



To: Amazon Watch

Att: Atossa Soltani

CC: Shannon Biggs, Randy Hayes, Linda Sheehan, Thomas Linzey
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From: Cormac Cullinan¹

Re: **Constitutional rights of Nature**

Date: 30 April 2008

MEMORANDUM

Introduction

1. This memorandum has been written in response to a request for information and support regarding the inclusion in the Ecuadorian constitution of articles recognising the rights of Nature. (The request was communicated via Randy Hayes and Shannon Biggs). I hope that readers, and particularly those involved in the constitution-making process in Ecuador, will forgive the fact that I refer, firstly to various characteristics of constitutions and their importance which they will already be very conscious of, and secondly, to examples from my home country, South Africa. My intention in doing so is simply to support those working so hard to include rights for Nature in the new constitution of Ecuador by providing evidence from my own experience that their work is of fundamental importance, not only to Ecuador, but also as an example to the world.
2. Currently the major legal systems of the world are designed to support the domination and exploitation of the Earth by humans in the mistaken belief that long-term human well-being can be achieved in this manner. *Wild Law* makes the case for rethinking our governance systems so that their fundamental purpose becomes ensuring that humans maintain mutually beneficial relationships with the other members of the Earth community (i.e. Nature). This requires recognising that human societies function within a natural system of order and aligning human governance systems with the fundamental principles or “laws” of natural systems. This approach or philosophy

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(known as “Earth Jurisprudence”) is rapidly gaining support in many countries in Africa, in the United Kingdom and the United States.² Articles informed by this approach have been included in the draft Kenyan constitution.³

3. I believe that it is highly desirable to including an article recognising the rights of Nature is because:
 - 3.1. it will help the people of Ecuador (and elsewhere) to appreciate the reality that we are an integral part of Nature and that the well-being of human societies, and particularly future generations, depends on living in harmony with Nature (i.e. living in accordance with the fundamental rules or “constitution” of the Earth community of which we are part);
 - 3.2. it will provide a means of moving towards a more balanced relationship with Nature by requiring the rights of humans to be balanced against the rights of other aspects of Nature and by creating a duty on humans to respect the rights of Nature (the precise content of this duty will be refined over time as our understanding of our role deepens); and
 - 3.3. it will provide a powerful legal tool to facilitate the evolutionary leap that human governance systems must make from hierarchical systems of dominance enforced by the exercise of power and force, to systems based on co-operation and mutual benefit.
4. This memorandum begins by reviewing some of the functions performed by constitutions in order to emphasise the importance of including the concept in a constitution (as opposed to in other legislation), before discussing whether or not it is useful to use the legal concept of “rights” in relation to Nature.

Constitutions define whose rights will be recognised and protected by law

5. Constitution-making is an enormously significant activity which usually only occurs a few times in a country’s history. A constitution literally “constitutes” a society or community (whether it be a state or a sports club) by defining what that group of people aspire to; how they see themselves (i.e. their sense of identity); how decisions will be taken and power will be exercised; and how change will occur (e.g. through elections and defined legislative processes). A constitution establishes the

² Since the publication of *Wild Law* in 2002, these ideas have certainly been gaining support and are being used in many countries in Africa, in the United Kingdom and the United States. In some cases, organisations such as the Community Environmental Legal Defence Fund (“CELDF”) in the United States had arrived at similar conclusions from their own work with communities. In other areas, such as Africa, the ideas have been enthusiastically received largely because people recognise the connections between this thinking and traditional customary systems of law and governance which have always recognised that humans are dependent on Nature and the paramount importance of maintaining a respectful relationship with Nature and recognising that the relationships that create the web of life that sustains us are reciprocal. This means that they are two-way relationships and will break down unless they are mutually beneficial (this is sometimes expressed in the maxim “for every taking there must be a giving”).

³ The new Kenyan constitution has not yet been adopted due to political tensions in that country unrelated to these articles.

fundamental framework within which a community will function and its culture will develop. Constitutions entrench these fundamental features of a society and deliberately make it difficult to change this framework once it has been established.

6. For example, the Declaration of Independence of the thirteen United States of America of 4 July 1776 stated:

"We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, and among these are Life, Liberty and the Pursuit of Happiness."

7. However, as the Community Environmental Legal Defense Fund ("CELDF") and others have pointed out, at the time that that Declaration and constitution were made, most people were not considered "Men" for the purposes of the Declaration and consequently not entitled to the rights enshrined in the constitution. Women, Native Americans, African Americans, and white men that did not own property, were all excluded from the constitution-making process and were not entitled even to vote at that stage. In other words these people fell outside of the framework of rights and it required the American Civil War, long political struggles by movements such as the abolitionists, the suffragettes and the civil rights movement, as well as constitutional amendments, to extend the framework of the constitution to embrace people who had always been members of American society, but were previously not fully recognised as such by the legal and political system.
8. As time passes, most people stop considering what lies outside of the frame established by the constitution and forget that some of choices made during the drafting of the constitution may need to be rethought. For example, today most Americans are not conscious that when their Bill of Rights was framed, it not only excluded most of the human inhabitants of the United States from its protection, but also all the non-human inhabitants and Nature as a whole. In the light of the accelerating degradation of our habitat, that choice now appears wholly inappropriate. 21st Century constitution-makers would be wise to avoid repeating that oversight.

Constitutions educate and establish new norms and values

9. A constitution, and in particular a bill of rights, sets out the values to which a society aspire even though these values may not necessarily enjoy majority support at the time that the constitution is drafted and adopted. One of the most important functions of a constitution is to promote discussion about higher values and to inspire a society to strive to live by them. By enshrining fundamental values in the form of rights, a constitution:
- 9.1. helps to establish new norms of behaviour;
 - 9.2. serves as a tool for educating society; and
 - 9.3. creates legal means, firstly to prevent power being exercised in a manner that undermines these new norms, and secondly to transform the society so that it better reflects these values.
10. For example, the South African Constitution of 1996 enshrines the right to life, the right to freedom from discrimination on the basis of race, gender or sexual orientation as well as an environmental right. At the time that this constitution was adopted, it was

probable that a majority of the society were racist, homophobic, supporters of the death penalty and were not particularly concerned with ecological sustainability. However, the presence of those rights in the Bill of Rights has had, and continues to have, a very important role in transforming the society from a bitterly divided one based on *apartheid*, towards a more integrated one which celebrates its diversity. This is occurring gradually as people become aware of their rights and take cases to court to enforce them and as old legislation is amended or replaced with new legislation that is consistent with the new constitution.

The critical issue of our time

11. Although constitutions are inevitably heavily influenced by the recent past and by the political change that leads to their being drafted, they are primarily documents for the future. In other words, those drafting a constitution must be conscious of the challenges which the society is likely to face in the decades and centuries, ahead.
12. At this time in the history of the planet, there is one issue which dominates all others. That issue concerns the fact that the dominant civilisations on Earth, without exception, are ecologically unviable. In other words, they are based on patterns of unsustainable consumption and waste disposal practices (including not only solid waste disposal to landfills but also emissions to the atmosphere and into water). The ill-effects of this are everywhere apparent and one of the consequences is that Earth is now in the early stages of the sixth period of mass extinction. (In the history of Earth there have only been five previous periods of mass extinction, the last seeing the demise of the dinosaurs approximately 15 million years ago.) It is already clear that a combination of climate change and the accelerating consumption of oil and gas, means that civilisation in the form that we know it cannot exist for much longer. Although massive change to our societies is inevitable, the degree and nature of that change will depend on the choices which we make to restructure our governance systems and control human activities within the short-to-medium term.
13. Humans are an integral and inseparable part of the Earth system and accordingly in the long-term, human fulfilment and well-being cannot be attained except by maintaining healthy relationships with the wider community of life on Earth. This means that our governance systems must of necessity have as a primary purpose, ensuring that the pursuit of human well-being does not undermine the integrity of Earth, which is a source of our well-being. This means that our constitutions and laws must reflect the reality that human society is part of a wider Earth community and must observe certain universal principles and prevent humans from transgressing them.

Removing the blinkers from our legal systems

14. In most countries today, Nature lies outside of the frame established by the constitution and all aspects of Nature are treated by the law as objects which prevents us from relating to them as the subjects that they really are. The relationship between humans and Nature is regulated by property laws which define this most fundamental relationship as one between a dominant owner (i.e. a subject) and object or "resource". Defining relationships in this way guarantees that they will be exploitative (in fact the word "exploitation" is commonly used in relation to "natural resources"). This is clear if one considers the relationships that arose when certain people were defined as

“objects” that could be owned (i.e. slaves). Self-evidently, the relationship between a slave-owner and a slave will be exploitative.

15. In order to make the evolutionary leap in thinking and practice that will be required to reintegrate humans into the Earth community and to change our relationships from ones of domination and exploitation to ones of partnership and community with the other beings on whom we depend, it will be necessary to expand our concepts of morality and ethics to embrace Nature. As Albert Einstein expressed it:

“A human being is a part of the whole called by us Universe, a part limited in time and space. We experience ourselves, our thoughts and feelings as something separate from the rest. A kind of optical delusion of consciousness. This delusion is a kind of prison for us, restricting us to our personal desires and to affection for a few persons nearest to us. Our task must be to free ourselves from the prison by widening our circle of compassion to embrace all living creatures and the whole of nature in its beauty. The true value of a human being is determined by the measure and the sense in which they have obtained liberation from the self. We shall require a substantially new manner of thinking if humanity is to survive.” (Albert Einstein, 1954)

16. If we are to re-contextualise our human societies within the network of relationships that constitute the Earth community, we will need legal mechanisms to guide human behaviour in a way which requires each of us to establish and maintain mutually beneficial relationships with Nature. As with any community, if one wants to remain part of it, one must observe its rules. This means that we must align our legal systems with the laws of Nature.
17. For example, it is clear that the natural systems that maintain climatic conditions on Earth and the composition of the atmosphere at levels conducive to life cannot absorb greenhouse gasses at the rate that human societies are generating them. Our legal systems are not aligned with this universal principle and consequently, in most cases it is lawful for human beings to engage in activities that emit excessive quantities of carbon dioxide and methane. We have made the fundamental error of believing that as “owners” of this “thing” called Earth or land we are able to maintain a one-way relationship of domination (i.e. we have rights in relation to Nature but not duties). However the community which is Earth is held together by a web of reciprocal relationships. In other words, these relationships are two-way and persist because they are mutually beneficial. So our abusive relationship to Earth is now producing a response (e.g. in the form of climate change) which has the potential to kill many, if not all, humans unless we modify our behaviour. Furthermore this challenge cannot be addressed successfully by trying to reassert relationships of dominance because humans do not have the political, economic or technological power to make the Earth’s climatic system subservient to human will.

The question of rights

18. A question which frequently arises is whether recognising “rights” for Nature is an appropriate way of responding to environmental problems. One of the difficulties that many people (particularly lawyers) have with this concept is that legally speaking, a right can only be held by a subject and can only be said to exist if it is enforceable in a court of law. Currently, the idea of “rights for Nature” fails on both accounts because no aspect of Nature is regarded as a subject capable of holding rights and most

contemporary legal systems do not have legal mechanisms that enable the rights of Nature to be recognised and enforced in courts. In other words, from the limited perspective of most contemporary legal systems “rights for Nature” is a legal absurdity.

19. However, we sometimes fail to recognise that we have chosen not to provide legal recognition and protection of the rights of Nature. The people of Ecuador now have an historic opportunity to make a new choice in their new constitution. Although the term “rights” has been developed in the context of human relationships and bears very specific meanings in this regard, I believe that it is appropriate to use the same term to describe fundamental aspects of the relationships between humans and non-human members of the Earth community. If we claim that humans and juristic persons (such as companies) have rights in relation to rivers, land etc., we must also recognise that as subjects, rivers and land must have reciprocal rights in relation to humans. If we do not, we will be perpetuating a fundamental inequality that will obstruct our attempts to describe the reality of the situation in legal terms.
20. The eminent thinker and cultural historian, Thomas Berry, has pointed out that fundamental rights originate from the fact of our existence within the Universe. In other words, if we claim to have fundamental rights which derive from the fact of our existence as humans and not from an Act of a legislature or a constitution, then it follows that all other members of the Earth community that have co-evolved with us must also have fundamental rights. In Berry’s view, these rights would not be the same for each aspect of Nature, but must at least include the right to exist, the right to habitat or a place to be, and the right to continue playing a role in the evolutionary story of which we are all part. Thomas Berry has stated that:

“When we use the term “rights” we mean the freedom of humans to fulfil their duties, responsibilities and essential nature and by analogy, the principle that other natural entities are entitled to fulfil their role within the Earth Community.” (Quoted in “Wild Law” at page 108.)

21. In other words, if we are to use the language of rights and corresponding duties to describe fundamental aspects of relations between humans that we require the members of human communities to observe, then broadening the ambit of our legal systems to recognise the reality that in fact we are an integral and inseparable part of a far wider community must mean that we use consistent language and concepts to describe our relations with the other members of the Earth community. By describing fundamental qualities or aspects of these relationships as “rights” it also enables us to mobilise the machinery of the legal system in defence of these relationships and, in so doing, to foster healthy relationships within the wider Earth community.
22. For example, one of the most important aspects of recognising rights for Nature is to create the corresponding duties on humans to observe and respect those rights. In other words, the main function of our legal systems will be to define the precise content of human duties in relation to aspects of Nature in order to ensure that the rights of Nature or the Earth community are not infringed. This can be understood as a form of enlightened self-interest because the only way to safeguard the long-term well-being of human communities is to protect the integrity and health of the Earth community of which human communities form part, and on which they are wholly dependent.

Can't we simply provide a remedy instead of a right?

23. One of the questions posed is whether it is necessary to provide that Nature has rights when one could simply give persons legal standing to go to court on behalf of Nature and empower those persons to recover damages for harm to Nature which must then be applied to restoring any ecological damage. In other words, is it not sufficient simply to give those humans who are concerned about the degradation of Nature, legal tools to enable them to address the problems caused by human exploitation of Nature?
24. In my view, this approach has a number of shortcomings. Firstly, it does not assist humans to make the essential and fundamental conceptual shift from seeing Nature as a collection of objects to be exploited to what Thomas Berry refers to as “a communion of subjects”. This shift is a fundamental importance not simply on ideological grounds, but also in order to remove a potentially fatal misconception about the role of humans on Earth. We now know that the mechanistic understanding of the universe which emerged in Western Europe during the “Age of Enlightenment” in the 16th and 17th centuries⁴ is incorrect. Modern scientific understandings of the universe point to it existing by virtue of a network of relationships or “communion” between the different parts. This means that we are part of a system which is vastly more complex than previously appreciated and that any prospect of us being able to dominate, control and manipulated as one would a machine, is pure fantasy.
25. In other words, using the language of “rights” instead of simply providing a legal remedy has a number of important advantages, including the following.
- 25.1. Recognising Earth and aspects of Earth (or members of the Earth community) as subjects capable of holding legally enforceable rights is a more accurate description, in legal terms, of reality.
- 25.2. The process of balancing the rights of different members of a community against one another is fundamental to a healthy community and recognising rights for Nature more accurately expresses the existing reality that human well-being in the long-term depends on maintaining balanced, reciprocal relations with the other members of the Earth community and cannot be achieved by the unilateral exercise of power.
- 25.3. It begins the process of dismantling the dangerous illusions that we have long laboured under, namely that:
- 25.3.1. humans are separate from Nature;
- 25.3.2. humans are superior to Nature and entitled to exploit it indefinitely for short-term gain; and
- 25.3.3. human wellbeing is best increased by increasing consumption rather than by maintaining mutually beneficial relations with other humans and other members of the Earth community.

⁴ This was brought about in part by the writings of philosophers and scientists such as Descartes, Bacon and Newton.

26. If one simply provides a legal mechanism to enable, for example, the recovery of damages for ecological harm, one remains within the existing legal framework which sees everything from a human-centred (i.e. anthropocentric) perspective. In other words, it would not be necessary for all persons, as well as the state itself, to begin to change their thinking, policies and actions to give effect to the reality that our wellbeing depends on maintaining good relations with the rest of the Earth community. All that would happen is that the courts would be empowered to grant a remedy to humans who were sufficiently aggrieved by an injury to Nature to go to the trouble and expense of bringing the matter before the court. This is unlikely to have a significant practical effect.
27. For example, in South Africa, the rules of standing in relation to environmental matters are very wide and almost anyone can litigate to protect the environment. It was initially feared that this would lead to a flood of litigation. However, in practice there has been very little environmental litigation because litigation is very expensive and there are relatively few people who are willing to spend money litigating on behalf of Nature in circumstances in which they will not derive a personal, short-term benefit. Furthermore, a remedy of this Nature tends to be reactive and in most cases litigation occurs only after the harm has occurred.
28. In short, the main objection to providing a remedy instead of a right is that the former does not achieve the most fundamental objective of shifting society's understanding of the need to change fundamentally how it relates to the world around it.
29. For example, the apartheid regime in South Africa was based on the false understanding on the part of those in power that the interests of a small part of the community (i.e. white people) was best served by maintaining a dominant and exploitative relationship to the rest of the community and denying them fundamental rights. In fact, the opposite was true and the society has only been able to flourish and progress by recognising the interdependence of all members of the community and enshrining the rights for all in the Constitution. Recognising the fundamental rights of every South African, regardless of race or gender, achieves far more than could have been achieved had the Constitution provided a remedy whereby damages could have been recovered and applied for the benefit of a person who has been a victim of racial discrimination.

Is it realistic to make such a fundamental change?

30. A fundamental shift in perspectives required to move from a legal system based on perpetuating exploitative relationships with the Earth seen as an object or property to one in which the purpose of the relationship is to encourage appropriate behaviour from the perspective of the whole Earth community. This shift is arguably as great as moving from an understanding that the sun revolves around the Earth to the contrary position. However, it does not necessarily mean that the impact of this shift will produce an immediate and devastatingly swift impact on society. Copernicus and Galileo did not succeed in convincing the authorities of the day that they were correct but, nevertheless, their theories did more accurately reflect the reality of the universe and without doing so, we would not have been able to progress scientifically.

31. In South Africa, enshrining the rights referred to in the introduction in the Constitution did not immediately transform South African society into a fair society that does not discriminate unfairly against people. However, the enactment of the South African Constitution started a process of transformation that is progressively transforming the society for the better. As more and more cases are brought to court challenging existing laws or practices on the basis that they are inconsistent with the values in the Constitution, so the machinery of government and the behaviour of corporations and individuals gradually changes. Similarly, children are taught the values enshrined in the Constitution which changes their expectations and norms of what constitutes acceptable behaviour.

32. Conclusions

33. Widespread environmental destruction and consequential adverse impacts on people are an inevitable result of the failure of our legal systems to recognise that we can only exist as part of natural communities and to enforce our primary responsibility to preserve the health of natural communities.

34. At this critical juncture in the history of our planet where there is a real possibility that the failure of human governance systems to regulate human behaviour so that we do not transgress the fundamental rules of the community of which we are part, is imperilling many members of the community, leadership is desperately needed. We hope that the people of Ecuador will provide the leadership that the world needs and adopt a constitution that is a shining example of what can be done to tackle the most crucial challenges facing humankind at this time.
