

**ENVIRONMENTAL ETHICS AND SUSTAINABLE DEVELOPMENT:
ETHICAL AND HUMAN RIGHTS ISSUES IN IMPLEMENTING
INDIGENOUS RIGHTS**

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I ABOUT ENVIRONMENTAL ETHICS:

Environmental ethics is concerned with the issue of responsible personal conduct with respect to natural landscapes, resources, species and non-human organisms. Conduct by persons is the direct concern of moral philosophy.

Moral responsibility normally implies knowledge, capacity, choice, and value significance. That is to say, if a person is morally responsible to do something, then he (a) knows of this requirement, (b) is capable of performing it, (c) can freely choose whether or not to do it, and (d) the performance thereof affects the welfare and/or liberty of other beings. Because one's response to these requirements reflects upon his value as a moral person, a peculiarly distinctive trait of humanity, we say that this response has moral significance.¹

This analysis of moral responsibility explains why environmental ethics has only recently attracted the attention and concern of environmentalists and the general public. Until quite recently, human effects on the environment were regarded as neutral since we assumed nature was both impersonal and too vast to be injured by our interventions. At the very least, we were quite unable to foresee the harm resulting from our dealings with nature. Now of course we know better. We know that we can cause massive and permanent damage to natural landscape, resources and ecosystems. Not only do we know that we can cause these insults, we also know how we can cause them, and how we can prevent or remedy them. Knowing this exacts a moral obligation to act with care, foresight and at times, with forbearance and constraint. In our dealings with the environment, we are in short,

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¹ Ernest Partridge, *Environmental Ethics: An Introduction*, (unpublished) 4-5 <<http://gadfly.igc.org/e-ethics/Intro-ee.htm>>

called upon to reflect, act, or perhaps to refrain from acting in a manner, which testifies to our worth as *moral* persons and as a *moral* culture – in a word respond ethically.²

Accordingly, environmental ethics includes such questions as:

- Why care about nature for itself when only people matter?
- When species or landscapes or wilderness areas are destroyed, what, of value, is lost to mankind?
- Will future generations miss what we have ‘taken from them’?
- Does land ownership make moral sense, or is it a morally absurd and repugnant concept in Western culture meant to deprive Indigenous peoples of their customary land?
- Do human beings have a need for nature that implies an obligation to preserve it?³

So, why is environmental ethics important? It is important because the explosive growth of scientific knowledge, followed shortly by a parallel growth in technical ingenuity, has created an explosive growth in moral problems – some unprecedented in human history. While ethics is a very ancient human preoccupation, environmental ethics is very new.⁴

In view of the recent dramatic growth in knowledge and technology, it is not difficult to see why this is so. Ethics deals with the realm of imaginable conduct that falls between the impossible and inevitable – that is, within the area of human capacity and choice. And now, within our lifetime, we have acquired capabilities and thus face choices that have never been faced before in the course of human history – indeed, we now face many capabilities and choices never contemplated or even imagined before. These include choices of birth, life and death for our species and others; choices that are rapidly changing the environment forever.⁵

When the ecosystem was not understood or even recognised or appreciated as a system; when the earth and its wilderness were believed to be too vast to be damaged by voluntary human choice; at such a time, there was no environmental ethics. But in our own time, we have revalidated the myth of Genesis, for in our own time, with knowledge has come power, and with both knowledge and power, we have lost our innocence.⁶

This knowledge and this power are a result of the scientific revolution. As a methodology, science purports to be value free and most practitioners of science aim to be value free. But this theoretically value free methodology has opened up a bewildering array of capacities and choices to us evaluating creatures. And we are

² Ibid 5.

³ Ibid.

⁴ Ibid 14.

⁵ Ibid 14-15.

⁶ Ibid 15.

now equipped with the ethical insights and moral restraints that are necessary to deal wisely and appropriately with these choices especially as they relate to the environment.

The issues of environmental ethics are momentous and involve moral choices of enormous importance that we can make and even more, which we must make. Our moral responsibility to nature and to the future is of unprecedented significance and urgency, and it is a responsibility that we cannot escape. That is the essence of environmental ethics.

Environmental ethics stretches classical ethics to a new level. 'All ethics seek an appropriate respect for life.'⁷ But we do not need a humanistic ethic applied to the environment, as we have needed one for business, law, medicine, technology, international development or nuclear disarmament. Respect for life does demand an ethic concerned about human welfare, but environmental ethics stands on a frontier, as radical theoretically as it is applied. It alone asks whether there can be non-human objects of duty. It seeks to evaluate nature, both wild nature and the nature that mixes with culture and to judge duty thereby.⁸

Therefore, a comprehensive environmental ethic needs

the best, naturalistic reasons, as well as good, humanistic ones, for respecting ecosystems. Ecosystems generate and support life, keep selection pressures high, enrich situated fitness, and allow congruent kinds to evolve in their places with sufficient containment.⁹

The concept of environmental ethics does not just provide opportunity for spirited debate on the value of sustainable development. It has played an important role in influencing the growth of ideas and opinions, representing something new in global governance, that seek to express genuine beliefs and values that should ideally govern decision-making for the benefit of humans and the rest of the living world. The most outstanding expression of these beliefs and values is perhaps the *Earth Charter*.¹⁰

As a set of principles to live by, rather than a prescription for action, the *Earth Charter* stands apart from the many other UN driven Declarations and Treaties that address sustainable development. And it does so in ways that have a direct impact on issues of environmental ethics.

⁷ Holmes Rolston III, 'Environmental Ethics: Values In and Duties to the Natural World' in F Herbert Bormann and Stephen R Kellert (eds), *Ecology, Economics, Ethics: The Broken Circle* (1991) 73.

⁸ Ibid 73-74.

⁹ Ibid 88.

¹⁰ *The Earth Charter Initiative* <<http://www.earthcharter.org/files/charter/charter.pdf>> 29 March 2005.

First it presents a holistic worldview driven by such *ethical* concerns as respect for nature, rather than the economics and science driven environment by the ‘numbers approach’ that most businesses and government take toward sustainable development. This holistic approach views the strengthening of democratic institutions, the transparency and accountability of governing institutions, and participatory decision-making as inseparable from environmental protection and social and economic justice.

In particular, there are a number of principles and sub-principles in the *Earth Charter* that directly bear upon human rights, sustainable development and, specifically, the rights and ethical treatment of Indigenous peoples. These are embedded in the Charter's four key principles under the broad heading of ‘Respect and Care for the Community of Life’:

1. Respect Earth and life in all its diversity: (a) recognise that all human beings are interdependent and every form of life has value regardless of its worth to human beings; (b) affirm faith in the inherent dignity of all human beings and in the intellectual, artistic, ethical, and spiritual potential of humanity.

2. Care for the community of life with understanding, compassion and love: (a) accept that with the right to own, manage, and use natural resources comes the duty to prevent environmental harm and to protect the rights of people; (b) affirm that with increased freedom, knowledge, and power comes increased responsibility to promote the common good.

3. Build democratic societies that are just, participatory, sustainable and peaceful: (a) ensure that communities at all levels guarantee human rights and fundamental freedoms and provide everyone with an opportunity to realise his or her full potential; (b) promote social and economic justice, enabling all to achieve a secure and meaningful livelihood that is ecologically responsible.

4. Secure Earth's bounty and beauty for present and future generations: (a) recognise that the freedom of action of each generation is qualified by the needs of future generations; (b) transmit to future generations values, traditions, and institutions that support the long-term flourishing of Earth's human and ecological communities.

The Charter then proceeds to outline in some detail how these principles and sub-principles are to be implemented under the headings of ‘Ecological Integrity’, ‘Social and Economic Justice’ and ‘Democracy, Nonviolence and Peace’. Time and space constraints will not permit an exhaustive review of the specific provisions of the Charter necessary to appreciate its full ethical implications and comprehensiveness of purpose. However, it should be noted that significant attention is given, in the Charter, to the protection and preservation of the traditional knowledge and spiritual wisdom of Indigenous peoples, as well as the eradication of poverty as an ethical, social and environmental imperative. The latter includes

guarantees of the right to potable water, clean air, food security, uncontaminated soil, shelter and safe sanitation¹¹ as well as the protection of human rights upholding the right of all, without discrimination, to a natural and social environment supportive of human dignity, bodily health, and spiritual well-being.¹²

Because it is not a policy making document which may be ratified by some governments and flouted or rejected by others, it is hoped by the framers of the *Earth Charter* that it will generate changes in attitude and ethical behaviour across a wide constituency including individuals, communities, local governments, schools and universities, non governmental organisations and businesses. Accordingly, the Earth Charter Commission hopes that it will become a common standard for ethical, just and environmentally sound behaviour by which the conduct of all individuals, organisations, businesses, governments and trans-national institutions will be guided and assessed.¹³

One cannot, however, ignore the myriad of other important initiatives undertaken by those equally determined to provide some sort of cohesion, as well as an ethical underpinning, to the large number of Multilateral Environmental Agreements (MEAs) and global treaties that have seen the development of international environmental law expand in ways that are placing new pressures on both developed and developing states to meet their obligations and responsibilities.¹⁴

Foremost amongst such initiatives is that of the IUCN Commission on Environmental Law's *Draft International Covenant on Environment and Development (Draft Covenant)* to serve as an umbrella agreement to govern the interaction of nations with the Earth's natural systems. Following up from former Secretary-General Perez de Cuellar's earlier observation that the time had come to devise a [binding] covenant regulating relations between humankind and nature,¹⁵ the IUCN through its Commission on Environmental Law (IUCN-CEL) responded by drafting a broad framework treaty that is now in its third iteration.¹⁶ The first Draft, begun in 1989 before the UN General Assembly established the Preparatory Committee for the Conference on Environment and Development (UNCED), and based in part on the World Charter for Nature, has been the subject of continuous

¹¹ The *Earth Charter*, above n 10, pt III, art 9(a).

¹² Ibid pt III, art 12.

¹³ Ibid the preamble.

¹⁴ Edith Brown-Weiss refers to the large number of international agreements giving rise to overlapping provisions, inconsistencies in obligations, significant gaps in coverage and duplication of goals and responsibilities as 'treaty congestion'. 'New Directions in International Law' (1995) United Nations Congress on Public International Law, reprinted in D G Craig, N A Robinson and K L Koh (eds), *Capacity Building for Environmental Law in the Asian and Pacific Region: Approaches and Resources* (2002) vol I, 9, 10.

¹⁵ N A Robinson, 'Colloquium: The Rio Environmental Law Treaties' IUCN's Proposed Covenant on Environment and Development' (1995) 13 *Pace Environmental Law Review* 133 reprinted in D G Craig, N A Robinson and K L Koh (eds), above n 14, vol II, 965.

¹⁶ This writer participated as a member of the *ad hoc* Working Group of experts that met in Bonn in March 2003 and was responsible for the preparation of the 'Third Edition: Updated Text' of the *Draft Covenant*.

discussion and refinement ever since.¹⁷ It, like the *Earth Charter*, contains fundamental moral elements and leading members of the IUCN Ethics Working Group have been involved in its drafting since 1993. The third version of the *Draft Covenant*, a joint project of the International Council of Environmental Law (ICEL) and IUCN-CEL was released in early 2004 and represents significant progress over the second edition that was presented to the United Nations Congress on Public International Law in March of 1995.

The purposes of the *Draft Covenant* are many, but first and foremost is the goal of distilling the many soft law statements and declarations going back to the 1972 *UN Stockholm Conference on the Human Environment* into a binding treaty and to promote consensus on fundamental principles.¹⁸ The hopes and aspirations of those who have laboured diligently over many years are that the *Draft Covenant* will become a negotiating document for a global treaty on environmental conservation and sustainable development and one that will assist the evolution of 'soft law' into binding law.¹⁹

Like the *Earth Charter*, the *Draft Covenant* is replete with provisions recognising the need for respect and care for the community of life and the recognition of the need to integrate environmental and developmental policies and laws in order to fulfil basic human needs, improve the quality of life, and ensure a more secure future for all.²⁰

There exists, however, a tension between proponents of the *Earth Charter* on the one hand and those of the *Draft Covenant* on the other. Some proponents of a binding treaty are apprehensive of the *Earth Charter*, fearing that widespread support will diminish the chances of reaching a consensus amongst States in support of the *Draft Covenant*. Why be bound by a 'treaty' with its ensuing 'legal' obligations and responsibilities when one can subscribe instead to the *Earth Charter* and avoid such legal constraints? It is a debate that is continuing unabated. Without the global community changing its behaviour and embracing the concept of environmental ethics quickly and without reservation, the goal of humankind achieving sustainable development will remain beyond our grasp.

¹⁷ Robinson, above n 15.

¹⁸ Ibid 968.

¹⁹ IUCN Environmental Law Programme, *Draft International Covenant on Environment and Development* (3rd ed, Updated Text, 2004) Commission on Environmental Law of IUCN – The World Conservation Union in cooperation with the International Council of Environmental Law (Environment Policy and Law Paper No 31 Rev 2) <http://www.iucn.org/themes/law/pdffdocuments/EPLP31EN_rev2.pdf> [Hereafter the *Draft International Covenant on Environment and Development*], see Foreword to the 2nd ed.

²⁰ A comparison of the principles contained in both documents reveal that they are remarkably similar and are in many cases traced back to earlier soft law declarations developed over the last 35 years.

II ENVIRONMENTAL ETHICS AND SUSTAINABLE DEVELOPMENT

The concept of sustainable development was popularised by the *Brundtland Report* thus:

Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of the future generations to meet their own needs. The concept ... does imply limits – not absolute limits but limitations imposed by the present state of technology and social organisation on environmental resources and by the ability of the biosphere to absorb the effects of human activities. But technology and social organisation can both be managed and improved to make way for a new era of economic growth.²¹

The concept as postulated in the report seems to suggest that we can continue to have economic growth so long as we develop better ways of managing the environment. However, the concept has now been extended to the socio-economic realm where the goal is not just a sustainable level of physical stock or physical production from an ecosystem over time, but some sustained increase in the level of societal and individual welfare. This broader context was found to be essential to the objective of sustainable development, in order to give specific emphasis to poverty alleviation, equity, public participation and culturally appropriate strategies.²²

The extension of the concept of sustainable development fits well within the concept of environmental ethics, which seeks to create a balance between the best naturalistic values, as well as good humanistic ones for respecting ecosystems. Accordingly, viewing sustainable development from an environmental ethics perspective, extends the emphasis of sustainable development from the traditional understanding postulated in the *Brundtland Report*, to take into account ethical issues relating to a wide range of economic, social and cultural factors which helps achieve the ethical values of equity, justice, temperance and wisdom in the choices we make concerning the environment.²³

It is important to note that the discourse on environmental ethics and sustainable development has been developed alongside a larger debate on development from a human rights perspective which espouses some of the same values. Development from a human rights perspective is people centred, participatory and environmentally sound. It involves not just economic growth, but equitable distribution, enhancement of people's capabilities and a widening of choices. It gives priority to poverty eradication, self-reliance and self-determination of people

²¹ D Craig, 'Global Sustainable Development: Human Rights, Environmental Rights and Indigenous Peoples' (paper presented at the Australian Human Rights Centre Seminar Series: Human Rights in a Globalising World, Sydney, 27 May 2003).

²² Ibid.

²³ See Patrick Curry, *On Ecological Ethics: a Critical Introduction* (1999) <http://eco.gn.apc.org/pubs/ethics_curry.html> 26 October 2004.

and governments and protection of the rights of the vulnerable, minorities and Indigenous peoples.

Development from a human rights perspective in the *Declaration on the Right to Development* is viewed as a comprehensive economic, social, cultural and political process. Its objective is the constant improvement of the well being of the entire population of individuals, on the basis of their active, free and meaningful participation in the development and fair distribution of the resulting benefits.

Accordingly, development from a human rights perspective is important because it provides a conceptual framework for the process of sustainable development, which is normatively based on international human rights standards operationally directed at promoting and protecting human rights. Additionally, development from a human rights perspective is important because it focuses on raising levels of accountability in the environmental development process by identifying claim holders and their entitlements and corresponding duty holders and their obligations. This allows for the development of adequate laws, policies, institutions, administrative procedures and mechanisms of redress and accountability that can deliver on the entitlements, respond to violations and ensure accountability.

Development from a human rights perspective also gives preference to strategies for empowerment. The goal is to give people the power, capacities, capabilities and access needed to change their own lives, improve their own communities and influence their own destinies. Finally, development from a human rights perspective also requires a high degree of participation, from communities, civil society, minorities, Indigenous peoples, women and others.

According to the *UN Declaration on the Right to Development*, such participation must be active, free and meaningful so that mere formal or ceremonial contacts with beneficiaries are not sufficient. The human rights imperative to sustainable development also means that particular attention is given to discrimination, equality, equity and vulnerable groups. These groups include women, minorities and Indigenous peoples.

The definition of the objectives of sustainable development in terms of environmental rights is an essential ingredient of development from a human rights perspective. Accordingly, development from a human rights perspective seeks to make the link between environmental ethics, human rights and sustainable development.

Certainly, environmental rights are not new. Many international agreements since the *UN Stockholm Convention* have highlighted environmental rights. Some 60 countries around the world have constitutions and legislation that provide for environmental rights. The Rio Summit sought to promote environmental rights through Agenda 21 and the UNCED Conventions. However, attempts to implement agreements that recognise and promote environmental rights have been largely

unsuccessful leading to a proliferation of unsustainable development. Laws and strategies intended to support the mainstreaming of sustainable development have had little impact in most countries, while perverse resource use is still widespread.

The development of environmental law since its appearance in the early 1960s, as a defined subset of administrative law, has progressed through a number of distinct stages and, by coincidence rather than design, each decade since the 1960s appears to be dominated by a particular regulatory focus. The 1960s heralded the development of 'command and control' regulation ie, specific legislative regulatory limits were established with respect to clean air, clean water and contaminated land. Compliance was determined solely on the basis of whether the 'polluter' was within or outside of the regulatory parameters set by the legislation.

The 1970s saw the introduction of a radical new approach in the form of Environmental Impact Assessment (EIA) methodology. EIA was characterised as a planning tool wherein the potential impacts of a particular policy and/or proposal were assessed prior to approval. In the event that significant adverse environmental impacts incapable of satisfactory mitigation were identified, consent or approval for the construction of a proposed undertaking was denied. This entirely prevented environmental damage and costly cleanups; the latter occurring where regulatory limits exceeded command and control regulation.

The 1980s saw a further shift in regulatory focus with the introduction of the concept of 'strict liability' with the attention focussed upon directors and officers of corporations. Legislation was enacted to hold corporations and their directors and officers liable for environmental regulatory offences without the necessity of proving 'intent' or even specific knowledge of the specific circumstances giving rise to the offence. Directors and officers as the controlling minds of their corporations were held vicariously responsible for the non-compliance of their companies including the actions of their employees under a regime of strict liability subject to the defence of due diligence. Penalties for non-compliance were greatly increased and in most jurisdictions included heavy fines and/or imprisonment for convicted directors and officers.

The late 1980s and early 1990s saw regulatory authorities increase the use of market-based incentives as a more effective means of encouraging environmental compliance by industry. Thus, emission trading schemes and a host of other market-based mechanisms proliferated not only in the context of domestic legislation but also in the context of international conventions such as the Kyoto Protocol.

Notwithstanding the application of a variety of economic incentives and innovative regulatory approaches over the past 50 years, precious little headway appears to have been made in restoring the ecological harmony that existed prior to industrialisation. It is generally accepted that the Earth's carrying capacity is fast approaching, and in some cases exceeding, its outer limits.

As a result of these failures, there have been growing calls for more effective approaches to achieving sustainable development made necessary from the impact of economic and social globalisation on the environment. Development from a human rights perspective is meant to provide a framework that ties in the linkage between environmental ethics, human rights and sustainable development. The implementation of indigenous rights provides a good illustration of the new approaches that have been undertaken at both international and national level to take into account not just environmental and ethical but human rights issues in order to achieve sustainable development.

III SUSTAINABLE APPROACHES TO ENVIRONMENTAL, HUMAN AND INDIGENOUS RIGHTS: THE INTERNATIONAL DIMENSIONS

In the field of natural resources and environment, early international legal instruments adopted during the last century, make only isolated mention of the rights of Indigenous peoples.²⁴ Of the more than one hundred instruments on the protection and use of natural resources, only a few provide for exceptions to be applied to the uses made by Indigenous peoples.²⁵ However, important progress was made in the last part of the decade of the nineteen eighties, particularly at UNCED, with the modern trend towards vigorous assertion of indigenous rights in legal instruments.²⁶

The UNCED gathering in 1992 brought together more heads of state than had ever before been assembled to debate the future of the Earth. A key outcome of UNCED was the *Convention on Biological Diversity* (CBD). Article 1 of the CBD states that:

The objectives of this Convention ... are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and appropriate transfer of relevant technologies, taking into account all rights over these resources and technologies, and by appropriate funding.

The CBD contains several significant sections relating to Indigenous peoples. Most important of these is Article 8(j) by which the signatories agree:

Subject to National Legislation, to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

²⁴ See for example; the *Convention Relative to the Preservation of Fauna and Flora in the Nature State* (1933) arts 2, 5, 8; the *International Convention for the Regulation of Whaling* (1946); the *African Convention of Nature and Natural Resources* (1968) art VIII(2).

²⁵ See for example the *World Cultural and Heritage Convention* (1972).

²⁶ Craig, above n 21, 19.

The CBD places indigenous and traditional knowledge, as well as traditional technologies and biogenetic resources under nation state sovereignty. *The Explanatory Guide to the CBD*²⁷ notes that the proviso subjecting Indigenous peoples to national legislation is unusual because the objectives of the article could be defeated through the implication that existing national legislation takes precedence. It can also be taken to mean that concerns of Indigenous peoples can be respected and preserved without addressing outstanding issues of Indigenous peoples' rights to land and biological resources.

It is clear that such communities cannot continue these traditional practices in isolation from land and the biological resources they need²⁸ and this recognition could be inconsistent with a growing body of international obligations such as the *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*²⁹ and the *Draft Declaration on the Rights of Indigenous Peoples*.³⁰ The *Convention (No 169)* was adopted by the International Labour Organisation in 1989. Whereas some Indigenous peoples and commentators believe the ILO undermines indigenous aspirations because it emphasizes participation or consultation rather than self determination, it nevertheless is the most internationally significant treaty so far that recognises the integrated and comprehensive rights of indigenous and tribal people.

The *Convention (No 169)* contains several provisions that require systematic and coordinated action to protect the rights of Indigenous peoples. Article 7 provides that the people concerned shall have the right to decide their own priorities for the process of development.³¹ It also provides that it shall be a matter of priority that Indigenous peoples participate in plans for the overall economic development of areas they inhabit.³² Governments are called upon to ensure that studies are carried out with the cooperation of the Indigenous peoples concerned³³ and to respect the special importance for the cultures and spiritual values of the peoples concerned regarding their relationship with the land or territories which they occupy or use, particularly the collective aspects of this relationship.³⁴ The *Convention (No. 169)* recognises the rights of ownership and possession over lands which Indigenous peoples traditionally occupy.³⁵ Thus, governments are required to take steps to identify the lands which Indigenous peoples traditionally occupy and to guarantee

²⁷ IUCN Environmental Law Centre, *The Convention on Biological Diversity: An Explanatory Guide* (1994) 48.

²⁸ Ibid 93.

²⁹ Adopted on 27 June 1989 by the General Conference of the International Labour Organisation (entered into force 5 September 1991) <<http://www.unhchr.ch/html/menu3/b/62.htm>> 11 April 2005 [Hereafter the *Convention (No 169)*].

³⁰ Craig (1993) above n 21, 23 [Hereafter the *Draft Declaration*].

³¹ Article 7(1).

³² Article 7(2).

³³ See art 7(3).

³⁴ Article 13(1).

³⁵ Article 14(1).

effective protection of their rights of ownership and possession.³⁶ The *Convention (No. 169)* also calls for the establishment of adequate procedures within national legal systems to resolve land claims by the peoples concerned.³⁷ Importantly, the *Convention (No. 169)* recognises the rights of Indigenous peoples to the natural resources on their lands and to participate in the use, management and conservation of these resources.³⁸

In addition to the *Convention (No. 169)*, two other UN Conventions are of practical relevance to Indigenous peoples' rights to ecologically sustainable development;³⁹ the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *International Covenant on Civil and Political Rights (ICCPR)*.

Article 1(2) of the ICESCR provides that:

[A]ll peoples may, for their own ends dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may people be deprived of its own means of substance.

Indigenous peoples assert their rights as people under this provision, but prefer the terminology of peoples associated with the right to self-determination.

Article 15(1c) provides that states recognise the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Posey argues that this provides a basis for indigenous intellectual, scientific and cultural property rights protection.

Article 12 of the ICCPR reiterates the provisions of Article 1(2) of the ICESCR. Article 18 of the ICCPR provides that every one shall have a right to freedom of conscience and religion. Article 27 provides for rights of minorities to enjoy their culture, profess and practice their own religion, or to use their own language.

However, the most comprehensive, integrated and strongest articulation of Indigenous peoples' rights to date has been provided by the *Draft Declaration on the Rights of Indigenous Peoples*. The *Draft Declaration* is the culmination of over a decade of consultation and participation by Indigenous peoples under the auspices of the Sub-commission on the Prevention of Discrimination and Protection of Minorities.

The *Draft Declaration* provides for a clear and unqualified right to indigenous self-determination.⁴⁰ Other rights strongly articulated in the *Draft Declaration* include

³⁶ Article 14(2).

³⁷ Article 14(3).

³⁸ Article 15.

³⁹ Craig, above n 21.

⁴⁰ *Draft Declaration*, art 3.

land rights, rights to resources, waters, seas, biological resources, the recognition of intellectual and cultural property and the rights of Indigenous peoples to determine their own development priorities.⁴¹ The *Draft Declaration* is currently making its way through the UN process and will within the next years attain the status of a UN Declaration after appropriate amendments by UN member states.

Besides the *Draft Declaration*, more recent developments relating to the articulation of the rights of Indigenous peoples at the international level include the *Draft Declaration of Principles on Human Rights and the Environment*.⁴² The drafting of this Declaration was prompted by the overlaps in the approaches to ethical and human rights issues in the various international instruments. The draft declaration commences with the recognition that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible. It further notes that all persons have a right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights are universal.

The World Conservation Union (IUCN) has carried the initiative for an integrated approach to human rights, environment and sustainable development forward. As discussed earlier, the *Draft International Covenant on Environment and Development*,⁴³ seeks to reiterate the importance of the right to development⁴⁴ but with due regard being given to the urgent need to maintain and restore the earth's ecological systems. Accordingly, the *Draft Covenant* provides for respect for all life forms,⁴⁵ the recognition of the common concern of all humanity,⁴⁶ intergenerational equity,⁴⁷ the prevention⁴⁸ and precautionary⁴⁹ principles and the indispensable requirement for the eradication of poverty as a means for achieving sustainable development.⁵⁰

The *Draft Covenant* also recognises the importance of eliminating unsustainable patterns of consumption and production and the promotion of appropriate demographic policies⁵¹ necessary to enhance the quality of life for all humanity and reduce the disparity in living conditions.⁵²

⁴¹ Ibid arts 25 to 30.

⁴² Meeting of Experts on Human Rights and Environment, 16 May, 1994 (Geneva).

⁴³ IUCN, *Draft International Covenant on Environment and Development*, above n 19.

⁴⁴ Ibid art 8.

⁴⁵ Ibid art 2.

⁴⁶ Ibid art 3.

⁴⁷ Ibid art 5.

⁴⁸ Ibid art 6.

⁴⁹ Ibid art 7.

⁵⁰ Ibid art 9.

⁵¹ Article 10.

⁵² Article 9.

The *United Nations Meeting of Experts on Human Rights and the Environment*⁵³ has reviewed the progress made since the United Nations Conference on Environment and concluded that there is a growing and close connection between human rights and environment protection in the context of sustainable development. The experts noted the linkage reflected in the developments related to procedural and substantive rights, in the activities of international organisations and in the drafting and application of national constitutions. There is a wealth of case law, particularly in developing nations, upholding the constitutional right to environmental quality.⁵⁴ This often requires innovative approaches to standing and public participation as seen in the famous Philippine case of *Oposa v Factoran*.⁵⁵ These are also reflected in other international instruments like the *Aarhus Convention* and the decisions of international treaty bodies, including courts and commissions, recognising the violation of a fundamental right as the cause, or a result of, environmental degradation.⁵⁶

The experts conclude by noting that respect for human rights is broadly accepted as a pre-condition for sustainable development and that environmental protection is a precondition for the enjoyment of human rights – they are interdependent and interrelated.⁵⁷ It is also now understood and agreed by the UN experts that poverty is at the centre of a number of human rights violations and is at the same time a major obstacle to achieving sustainable development.⁵⁸

IV SUSTAINABLE APPROACHES TO ENVIRONMENTAL, HUMAN AND INDIGENOUS RIGHTS: EXAMPLES OF NATIONAL IMPLEMENTATION⁵⁹

Many nations have recognised the customary laws of Indigenous peoples to use and manage their resources through the common law or through statute. In the Canadian,⁶⁰ New Zealand⁶¹ and Australian experience, the recognition of native title has encompassed related customary laws for the use of land and natural resources. In *Mabo v Queensland*,⁶² the Australian High Court recognised the existence of native title, which entitles Indigenous peoples in Australia to the use and enjoyment of ancestral lands in accordance with their unique laws and customs. Four judges –

⁵³ Office of the High Commissioner for Human Rights (OHCHR) and United Nations Environment Programme (UNEP), Meeting of Experts on Human Rights and the Environment (2002).

⁵⁴ 'Judicial Decisions and Alternative Dispute Resolution' in D Craig, N Robinson and K L Koh (eds), above n 14, 705.

⁵⁵ GR No 101083, 30 July 1993, extracted from UNEP/UNDP, *Compendium of Judicial Decisions on Matters Related to Environment* (1998) vol 1, 22-36, reprinted in D Craig, N Robinson, and K L Koh (eds), above n 14, 720.

⁵⁶ Meeting of Experts on Human Rights and the Environment, above n 53, 2.

⁵⁷ Ibid 3.

⁵⁸ Ibid.

⁵⁹ This entire section is from D Craig, above n 21.

⁶⁰ See *Calder v Attorney-General of British Columbia* [1973] SCR 313.

⁶¹ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

⁶² *Mabo and Others v The State of Queensland (No 2)* (1992) 175 CLR 1.

Brennan, Dean, Gaudron and Toohey JJ – explicitly rejected a narrow view of ‘traditional law or custom’. Justice Brennan stated:

Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed. ...

It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the Indigenous peoples and the land remains.⁶³

A Canadian Supreme Court case has decided that the Canadian Federal Government owes a fiduciary obligation to Indigenous peoples when they dispose of ancestral or reserve land.⁶⁴ The Court also held that native title includes practices that form an integral ‘part’ of an indigenous community's distinctive culture such as the indigenous use of fisheries.⁶⁵ An argument can be made that native title necessarily includes indigenous management of marine resources, wildlife, natural resources, land and waters and this is an essential dimension of their sustainable indigenous use.

In the context of Canada, the recognition of native title has led to the negotiation of some modern treaties which settle indigenous land claims, allocate rights to natural resources (and royalties from their exploitation) and set up comprehensive regimes for indigenous participation in environmental assessment, development decisions and the management of land, seas, natural resources and wildlife (Canadian Regional Agreements).⁶⁶ Native title rights and Regional Agreements are granted constitutional protection.⁶⁷

Unresolved native title in New Zealand led to the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*, Maori ownership of part of the New Zealand fishing quota and the purchase of part of a joint venture commercial fishing company. Notably, this Act increased Maori representation on statutory bodies governing the management of fisheries.

In Fiji the *Fisheries Act 1942* registers the ownership of any customary fishing rights, establishes a Native Fisheries Commission and institutes a system of permits. The Fiji example is an illustration of many legislative regimes that give some

⁶³ Ibid 68, 83.

⁶⁴ *Guerin v The Queen* [1984] 2 SCR 355.

⁶⁵ *R v Sparrow* [1990] 1 SCR 1075.

⁶⁶ See G Nethem, D Craig, and G Meyers, *Indigenous Governance Structures, Australian Institutions for Aboriginal and Torres Strait Islander Studies* (2001).

⁶⁷ *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 35(1).

protection to indigenous customary laws when faced with conflicting interests and incursions. Australia and Canada also provide examples of co-management of National Parks through legislation that allows continued indigenous ownership, occupation and use of the parks and recognises and promotes indigenous customary practices in the management of them.

The jurisprudence whereby longstanding treaties between governments and Indigenous peoples are being interpreted in the modern context also gives greater emphasis and recognition to indigenous customary laws relating to environment and sustainable development.

V CONCLUSION

It is no longer open to the Earth's human inhabitants to seriously question whether a sea change in their attitude, approach and morality towards all living creatures that share this planet is warranted. In the space of a few short decades basic resources such as clean air and clean water that had hitherto been considered abundant, safe and inexhaustible are now under threat, not just in countries that have historically suffered from poverty, disease and substandard living conditions, but in the very heartland of nations that occupy the very top rungs of our civilisation in the context of economic development.

Science and technology and the law, as advanced as they are, have not provided the necessary solutions to the worldwide quagmire into which humankind has slipped. As we enter the new millennium there is a growing acknowledgement and acceptance that the quest for social and economic justice, although long established as a universally accepted aspiration, must be accelerated. As set out in the terms of the *Earth Charter* itself, the '*eradication of poverty as an ethical, social, and economic imperative*' is no longer an option that can be ignored, for to do so will only perpetuate and increase the destructive forces that have placed us where we are today.

Environmental ethics and sustainable development are inexorably bound together and one cannot achieve the latter without embracing the former. To this end both the *Earth Charter* and the *Draft Covenant on Environment and Development* provide the international legal frameworks necessary to move forward and their early adoption should be supported.