Bosselmann, above n 35, 28-33.

[64]U.N. Doc. 6.10. 31 I.L.;. 818 (1992).

[65] Kiss and Shelton, above n 31, 11.

[66] Redgwell, above n 58, 73.

[67] Which at present, of course, they are.

[68] Bosselmann, above n 35, 94-7.

[69] Ibid.

[70] Redgwell, above n 58, 73.

[71] Proposed amendments in italics and underlined.

[72] For a proposal with respect to the Austrian constitution see P.Pernthaler, Reform der Bundesverfassung, in: P.Pernthaler/K.Wimmer/N.Wimmer, *Umweltpolitik durch Recht*, Wien 1992, 10; with respect to the Swiss constitution see Bundesamt für Umwelt, Wald und Landschaft (ed.), *Die Würde der Kreatur*, Gutachten 1995.

[73] K.-H. Ladeur, P*ost-Modern Constitutional Theory*, European University Institute Working Paper Law No. 95/6.