

## AN ENVIRONMENTAL LAW TRILOGY

1. NATURE CONSERVATION: AN ANALYSIS OF THE LEGAL AND PHILOSOPHICAL PRIORITIES FOR THE CONSERVATION OF WILDLIFE, A DIMINISHING RESOURCE IN SOUTH AFRICA
2. TOWARDS SENSE AND SUSTAINABILITY: LAW AND THE TRADITIONS OF AFRICA IN THE PROCESS OF LAND REFORM IN SOUTH AFRICA
3. THE RESOLUTION OF ENVIRONMENTAL CONFLICTS: SOME CONCERNS ABOUT THE PREMATURE APPLICATION OF 'ALTERNATIVE' METHODS IN A DEVELOPING BRANCH OF THE LAW

by

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## PREFACE

This submission consists of three short dissertations intended for publication in appropriate journals. Although each dissertation is intended to stand independently of the others, they follow a logical progression in the order in which they are presented, the second and third anticipating the arguments developed in the first.

In the first of the trilogy, wildlife law is introduced through a focus on nature conservation priorities and it serves as an introduction to some of the fundamental philosophies which pervade environmental law generally. Concern for wildlife gave rise to the environmental movement as it is presently known and it is therefore appropriate to begin with a wildlife law topic. Current wildlife legislation in South Africa is analyzed, assessed and found to be lacking in a number of important respects. Comparative developments in this field of law in the United States of America are studied and the paper concludes with practical suggestions as to what principles and philosophies should underlie proposed new legislation to consolidate existing provincial nature conservation ordinances.

The process of land reform in a post apartheid South Africa is used as an illustration of potential land-use planning problems which have their root cause in Roman - Dutch concepts of property ownership. It is argued that unless there is a radical departure from the present concept of land ownership it will be impossible to accommodate the growing demands for land by the majority of South Africa's population, which could result in serious social instability. Equally serious is the environmental degradation which has occurred in South Africa whilst it has been in the hands of the white minority. It is argued that a contributing factor has been the emphasis placed on the rights of ownership as opposed to the duties of trusteeship in land recognised by traditional African culture. The ideas presented in this paper are not suggested to provide the ultimate solution to a complex problem, but rather to encourage thinkers to shed the fetters which have inhibited their thinking in the past and to view the concept

of ownership less dogmatically than they have in the interests of sustainable land use.

Conflict resolution by the adoption of informal or 'alternative' methods is the new trend in the legal world. The 'environmental dispute' is identified and distinguished from other forms of conflict, and it is demonstrated to be particularly suited to settlement through informal procedures. However a word of caution is expressed in that, given the undeveloped state of South African environmental law, the evolution of this branch of the law may suffer if the rigours of the formal approach and the application of the judicial process are bypassed by adopting the more comfortable route presented by alternative remedies. The paradox of the South African situation is illustrated through two prominent cases in which so-called 'alternative' methods have been employed, not because the formal approach has failed or is less desirable, but because it simply does not exist.

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## PART ONE

# NATURE CONSERVATION: AN ANALYSIS OF THE LEGAL AND PHILOSOPHICAL PRIORITIES FOR THE PROTECTION OF WILDLIFE, A DIMINISHING RESOURCE IN SOUTH AFRICA

## 1. INTRODUCTION

‘Conservation is sometimes perceived as stopping everything cold, as holding whooping cranes in higher esteem than people. It is up to science to spread the understanding that the choice is not between wild places or people. Rather, it is between a rich or an impoverished existence for man.’<sup>1</sup>

### 1.1. NATURE CONSERVATION DEFINED

#### 1.1.1 *Ecosystemics*

The conservation of nature consists of two elements: the protection of living creatures and the caring for the habitats in which such creatures live. Habitats may consist of both living and non-living components. An ecosystem is the totality represented by the living organisms, their habitat and their interaction with each other and with their environment.<sup>2</sup> A healthy ecosystem is one which is in balance, or functions in such a way that no one component is dominant to the

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<sup>1</sup>Thomas E Lovejoy quoted in Paul and Anne Ehrlich *Extinction* (1982) 207.

<sup>2</sup>The word ‘ecosystem’ is a combination of the two words ‘ecology’ and ‘system’. The *Concise Oxford Dictionary* defines it as a ‘system of interacting organisms in a particular habitat.’ The word ‘ecology is defined as the ‘branch of biology dealing with organisms’ relations to one another and to their surroundings.’ Humans are included in this definition but in the conservation sense ecosystems are regarded as wild biotic communities, not human communities which are seen as separate from nature. This is consistent with the dualistic thinking which is found throughout the history of Western philosophy (eg the familiar distinctions between culture and nature, mind and body, reason and emotions, ruler and ruled and so on).

extent that the cyclical process of renewal and regeneration of all life within the ecosystem is disturbed or irreparably altered.<sup>3</sup> It may be said therefore that nature conservation is concerned primarily with the establishment and maintenance of healthy ecosystems.

### 1.1.2. *Humanistic Interests*

Conservation has two dimensions: the protection of nature for its own sake;<sup>4</sup> and management, which ensures 'the thrifty use of non-renewable resources and the use of renewable resources without diminishing their quality or endangering their supply'.<sup>5</sup> Both elements are derived from the humanistic principle which values nature in terms of its worth to man. Value itself is determined by and only arrives with human interest.<sup>6</sup> Inspired writers such as Rachel Carson<sup>7</sup> and Aldo Leopold<sup>8</sup>

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<sup>3</sup>This is consistent with the well-known principles of Aldo Leopold's 'Land Ethic' which is summarised by Leopold in *A Sand County Almanac* (1949) 262 as 'A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.' Although these words were expressed more than fifty years ago they remain relevant today, and the principle still forms the ethical foundation for most environmental philosophies. Nevertheless it is ambiguous because it does not distinguish clearly between natural disturbances which are a necessary part of the functioning of the ecosystem and those which are damaging. Our knowledge about the functioning of particular ecosystems is not always complete and therefore our understanding of what is 'right' may not be accurate. Perhaps the most plausible interpretation of the principle is to limit it to the actions of humans which do, or have the capacity to transform biotic communities. Accordingly the principle does not apply to the autonomous processes of nature which transform one biotic community into another.

<sup>4</sup>Some writers suggest that wilderness areas have intrinsic or inherent worth and are deserving of protection in their own right, (see generally Roderick Nash *Wilderness and the American Mind* (1982)) although it is widely held that 'wilderness is preserved and managed for the benefits and values it provides people'. (John c. Hendee, George H. Stankey and Robert C. Lucas *Wilderness Management* (1990) 17.) This evidences the complex dichotomy between anthropocentric and biocentric philosophies of nature, the former placing man at the centre of importance of the natural order, and the latter viewing man as an integral part of nature, of no greater or lesser importance biologically.

<sup>5</sup>Anne & Malcolm MacEwan *National Parks: Conservation or Cosmetics?* (The Resource Management Series 5) (1982) 70.

<sup>6</sup>Holmes Rolston III *Philosophy Gone Wild* 'Essays in Environmental Ethics' (1968) 77.

<sup>7</sup>See generally her provoking work *The Silent Spring* (1962).

<sup>8</sup>See generally *A Sand County Almanac* op cit note 3.

promoted the 'quest for better modes of "caring for" the land, forests, grasslands, soil, and rivers'<sup>9</sup> for reasons other than pure human selfishness. Despite this shift from anthropocentrism to biocentrism in the valuation of nature, human self interest lies at the heart of nature conservation policy even in the most developed and progressive cultures.<sup>10</sup> It is hardly surprising therefore to discover that the protection of human interests is the primary concern of legislation developed to protect nature in all legal systems which have adopted nature conservation laws, some even at the constitutional level.<sup>11</sup>

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<sup>9</sup>Holmes Rolston op cit note 6 77.

<sup>10</sup>The progression of attitudes from the concept of 'land disposal and exploitation' through 'conservation and reservation' to 'environmental quality' is well documented. What used to be termed 'conservation' is now known as 'environmentalism'. Nash in his seminal work op cit note 4 at 254 traces the progression thus:

'Fear underlay the upswell in what used to be called "conservation", but was increasingly known as "environmentalism". It was not the old fear of running out of resources and losing the competitive edge in international politics that alarmed the generation of Theodore Roosevelt and Gifford Pinchot. Neither did the fear stem from the prospect of ugliness in the world. The "cosmetic" conservation implicit, for instance, in highway beautification and much of the quality-of-life and quality-of-environment ideas lost momentum rapidly as the 1960s ended. The new driving impulse, based on ecological awareness, transcended concern for the quality of life to fear for life itself. Americans suddenly realised that man is vulnerable. More precisely, they began to see man a part of a larger community of life, dependent for his survival on the survival of the ecosystem and on the health of the total environment. Man, in a word, was rediscovered as being part of nature. The ecological perspective also entailed recognition that civilised man has placed heavy strains on the delicate balances that support life on earth. This, of course, was not a new idea in American environmental history. What was new in the 1960s and in the 1970s was the volume and intensity of public concern and the tendency to define the issue in ethical rather than in economic terms'.

South Africa, in comparative terms, has reached this philosophical turning point. Just as America's National Environmental Policy Act of 1969 (42 USCS § 4321 et seq) transformed concern into action, so too is South Africa poised to enter its 'environmental decade' with the promise of the incorporation of an environmental charter in its proposed Bill of Rights as part of its new constitutional dispensation. See generally the South African Law Commission *Project 58 Group and Human Rights Interim Report* (October 1991) (hereinafter referred to as the *Law Commission Report*).

<sup>11</sup>The preambles to the principal conservation statutes of the USA, Britain and South Africa define the objects of the legislation as being to provide for controlled use of resources and environmental protection in the interests of humans, forewarning of the strong anthropocentric character of the legislation which follows. The constitutions of a number of countries include the protection of the environment as a 'human' right (eg Spain and Peru), or impose upon the state an obligation to protect natural resources for the benefit of its citizens (eg Spain and Namibia), or upon citizens to do so, again for the benefit of other citizens. (eg Ethiopia and India). India takes

Nature conservation may therefore be defined as the conservation of the natural world in such a way as to achieve the maximum benefit for man without compromising the ecological integrity of the natural order of life on earth.

## 1.2. NATURE CONSERVATION IN SOUTH AFRICA

### 1.2.1. *Cultural Relevance?*

In South Africa conservation legislation exists at two levels:

- Nationally where limited conservation is achieved incidentally through a plethora of related but unco-ordinated statutes<sup>12</sup> the main purpose whereof is to control human activities in specific environments; and
- Provincially through separate nature conservation Ordinances<sup>13</sup> administered by regional nature conservation agencies.

National and provincial parks fall into one or other of these categories and again the benefits for humans is paramount in that 'the area which constitutes the park shall, as far as may be and for the benefit and enjoyment of visitors, be retained

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the duty further by requiring citizens 'to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for all living creatures', probably the only example of a purely biocentric provision in any constitution.

<sup>12</sup>The *Law Commission Report* op cit note 10 541 states that there are over sixty Acts which contain an element of environmental protection. Few are specifically aimed at nature conservation which is achieved as a by-product of other objectives. Those which are aimed at the control of resource use or the protection of specific environments lack effectiveness because they are unco-ordinated and their implementation is in the hands of different government or provincial authorities which act independently of each other and on inadequate funding.

<sup>13</sup>The Cape Province Nature and Environmental Conservation Ordinance 19 of 1974; the Natal Nature Conservation Ordinance 15 of 1974; the Transvaal Conservation Ordinance 12 of 1983; the Orange Free State Nature and Environmental Conservation Ordinance 8 of 1969. Legislation in the 'Black Homelands' and the National States within South Africa's boundaries compound the problem, but they are excluded for present purposes. In the case of KwaZulu, its Nature Conservation Act 8 of 1975 is significant because many areas, such as Maputaland, and part of the St Lucia wetland region are of high conservation value, and are therefore deserving of effective protection, which under present legislation is not guaranteed. Because biological boundaries do not always coincide with political boundaries, conservation strategies must of necessity involve co-operation between adjoining countries.

in its natural state'.<sup>14</sup> Legislation is generally a reflection of prevailing social and cultural mores. Nature conservation legislation in South Africa has not kept pace with the changing attitudes of society and is the product of societal demands of at least two decades past. The groundswell of environmental concern in South Africa<sup>15</sup> demands that this new respect for the earth be reflected in the law, which, in the interests of all of the inhabitants of the region, should be made relevant to this evolving cultural paradigm. Furthermore, given the diversity of cultures in South Africa, the law should play the important normative function of developing an environmental ethic which accommodates the aspirations of all its people without the compromise of any part of what remains<sup>16</sup> of the country's rich natural heritage.<sup>17</sup> South Africa's socio-political agenda is extremely

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<sup>14</sup>Section 4 of the National Parks Act 57 of 1976. There is a move away from this emphasis in the Environment Conservation Act 73 of 1989 which provides for the declaration of 'protected natural environments' (s 16) and 'special nature reserves' (s 18) specifically for the purpose of protecting nature and not only human interests.

<sup>15</sup>For Example the public outcry at threats to mine in the Kruger National Park, on the Eastern Shores of lake St Lucia and on Chapman's peak in the Cape, and the move away from using products which are 'environmentally unfriendly', such as those which deplete the ozone layer.

<sup>16</sup>Only 5 000 000 hectares or 4,7% of South Africa is devoted to nature conservation - see the *Report of the Three Committees of the President's Council on a National Environmental System* (22 October 1991) PC 1/1991 (hereinafter referred to as the *President's Council Report*) 13. The International Union for the Conservation of Nature (IUCN) recommends that 10% of a country's surface should be conserved and that is the generally accepted norm. It is claimed that would ensure the preservation of about 50% of a country's fauna and flora - see the President's Council report op cit 75. Through careful management of the country's parks and reserves South Africa has maintained a rich diversity of species but there is no room for complacency. As pressures grow as a result of the demands for land by the burgeoning populations, conservation areas increase in rarity value.

<sup>17</sup>This notion is not new to South Africa. In 1975 Barend van Niekerk wrote of an 'ecological norm' in the law - see 'The Ecological Norm in Law or the Jurisprudence of the Fight Against Pollution' (1975) 92 *SALJ* 78. In 1984 Glavovic called for the adoption of a 'conservation ethic' as a matter of law - see PD Glavovic 'The Need for the Legislative Adoption of a Conservation Ethic' (1984) XXVII *CILSA* 144. More recently Glavovic has argued for the inclusion of conservation principles in a Bill of Rights - see PD Glavovic 'Human Rights and Environmental Law: The Case for a Conservation Bill of Rights' (1988) XXI *CILSA* 52.

crowded, and there is the risk that priorities will become confused.<sup>18</sup> From a nature conservation point of view there is a degree of urgency given the relative scarcity of wildlife resources<sup>19</sup> and conservation areas on the one hand, and the fact that they are so vulnerable on the other.<sup>20</sup>

## 2. WILDLIFE LAW IN PERSPECTIVE

'Human survival is inextricably linked to the continued performance of the myriad of energy flow and material cycling processes of the earth's ecosystem. Wild animals are an essential component in this complex system.'<sup>21</sup>

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<sup>18</sup>For example, see Albie Sachs 'Conservation and Third Generation Rights: The Rights to Beauty', a paper presented at a conference of Lawyers for Human Rights at Macaulay in May 1990. In warning that there may not be room for the conservation of nature on the 'crowded' agenda of the struggle for political change he argued that it may be inappropriate to include nature conservation in the list of priorities for people in their struggle for freedom:

'It might appear irreverent to speak of the Maluti mountains and the rolling bushveld when blood is being spilt on our roadways; it would seem inappropriate to lament chimney pollution when the air is thick with teargas. People who have washing machines have no right to condemn others who dirty streams with their laundry; those who summon up energy with the click of a switch should hesitate before denouncing persons who denude forests in search of firewood. It is undeniably distasteful to spend huge sums on saving the white rhino when millions of black children are starving.'

Despite this apparent pessimism the importance of resource protection is not ignored. Sachs goes on to say: 'The health of people, the conservation of resources and the protection of nature are of interest to all South Africans, particularly those preparing to be free citizens of a free country.' However what is not guaranteed is that the conservation of nature will receive the priority it deserves on the agenda. Of greater concern is that the importance of nature conservation areas, which are for many black people stark reminders of the apartheid regime because so many were established after the forced removal of indigenous people, will be recognised and maintained.

<sup>19</sup>Although less of South Africa is devoted to nature conservation than is the international norm (see note 16) this inadequacy is widely recognised. Attention is drawn to it in the President's Council report and during an interview on the BBC television program 'Nature: Fair Game' ANC leader Nelson Mandela stated: 'South Africa only reserves about 4%. We are debating this matter at present and would strive to preserve that 10% so that conservation should grow and develop.'

<sup>20</sup>Obviously the legally proclaimed national and provincial parks enjoy a high level of protection even at this point. It is the conservation of nature outside these areas which is not adequately addressed in law. That is not to say that there is no danger of the national and provincial parks coming under fire, particularly financially, if it is considered that the funds required for their support is not justified given other social demands.

<sup>21</sup>William W Shaw 'Problems in Wildlife Valuation in Natural Resource Management' in George L Peterson & Alan Randall (eds) *Valuation of Wildland Resource Benefits* (1984) 223.

## 2.1. SOUTH AFRICA - INFANT EMERGENCE OR ROBUST ADOLESCENCE?

### 2.1.2. *Stagnated law*

In 1988 it was stated: 'Wildlife law as an accepted discipline or body of law, is still in an embryonic stage in South Africa. In the USA it has given birth, has passed through the stage of infant emergence, and has been described as already having proclaimed its robust adolescence.'<sup>22</sup> This statement probably holds good for South Africa today. No recent legislation has done anything to alter the position. South Africa has a new Environment Conservation Act (73 of 1989) and a new Physical Planning Act 125 of 1991 neither of which has contributed to the maturation of wildlife law. The Game Theft Act 105 of 1991, came into effect on the 5th July 1991, and whilst it marks an important departure from the Roman - Dutch definition of wild animals, it cannot be regarded as any great innovation in the field of wildlife law.<sup>23</sup> Furthermore its purpose is primarily agricultural and not conservational<sup>24</sup>

### 2.1.3. *Limitations by Definition*

Perhaps part of the reason for the lack of development in this branch of the law lies in its inadequate definition. 'Wildlife' is generally taken to mean wild animals

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<sup>22</sup>PD Glavovic 'An Introduction to Wildlife Law' (1988)105 *SALJ* 519.

<sup>23</sup>The focus of the Act is agricultural rather than conservational. It partially resolves the difficulties encountered by game farmers in recovering animals which escape from their farms. In Roman -Dutch law wild animals are 'res nullius'. Bothma & Rabie in Fuggle & Rabie *Environmental Concerns in South Africa* (1983) 197 summarise the position as follows:

A 'res nullius' is a thing which belongs to nobody, but which can become the property of anyone who assumes possession of it through effective physical control ('occupatio'). The fact that wild animals are regarded as 'res nullius' means that, save in the exceptional case where someone has acquired ownership of them, there are no private law remedies available to the citizens of this country when wild animals are killed, captured or injured. The common - law crimes of theft and malicious damage to property are also not applicable. Consequently wild animals would be without any legal protection were it not for specific legislation for their conservation.'

<sup>24</sup>See MA Rabie & CG van der Merwe *Stell LR* (1990) 1 112 generally. Arguments such as those advanced by the authors were no doubt persuasive in the initiation of the Game Theft Act.

and not their habitats, and therefore 'wildlife law' has concerned itself by and large with the protection of animals only.<sup>25</sup> Incidental protection of habitats has been an important by-product of animal protection, as most of the nature conservation areas set aside in modern systems of law were proclaimed largely in the interests of the preservation of wild animals.<sup>26</sup> 'Wildlife law' is the generic term for that discrete branch of the law which is concerned with the protection of animals,<sup>27</sup> the primary focus of most conservation efforts. However, if the term 'wildlife' is to be restricted to animal life it does not admit the inclusion of flora or habitats in its definition, and therefore if it is to be the primary legislative tool for conservation, it is inadequate. Either its scope must be increased to include all living things and those non-living components of habitats upon which

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<sup>25</sup>See Bothma & Rabie in Fuggle & Rabie op cit note 23 Chapter 10 generally and Glavovic 'Introduction to Wildlife Law' op cit note 22 519 et seq.

<sup>26</sup>The history of wildlife preservation is well documented in two excellent and immensely readable works, one dealing with South Africa and the other the USA. They are John Pringle's *The Conservationists and the Killers* (1982) and James B Trefethen's *An American Crusade for Wildlife* (1975). Both authors give good accounts of the establishment of protected areas in the interests of the preservation of specific species. The 'Ancient Forest Campaign' which culminated with the famous trilogy of cases: *Seattle Audibon Society v Robertson* 914 F 2d 1311 (9<sup>th</sup> Cir 1990) *Northem Spotted Owl v Hodel* 16 USC §1533 (b)(1)(A) and *Marble Mountain Audibon Society v Rice* 914 F 2d 179 (9<sup>th</sup> Cir 1990), is a good example of the role played by citizens in the protection of habitats in the interests of the preservation of specific endangered species. Concern over the possible extinction of what may have been considered an insignificant little fish, the Snail Darter, and which brought a stop to the proposed construction of the multi million-dollar Tellico dam in Tennessee, reinforces the value which can be placed on all species, because of the integral link which they form in the ecological chain. See *Tennessee Valley Authority (TVA) v Hill* 437 US 153 98 S Ct 2279 57 L Ed 2d 117 (1978).

<sup>27</sup>Most authors on the topic prefer to restrict the definition to animals in the interests of the containment of their works rather than for reasons of logic. For example see Michael J Bean *The Evolution of National Wildlife Law* (1983) 1-5. Glavovic op cit note 22 520 attempts to justify its limitation to animals because of the conceptual differences between the different organisms which comprise the biotic community. In avoiding any exhaustive definition of wildlife, he points out that in any event the law is mainly statutory, and will therefore have adequate definition for its particular purpose. As will be observed infra, this approach has contributed to a piecemeal development of the law, where particular problems are treated symptomatically rather than at their root cause, which is primarily ethical.

living things are dependent, or in the conservation sense, it should fall under a more general branch of the law, perhaps properly termed 'conservation law'.<sup>28</sup>

#### 2.1.4. *Human responsibility*

As the science of ecology has developed it has become apparent and increasingly accepted that human relations to nature should not be dominated by the economic, instrumental attitudes to land which have guided mainstream thinking for decades. Leopold first expressed this sentiment by describing the land as a community of beings and processes of which humans are and should be members, rather than some extrinsic and inessential place in which they only contingently happen to live.<sup>29</sup> However Western instrumental understanding of nature ignores the responsibility which is carried with being what Leopold termed as being 'plain citizens' of the biotic community. 'In denying these responsibilities humans have simplified and destabilised the land community, threatening the viability of many species, exterminating some, and ultimately degrading both the physical and spiritual space of human existence.'<sup>30</sup> The denial of this responsibility has had another important consequence: a retardation of the development of laws designed to protect that physical and spiritual space, and a degree of tolerance in the laws which is unhealthily permissive in its approach to the control of the exploitation of wild animals as a resource.

#### 2.1.5. *Too Little, Too Late*

What of the law that allowed the extinction of the quagga, not the first or only species to become extinct in South Africa, and probably not the last? For the

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<sup>28</sup>For present purposes 'wildlife' will be given its restricted meaning so as to be consistent with the principal authors on the subject, unless wider meaning is apparent from the context in which it is used.

<sup>29</sup>Leopold 'The Land Ethic' in *A Sand County Almanac* op cit note 3 237-264.

<sup>30</sup>Roger JH King 'Environmental Ethics and the Case for Hunting' *Environmental Ethics* (Spring 1991) vol 13 No 1 66.

quagga the law came many years too late, when the Cape Government gave it legal protection in 1886, 23 years after the last one had been shot in the Cape, and the last known member of the species had died in the Amsterdam Zoo, Holland, in 1883.<sup>31</sup> The extinction of the quagga occurred without outcry, as has been the case with the disappearance of most species which have ceased to exist, probably because it was through the lawful activities of man that it occurred. South Africa, like most of the colonies, was land and resource rich. The supply of wild animals as quarry in the sport of hunting and as a food resource must have seemed endless to the colonists, who adopted a 'free taking'<sup>32</sup> ethic in their approach to wild animals. When the realisation occurred, that animals could not be exploited without control indefinitely if extinctions were to be avoided, controls came in predictably human fashion.

#### 2.1.6. *Moral Considerability* 13

Humans have created an artificial hierarchy in the natural order of life on earth and have accorded themselves the position of highest importance, claiming as a divine right that all life on earth exists for their benefit.<sup>33</sup> Traditionally 'moral considerability' is denied non-human species,<sup>34</sup> despite the fact that many

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<sup>31</sup>See Pringle op cit note 26 10-16.

<sup>32</sup>Thomas A Lund *American Wildlife Law* (1980) 36. Lund distinguishes colonial attitudes from those which preceded them in England. He identifies the following as the cornerstones of English law and policy: the facilitation of sustained periodic harvesting of wildlife, the regulation of human behaviour, the favouring of particular groups and the vindication of animal rights (3-4). Glavovic ('An Introduction to Wildlife Law' op cit note 22 522) observes: 'These attitudes were not maintained in the colonies where a more robust pioneering, free taking and subsistence ethos was essential in order to advance frontiers.'

<sup>33</sup>See Genesis 1:26 - Of man God ordered: '...and let them have dominion over the fish of the sea and over the fowl of the air and over the earth and over every creeping thing that creepeth upon the earth'. Implicit in the concept of dominion is the responsibility of custodianship. It is in this aspect that man has been found to be lacking.

<sup>34</sup>A being is 'morally considerable' if it deserves a standing in moral deliberation. The moral significance of a being depends on its relative standing in relation to other 'morally considerable' beings. See Kenneth E Goodplaster 'On Being Morally Considerable' *Journal of Philosophy* 75 (1978) 308-325.

animals possess traits which are commonly thought to be relevant to membership, whilst some humans do not. This apparent contradiction has been criticised by the animal liberationist proponents<sup>35</sup> who wish to extend moral standing to animals. Both arguments have their short-comings. Giving an individual bias to any species misses the important dimension of the ecology based philosophy of the land ethic which values ecosystems as a functioning whole which has a stability of its own deserving of respect. King claims that 'a holistic ethic geared to respecting the integrity of the whole is more in tune with the ecological reality of biotic communities than a liberationist individualism'.<sup>36</sup> For this reason the Leopoldian land ethic is to be preferred despite its failure successfully to place humans in the biotic community<sup>37</sup>. An extension to both philosophies is that put forward by Christopher D Stone who argues that legal rights should be extended to all natural objects such as trees, mountains and lakes, in much the same way as rights are given to companies and other incorporeal persons.<sup>38</sup> As will be observed, the concept is not as 'unthinkable' as it initially appears.<sup>39</sup>

### 2.1.7. *Species Listing*

The protection of wildlife in its earliest and simplest form begins with the prohibition or limitation of its killing or 'taking'.<sup>40</sup> In typically parochial fashion

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<sup>35</sup> Both Singer and Tom Regan argue that some animals are more rational and self-conscious than, for example, a foetus or a comatose person, neither of whom are denied moral standing - See Peter Singer (ed) *In Defense of Animals* 1985 6 and 16.

<sup>36</sup> King op cit note 30 60.

<sup>37</sup> Ecofeminists criticise the land ethic as ignoring the social and political aspect of individual human action and the impact that may have on the environment legitimately or otherwise. They argue that by not grasping its implications, our understanding of the depth and seriousness of the environmental crisis is restricted. See Andree Collard with Joyce Contrucci *The Rape of the Wild: Man's Violence Against Animals and the Earth* (1989) and Mary Daly *Gyn/Ecology: The MetaEthics of Radical Feminism* (1978), generally.

<sup>38</sup> See generally Christopher D Stone *Should Trees Have Standing?* (1974).

<sup>39</sup> Stone op cit note 38 3-10.

<sup>40</sup> Michael J. Bean op cit note 27 67.

this began with the regulation of the killing of specific species of animals regarded as rare or endangered, or as having some benefit to mankind.<sup>41</sup> In the USA, the Bald Eagle Protection Act<sup>42</sup> had an almost cosmetic purpose: the desire of Congress to preserve the nation's symbol which was threatened with extinction as a result of indiscriminate hunting.<sup>43</sup> Important exceptions to the prohibition against the killing or possession of bald eagles reveal its human purpose. The Secretary of the Interior may permit the taking and possession of bald eagles 'for scientific or exhibition purposes of museums, scientific societies, and zoological parks' as well as 'for the protection of wildlife or of agricultural or other interests in any particular locality'.<sup>44</sup> The principle of listing species of wildlife and categorising them according to their rarity or value to man<sup>45</sup> is fundamental to all early wildlife legislation and remains the cornerstone of modern legislation, even in the USA with its robust adolescence.<sup>46</sup> It persists as the common flaw in most systems of law because it is based on human utility or values and not ecology, the former often being incompatible with the latter. American Federal

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<sup>41</sup>The first international treaty dealing with the protection of wildlife was the Convention for the Protection of Birds Useful to Agriculture, Paris 1902. The convention speaks of 'harmful' birds, determined at a time when man was ecologically ignorant and any interference in natural processes was without knowledge of its potential consequences.

<sup>42</sup>16 USC §§668-668d(1976 & Supp. V 1981) first promulgated in 1940.

<sup>43</sup>The Wild Free-Roaming Horses and Burros Act 16 USC §§1331-1340 (1976 & Supp V 1981) was passed for similar reasons. Congress declared horses and burros to be 'living symbols of the historic and pioneer spirit of the West. See Bean op cit note 27 99.

<sup>44</sup>16 USC §668a (1981) and see Bean op cit note 27 90 et seq for a discussion of the development of the legislation and its adaptation to coincide with human convenience.

<sup>45</sup>As Lund op cit note 32 95 points out: 'Even if the degree of public interest were the key to the proper hierarchy among species, changing fashions of public interest in wildlife indicated that one generation might abhor a species that another treasured.' That is precisely the danger of having arbitrary lists which determine the degree of protection afforded to species in law.

<sup>46</sup>It is interesting to note that the early Cape Placaaten initiated less than five years after the arrival of Jan van Riebeeck had the preservation of wildlife as their primary focus without the qualification of its worth in human terms, despite the fact that its purpose was clearly to protect the station's natural resources. The philosophy implicit in the language of the Placaaten was not carried into the legislation of the Boer Republics and, except in the limited circumstances referred to in note 14 supra, is absent in current South African law.

wildlife legislation<sup>47</sup> sought to move away from ad hoc species orientation in favour of the protection of ecosystems, and protection, not according to species, but categories.<sup>48</sup> Whilst this marked an important progression, it did no more than move the fundamental inadequacies of listing one step away from the problem, at the same time perpetuating its ecological shortcomings.

#### 2.1.8. *A Piecemeal Approach*

Wildlife law in most countries has developed reactively to the ad hoc expressions of concern by the public on a wide range of environmental issues. It is not surprising therefore to discover that it has a patchwork character. Statutes are plentiful and frequently overlapping.<sup>49</sup> In South Africa, nature conservation occurs haphazardly, animals being treated separately from their habitats, and habitats falling essentially into protected or unprotected categories. Wildlife, with the exception of seals and sea birds,<sup>50</sup> enjoy limited statutory protection outside of legally designated parks and reserves or state forests. The provincial ordinances introduce a degree of protection through the control of hunting, but such controls are heavily biased in favour of landowners and persons occupying the land through them, and do not directly promote nature conservation outside protected areas.<sup>51</sup> There is no stated policy which has the effect of law at either the

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<sup>47</sup>Notably the Endangered Species Act of 1973 (16 USCS §§ 1531-1543) and the Marine Mammals Protection Act of 1972 (USCS §§ 1361-1407). But see Gary D Meyers 'Variation on a Theme: Expanding the Public Trust Doctrine to Include the Protection of Wildlife' (1988-89) 19 *Environmental Law* 723 and his criticism of the continued human tendency to categorise animals as objects.

<sup>48</sup>Lund op cit note 32 96.

<sup>49</sup>The USA has over 90 Federal Statutes and South Africa at least 60 which directly or indirectly concern themselves with the protection of wildlife or specific habitats.

<sup>50</sup>Under the Seals and Sea Birds Protection Act 46 of 1973 which lists 36 islands which are controlled as sanctuaries and breeding sites for sea birds and seals.

<sup>51</sup>Although the stated purpose of the ordinances is ... 'to consolidate the laws relating to nature conservation ...' (see the preambles to the ordinances referred to in note 13) they really do little more than categorise fauna and flora into schedules which determine the protective status of the

national or provincial level to guide legislators or administrators in the formulation or administration of conservation legislation, and until such policy is determined<sup>52</sup> there can only be piecemeal protection of the natural environment, and haphazard growth in the law.

Without the stimulation of a national policy, wildlife law will not advance beyond its infant emergence. A word of caution however, is that South Africa should not aspire to the robust adolescence of American wildlife law. There are lessons to be learned from their experience<sup>53</sup> which, if applied timeously, could see South Africa advance to adulthood without the torture of teething and puberty. Perhaps most importantly, South Africa should develop its own unique character in its law, one which accommodates the diversity of its land and its people. In order to achieve that objective, the favouring of any group or class of person will have to be avoided<sup>54</sup> and will only be achieved by adopting principles which are ecology

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species, and provide for permit and licensing systems for the taking thereof.

<sup>52</sup>Section 2 of the Environment Conservation Act 73 of 1989 empowers the minister of Environment Affairs to determine wide-ranging policy with the conservation of all of the elements of the natural environment as its focus, and which could considerably increase the scope of wildlife law. Significantly, none has been declared, probably because of the restrictions imposed upon the minister by the requirement that he consult with the Administrator of each province and seek the concurrence of a number of other ministers before declaring such policy (s 2(2)). The need to seek concurrence fell away with the promulgation of the Environment Conservation Act 79 of 1992 (s2(b)) but as yet no policy has been forthcoming.

<sup>53</sup>One such lesson must surely be to avoid the temptation to legislate for every specific problem that arises as and when it arises, but rather to formulate general principles in legislation as a form of ethics or norms rather than as substantive principles of law with limited application. A number of writers have expressed doubts as to the practicality of this approach, notably DV Cowen in 'Towards Distinctive Principles of South African Environmental Law: Some Jurisprudential Perspectives and a Role for Legislation' (1989) 52 *THRHR* 3-31, in which he expresses scepticism about the viability of van Niekerk's 'ecological norm' (loc cit note 17). The shortcomings in wildlife law are not as a result of a lack of substantive law, indeed in both South Africa and the USA there is an over-abundance of statute law, but rather the quality of what exists. That lack of quality does not stem from any great inadequacies in legislative drafting but flaws in the philosophical framework from which it has emerged.

<sup>54</sup>So too must the temptation to redress past inequalities in the right to use and enjoy the environment in South Africa. Wildlife is a legitimate political issue but it should not be allowed to become the object of political bargaining where the ultimate loser is the environment.

based and are not founded on purely human interests. Humans must be accommodated as members of the biotic community, not as demigods.<sup>55</sup>

## 2.2. EXTANT LAW - REVISE OR ABANDON?

### 2.2.1. *Holism and integrated nature conservation*

The recognition of the holistic<sup>56</sup> character of ecosystems is a recent phenomenon. The concept of managing the earth as a single entity comprising interdependent components, the whole of which, if managed carefully is greater than the sum of its parts, has become the focus of international conservation priorities<sup>57</sup> but is yet to find its way into domestic legal systems in the context of nature conservation.<sup>58</sup> In South Africa this weakness is particularly acute with its fragmented environmental legislation and the division of the administration of

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<sup>55</sup>Terminology such as that used by Sachs in his paper op cit op cit note 18 to the effect that South Africa belongs to all who live in it, is to be avoided. It over-emphasises the importance of humans in the biotic community to their own detriment. What should be encouraged is the concept of belonging in the biotic community in such a way as to accommodate both homocentric and ecocentric interests.

<sup>56</sup>From 'holism', the tendency in nature to form wholes that are more than the sum of the parts by ordered grouping.

<sup>57</sup>See *Caring for the Earth* (October 1991) a joint publication of the International Union for the Conservation of Nature(IUCN), the United Nations Economic Program(UNEP) and the World Wide Fund for Nature (WWF) Part I. Recognition is given to the concept that all life on earth, with soil, water and air, constitutes a great, interdependent system termed the 'biosphere'. Disturbing one component can affect the whole. It is acknowledged that human survival depends on the use of other species, but that it is a matter of ethics, as well as practicality that the survival of those species and their habitats are safeguarded.

<sup>58</sup>However, there is a positive trend towards an integrated approach to environmental management. Britain has consolidated its pollution control inspectorate under its Environmental Protection Act C 43 of 1990, and even South Africa has made positive moves in the same direction with the 'Integrated Environmental Management' procedure devised by the Council for the Environment, and although not mandatory is being voluntarily applied by many developers. This philosophy seems implicit in s 16 of the Environment Conservation Act 73 of 1989. Its concern is with 'biotic diversity in general' as opposed to any specific species or habitat. Section 13 of the Forest Act 122 of 1984 is similar in that its concern is primarily the preservation of whole biotic communities dominated by trees. However, the purpose is the preservation of the 'scenic beauty', which is clearly humanistic.

nature conservation between the four provinces which operate under four separate ordinances whose differences are significant enough to defeat the concept of holistic conservation management according to a nationally coordinated conservation strategy.<sup>59</sup> The arguments in favour of the integrated environmental management of the planet as a whole, apply equally to the management of the wild environment, even to those components which by definition allow only minimal human intrusion.<sup>60</sup>

### 2.2.2. *Statutes*

Since the promulgation of the Natal and Cape provincial ordinances in 1974, there has been no legislation (except amendments to the ordinances and to a limited extent, the Forest Act 122 of 1984) which directly affects nature conservation outside of nature reserves and state forests. This approach is consistent with the general policy of the governments of the time, to devolve as much control of non-strategic affairs of state to regional authorities. There was opportunity in the promulgation of two Environment Conservation Acts since 1974,<sup>61</sup> but with each, 'the opportunity was lost'.<sup>62</sup> The Bill which preceded the 1989 Act was well received by environmentalists because of the clear statement of policy it contained<sup>63</sup> which gave to all citizens the right to 'live, work and relax in a safe productive, healthy and aesthetically and culturally acceptable

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<sup>59</sup>This weakness is recognised in the President's Council report op cit note 16 166 et seq.

<sup>60</sup>For example wilderness areas.

<sup>61</sup>Act 100 of 1982 and Act 73 of 1989.

<sup>62</sup>See generally PD Glavovic 'Some Thoughts Of an Environmental Lawyer on the Implications of the Environment Conservation Act 73 of 1989. A Case of Missed Opportunities' 1990 107 *SALJ* 107.

<sup>63</sup>Section 2.

environment'.<sup>64</sup> It did not deal specifically with wildlife nor with conservation areas, except to provide for the declaration of certain areas with varying degrees of protected status. These enabling provisions were carried through into the Act,<sup>65</sup> but policy was left for determination by the Minister of Environment Affairs,<sup>66</sup> instead of being expressed as a matter of substantive law. No policy has yet been declared, nor has the minister used any of the powers vested in him in the interests of nature conservation. It may be assumed that he does not intend to do so in the immediate future, preferring rather to leave responsibility for nature conservation to the provincial authorities, thereby adhering to the status quo.<sup>67</sup>

The Physical Planning Act 125 of 1991, if anything, is a retrogressive step for nature conservation, in that the reference to 'nature areas' in the previous Act<sup>68</sup> has been deleted. The Act is now limited to the promotion of the 'orderly physical development of the Republic' through the preparation of development and

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<sup>64</sup>In so doing it would have gone a long way to resolving the vexed problem of citizens rights to act in the public interest when environmental degradation has occurred or is apprehended, a right presently denied South Africans. For comprehensive treatments of the subject see Cheryl Loots 'Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation' (1987) 104 *SALJ* 131, and Bray W, 'Locus Standi in Environmental Law' (1989) 22 *CILSA* 33.

<sup>65</sup>Protected Natural Environments (s 16); Special Nature Reserves (s 18); Limited Development Areas (s 23). In addition the minister may identify and limit or prohibit certain activities in stipulated areas (ss 22 and 23).

<sup>66</sup>Subject to onerous obligations to consult with the administrator of each province and to obtain the concurrence of a number of other ministers before so doing (s 2(2)).

<sup>67</sup>The present minister took office shortly after the Presidents' Council commenced the taking of evidence on a National Environmental Management System, and the South African Law Commission evidence on a Bill of Rights. The Minister understandably must have adopted a 'wait and see' approach. The question now is whether the Minister will promote the many suggestions for the strengthening of his department, and whether the action suggested will be given the priority called for in the President's Council report op cit note 16 206-228.

<sup>68</sup>Section 4 of Act 88 of 1967 - but now protected natural environments under s16 of the Environment Conservation Act 73 of 1989.

structure plans on a national, regional and urban basis.<sup>69</sup> The Forest Act 122 of 1984 has a chapter devoted to 'Protection of Biota and Ecosystems'.<sup>70</sup> As with the Environment Conservation Act its provisions are enabling, the Minister<sup>71</sup> being given the power to make declarations as to the protection of trees on private land<sup>72</sup> and the setting aside of nature reserves and wilderness areas in state forests.<sup>73</sup> The same reluctance in the Minister to use any of the potentially useful provisions of the Act appears to prevail. It is almost as if there is formal policy at central government level not to encroach upon the domain of the provincial authorities where nature conservation is concerned. The provincial authorities appear comfortable with the ordinances despite their obvious shortcomings, probably because under the ordinances they are to a large extent, master of their own destiny.]

### 2.2.3. *The Ordinances*

The Nature Conservation Ordinances of the four provinces were promulgated by the respective provincial councils of the provinces under the authority conferred upon them by the Republic of South Africa Constitution Act 32 of 1961.<sup>74</sup> They are all similar in content,<sup>75</sup> but differ markedly in their schedules which

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<sup>69</sup>See the preamble to Act 125 of 1991.

<sup>70</sup>Part V.

<sup>71</sup>Of Water Affairs and Forestry, whose department is now separated from the Department of Environment Affairs.

<sup>72</sup>Section 13.

<sup>73</sup>Section 15. This section has been put to good effect in the declaration of a number of important areas as wilderness, in conservation terms probably one of the country's most precious resources in terms of rarity and for the genetic bank for biodiversity that they represent. See Hendee et al op cit note 4 7-11 on wilderness values and 74-77 on wilderness in South Africa, its location and extent.

<sup>74</sup>Section 84 (1)(j).

<sup>75</sup>For the purposes of this discussion focus will be on the Natal Nature Conservation Ordinance 15 of 1974.

determine the protected status of the animals which appear therein.<sup>76</sup> Since the ordinances are limited to their respective provincial boundaries, their differences create the anomaly that an animal may stray from one province to another and in the process undergo a significant change in status to its detriment.<sup>77</sup>

#### 2.2.4. *Old fashioned language and content*

The Natal Ordinance is structured in twelve chapters which are almost severable from each other in that each deals with a different subject matter and each has general provisions applicable to the particular subject but which are similar to those in the other chapters. As a result the ordinance is repetitive and unduly bulky.<sup>78</sup> Two central themes run through the ordinance and they reveal its anthropocentric bias: its over-emphasis of the rights of property owners<sup>79</sup> who

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<sup>76</sup>See Bothma & Rabie op cit note 23 203-204 for severe criticism of the system of class schedules for the determination of the status of wild animals. The authors reach this conclusion:

‘Finally, although legal classification of wild animals may seem rational from a human point of view, it is based on the arrogant assumption that man, himself a creature harmful to the environment, is free to decide which animal is useful, useless or harmful, with the corresponding adverse or beneficial consequences for the classified animals. Although there is no alternative to this, those responsible for compiling categories of species should reflect on the consequences of their decisions and appreciate the moral judgements they are making.’

<sup>77</sup>It is an absurdity in the law which classifies the species wild dog (or Cape hunting dog) *lyacon pictus* as specially protected game in Natal and as vermin in the adjoining Orange Free State. The unlawful killing of specially protected game in Natal attracts a maximum fine of R100,000 and the killing of vermin in Orange Free State a round of applause! The irony is that the species probably no longer occurs naturally in the latter province.

<sup>78</sup>For example 11 sections are devoted to the making of regulations in respect of specific subject matter which when read together give the Administrator such wide powers that they could be replaced by a single section giving the Administrator the power to make any regulations not inconsistent with the purpose of the ordinance. It is not suggested that such wide powers should be given to the Administrator, especially since the ordinance gives him a discretion not fettered by an obligation to exercise such discretion according to what is ecologically expedient.

<sup>79</sup>Section 33(4) exempts the owner of a commercial game farmer (on his own farm) from the obligation to obtain the ordinary and special licences required by ss 34 and 35, from the prohibition against using unlicensed employees to assist with hunts contained in s 44, and from the prohibited hunting methods set out in ss 48(1) (a), (b), (d) and (e). In terms of s 44(3), owners, occupiers with an owner’s consent, his spouse, children and employees may hunt ordinary game (consisting of about 20 species of animal and bird) in the open season without a licence. Section 35(2) grants an owner (and the persons referred to in s 34(3)) the right to a permit to hunt without a licence a stipulated

are exempted from many of its restrictive provisions, and the selective nature of its system of listing and categorisation.<sup>80</sup> The ordinances use terminology which is no longer appropriate, given modern attitudes to wildlife. The word 'game' in reference to a particular class of mammal indicates that the primary purpose for its existence is to be the quarry of human hunting pursuits. The carcass of a certain class of animal is regarded as a 'trophy'<sup>81</sup> whereas another class of animal is termed 'vermin'.<sup>82</sup> The Administrator,<sup>83</sup> and in some cases the Board,<sup>84</sup> is given wide discretionary powers to make regulations or to determine what is to be included or excluded from defined terms in the ordinance. Furthermore the Administrator has the unfettered discretion to proclaim or deproclaim parks and reserves.<sup>85</sup> The obvious result is that the law becomes

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number of species of a stated sex. Section 38(2)(b) exempts the holder of a commercial game reserve licence from the first part of the section which prohibits the capture and keeping of protected and ordinary game. Owners and occupiers are able to escape prosecution for offenses relating to the use of snares, traps and poisons if the act was committed in order to protect their crops or livestock against the 'depredations of vermin or marauding dogs or the like' by virtue of the provisions of s 48(3).

<sup>80</sup>There is a curious prejudice against sharks, presumably because of their threat to humans in pursuit of recreation. The explosion of substances in water is forbidden by s 182(b) except for the purpose of 'killing sharks'. The indiscriminate killing and determined campaign against sharks on the Natal coast has undoubtedly had an impact on the coastal ecology of the entire sub-continent. The Great White shark, once the target of merciless hunting by humans, is now on the list of threatened and endangered species.

<sup>81</sup>Section 50.

<sup>82</sup>Section 11(9). The placing of animals in such a category raises moral and ethical issues not considered by the draftsmen of the ordinance.

<sup>83</sup>In consultation with Exco, a body which does not generally have any ecological expertise in its ranks since it is comprised of politicians who would only fortuitously happen to have any experience in the field.

<sup>84</sup>In terms of s 17, subject to the approval of the Administrator, and provided such regulations are not inconsistent with the ordinance. Section 17 sets out a wide range of matters in connection with which such regulations may be made.

<sup>85</sup>Section 2. The only restriction on the discretion of the Administrator is in relation to the increase or alteration of boundaries of game or nature reserves established on state land, in which case the prior approval of the Minister of Agriculture is required. Agricultural interests are represented in the composition of the Board as s 4(2) requires the Board to include one member

uncertain<sup>86</sup> because there are no defined guidelines to indicate how such discretionary powers are to be exercised, nor any obligation on the authority concerned to have regard to ecological criteria in the decision making process. There is no provision for public participation in the decision-making process even though the decisions taken may be of considerable public interest, and no provision for review of the decisions of the authority concerned.

#### 2.2.5. *Revise or Abandon?*

Existing national legislation is in need of revision generally, but the scope of such revision goes beyond the ambit of this discussion as it is not concerned directly with nature conservation except in the limited instances already discussed. So too does an examination of the common law, the latter being in a undeveloped state simply because no customary law of conservation as a discrete branch exists, and because the lack of relevant legislation has meant that the courts have not had to concern themselves with interpreting such legislation thereby developing policy through their opinions. As for the provincial ordinances, they have been exposed as having fundamental flaws both philosophically and technically. There can be no justification for their continued existence except at the level of management rules for the provincial authorities to cater for such regional differences as may occur between the four provinces.

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nominated by the Natal Agricultural Union.

<sup>86</sup>Cowen's principal criticism of van Niekerk's 'ecological norm' is the lack of certainty it gives to the law (op cit note 53 generally). Cowen prefers the Australian method of providing the 'concrete and specific over the abstract and the general'(loc cit 14). This approach assumes that the legislators will have the degree of knowledge necessary to make those specific decisions. Despite the advances made in the field of ecology, our knowledge is not complete, and therefore there is no guarantee that they will be ecologically prudent and not political, given the fact that the law makers are politicians, not ecologists. The Natal Ordinance has a number of detailed and specific provisions which in fact cause uncertainty and in some cases inaccuracy. For example, s 17(1)(p) allows the Board to 'exclude any animal from the meaning of the word "animal" as defined in s 1'. The decision may be arbitrary. The Administrator has defined 'growing in a wild state' as being 'not introduced by man' (s 1). Excluded therefore are areas 'rehabilitated' to their wild state after major developments (which may have been one of the conditions upon which the development rights were granted), and managed as such in no different a fashion to any nature reserve deemed to be in a wild state merely because it is defined as such by the ordinance.

In its report on a national environmental management system<sup>87</sup> the President's council makes the following recommendations:

that 'the provincial legislation be consolidated into a Nature Conservation Act, the enforcement of which could be delegated to the provinces or regions';<sup>88</sup>

and

that 'some provincial management functions...be delegated to regional interdepartmental committees with the necessary expertise and manpower'.<sup>89</sup>

The debatable question is whether 'consolidation' is appropriate or whether given the serious short-comings of the existing legislation, the ordinance should be abandoned in favour of more relevant new law which reflects ecology based approaches to conservation rather than the utilitarian foundation of present South African conservation law. Consolidation may be appropriate only with regard to the functioning of the provincial management and enforcement agencies, the control of parks and reserves, and the administrative functions prescribed by national legislation, and therefore those elements of the ordinances which satisfactorily serve those purposes should be retained, and consolidated so as to achieve as much consistency between the administrations as is appropriate, given their physical differences. As for the new legislation itself, there are no redeeming features of the provincial ordinances which deserve to be included in the form in which they presently occur.<sup>90</sup>

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<sup>87</sup>See generally the *President's Council Report* op cit note 16.

<sup>88</sup>*President's Council Report* Op cit note 16 73.

<sup>89</sup>*President's Council Report* Op cit note 16 74.

<sup>90</sup>From a practical point of view, existing nature reserves and parks proclaimed under the ordinances should be retained and so should the present management structures so as to ensure continuity of their operation.

### 3. A NATIONAL NATURE CONSERVATION ACT

‘Our new approach must meet two fundamental requirements. One is to secure a widespread and deeply-held commitment to a new ethic, the ethic for sustainable living, and to translate its principles into practice. The other is to integrate conservation and development: conservation to keep our actions within the Earth’s capacity, and development to enable people everywhere to enjoy long, healthy and fulfilling lives’.<sup>91</sup>

#### 3.1. PURPOSE

##### 3.1.1. *Objects and Objectives*

The message of the aforementioned extract from *Caring for the Earth* is directed at an action plan for global management according to principles which will ensure that humanity lives within the carrying capacity of the Earth. The principles which it espouses are equally applicable to the individual components of environmental management, one of which is nature conservation. Pollution may be regarded as human activity which produces harmful emissions which exceed the assimilative capability of the Earth. Applying the same principles, human activity which threatens the natural balance or health of ecosystems, should not be permitted.

It is control of that conduct which is the objective of nature conservation. Subject to some minor modification conservation legislation could have as its objects:

‘the protection of ecological processes, natural systems and the natural beauty as well as the preservation of biotic diversity in the natural environment’

and

‘the promotion of sustained utilisation of species and ecosystems and the effective application and re-use of natural resources’.

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<sup>91</sup>*Caring for the Earth* op cit note 57 3.

The Minister of Environment is already empowered to determine policy which has those objectives as its purpose,<sup>92</sup> and there is no reason why they could not be the basis for a National Nature Conservation Act. Were the Act to have those objects, it would accommodate two important concepts: the preservation and protection of all members of the biotic community for their own sake, and the tolerance of humans as consumers in the ecosystem, as indeed all living creatures are to a greater or lesser degree, provided that their rate of consumption does not exceed the natural ability of the ecosystem to replenish what has been consumed.<sup>93</sup>

### 3.1.2 *The Scope of its Application*

The Act would apply to all indigenous flora and fauna, irrespective of where they occurred.<sup>94</sup> Land owners would hold no special rights or privileges simply by virtue of their ownership as is the present case. In fact land owners, as custodians of the country's natural heritage, would have an obligation to preserve and protect it, and would be subject to the same limitations as to use as any other person.<sup>95</sup>

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<sup>92</sup>Section 2(1)(a)&(b) of the Environment Conservation Act 73 of 1989.

<sup>93</sup>The control over the production and disposal of human waste, natural and chemical, would not fall within the ambit of this legislation, but would fall within the separate purview of pollution control legislation. (See the recommendations of the *President's Council Report* op cit note 16 216-217).

<sup>94</sup>A distinction has always been made between conservation inside and outside of protected areas for obvious reasons. (See Bothma & Rabie op cit note 23 198). But it is conservation outside of the reserves that is cause for the gravest concern. (See Bothma & Rabie op cit note 23 200, and Grafton, *African Wildlife* 22 (1968) 4 302). Current legislation is not adequate in its present state.

<sup>95</sup>The benefits of ownership would be purely commercial in that the resource may be available to the owner at no cost other than statutory licence or permit fees, from which he should not be exempt.

## 3.2. CONTENT

### 3.2.1. *Habitat Protection*

At present the protection of habitats takes place at a number of legislative levels. Categories of protected areas are created arbitrarily,<sup>96</sup> usually on land which has not already been given over to some other human use. It has been said that the major task facing conservationists is to ensure that the areas between the reserves do not become 'biological deserts, but supplement the functions of the reserves in preserving biotic diversity at lower levels'.<sup>97</sup> Therefore legislation which is aimed at habitat protection must apply to the country as a whole, and not only to existing demarcated protected areas. This can be achieved by a suitable definition of 'natural environment'<sup>98</sup> to which the Act would apply. A natural environment should include

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<sup>96</sup>Arbitrary in the sense that the area may not be ecologically complete, but is all that is available of the type into which category, determined humanistically, it happens to fall. The Council for the Environment has formulated a suite of protected area categories which closely resembles that of the IUCN, and has submitted it to interested parties for comment. (See the President's Council report op cit note 16 79).

<sup>97</sup>Paul & Anne Ehrlich op cit Note 1 233. The authors make this useful observation: 'The public image of an ideal ecosystem must be changed from one of closely clipped lawns or golf courses spotted with occasional "specimen" trees and bordered flower beds to one of the more complex and varied aspect presented by natural communities.'

<sup>98</sup>Section 16 of the Environment Conservation Act 73 of 1989 provides for the declaration of such areas by the Administrator if there are 'adequate grounds to presume that the declaration will substantially promote the preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general'. The section clearly contemplates such declarations in respect of privately owned land and provides for compensation of landowners who incur expenses in complying with conditions imposed in respect of the land so declared. The principle is sound, even though it places responsibility for habitat protection in the hands of the Administrator, a regional authority, but it would be preferable to have central government control which implies more direct responsibility to citizens.

‘any open space which supports indigenous plant or animal life, or is capable of so doing’.<sup>99</sup>

Clearly considerable revision of land-use practices will be necessary and conflicts will be unavoidable. Partial solutions to such conflicts are: the implementation of mandatory environmental assessment procedures<sup>100</sup> which should be undertaken at an early stage, and public participation in the process. What is to be achieved is a departure from the concept that landowners are free to do what as they please on their own property subject only to the common law of nuisance and the limited statutory restrictions which presently apply, in favour of a concept of trusteeship in land for the benefit of all living creatures, in recognition of the fact that each plays an integral part in the survival of the others. Protected areas in their present form should be retained in order to provide continuity during the period of transition from a utility based classification of areas to an ecology based reform of land use. Just as humans require sanctuaries for themselves so too does wildlife. There is justification therefore for the continued existence of areas in which human intervention is prohibited except where that is required to ameliorate the effects of human activities outside of such sanctuaries.

### 3.2.2. *Species Protection*

The inextricable link of all life on Earth to the survival of the others should be the founding principle of any species protection law.<sup>101</sup> For that reason all life on Earth should enjoy a measure of protection determined by the natural order

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<sup>99</sup>Where possible, attempts at ecosystem rehabilitation should be made by the planting of indigenous plant species in preference to exotic species in public open spaces, or alongside roads and railways where revegetation is undertaken as a matter of course after a development.

<sup>100</sup>Such as the Integrated Environmental Management procedure developed by the Council for the Environment. Full use must be made of the ‘scoping’ procedure advocated so as to ensure that public concerns are fully addressed.

<sup>101</sup>Cf Paul & Anne Ehrlich op cit note 1 48 where they argue that ethically, reasons exist for species preservation. ‘The argument is simply that our fellow passengers on Spaceship Earth, who are quite possibly our only living companions in the entire Universe, *have a right to exist.*’

of life on the planet and not merely determined by human values, although humans as the de facto managers of the planet will be obliged to make management decisions from time to time. Humans must of necessity make the rules which govern their own conduct and will also rule for other species which threaten to upset the balance of nature. Humans have already interfered in the natural order of life on the Earth to such an extent that their continued interference may be necessary to maintain what is now the balance of nature. Conservation, law simply put, must ensure that such interference takes place with sensitivity and with respect for all other living creatures.<sup>102</sup>

Species will require classification as a record of their present status, and those whose existence has been threatened by the activities of humans may deserve greater protection than others. However, the tendency to 'arrogantly assume' the usefulness of species must be avoided. If lists are to be created they should be of species which for good ecological reasons deserve no protection, or whose numbers are multiplying with such proliferation that they threaten to disturb the natural order.<sup>103</sup> Humans as consumers should be free to consume species which exist in sufficiently great numbers that, despite their consumption by humans even on an uncontrolled basis, maintain healthy populations. Just which those species are must be scientifically determined with reasonable certainty and the effect of human consumption on their viability monitored. If circumstances

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<sup>102</sup>There are obvious difficulties in that some organisms are direct enemies of humans. Do malarial parasites or viruses have right to exist? Perhaps the answer lies in this: Every creature has the right to defend itself against attack by another. The laws of nature determine to a large extent that there will always be victors and vanquished. The right of humans to resist disease does not necessarily amount to a denial of the right of other organisms to exist but is a legitimate act of self-defence.

<sup>103</sup>Cowen op cit note 53 21 has difficulty with Stone's notion that legal rights should be extended to non-human entities for a number of reasons, one of which is that rights should be extended to invader species of plant such as Rooikrantz or Port Jackson. The answer is simple: plants which dominate and destroy other species within the natural habitat of the latter, interfere with the 'rights' of those species and are therefore 'breaking the law'. Humans as the planet managers may intervene to abate the encroachment.

change, their protected status must revert. Whilst such a system may appear to contradict the proposition that the system of listing is one of the fundamental flaws in conservation law in its present state, the difference is significant. Lists in the form now suggested are not based on any humanistic value judgements which suit only the human species. They are merely planetary stock lists which are essential to good planetary housekeeping. Humans are the self-styled housekeepers of the Earth and therefore carry the responsibility to compile and maintain such lists, even at the level of their own self interest.

### 3.2.3. *Human Diversity*

Humanity is not immune to its own destructive forces. By definition humans are part of the ecosystem and the preservation of the diversity represented by the cultures of the human race is probably as important to ecosystemic health as the preservation of any species. Western culture has not demonstrated knowledge of successful long-term occupancy of the Earth because of its propensity to conquer ecosystems rather than to live within their natural constraints.<sup>104</sup> The white man has adopted the same arrogance to indigenous people as he has to wildlife. He has forced his religion and culture on communities that lived for centuries in harmony with their environment, and then recognising that there is some amusement to be gained in preserving them in their natural state, insultingly sets aside 'reservations' in which they are encouraged to keep alive their 'primitive' culture. By then it is too late, because of the acculturation they have undergone

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<sup>104</sup>This failing has long been recognised by so called primitive people. Chief Seathl in his much quoted letter to the American Congress in 1885 stated the following:

'Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. ...the white man...is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother but his enemy, and when he has conquered it, he moves on...' - Quoted in Paul & Anne Erlich op cit note 1 239.

through the contact they have had with the dominant white culture.<sup>105</sup> It is probably naive to believe that indigenous cultures can be preserved intact through a system of reservations, and probably unfair to deny them those positive aspects of western scientific advancement. In the conservation sense, what should be avoided is the polarisation of nature conservation against the survival of indigenous people<sup>106</sup> Provided ecosystems are not placed at risk, there is no reason why indigenous people cannot be accommodated within conservation areas and allowed to live according to their traditional customs.<sup>107</sup>

#### 3.2.4. *Administration and Management*

The administrative structures which are presently in place are probably adequate for the purposes of administering the proposed new legislation except in respect of their financial resources. Greater responsibility to provide finance must be assumed at central government level, the justification therefor being more economic than ethical. Spending money to protect natural resources is a wise investment in that it will guarantee the continued supply of the raw materials upon which any economy is founded. Determining economic prosperity without taking into account natural capital is illusory.<sup>108</sup> Consideration should be given to the establishment of regional parks boards styled on the Natal Parks Board so as to ensure that the Act is implemented effectively and a national advisory board so as to ensure uniformity throughout the country. Despite the negative aspects

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<sup>105</sup> See BA Pauw *The Second Generation* 2nd ed (1979) 23 et seq. Once a pattern of migration from reserves to cities is established, maintaining the purity of a culture becomes impossible unless a sufficient number remain to preserve their identity.(cf native Americans).

<sup>106</sup>South Africa's record in this respect is not a proud one. Part of the vulnerability of the country's natural areas stems from their symbolism of white domination of the indigenous black people.

<sup>107</sup>See PD Glavovic 'Traditional Rights to the Land and the Wilderness in South Africa' *Case Western Reserve Journal of International Law* (1991)V 23 N 2 281 and in particular the conclusions drawn at 317 et seq.

<sup>108</sup>See Lester R Brown 'The Illusion of Progress' in *The State of the World* (1990) 8.

of enforcement by criminal sanction,<sup>109</sup> it remains the only practical method of ensuring compliance with the law.<sup>110</sup> Education is clearly an important feature of gaining acceptability for any legislation, and that should be one of the central functions of the parks boards.

### 3.2.5. *Hunting*

Giving legal recognition to hunting raises an important moral dilemma and one which appears impossible to resolve. There are both advocates and critics of hunting who present equally plausible arguments.<sup>111</sup> Hunting is an important part of the agricultural industry in South Africa, and vested interests will ensure that it is not legislated out of existence. Furthermore hunting appears to be culturally acceptable to a majority of the population and tolerating it in the law is probably an accurate reflection of prevailing social mores, despite the obvious negative moral connotations it has. Something of a compromise may be to ensure that as far as possible the concerns of the opponents to hunting<sup>112</sup> are addressed if not satisfied, and that the principles which are put forward to justify hunting on moral grounds are given legal effect. In other words, if there is to be hunting, it is to be done ethically, and it must not contravene the principles of conservation legislation. Licences should not be granted as matter of right. There should be a

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<sup>109</sup>See Rabie & Erasmus in Fuggle & Rabie *Environmental Concerns in South Africa* (1983) 44.

<sup>110</sup>In this respect the penalty for transgressions must be sufficiently severe as to act as a deterrent, because certain transgressions may produce irreversible impacts. Furthermore, the state should not be immune to the provisions of the Act as it presently is under the ordinances. See section 216A of the Natal Ordinance and s 113 of the Transvaal Ordinance, whereas in terms of s 80 of the Cape Ordinance this is achieved by the provisions which allow the Administrator to exempt certain persons from the operation of the Ordinance.

<sup>111</sup>King op cit note 30 generally, gives a comprehensive analysis of the principal arguments for and against hunting. It is beyond the scope of this paper to enter into the debate any further than to note that there are aspects of the philosophical debate which should be taken into account in any new legislation.

<sup>112</sup>For example hunting must not cause animals to suffer unduly and must allow the animals a fair chance to escape.

qualifying examination prior to grant of the licence, the applicant being required to have technical knowledge of weaponry, hunting methods, principles of nature conservation, relevant legislation and hunting ethics.<sup>113</sup>

#### 4. NATURE CONSERVATION IN A NEW SOUTH AFRICA

'...We once had a way of living in the world and knowing what was happening on the land. We were in tune with all that lived and sang...'<sup>114</sup>

##### 4.1. CULTURAL CONSERVATION

###### 4.1.1. *So What Went Wrong?*

A tradition of understanding nature is attributed to the Zulu people.<sup>115</sup> The same cannot be said of the people who have ruled South Africa for over three centuries. The lack of a conservation ethic in the legal system of the country is therefore no more than evidence of the political and cultural domination of one race over the others. The traditional wisdom<sup>116</sup> demonstrated in the words of

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<sup>113</sup>Bothma and Rabie op cit note 23 206 refer to the position in Germany where a system of stringent qualifying examinations exists. At present in South Africa hunting generally takes place on private game farms. For economic reasons alone it is in the interests of the farmer to ensure that reasonable standards are employed in hunting. If hunting is to be made available to people as a traditional right as suggested, then the system of qualification will be a high priority. This has been partially addressed in Natal where the Natal Parks Board requires hunters on its organised hunts to pass both written and practical examinations before participation is allowed. See J du P Bothma & PD Glavovic in Fuggle & Rabie *Environmental Management in South Africa* (1992) 263-264.

<sup>114</sup>M Ntombela 'The Zulu Tradition' in V Martin (ed) *For the Conservation of Earth* (1988) 288.

<sup>115</sup>Nick Steele 'Kwa Zulu - Conservation in a Third World Environment' in *For the Conservation of Earth* op cit note 114 115.

<sup>116</sup>See Glavovic 'Traditional Rights to the Land and Wilderness in South Africa' op cit note 107 308.

Magqubu Ntombela<sup>117</sup> was ignored by the white settlers as they carried out cultural practices of their own - unfettered resource exploitation that had no bounds. The result, the extinction of many species of fauna and flora, and a landscape, the greater proportion of which, is irreparably altered.

#### 4.1.2. *Traditional Wisdom*

It is suggested that 'conservation programmes should draw on traditional wisdom.'<sup>118</sup> The notion is an attractive one which has an almost mystical ring to it. Perhaps most significantly it implies the recognition and appreciation of the indigenous culture of the country. By incorporating such values in the formulation of policy, participation in the process is achieved at the most fundamental level. This is extremely important to people who for so long have been excluded from the decision-making process. Policy is likely to be acceptable if the people whom it affects have made a contribution to it.<sup>119</sup> The first and most obvious obstacle to be overcome if the idea is to be adopted, is finding a source of this traditional wisdom. The indigenous tradition of the country is, as has been observed, oral. One of the negative impacts of acculturation on the indigenous people of the country has been a loss of this tradition. Living 'repositories' are few, and the accuracy of their record may be doubted. The problem is resolved of course if the old tradition happens to coincide with the new.

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<sup>117</sup>Described by Martin in *For the Conservation of Earth* op cit note 114 289 as a 'living repository of the ancient oral tradition of his people'.

<sup>118</sup>Glavovic in 'Traditional Rights to the Land and Wilderness' op cit note 107 308. The author says it would be foolish not to do so.

<sup>119</sup>The recognition of the need to have local participation in resource management is not new. See Glavovic 'Traditional Rights to the Land and Wilderness in South Africa' op cit note 107 308-309 and MN Bruton 'Conservation and Development in Maputaland' in MN Bruton & KH Cooper (eds) *Studies on the Ecology of Maputaland* (1980) 516. It is argued that the setting aside of parks and reserves is more likely to gain acceptability if the local people have been consulted and have contributed to the determination of boundaries, the formulation of management plans and share in the income generated by the park or reserve.

#### 4.1.3. *Conservation Wisdom*

Western first world society tends to regard itself as the innovator of ecology based conservation philosophies and has formulated 'new strategies of care'<sup>120</sup> It is true that new concern for the environment has bred a new language to describe this attitude, but are the ideas really anything new? Is the new environmental philosophy not just a restatement of universal principles which have been part of the cultures of many civilisations, and merely forgotten by western culture because of its preoccupation with materialistic values? There is a remarkable similarity in both content and language in the expressions of American Indian and African tribesmen, when speaking of the conservation ethic of their tribes and their forebears. Its content is repeated in the 'new' western philosophies. Could it be that there is a universal conservation ethic, which has merely been inadvertently omitted from western legal systems until very recently, and remains absent in South African law? All of the fundamental principles of the new thought can be extracted from this short passage attributed to Ntombela:

'KwaZulu was once a land full of wild animals like the elephant, rhino, kudu and crocodiles. We lived with and knew these animals... I know the white rhino very well as I was born amongst them. This animal is highly respected by our people... He [King Dinizulu] did not allow people to kill the animals and any person caught was severely punished... I think it is a very good thing that we should stick to the old traditional ways of living so as to protect the future for our children, so that our children will understand what a wild animal is... I understand the plants and the animals, birds and insects. I can tell when rain is coming. All this knowledge is in my blood... We once had a way of living in the world and knowing what was happening on the land. We were in tune with all that lived and sang.'<sup>121</sup>

Translated into modern jargon what Ntombela is saying of his people is this:

- their knowledge of ecology was good;
- animals were protected out of respect for them not for some utilitarian reason;

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<sup>120</sup>*Caring for the Earth* op cit note 57 3.

<sup>121</sup>Ntombela op cit note 114 288.

- they had a concern for the future which implies that over exploitation of natural resources will not be allowed- in short they understood sustainability;
- they accepted their stewardship of the land;
- they believed that their children should be educated to understand and care for nature;
- they were in tune with nature which suggests that the people were part of the biotic community, not apart from it.

Chief Seathl said the same in this passage:

'...all Things share the same breath - the beasts, the tress, the man. The white man does not seem to notice the air that he breathes. Like a man dying for many days, he is numb to the stench.... What is man without the beasts? If all the beasts were gone, men would die of great loneliness of spirit, for whatever happens to the beast also happens to man. All things are connected. Whatever befalls the earth also befalls the sons of the earth....The whites too shall pass, perhaps sooner than the other tribes. Continue to contaminate your bed, and you will one day suffocate in your own waste. When the buffalo are all slaughtered, the wild horses all tamed, the secret corners of the forest heavy with the scent of many men, and the view of the ripe hills blotted by talking wires, where is the thicket? Gone. Where is the eagle? Gone. And what is it to say good-by to the swift pony and the hunt, the end of living and the beginning of survival.'<sup>122</sup>

## 5. CONCLUSION

South Africa is at an important political and social crossroad. The quality of life of many people will be improved given the new social order which will develop. New opportunities will arise for many as they take their place in a community from which they have previously been denied. The question is whether the right will be exercised with the degree of respect their forefathers showed to the other

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<sup>122</sup>Quoted in Paul & Anne Erlich op cit note 104 239.

members of the biotic community, or whether new found freedom will carry with it the same arrogance displayed by their former oppressors. The importance of nature conservation seems to be recognised by most political leaders who have made public expressions on the subject. This may be born out of the utilitarian view that there are economic benefits to be gained from the tourist potential of the country's nature areas, and therefore the concern expressed does not guarantee the protection of the resource except when economically expedient. For this reason there is a compelling need for new law which reflects universal conservation priorities, to guarantee that the true value of the country's natural heritage will be preserved to provide a rich existence for man and beast alike. For nature the first step is the promulgation of a Nature Conservation Act which is born out of the philosophy of Seathl and Ntombela, not Descartes and Locke.

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## PART TWO

### TOWARDS SENSE AND SUSTAINABILITY: LAW AND THE TRADITIONS OF AFRICA IN THE PROCESS OF LAND REFORM IN SOUTH AFRICA

#### 1. INTRODUCTION

In South Africa the law of property is concerned primarily with the protection of wealth. That protection is achieved both statutorily and in the common law by placing great value and importance on the concept of ownership.<sup>1</sup> Ownership confers the right selfishly to exclude others from ones property, to reap and enjoy its fruits exclusively, and to engage in any activity thereon not specifically limited by public or private law.<sup>2</sup> Not surprisingly therefore, land is the most valuable category of property capable of ownership. In South Africa nearly 95% of the land forms part of the private wealth of its citizens.<sup>3</sup> Two features characterise land in South Africa:

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<sup>1</sup>Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê. Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref, met en op sy eiendom kan maak wat hy wil. Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas.... Geen eienaar het dus altyd 'n onbepaalde bevoegdheid om na vrye welbehag en goeie dinge sy eiendomsbevoegdhede ten aansien van sy eiendom uit te oefen nie.' Per Spoelstra AJ in *Gien v Gien* 1979 (2) SA 1113 T at 1120. The learned Judge then goes on to quote Sohm *The Institutes* ' ... as soon therefore as the legal limitations imposed upon ownership - whether by the rights of others or by the rules of public law - disappear, ownership at once, and of its own accord, re-establishes itself as a plenary control. That is what is sometimes described as the "elasticity" of ownership.'

<sup>2</sup>H Silberberg & J Schoeman *The Law of Property* 2 ed (1983) 162.

<sup>3</sup>See the *Report of the Three Committees of the President's Council on a National Environmental Management System* PC 1/1991 (October 1991) (hereinafter referred to as the *President's Council Report*) 13.

(a) its inequitable distribution amongst its people;<sup>4</sup>

and

(b) the degree to which it has been degraded by its inhabitants, mostly at the instance of the landocracy.<sup>5</sup>

Neither is unique to South Africa, and both are products of the legal and philosophical institutional thinking which was introduced into the country during the process of the colonisation of Africa by whites.<sup>6</sup> Both are the subject of unprecedented public attention in South Africa today, the former as part of a new political dispensation which is promised to the disenfranchised majority, and the latter as part of a global concern for the environment which has hitherto been ignored in South Africa. This article will criticise extant land law and will suggest that the solutions which are so urgently needed may be found in the cultural systems which prevailed when the colonists arrived on the sub-continent some 350 years ago.

## 2. THE LAND ISSUE

### 2.1. *Land Reform*

Broadly speaking the 'land issue' may be defined as the recognition of the inequality of the distribution of land (and the wealth it represents) as a result of

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<sup>4</sup>The Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 resulted in the allocation of approximately 87% of South Africa's land to its white population although they represented less than 18% of the total population. See Zola Skweyiya 'Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models' (1990) 2 *SAJHR* 197.

<sup>5</sup>As a result of poor agricultural practices South Africa loses approximately 400 million tons of top soil each year, air pollution levels in some areas far exceed standards tolerated in most other western countries, and water quality near urban areas is rapidly deteriorating as a result of industrial activity and spreading informal settlements. See generally *Rotating the Cube - Environmental Strategies for the 1990's* (1990) and especially chapters 1,2 and 4.

<sup>6</sup>For the historical development of the introduction of western concepts of land tenure see TRH Davenport & KS Hunt *The Right to the Land* (1974) generally.

'generations of legal tinkering',<sup>7</sup> and the search for solutions which will redress those inequities through a process of social, economic and political reform. The process encompasses what is loosely termed 'land reform',<sup>8</sup> but which is probably more accurately described as the redistribution of land by taking it from its present owner and making it available to another owner deemed to have a greater right thereto, such right being determined by the application of some social, economic and political formula devised by the governing body of the day.<sup>9</sup> There is no doubt that the redistribution of land is the key issue in the process of reform, but the form which that redistribution takes is crucial to the permanency of the solution. What is to be avoided is the providing of solutions which raise greater problems than those they have attempted to solve, or which merely conceal the problem, not solve it.<sup>10</sup>

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<sup>7</sup>Geoff Budlender & Johan Latsky 'Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones' (1990) 2 *SAJHR* 155. The authors describe the country's intricate system of interrelated legal provisions 'of quite astonishing complexity' thus:

'It is the kind of labyrinthine complexity which cannot and did not arise from a single flash of misguided brilliance. Rather, it is the result of generations of legal tinkering, of piecemeal and painstaking technical embellishments of structures created on the one hand, in the grand apartheid plan, and on the other hand in response to ideological, developmental and economic realities from time to time and from area to area.'

<sup>8</sup>Tessa Marcus 'Land Reform - Considering National, Class and Gender Issues' (1990) 2 *SAJHR* 178 describes land reform thus:

'The struggle for land reform in South Africa is a complex web of interrelated national, class and gender issues which arise out of the legacy of apartheid. These are often coincident. They also straddle the urban/rural divide in a particular and involved way because of the social, political and physical impositions of white minority rule. Together they provide the yardstick to evaluate the implications of land reform measures.'

It may be an oversimplification to attribute the present distribution of land to a 'legacy of apartheid'. It goes much deeper, to the legal and moral foundations from which apartheid law emerged.

<sup>9</sup>Marcus (op cit note 8 193) appears to recognise this when she concludes: 'Transforming relations in the sector is not only about changing ownership patterns, it is also about vesting the right of administering and controlling the land in local democratic organisations and institutions. The social content of these bodies will determine to whom the land is restored.'

<sup>10</sup>For example the reforms introduced in Zimbabwe and Kenya reinforce the right of private ownership in the form of family farms which it was believed would promote and sustain democratic institutions. Whether it will remain to be seen. What has occurred however, is that the rural populations have become socially and economically stratified, in effect a new form of class distinction akin to apartheid. See Skweyiya op cit note 4 205.

## 2.2. *Political Solutions*

The land issue has been addressed in a number of post-colonial African states as most of them had land tenure systems and disproportionate land distribution during colonial rule.<sup>11</sup> None of the systems has been entirely successful, and none provides ready-made solutions for South Africa. Their failure has been their attempt to address the problem symptomatically and not at its root cause. All have retained systems of property law which have their foundation in jurisprudence introduced by their colonial oppressors.<sup>12</sup> Where there has been a departure from colonial thinking, it has generally been in favour of socialism, and therefore a political solution has been applied to what is essentially a legal problem. It would appear that the protagonists in South Africa's drama are leading the country in the same direction<sup>13</sup> as the new participants appear to be following suit, unable to free themselves from European philosophical thinking.<sup>14</sup> There is an irreconcilable dichotomy in their plan. On the one hand it is proposed

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<sup>11</sup>For a brief description of the essential characteristics of those reforms see Skweyiya op cit note 4 203-205.

<sup>12</sup>Their insistence that private ownership in the western sense should be retained in some form results in the paradoxical situation that in seeking freedom in the process of reform they have locked themselves into the philosophical regime of the colonists. Their private law remains that described by Immanuel Kant as the coercive laws which secure each person in his possessions. For Kant nature was viewed thus: It is not usable by mankind unless there is some lawful partition of the soil. An individual's title does not stem from his use of his property; to have a right, is to have the right to exclude others, and to *have* such a right it is only necessary to belong to a community and to take up that right, in the sense of manifesting the intention to restrict the freedom of others by insisting on that right. I Kant *The Metaphysical Elements of Justice* (1956) tr John Ladd 56-65.

<sup>13</sup>The *White Paper on Land Reform* released by the government in 1991 promised sweeping changes to land ownership by blacks in South Africa. That promise was made good by the promulgation of the Abolition of Racially Based Land Measures Act 108 1991 which brought to an end the much hated apartheid laws embodied in the Black Lands Acts 27 of 1913 and 18 of 1936, the Group Areas Act 36 of 1966 and the Black Communities Development Act 4 of 1984. Despite the rhetoric of the *White Paper* which promises a policy to guarantee the use of the land 'as economically as possible to the greatest advantage of all' and which will be mindful of the 'responsibility to conserve it for future generations', the new order like the old, seeks to attain its political objectives by promoting the concepts of private ownership and private enterprise.

<sup>14</sup>Particularly that of Hegel and Marx, probably through the influence of their Soviet comrades in arms during the struggle for freedom.

that 'land should be subjected to public control in the interests of the nation', and it is stated that '...land is also a central element in the natural and human environment, and a crucial link in an often delicate balance'.<sup>15</sup> On the other it is recognised that social reform cannot be achieved without a healthy economy. 'Giving the land to those who work it'<sup>16</sup> may 'create a democracy in the countryside and would rally the support of the black rural population for the new post-apartheid order'<sup>17</sup> but it brings with it easily discernable problems as the author clearly recognises.<sup>18</sup>

### 2.3 *A New Look at the Land*

It has been some time since there has been a serious call for a re-examination of the concept of land ownership in South Africa.<sup>19</sup> There is now a compelling

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<sup>15</sup>Skweyiya op cit note 4 195-196, and especially the reference in note 1 where it is quoted in the text: 'Public control of land is therefore indispensable to its protection as an asset and the achievement of long-term objectives of human settlement policies and strategies'.

<sup>16</sup>Skweyiya op cit note 4 203. Hegel saw labour as the means of attaining property. Perhaps that is the origin of Skweyiya's call.

<sup>17</sup>Ibid.

<sup>18</sup>Ibid. The author concedes:

'Many highly productive farms, which use a considerable amount of fixed and movable assets, are production units that would be very difficult to divide without damaging their productivity. They require large amounts of capital to manage as they are run at present. Such a policy of returning the land to those who work it may be unwise and politically impractical.'

The use of the word 'returning' is not explained. It suggests that the workers had some previous right of ownership of which they have been dispossessed. It is not qualified as being some traditional right to the land and is therefore an inaccurate generalisation. He does not advance the argument as to whether or not the indigenous people of the Highveld were in fact dispossessed of their land or whether there is an argument for the legitimacy of the settlers' actions in the law of sovereignty or as a derivative acquisition of terra nullius or as conquest. See PD Glavovic 'Traditional Rights to the Land and the Wilderness in South Africa' *Case Western Reserve Journal of International Law* Vol 23 No 2 (1991) 290.

<sup>19</sup>In 1984 Denis V Cowen critically examined the traditional concepts of land ownership in a paper presented under the title 'New Patterns of Landownership. The Transformation of the Concept of Ownership as Plena in re Potestas'. That was followed by a series of articles published in 1985 in *Acta Juridica* and re-published in a single volume entitled 'Land Ownership, Changing Concepts'. Although the various authors recognise the unsatisfactory aspects of the Roman - Dutch

need to do so before irrevocable steps are taken in the process of land reform, and a system which is based on the Roman-Dutch concept of ownership is devised, because it was an extension of the latter which allowed those ills<sup>20</sup> which are now sought to be alleviated, to find their way into the law, and will condemn any future dispensation to a similar fate.

### 3. THE ENVIRONMENTAL ISSUE

#### 3.1. *A Free-Taking Ethic*

It is too narrow a view to take to suggest that the Roman-Dutch concept of ownership is also the villain of the piece in the environmental issue; but the philosophical framework, which gave birth to the concept of ownership as *plena in re potestas*, also engendered the free-taking ethic which has dominated attitudes towards the environment in South Africa since the arrival of the colonists more than three and a half centuries ago.<sup>21</sup> It is that attitude which has seen the extinction of several species of fauna and flora, and a landscape

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concept of ownership, none considered it in the context of traditional rights to the land nor with land reform in mind. The subject is accordingly ripe for debate.

<sup>20</sup>Obviously the overriding causes of the legislative regime of apartheid was socio-political. The law was a response to a variety of pressures: whites demanded protection against economic competition, clearly an important factor, but residential segregation (in the form of the Group Areas Act 36 of 1966) cannot be explained by economic considerations alone. A host of white fears and ideological motives also lay behind the law. See Melville Feinstein & Claire Pickard-Cambridge *Land and Race* (1987) 6. They are no longer relevant except to remind one of the fallacy of the apartheid system.

<sup>21</sup>The right to dominate the land is implicit in Roman-Dutch ownership. That dominance took place without recognition of its ultimate effect on society. Sir Crispin Ticknell (warden of Green College Oxford and former British Ambassador to the United Nations) recently issued this warning: 'Above all we must recognise that human society is more fragile than life itself. Ultimately we are as constrained by biological limits as any animal species. But, unlike them, we can consciously shape our future. If we fail to do so, there will be no one to blame but ourselves'- *New Scientist* 7 September 1991 11.

which has been degraded to the extent that the capability of the land to support its inhabitants indefinitely is seriously threatened.<sup>22</sup>

### 3.2. *Environmental Concerns*

A formula for land reform which does not have adequate safeguards against environmental degradation and resource over-exploitation will ultimately fail. Handing a wasteland to people who have been starved of a right to the land presents no solution.<sup>23</sup> Again the protagonists of such a formula appear to ignore the fact that environmental concerns are properly part of the land issue,<sup>24</sup> and that the fundamental causes of environmental degradation must be taken into account and avoided in the preparation of any blue print for the future. No land use plan is complete unless environmental concerns are adequately addressed.

## 4. THE LAW AGAINST SUSTAINABILITY

### 4.1. *Western Concepts*

The concepts of the ownership, tenure, possession and occupation of land have been the subject of philosophical and jurisprudential debate for centuries.<sup>25</sup>

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<sup>22</sup>It is the over-emphasis of ownership as a right without a concomitant duty of respect for the environment which has contributed significantly to a reduction in the quality of life for many people because the assimilative capability of the land has been overtaxed.

<sup>23</sup>The priority appears to be the acquisition of the right to the land irrespective of the state in which it is received. The need for environmental quality of life is recognised but is placed low on the agenda of change. Albie Sachs in a paper titled 'Conservation and Third Generation Rights. The Right to Beauty', presented at a conference of Lawyers for Human Rights at Macaulay in May 1990, in warning that there may not be room for nature conservation on the 'crowded' agenda of the struggle for change, did at least qualify his apparent pessimism by saying 'The health of the people, the conservation of resources and the protection of nature are of interest to all South Africans, particularly those preparing to be free citizens of a free country'.

<sup>24</sup>See Michael Robertson's criticism of Skweyiya's models for agrarian reform in 'Land and Human Rights In South Africa: (A Reply to Marcus and Skweyiya)' (1990) 2 *SAJHR* 217 where he says: 'What is missing, perhaps, is an indication of the critical need to address the ecological dimension in implementing agrarian reform....Only if this is done can there be any hope of achieving, and sustaining, a system of economic and social justice.'

<sup>25</sup>The works loc cit note 19 provide the central features of the debate which go beyond the scope of this article.

They have been legislatively and judicially defined and the meaning they have attained form the cornerstones of modern land use law. In South Africa ownership was introduced in typical colonial fashion and in ignorance of prevailing indigenous systems of tenure which bore no resemblance to that introduced.<sup>26</sup> It is this colonial concept of ownership which has shaped planning policies which have in turn determined the distribution of land between South Africa's people. By the turn of the century whites owned and occupied most of the land in South Africa.<sup>27</sup> What followed in the early part of the century was a legislative programme which began with the exclusion of the rights of blacks under the Constitution and followed with statutory delimitation of the country into race zones. This pattern continued with ever-increasing restrictions on the black population curtailing all of their basic human freedoms.<sup>28</sup> For the land it meant the legislative determination of land use patterns and rights which were

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<sup>26</sup>CK Meek *Land Law and Custom in the Colonies* 2 ed (1968) 12. The author identifies serious errors in the approaches adopted by the colonial governments:

'The absence of accurate information regarding native systems of tenure has had many unfortunate effects. In the making of treaties with natives, Colonial Governments and individuals have assumed that they were being given exclusive rights over the land, whereas the natives have assumed that they were merely granting the qualified rights of user which they themselves enjoyed. On the other hand, some governments have enacted laws recognising the native rights as though they were the equivalent of freehold rights in Western countries, thus conferring on the natives an authority to dispose of lands over which, under their own law, they only had usufructuary rights. Failure to understand the custom of shifting cultivation has led successive governments to underestimate the amount of land required by native tribes, or to claim as Crown property land which they had believed to be vacant.'

<sup>27</sup>See note 4.

<sup>28</sup>The list of apartheid legislation is formidable. That which was most significant in terms of its effect on the rights of blacks to the land is the following: The Black Land Act 27 of 1913 which should be read with the Development Trust and Land Act 18 of 1936, the Black Administration Act 38 of 1927, the Black (Urban Areas) Consolidation Act 45 of 1945 (repealed by the Black Communities Development Act 4 of 1984 which was itself repealed by Act 74 of 1976, and by the Abolition of Influx Control Act 68 of 1986), the Promotion of Black Self-Government Act 46 of 1959, the National States Constitution Act 21 of 1971, the Group Areas Act 36 of 1966, the Prevention of Illegal Squatting Act 52 of 1951, the Trespass Act 6 of 1959 the Blacks (Prohibition of Interdicts) Act 64 of 1956, the Slums Act 76 of 1979. For that which has been repealed see note 13.

political and not based on its wisest use, nor on any principles of ecology or science.<sup>29</sup> The result was a racially segregated society bringing with it social and political turmoil, and resource exploitation with no concern for its long term environmental effects.

#### 4.2. *De Facto Apartheid*

The era of legal apartheid is drawing to an end<sup>30</sup> and there are strong indications of a move towards the more prudent use of the country's resources.<sup>31</sup> However, one major obstacle remains: the minority continue to control over 90% of the land and its resources and until some equality is achieved the ghost of apartheid will continue to haunt the land. Re-distribution of the land will occur. That is a political reality. The development of laws protecting the environment will occur for equally compelling but different reasons. Both movements may be termed reforms. Neither will be effective unless there are radical changes to the basic principles of the law relating to the ownership and use of land. In this regard there is no cause for optimism, and the prospects are that land law which frustrates sustainability will be retained amongst the basic tenets of the country's legal system.<sup>32</sup>

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<sup>29</sup>Budlender & Latsky op cit note 7 155 term zoning along racial lines 'the spacial dimension of apartheid'.

<sup>30</sup>See note 13.

<sup>31</sup>See the recommendations out in the *President's Council Report* op cit note 3 generally and the document published by the Council for the Environment entitled *An Approach to a National Environmental Policy and Strategy for South Africa* October 1989.

<sup>32</sup>The *White Paper* op cit note 13 is probably still an accurate statement of the government's stance on the issue. It is clearly in support of private ownership and private enterprise and against the concept of nationalisation. The parties to the left of government appear ambivalent on the subject. Marcus op cit note 8 189 believes 'There is little substantive argument against the wholesale nationalisation of land, agricultural land included'. She provides no answer to the obvious questions as to what the effect on productivity would be. Perhaps she sees the answer in the first of her suggestions, and that is that commercial agricultural (and industrial) enterprises could be left in private ownership. She gives no indication of what criteria are to be taken into account in making the determination of which land is to be nationalised. Skweyiya op cit note 4 208 is even more uncertain of his position. He is not convinced of the merits of nationalisation, but does not rule it

## 5. THE CASE AGAINST OWNERSHIP AS PLENA IN RE POTESTAS

### 5.1. *The Land Ownership Debate*

The common law of property does not distinguish between the ownership of land and other property capable of being owned.<sup>33</sup> Where there are differences they are usually statutorily imposed or suffer the inroads of the common law of nuisance.<sup>34</sup> Ownership of land, as with any 'thing' has an essential characteristic which has survived social, economic, political and cultural influences since the Middle Ages, and that is its 'absolute' nature.<sup>35</sup> Modern writers have argued that this characteristic does not emanate from Roman-Dutch law but has its origins in Roman law and received nineteenth-century Pandectism.<sup>36</sup> Some have challenged the accuracy of the description of the concept of absoluteness in relation to ownership, since as there are inroads by statute and common law, and because the term 'absolute' does not admit of degrees, it is inappropriate.<sup>37</sup> Cowen has criticised it for frustrating the social needs of our time and of being

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out as a possibility.

<sup>33</sup>See Cowen op cit note 19 70.

<sup>34</sup>Carole Lewis 'The Modern Concept of Ownership of Land' in *Land Ownership, Changing Concepts* op cit note 19 242 describes the weakening of the right thus: 'However when one looks at the content of the right, (as opposed to its substance) particularly in relation to land, it will be seen that it is a paltry right so whittled away by legislation in the past century that it cannot be equated with the ownership of classical Roman law or even the right as it was envisaged by the Roman Dutch writers.'

<sup>35</sup>DP Visser 'The "Absoluteness" of Ownership: The South African Law in Perspective' in *Land Ownership, Changing Perspectives* op cit note 19 40.

<sup>36</sup>*Ibid.*

<sup>37</sup>See Peter Birks in *Land Ownership, Changing Concepts* op cit note 19 1, who, however, suggests that it may still be a useful description: "Absolute" is not, properly speaking, a word which admits of degrees. Hence if Roman Ownership was at all restricted in its content, as indeed it must have been and was, it was not, strictly absolute. However, if a looser usage is admitted, a last question to be asked is whether, if some measure can be said to have been set to the extent of permissible interference with an owner's freedoms, the remaining area of inviolability was so great as to attract the word "absolute" as useful description of the quality of Roman ownership.'

‘unsatisfactory from the point of view of general jurisprudence’.<sup>38</sup> The latter author makes the further important point that ‘the traditional concept fails to distinguish, as it should, between what attributes are appropriate for different objects of ownership’.<sup>39</sup> All of the writers referred to above share one thing in common: an uneasiness with the universal application of a rigid legal principle which is intolerant of changes to social, political and economic conditions. They suggest a watering down of the potency of the concept, but not a complete departure from its hallowed principles to meet modern social needs. Cowen would have a distinction applicable to land because ‘reverence for the land one owns is the foundation of that ownership in a profound philosophical sense’<sup>40</sup> and it cannot co-exist with the right to destroy that land, as in the case of movables.

## 5.2. *Social Irrelevance*

The debate, whilst intellectually stimulating, lacks relevance to modern South Africa. The law under discussion has its origins in Roman and Medieval European jurisprudence and must surely have developed in socio-economic conditions far removed from present-day Africa, yet where it is criticised it is from a philosophical perspective which has identical origins. For Cowen the ‘fragmentation of ownership’ as a ‘need of our time’<sup>41</sup> was to allow it to admit of new concepts of property in the form of sectional title and time sharing rather than to depart completely from traditional concepts of ownership in order to make it more relevant to the greater needs of South African society. Perhaps it was because the debate took place at a time that apartheid law was at its zenith, concern for the environment was low, and the concept of a redistribution of land from whites to blacks unthinkable. Now more than ever, there is a need to re-

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<sup>38</sup>Cowen op cit note 19 72.

<sup>39</sup>Cowen op cit note 19 70.

<sup>40</sup>Cowen op cit note 19 71.

<sup>41</sup>Ibid.

open the debate, and in so doing one must shed the blinkered vision which dominated even the most distinguished thinkers of the time. If, in finding answers to the problem, it is necessary to draw on the experience of cultures gone by, then the condescending attitude to African cultures which is prevalent in modern legal thinking because of its apparently primitive nature, must be abandoned.<sup>42</sup> There are important lessons to be learned from the traditions and cultures of Africa, lessons which, if applied, may make it unnecessary to re-open the debate at all. It may be a question of re-inflating the wheel, not re-inventing it as is the habit of western thought when it claims as its own, knowledge which existed in cultures long since lost.<sup>43</sup>

## 6. THE TRADITIONS OF AFRICA

### 6.1. *Land Responsibility*

There is a responsibility for the land which is implicit in most African cultures, and is similarly present in the American Indian concept of land tenure. It is best summarised in the following statement:

'I conceive that land belongs to a vast family of which many are dead; few are living and countless members are still unborn.'<sup>44</sup>

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<sup>42</sup>Examples of this attitude are even present in judgements of the courts, which although being obliged in certain instances to apply African customary law, do their best to apply their own system. This is usually by avoiding its application because customary law has no knowledge of a particular concept, eg ownership. For that reason the common law is allowed to prevail over customary law, where with a more liberal approach customary law could be faithfully applied. Examples are *M'hlongo v Dube & another* 1950 NAC 164 (NE), *Nhlanhla v Mokweno* 1952 NAC 286 (NE).

<sup>43</sup>One of the reasons for the failure of the colonists to recognise the good in the cultures they encountered was the problem of linguistics. Inaccurate English terms were used to describe what was understood of the indigenous system and that obviously led to confusion. In this regard see Meek op cit note 26 11-12 and TW Bennet 'Terminology and Land Tenure in Customary Law: An Exercise in Linguistic Theory' in *Land Ownership, Changing Concepts* op cit note 19 173 et seq.

<sup>44</sup>These are words attributed to a Nigerian chief in a statement to the West African Lands Committee in 1912, quoted in TO Elias *The Nature of African Customary Law* (1956) 163.

Although these words are attributed to a Nigerian chief, they could have been uttered by any African of the sub-Sahara, all of whom are believed to have common geographical origins,<sup>45</sup> giving some indication of the age of the principles upon which they are based. For example, in Zulu custom there is no such concept as property in land.<sup>46</sup> All land 'belongs to the king or chief as the representative of the nation as a whole, and in him is vested the power of allotting land to his subjects'.<sup>47</sup> The *indunas* or direct heads under the king, in turn have the power to allot land in their districts to the people in their charge. Land is gratuitously assigned to all,<sup>48</sup> but no man can hold it as his own, nor does he have the power to sell or to negotiate with it. All he is given is the right to use the land so granted for his kraal and his gardens; but while he is cultivating or occupying it, it cannot be taken away except for misdemeanour.<sup>49</sup> All land

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<sup>45</sup>See CG Seligman *Races of Africa* 4 ed (1966) 11 and 31. Although the theories as to the origins of the present day inhabitants differ it is generally accepted that they originated in western and central Africa and were subjected to intermingling en route southwards. See also the comments of J.W. Sleight in the foreword to AJ Kerr *The Native Common Law of Immovable Property* 1953 v.

<sup>46</sup>Eileen Jensen Krige *The Social System of the Zulus* (1977) 176-177.

<sup>47</sup>Jensen Krige op cit note 46 176. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. That title is *prima facie* based not only on individual ownership as English law has made familiar, but on communal usufructuary occupation, which may be so complete as to reduce any radical right in the sovereign, to one which extends to comparatively limited rights of interference. Members of the tribe were thought to use the land on a communistic basis. This idea about customary tenure has been echoed in many countries, notably Kenya, Nigeria and Tanzania.

<sup>48</sup>The principle of the gratuitous allocation of land by the chief is also common practice throughout Africa. However Meek, op cit note 26 149-150, reports an observation in Nigeria, that in crowded areas applicants for land were inclined to offer, and chiefs to accept, more than the modest presents which are normally given, not as rent, but as an acknowledgement of the chief's political authority, which includes authority to dispose of vacant lands. This created a growing tendency for the occupier to regard his farm as alienable property. The position differed in the fertile regions of Chad where land was bought and sold, probably as a result of the influence of Muslim law.

<sup>49</sup>Jensen Krige op cit note 46 177. This sanction is also commonplace in most African systems. It compels obedience to the chief and ensures proper use of the land, but is obviously open to abuse.

that has not been allocated for village and garden purposes is free for public grazing.<sup>50</sup>

### 6.2. *The Pastoralists*

The most elementary form of land occupation occurs amongst pastoral people who roam freely in search of grazing and water. Normally under such conditions there is no need to define rights.<sup>51</sup> There is a symbiotic relationship between the pastoralists and the agriculturalists.<sup>52</sup> Disputes do arise however over crop damage by the animals. Where pastoral people are confined to limited areas (usually for bio-physical reasons) more definite rights may arise. In Tanzania, wherever personal rights in grazing grounds are recognised, there is continual litigation because boundaries are not clearly demarcated. No such difficulties exist where the grazing grounds are allocated annually by the village authority.<sup>53</sup>

### 6.3. *Agriculturalists*

By their very nature agricultural rights require greater definition than pastoral rights, and this is accommodated in most African systems. Land gains value to the occupier only through labour and the improvements which are effected to it. In those countries which allow the transfer of land to another, any consideration which is received is for the improvements, not for the land itself, although there

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<sup>50</sup>Ibid.

<sup>51</sup>Meek op cit note 26 13. But there may be well defined routes to definite areas which the pastoralists are allowed to exploit.

<sup>52</sup>The pastoralists exchange milk for produce. The agriculturalists recognise the value of manure.

<sup>53</sup>Meek op cit note 26 14.

is obviously a simultaneous transfer of such rights as the person may have had in the land.<sup>54</sup> Meek sums up the position as follows:

‘The main characteristics of indigenous systems of land holding are generally that these are devised to meet the needs of a subsistence system of agriculture and depend on a sufficiency of land to allow a rotation which includes long periods of fallow. The land is held on (a) kinship, and/or (b) local group basis. Individuals have definite rights but these are qualified by membership of the family, kindred and ward (or small village). Similarly, the individual claims of families exist concurrently with the wider claims of the clan or group. Title therefore has a community character, and is usufructuary rather than absolute.’<sup>55</sup>

Possession and ownership are accordingly linked to use and in that way stimulate productivity. The disadvantages are largely economic: the lack of a right of ownership prevents the occupier from raising money on the land and it can therefore be a hinderance to development.<sup>56</sup>

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<sup>54</sup>Meek op cit note 26 19, where AT Culwick is quoted as describing the land system of the Wa-Bena of Tanganyika (Tanzania) thus:

‘Land, *per se*, has no value in the eyes of the Mbena and nobody bothers about it until it is cleared.... He can, if he wants, dispose of a field to his neighbour.... He may negotiate a transfer to another, usually a relative, receiving in exchange goods, cash, or services of some kind. But as land itself has no value, he is really, of course, selling the work of clearing and breaking the ground, and any crops which may be growing on it at the time of the transfer; i.e. he is actually being paid for improvements, and not for the land itself, though at the same time he, as the owner, is transferring his rights over the land.’

<sup>55</sup>Meek op cit note 26 26 - The rights are more akin to the ancient Greek than the Roman pattern, the Greeks having a conception of ‘relative’ property rights as opposed to the ‘absolute’ character of property in Roman Law.

<sup>56</sup>Ibid, where the author makes this interesting observation:

‘Reference has been made to the fact that there are special rules governing property in economic trees, as distinct from the land on which they grow. The rules differ with the different kinds of trees and there are wide variations in local custom. But generally it may be said that, as in the case of land, so with trees, labour creates rights. Thus, while the fruit of wild palm trees may be free to all, restrictions on this freedom appear as soon as the trees are prepared for the tapping of wine. This is a laborious process, and the person who carries it out establishes a proprietary right over the tree which he has tapped.’

## 7. THE RECOGNITION OF ABORIGINAL TITLE

### 7.1. *Common Law Aboriginal Title*

In English law there is the doctrine of 'common law aboriginal title'. It assumes that at least some of the indigenous people inhabiting settled colonies were in occupation of lands when the Crown acquired territorial sovereignty.<sup>57</sup> The question to be considered is whether they would have title by occupancy. The law of occupancy, it has been said, is founded on the law of nature<sup>58</sup> and it can therefore be argued that even before the Crown acquired sovereignty and applied English law, indigenous people would have a natural law right to lands occupied by them.<sup>59</sup> That occupation furthermore, would be according to the aboriginal system applicable to the people concerned, and therefore in principle there was recognition of customary aboriginal title. Thus, in the first instance there is jurisprudential recognition of such rights. In the second, there is precedent for their statutory recognition and incorporation into modern domestic systems of law: the USA has a highly developed system of 'Federal Indian Law'<sup>60</sup> which both recognises and entrenches Indian customary law, but only in limited areas of application.<sup>61</sup>

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<sup>57</sup>Kent McNeil *Common Law Aboriginal Title* (1969) 205.

<sup>58</sup>*Ibid.*

<sup>59</sup>See Immanuel Kant *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (1887) 91-94.

<sup>60</sup>See David H Getches & Charles F Wilkinson *Cases and Materials on Federal Indian Law* 2<sup>ed</sup> (1986) xxiii where federal Indian law is described thus: 'The field of federal Indian law involves that body of law that regulates the legal relationships between Indian tribes and the United States.'

<sup>61</sup>*Ibid.* - 'But a case is not automatically an Indian law case because of the race of any litigant. The dispute must arise within Indian country (which for most purposes, is defined as all land within the boundaries of an Indian reservation) or be governed by one of the relatively few Indian treaties or statutes that apply outside of Indian Country.'

## 7.2. *Capitalism Protected*

It is not suggested that either the English or the American form of recognition of aboriginal land law is appropriate to South Africa. Both are too restricted in their geographical application and both are applied in areas with racially determined boundaries. In effect both perpetuate a form of apartheid. Conversely, it is naive to believe that any argument for the general application of aboriginal title to property is likely to be persuasive. It is contrary to the capitalist structure of the economy of the western world. Furthermore, its general application would undoubtedly have an adverse effect on the economy of a country such as South Africa, a condition the country can ill-afford during the period of re-building which must necessarily follow the demise of apartheid.

## 8. CONCLUSION - A MODEL FOR LAND REFORM

### 8.1. *Cowen's Key*

Cowen provides the key (probably unwittingly) in his criticism of the traditional (western) concept in its failure to distinguish which 'attributes are appropriate for different objects of ownership'.<sup>62</sup> His argument can be taken one step further, and that is to suggest that in the context of land ownership, there should be a distinction between what form of 'ownership' is to apply to different land parcels, the differences being determined not according to racial zoning as in the past,<sup>63</sup> but according to the usage potential of the particular land parcel. A comprehensive land-use plan for the country is long overdue.<sup>64</sup> It is contemplated in the Physical Planning Act 125 of 1991, and it is here that truly innovative thinking is required, but not in the devising of new systems of land

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<sup>62</sup>Cowen op cit note 19 70.

<sup>63</sup>As was the case in the USA. See Getches & Wilkinson op cit note 60 111-122.

<sup>64</sup>Not merely to accommodate people in the process of land reform, but also to ensure its wisest and most economical use for the benefit of all.

ownership nor through the denial of all individual rights of property.<sup>65</sup> An African form of ownership already exists and it has demonstrably succeeded in terms of providing adequately for the land needs of the majority of the people, whilst at the same time protecting the ecological integrity of the land. In short it is a formula for sustainability within the western meaning of that expression.<sup>66</sup> Although this system existed at a time when people were fewer and land more plentiful, it is submitted that it still has relevance today.

## 8.2. *The Realities*

In contemplating the formidable task which faces planners charged with the preparation of a national land-use plan which will satisfy the aspirations of the land hungry masses, certain features present themselves as facts:

- making state-owned land as it presently exists available for re-settlement is no solution, because it is inadequate in extent, consists mostly of nature areas which are an important ingredient of human quality of life and has great value as public open space;
- South Africa is an arid country yet nearly 90% of its surface area is devoted to agriculture in the hands of a small minority of white farmers, a large number of whom farm uneconomically, relying on the many state subsidies available to white farmers to survive.<sup>67</sup>

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<sup>65</sup>For example, through nationalisation or through communal or collective farms which have not proved successful in other post-colonial African countries, notably Zimbabwe, Angola and Mocambique. The absence of a stimulus to generate productivity is harmful to the economy, and if there is no incentive to care for the land it is harmful to the environment.

<sup>66</sup>If an activity is 'sustainable' it can continue for ever. See *Caring for the Earth, A Strategy for Sustainable Living* a joint publication of the World Conservation Union (IUCN), the United Nations Environment Programme (UNEP) and the World Wide Fund For Nature (WWF)(1991) ch 1.

<sup>67</sup>See the *President's Council Report* op cit note 3 18-19.

### 8.3. *Farmers*

Farmers traditionally wield considerable political power, and therefore farmland has never presented itself as a soft target for any re-settlement plan. However, making white owned farms available for re-settlement of people is not just the only available option, it is the most logical in terms of morality and economics. Appeasing a small minority of farmers must surely give way to the satisfaction of the demands of the vast majority of the populace. If the plan is well conceived it will be economically sensible and politically expedient.

### 8.4. *Some Basic Precepts*

It is not intended to provide a land-use plan in this article.<sup>68</sup> That is a task better handled by planners than by lawyers or politicians. What will be offered at this stage is brief guidelines as to some of the principles which may be appropriate to the exercise, which could be undertaken within the framework of existing legislation. The task begins with the determination of the agricultural potential of all existing farmland and a consideration of alternative uses to which the land could be put.<sup>69</sup> That which may not be suitable for the intensive type of agriculture presently conducted may be suitable for subsistence farming, or pastoralist farming on a nomadic basis where the veld is given an opportunity to rest periodically, or where the land is occupied only during periods of natural fertility and not permanently. Demographic trends should be taken into account and land near presently overcrowded urban settlements given special consideration. A system of 'passive removals' could be introduced where opportunity is created outside of urban settlements encouraging movement into

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<sup>68</sup>Nor is it intended to deal with the planning methodologies of the Physical Planning Act 88 of 1967 as they have been repealed by Act 125 of 1991. In any event, it is submitted that they are inappropriate for a modern solution to the issue of land reform in South Africa.

<sup>69</sup>The Minister of Planning, Provincial Affairs and National Housing is empowered by s 2 of the Physical Planning Act 125 of 1991 to collect or cause to be collected information on the physical, social and economic characteristics of any area and to evaluate its economic development potential for the purposes of preparing policy plans.

those areas thereby alleviating the pressure on informal townships.<sup>70</sup> Making economically viable large farms available for settlement should be avoided for two reasons: the cost of their acquisition and the loss of agricultural productivity.

#### 8.5. *The State as Trustee*

Initially the land would have to be acquired by the state who would hold it as trustee for the people. Local authorities or even tribal chieftainships would control both the allocation of land and its use,<sup>71</sup> ensuring that it is put to use for the purpose for which it was intended, and that environmental degradation does not occur. The penalty for improper use would be the withdrawal of the right of use and occupation. No consideration would be payable for the use of the land, but it may be necessary to introduce a levy for communal services. Without the cost of acquiring the land, occupants would be able to apply what funds they do have to improving the land occupied by them. Dealing in land would not be allowed, but in the event of a person wishing to move, the value of the improvements could be recoverable from the successor in occupation. In this way improvement to the land could be encouraged without occupiers fearing a loss of their investment.<sup>72</sup>

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<sup>70</sup>Public participation in the preparation of draft plans is made possible by s 11 of the Physical Planning Act 125 of 1991. Draft plans are published interested persons given 21 days within which to make representations thereon. Planning could therefore take into account the requirements of local communities before being implemented.

<sup>71</sup>This could be achieved in much the same way as is contemplated in chapter 3 of the Less Formal Townships Establishment Act 113 of 1991.

<sup>72</sup>The acquisition of land by the state for the purposes of resettlement could be by expropriation without the need to pay compensation, since unless the legislation under which the expropriation is made provides therefor, no compensation is payable. See *Cape Town Municipality v Abdulla* 1976 (2) SA 370. It is submitted however that provision should be made for compensation to be paid so as not to inhibit the development of the land.

### 8.6. *New Definitions*

Jurisprudentially, this 'new' concept of land use would have to be achieved by re-defining the terms 'property' and 'ownership' in relation to that land which is made available for human settlement. Property in the defined areas would be in the form of *res publicae*, and ownership given the restricted interpretation as a right to possess and use provided that such use does not diminish the quality of the land. The so-called 'right to the land' would re-assume the meaning it had in African tribal culture, a right which existed concomitantly with the duty of trusteeship in the land. Included in the right to the land is the right to harvest its natural resources provided such harvesting does not exceed the natural ability of the land to regenerate what is removed.<sup>73</sup> Careful control of the exploitation of non-renewable resources would have to be implemented to ensure that their use does not affect the future carrying capacity of the land. If there is a likelihood of that occurring then the use of the resource should not be permitted in the interests of future generations.<sup>74</sup>

### 8.7. *A Test for Sustainability*

Whilst what is proposed, is a solution to land reform in South Africa, it is also a test for the principle of sustainability which has general global application. World conservation strategies speak glibly of concepts such as 'sustained use', 'sustained development' and 'resource management'. South Africa has the unique opportunity to test their validity and at the same time resolve what is probably the most pressing socio-political issue in its history.

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<sup>73</sup>More effective implementation of the provisions of the Conservation of Agricultural Resources Act 43 of 1983 than is presently achieved, could ensure the sustainable use of renewable resources.

<sup>74</sup>As is the case with renewable resources, adequate, if not perfect legislation is already in place in the form of the Minerals Act 50 of 1991.

## PART THREE

### THE RESOLUTION OF ENVIRONMENTAL CONFLICTS: SOME CONCERNS ABOUT THE PREMATURE APPLICATION OF 'ALTERNATIVE' METHODS IN A DEVELOPING BRANCH OF THE LAW

#### 1. INTRODUCTION

##### 1.1. *Informal Techniques*

'Alternative dispute resolution' grows in popularity as a tool in the solving of a widening range of problems between people. However, like 'alternative medicine' it has a ring about it which makes one suspicious of its true worth, origin and the safety with which it can be administered. It has been successfully imported into the so-called 'polycentric' or many centred dispute<sup>1</sup> or where the participants<sup>2</sup> must in their own interests have a continuing relationship after the dispute has been resolved, or where winner-loser results are inappropriate. In the United States of America (USA) it was in the fields of family, neighbour, environmental and, in particular, labour and industrial disputes that alternative dispute settlement techniques were applied and developed.<sup>3</sup> In South Africa the pattern has been the same, with the exception perhaps of environmental issues which have only recently become the subject of public concern, and because its

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<sup>1</sup>See L Fuller 'Collective Bargaining and the Arbitrator' *Wisconsin Law Review* (1963) 1 3-46.

<sup>2</sup>See Jay Folberg & Alison Taylor *Mediation A Comprehensive Guide to Resolving Conflicts Without Litigation* (1984) xiii. The authors prefer to call those who are mediating their disputes as 'participants' or occasionally 'disputants', claiming that it 'better conveys the idea of involvement that is essential to the mediation process'. Terms such as 'party' imply the traditional adversarial process, and 'client' is too closely connected to legal and counselling practices. This article will follow suit.

<sup>3</sup>Folberg & Taylor op cit note 2 4.

environmental law is still in its infancy when compared to what obtains in the USA.

## 1.2. *Formal Techniques*

In each of the areas of its application, alternative techniques have followed periods of intense adversarial activity during the application of formal procedures. The employment of coercion is implicit in formal dispute resolution as the means whereby polemic behaviours are deterred.<sup>4</sup> However, not all disputes can be resolved by the coercive process, and the gravitation towards alternative methods is probably evidence of a natural social development of the human race. It is a move away from the authoritarianism which dominated primitive societies and is a significant element in modern society.<sup>5</sup> The question to be considered in relation to the development of legal processes or the evolution of any particular branch of the law, is whether the sequential phase represented by the application of formal methods can be by-passed in favour of the direct application of an informal method as the principal mode of dispute resolution.<sup>6</sup> Advocates of alternative dispute resolution would argue that environmental disputes, because of their classic polycentric nature, are best resolved without recourse to litigation. South Africa has not yet experienced the application of environmental law in an adversarial process to any meaningful degree.<sup>7</sup> Until that developmental stage

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<sup>4</sup>John Burton *Conflict: Resolution and Prevention* (1990) 13.

<sup>5</sup>Ibid. Burton believes that the failure to recognise that there are two quite different disputes, one which can be resolved by coercion and one which cannot, is 'at the heart of legal, political, academic and social disagreements over the handling of conflict within and between societies'.

<sup>6</sup>The importance of the role to be played by the courts and the need for the application of formal processes will be considered in detail infra.

<sup>7</sup>The reasons are two-fold. Firstly, environmental legislation is scattered through more than sixty statutes which are unco-ordinated and largely ineffective because of a lack of clearly defined policy to guide their application. See PD Glavovic 'Some Thoughts of an Environmental Lawyer on the Implications of the Environment Conservation Act 73 of 1989: A Case of Missed Opportunities' (1989) 107 *SALJ* 107. Secondly, citizens rights to act in the public interest in enforcing environmental legislation are extremely limited, the result of which is a paucity of judicial precedent. See Rabie & Eckhard 'Locus Standi: The Administration's Shield and the Environmentalist's Shackle' (1976) IX

has been experienced, careful consideration must be given to the circumstances under which the informal process is best applied, so as to ensure that environmental law is not weakened by the omission of what may be an important phase in its evolution.

## 2. IMPORTANT DEFINITIONS AND DISTINCTIONS

### 2.1. *Conflict*

The word 'conflict' has a wide range of meanings and applications in Western vocabularies.<sup>8</sup> At the biographical level it means inner stress or tension or 'intrapersonal' conflict.<sup>9</sup> Although the inner state of mind undoubtedly affects the relationships of people with each other as individuals or as groups, it is not the focus of the present enquiry. It is 'interpersonal' conflict which requires the application of systems and processes at various levels in order to achieve their resolution. The word 'dispute' is frequently used interchangeably with the word conflict, and whilst it may be linguistically correct to do it can lead to confusion. For Folberg & Taylor, an interpersonal conflict becomes a dispute when it is communicated or manifested.<sup>10</sup> Burton on the other hand prefers to distinguish between disputes and conflicts on the basis that the former are situations capable of resolution by negotiation or compromise without the alteration of institutions and structures, and the latter, behaviour which goes beyond the normal

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*CILSA* 141, Cheryl Loots 'Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation' (1987) 104 *SALJ* 131 and W Bray 'Locus Standi in Environmental Law' (1989) XXII *CILSA* 33.

<sup>8</sup>Adda B Bozeman *Conflict in Africa, Concepts and Realities* (1976) 3.

<sup>9</sup>Whilst in the context of developing skills as a practitioner (as a mediator or arbitrator) in the field of dispute or conflict resolution, a knowledge of intrapersonal conflict is necessary, it is beyond the scope of this article to elaborate any further thereon. For the basic constructs and viewpoints necessary for working with participants in the process see Folberg & Taylor op cit note 2 73-99.

<sup>10</sup>Folberg & Taylor op cit note 2 19.

disagreements and confrontations which are a normal part of community life.<sup>11</sup> In the environmental context certain disputes will have their sources in deeply rooted human needs; but where they manifest themselves, it will generally be at the level of normal social confrontation which is capable of resolution by the application of formal or informal processes. In the discussion which follows it is not intended to draw a distinction between the various degrees which exist within the concept of conflict,<sup>12</sup> and the term will be used to indicate interpersonal conflict which is communicated.<sup>13</sup>

## 2.2. *Resolution and Provention*

'Resolution' presents similar difficulties in definition. Again, in the context in which it applies to this discussion, it can be given its more simple meaning without losing the importance attached to distinguishing the different forms it can take or the applications it can have.<sup>14</sup> 'Potential conflicts' can be resolved before they arise by removing the sources of incompatible conduct before they become

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<sup>11</sup>Burton op cit note 4 2. The author elaborates thus: 'Overtly it is behaviour that is , or has the potential of being, destructive of persons, properties and systems. The issues that lead to conflicts are not the ordinary ideas, choices, preferences and interests which are argued and negotiated as part of normal social living. They are those whose sources are deeply rooted in human behaviours'.

<sup>12</sup>Drawing the line is often difficult. Burton's approach is novel and successfully achieves that end. He argues that there has been a fundamental error in the assessment of the human dimension involved in conflict and its management. He says: 'It is a mistake not only in theory, but also pragmatically when coercive and authoritative processes of control are used in an attempt to preserve existing interests and institutions'. That is possibly the most important distinction to be made in this enquiry: when to depart from formal procedures in favour of alternative methods.

<sup>13</sup>Folberg & Taylor op cit note 2 18-25.

<sup>14</sup>For example, Folberg & Taylor op cit note 2 25 distinguish between 'conflict resolution' and 'conflict management'. The former creates a state of uniformity or convergence of purpose or means, whereas the latter merely realigns the divergence to the point that it is not damaging to the opposing parties. They believe that 'conflict resolution is a contradiction in terms, and would prefer to use the term 'convergence promotion'. Burton op cit note 4 3 adds to the debate by stating this: 'We thus make a distinction between *resolution*, that is, treatment of problems that are the source of conflict, and the suppression of *settlement* of conflict by coercive means, or by bargaining and negotiation in which relative power determines the outcome.'

the subject of dispute. No word suitably describes that process and therefore Burton has invented his own: 'provention'.<sup>15</sup>

For present purposes the 'environmental dispute' will be defined as one in which conflicting or competing claims are made upon any part of the environment, natural or built, either as a whole or in respect of any of the myriad of its individual components. It includes disputes amongst private individuals, citizens and governments or their agencies, and is not limited to a clash of interests through competition for the same resource.<sup>16</sup>

### 3. THE SPECIAL CHARACTER OF THE ENVIRONMENTAL DISPUTE.

#### 3.1. *Participants*

Labour and industrial disputes are similar to environmental disputes in a number of respects. They are both polycentric, usually involve a multiplicity of participants and neither are best resolved on a winner-loser basis.<sup>17</sup> Where they differ is in the following important respects:

- The issues are not as clearly defined or as narrow as they generally are in a labour dispute. Ecological factors generally encompass a wide range of connected disciplines, and the outcome of the dispute may have

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<sup>15</sup>Burton op cit note 4 3. 'The term "provention" is invented because the term "prevention" has a negative connotation. The absence of a suitable word reflects the fact that prevention of an undesirable event by removing its causes, and by creating conditions that do not give rise to its causes, has not been a focus of attention of societies or of scholars.'

<sup>16</sup>For example the public interest may be at stake when the confrontation arises and the interests of the parties on one side of the dispute may not be for personal gain.

<sup>17</sup>Where neighbours or members of a community are the participants in the environmental dispute, an on-going relationship between the parties is difficult to avoid and therefore the less the acrimony at the end of the dispute the better.

political, social and economic impacts which affect a wider group than the participants themselves.<sup>18</sup>

- Although there is a multiplicity of parties in a labour dispute, they are at least well defined. That may not be the case with an environmental issue. A particular public interest group may well be the protagonist in the dispute, but their constituency or the level of support they enjoy amongst the public generally may not be clear, and that may make it difficult for the opposing party to prepare its strategy.<sup>19</sup>
- Most significantly, environmental issues have an almost tripartite character. Objectively speaking, the protection of the environment is in the interests of all, and therefore irrespective of the individual interests of the various participants, all have a duty to do what is in the best interests of the environment.<sup>20</sup>

### 3.2. *Issues*

Broadly speaking environmental disputes will fall into one or more of the following categories:

- Resource conservation and use;<sup>21</sup>

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<sup>18</sup>For example, the prevention of the construction of a water storage dam because it may threaten the existence of a single species of fish may affect the water supply of a city, is something which has both economic and social implications for its inhabitants.

<sup>19</sup>For example, a company may lose market support for its products because of its involvement in an unrelated development which is perceived to be environmentally unfriendly. Despite the absence of citizen suits in South Africa, many major corporations spend large sums of money promoting an image of concern for the environment.

<sup>20</sup>Just what constitutes the best environmental option may be the subject of the dispute itself, adding to the complexity of the problem.

<sup>21</sup>By resource it is meant any part of the physical environment and material wealth of the country which may be used for the benefit of humans. The existence or destruction of the physical environment may also have spiritual implications. See CA Meier 'Wilderness and the Search for the Soul of Modern Man' in Vance Martin & Mary Inglis (eds) *Wilderness, The Way Ahead* 1988 153: 'Neurosis has become the plague of our days, the penalty for our hubris. Interfering too drastically with "nature without" of necessity creates disorder of the inner nature, for the two are intimately connected.'

- Pollution prevention and control;<sup>22</sup>
- Land distribution and use.<sup>23</sup>

#### 4. ENVIRONMENTAL RIGHTS

##### 4.1. *Locus Standi*

To speak of environmental disputes implies the existence of enforceable environmental rights. In South Africa, if such rights do exist, it is in the extremely limited circumstances in which participants are able to show a degree of 'interest' in the issue which qualifies them for a right of standing before the body which is adjudicating the dispute.<sup>24</sup> This generally emerges from the common law of nuisance and not from any general statutory or constitutional right available to all citizens. The absence of environmental rights as a general constitutional right, or as a statement of environmental policy as a matter of substantive law,<sup>25</sup> has important practical consequences. It effectively denies the existence of a formal dispute resolution procedure for environmental conflicts where the public interest is at stake.<sup>26</sup> The issue of locus standi is generally insurmountable. Without the threat of the institution of formal proceedings, there is nothing to compel any

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<sup>22</sup>Pollution is the release of any substance at rates which exceeds the assimilative capacity of the surrounding environment or the medium into which it is released. The quantities per se which are released are not of particular relevance. It is their capacity to cause harm which is the issue.

<sup>23</sup>In South Africa this area of dispute is complicated by the inequitable distribution of land between blacks and whites, one of the legacies of apartheid and the colonisation of the sub-continent. The Abolition of Racially Based Land Measures Act 108 of 1991 has brought legal apartheid to an end, but de facto it remains alive and well through the mere fact that whites who constitute the smallest part of the total population of the country, occupy most land, and this is a volatile fuel for the fire of conflict.

<sup>24</sup>See Rabie, Loots & Bray loc cit note 7 generally.

<sup>25</sup>See Glavovic loc cit note 7 109-110.

<sup>26</sup>See Loots loc cit note 7 generally.

unwilling participant in a dispute to submit to any informal mechanism.<sup>27</sup> Environmental litigation and criminal prosecutions have been rare in South African legal history. The successful resolution of true environmental disputes through any structured process has not yet occurred.<sup>28</sup>

#### 4.2. *The Pace of Events*

Whilst it is probably accurate to predict that until there is a declaration of environmental policy or the inclusion of environmental rights at the constitutional level, the status quo will prevail, there are a number of factors which may precipitate the application of informal procedures before the legal mechanisms are in place.<sup>29</sup> The pace of events may simply overtake legislative programs and the movement towards a new constitutional dispensation. That has already begun

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<sup>27</sup>Whilst Burton op cit note 4 13 submits that certain conflicts cannot be resolved by coercion, there must be some force which drives participants to enter into the resolution process. It may be an entirely voluntary act on the part of the participants but, in environmental disputes, it is submitted that there will be some motivating force which compels participation, even indirectly. For example, a corporation involved in a proposed development may agree to the resolution of the environmental issues by participating in an environmental impact assessment in order to avoid the adverse publicity which may be generated by the perception that the proposed development is environmentally unsound.

<sup>28</sup>Excluded from the definition of environmental litigation and informal resolution for present purposes are matters which are founded in common law, since they generally emanate from the law of nuisance in which environmental law, if it applies at all, is only of ancillary application.

<sup>29</sup>The following is not intended to be an exhaustive list. It provides an example for each of the categories of environmental dispute referred to supra:

- The public outcry over proposals to carry out activities which may damage ecologically sensitive nature areas may be damaging to the reputation of the proponent given the present level of concern for the conservation of wildlife in South Africa.
- For similar reasons, industries may be compelled to introduce self regulation with regard to emission of pollutants so that their international competitors are not given ammunition to counter overseas marketing strategies.
- The demand for the redistribution of land may run ahead of the formulation of mechanisms for land allocation. Where unlawful occupation of land occurs, presently available procedures (eg. eviction under the Prevention of Illegal Squatting Act 52 of 1951) may appear insensitive of the government at a delicate stage of political negotiations, whereas for the occupants there may be a desire to avoid the attendant violence which accompanies evictions if there is the promise of a negotiated settlement.

to occur.<sup>30</sup> Where the participants have no recourse to any formal procedure but elect to submit to an informal process, it is not an alternative in the usual sense. It is the only option available. By not participating, an unwilling party risks a sanction<sup>31</sup> (which may be totally extraneous to the issue at hand), and is therefore compelled to participate. There may be practical advantages in adopting the informal approach while there is this lacuna in the law, but the disadvantages must not be ignored.

## 5. THE ROLE OF THE COURTS

### 5.1. *Coercive Power*

Formal dispute resolution has characteristics which are common to all disputes, irrespective of the cause of the conflict. The parties are generally represented by legal counsel, the issues are well defined, the procedures follow strict rules and the hearing takes place before one or more arbiters. Most significantly, the parties are discouraged from having direct contact with each other or choose not to do so for fear of compromising their positions. A result is achieved through the enforcement of legal norms or by the application of coercive power.<sup>32</sup> The result seldom leads to the removal of the causes for conflict, and can leave the parties more polarised than before on a particular issue. Well-meaning participants are cast into an unavoidable adversarial position from which there is often no return.<sup>33</sup>

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<sup>30</sup>Two examples will be cited below, namely the 'Dukuduku squatter issue', and the 'St Lucia mining proposal'.

<sup>31</sup>See note 29.

<sup>32</sup>Burton op cit note 4 13.

<sup>33</sup>RJ Golten 'Mediation: A Sellout for Conservation Advocates or a Bargain?' *Environmental Professional* (1980) 62.

Because of the special character of environmental disputes, litigation is not always the appropriate process to apply in finding solutions. It is slow,<sup>34</sup> expensive and because of the formality of the proceedings, does not always elicit the subtleties present in multi-faceted issues, such as those which generally characterise environmental disputes. The decision is placed in the hands of a judge and beyond the control of the parties. The result may not be to the liking of either party, or it may fail to determine long-term environmental implications.<sup>35</sup>

## 5.2. *Development of the Law*

Whilst informal methods may succeed where adjudication has failed,<sup>36</sup> the courts serve important functions in the development of the law which cannot be performed by a mediator for obvious reasons: the courts create precedent and assist in the formulation of policy through the interpretation of new laws. In this way the courts have played a vital function in the evolution of solutions to the most pressing of society's problems, and are likely to continue to do so despite the fact that more popular methods of resolving disputes may emerge, or because of the increased technical complexity which is presented by environmental issues.<sup>37</sup>

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<sup>34</sup>See *Scenic Hudson Preservation Conference v the Federal Power Commission* 354 F 2d 608, 620 (2d Cir. 1965). This was the beginning of a 17 year legal battle in the courts which was finally settled by mediation under Russell E Train, president of the World Wildlife Fund- US.

<sup>35</sup>Folberg & Taylor op cit note 2 220.

<sup>36</sup>It is generally accepted that mediation lends itself more easily to the constructive use of expertise and technical data than the 'adversarial posturing and obstructionism commonly displayed by experts hired to testify in heated court proceedings.' See Folberg & Taylor op cit note 2 221.

<sup>37</sup>Lettie M Wenner *The Environmental Decade in Court* (1982) 3. In commenting on the role of the courts in developing environmental policy in the USA the author makes this prediction: 'Despite the complaints of some judicial actors about the difficulties they have experienced in attempting to answer increasing numbers of technically complex questions, it is unlikely that the courts are going to become less involved with such problems. As long as the problems of scarce resources and limited assimilative capacity continue to plague society, it is unlikely that the courts will be able to evade such issues.'

In South Africa the courts have a particularly important role to play as public policy maker for this very important reason: if environmental policy is finally determined by the Minister of Environment Affairs as he is empowered to do,<sup>38</sup> or environmental rights are included in a new Constitution, or new environmental legislation is promulgated, it is likely to be expressed in wide terms requiring judicial refinement before it achieves effectiveness.<sup>39</sup> It is through the stable and predictable patterns established by the courts in their opinions that the law derives its certainty,<sup>40</sup> and is able to fulfil the normative function society demands of it. Because legislation is usually reactive and the process to its promulgation is slow, it is through judicial interpretation that this creative role can be attained.<sup>41</sup> The processes are interdependent and complementary of each other, and it is therefore not necessary to place one before the other either in time or importance as writers have tended to do.<sup>42</sup> What is important, is to recognise that the influence of the courts in the evolutionary process, determines

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<sup>38</sup>Under s 2 of the Environment Conservation Act 73 of 1989.

<sup>39</sup>In the USA an area of environmental law which grew by means of judicial precedent rather than by statutory changes was federal impact analysis. Because of the 'sparse' words of the National Environmental Policy Act of 1969 (42 USCS § 4321 et seq) it has been the subject of thousands of court decisions. See John E Bonine & Thomas O McGarity *The Law of Environmental Protection* (1984) 4.

<sup>40</sup>Lettie M Wenner op cit note 37 3.

<sup>41</sup>There has also been criticism of the pace of the judicial process if it is not prompted by legislation. See PD Glavovic 'The Need for the Legislative Adoption of a Conservation Ethic' (1984) XXVII *CILSA* 148 where he says: 'No doubt our common law system is sufficiently positive and robust to respond to the need to protect such interests by providing judicial cognisance of a conservation ethic. But this traditional, evolutionary process is too slow.' Cowen agrees and supports Lord Scarman's view that 'we have no alternative but to rely on legislation as the pace-setter and the innovative, seminal agency. See Denis V Cowen 'Towards Distinctive Principles of South African Environmental Law: Some Jurisprudential Perspectives and a Role for Legislation' (1989) 52 *THRHR* 13). However as van der Vyver points out, legislation cannot solve all social problems. See Johan an der Vyver 'The Function of Legislation as an Instrument of Social Reform (1976) *SALJ* 56 et seq.

<sup>42</sup>See note 41.

the ultimate character of the law. No other dispute resolution process can achieve this.

## 6. INFORMAL DISPUTE RESOLUTION PROCESSES

### 6.1. *Techniques*

It is beyond the scope of this article to deal with the various techniques which fall into the category of informal dispute resolution, except to identify them and to indicate where they differ.<sup>43</sup> At the one end of the scale is arbitration, which is the most rigid of the informal processes, and differs little from adjudication. At the other end of the scale is negotiation between the parties directly without any structured process. The latter requires a great deal of co-operation between the parties and a willingness to reach agreement. Between the two lie problem solving, counselling and mediation which all require the intervention of a third party. The degree of formality applied is determined by the parties themselves who retain control over the process. The success or failure of problem solving and counselling is determined largely by the skill of the third party. With mediation, by contrast, success or failure rests primarily with the participants.<sup>44</sup> Individuals are required to take responsibility for determining what is fair. That in itself 'strengthens democratic values and enhances the dignity of those in conflict'.<sup>45</sup> In the process, the parties are educated about each other, identify and isolate crucial issues in a spirit of co-operation which engenders a lasting settlement to the dispute. This latter feature of mediation makes it particularly well suited to the resolution of environmental disputes.

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<sup>43</sup>See Folberg & Taylor op cit note 2 Ch 3 for more detail.

<sup>44</sup>Folberg & Taylor op cit note 2 35. The primary benefit of mediation over adjudication or arbitration is self-determination.

<sup>45</sup>Ibid.

## 6.2. *Mediation*

The mediation process follows a logical sequence which begins with the creation of trust between the parties and the mediator, and the setting up of the structure to be followed.<sup>46</sup> Facts are then established and the issues isolated.<sup>47</sup> Frequently the success or failure of the mediation will be determined at this stage because the degree of co-operation necessary for success will become obvious. Options and alternatives are considered during which creativity on the part of the mediator is called for. The mediator must guide the participants and suggest options in such a way that it is open to the parties to reject them without jeopardising the entire process.<sup>48</sup> At this point issues must be negotiated and decisions taken. Again a great deal of co-operation is necessary and the participants may be obliged to make compromises in order to accommodate each other.<sup>49</sup> When the issues have been settled they should be recorded. Depending on the nature of the dispute, a form of legal review may be desirable or even compulsory before implementation.<sup>50</sup> The process culminates with implementation and review or revision by the participants if necessary.

## 7. ENVIRONMENTAL SOLUTIONS

### 7.1. *Environmental Issues*

Environmental issues face everybody, despite an apparent lack of awareness of their full implications amongst a greater part of society, and a tendency by

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<sup>46</sup>Folberg & Taylor op cit note 2 38-47.

<sup>47</sup>Folberg & Taylor op cit note 2 47-49.

<sup>48</sup>Folberg & Taylor op cit note 2 53.

<sup>49</sup>Folberg & Taylor op cit note 2 53-60.

<sup>50</sup>For example, in a custody dispute the court as the upper guardian of a minor child must sanction settlements over custody by being satisfied that the agreement reached is in the best interests of the child.

individuals to avoid responsibility for the stress placed on the environment through the activities of humans.<sup>51</sup> In South Africa the situation is aggravated by the lack of an effective body of legislation and a lack of defined environmental policy as observed supra. For that reason environmental issues have not dominated or intruded into the human fabric to the extent that they have in the USA, and conflicts have accordingly been rare. Indications are that the situation is changing. Awareness of environmental issues is growing at an unprecedented rate and formal recommendations have been made for the formulation of environmental policy. The inclusion of an environmental right in a proposed Bill of Rights seems to be a future certainty irrespective of political developments.<sup>52</sup> The legislative declaration of policy or the inclusion of an environmental right in a Bill of Rights, will act as a catalyst for action on the part of concerned groups and individuals and will spark off South Africa's 'environmental decade', just as the promulgation of the USA's National Environmental Policy Act (NEPA) did in 1970.<sup>53</sup>

## 7.2. *Public Participation*

In the meanwhile environmental disputes will have their origins in limited circumstances, either where there is sufficient public concern or political pressure, or where a proponent of an activity voluntarily submits the scheme to an environmental impact assessment (EIA) or to the wider integrated environmental

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<sup>51</sup>See Martin Bern 'Government Regulation and the Development of Environmental Ethics Under the Clean Air Act' *Ecology Law Quarterly* 16 (1989) 539.

<sup>52</sup> See the *Report of the Three Committees of the President's Council on a National Environmental Management system* (October 1991) PC 1/1991 187-189 and the *South African Law Commission Project 58 Group and Human Rights Interim Report* (August 1991) 540-581.

<sup>53</sup>See Lettie M Wenner op cit note 37 1. The then President Richard M Nixon was not sympathetic to the environmental movement, and in that respect he was little different to the present day South African administration. However no politician could afford to ignore the demands of the environmental movement. The situation is likely to be repeated in South Africa. Political pressure will be both internal and from abroad, given the international concern for the environment at present.

management procedure (IEM)<sup>54</sup>. The IEM procedure provides for public participation in the decision-making process and therefore creates the potential for parties opposed to the activity to be heard in any dispute which might arise, whereas in law they may have no standing to intervene.<sup>55</sup> Whilst the process does not provide for the role of a mediator, it is designed to achieve a 'harmony' between development and environmental conservation. To achieve harmony there are likely to be compromises which in turn entails the application of a process to determine the respective positions of the interested parties. The person or body charged with the management of the process will in effect fulfil the role of mediator and should therefore have a degree of impartiality necessary to engender credibility with the participants.<sup>56</sup> Environmental impact assessments as part of the development process are not new to South Africa, but the accommodation of the public or of public interest groups in the process is rare.<sup>57</sup>

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<sup>54</sup>This is the procedure devised by the Council for the Environment and is published in April 1989 in a report titled *Integrated Environmental Management in South Africa*. It is not compulsory although s 26 of the Environment Conservation Act 73 of 1989 empowers the Minister of Environment Affairs to make regulations which could make impact reports compulsory in respect of activities he has identified in terms of s 21, those being activities which 'in his opinion have a substantial detrimental effect on the environment, whether in general or in respect of certain areas'.

<sup>55</sup>In much the same way the door to environmental mediations was opened by the promulgation of NEPA in the USA. Although it did not specifically provide for mediation as a conflict resolution method, that is implied in its language. Furthermore it requires alternatives to be explored and the involvement of citizens in the process.

<sup>56</sup>The IEM procedure places the controlling authority in the position of manager of the process. It is the authority which determines the class of investigation to be undertaken (based on the likelihood of environmental damage), monitors the implementation of the process and makes a decision as to the acceptability or otherwise of the scheme. That may not always be desirable but until such time as an independent body which is able to perform that function is created, the status quo will persist.

<sup>57</sup>This is despite the recognition by developers and the authorities after the fact that an early disclosure of the details of the proposal and public involvement may have reduced the level of emotional conflict. See GR Preston, RF Fuggle & WR Siegfried 'Attitudes of Business Leaders and Professional Ecologists to Environmental Evaluations in South Africa' *South African Journal of Science* July (1989) 85 433.

## 8. TWO SOUTH AFRICAN CASE STUDIES

Having outlined the essential characteristics of both the formal and informal methods of dispute resolution, case studies, where a degree of success has been achieved in environmental dispute resolution, will be examined briefly in an effort to demonstrate firstly the advantages of the informal procedure and also to demonstrate that at present in South Africa it is a practical and perhaps the most appropriate form of environmental dispute resolution.<sup>58</sup>

### 8.1. *The Dukuduku Squatter Issue*

Dukuduku is a State forest adjoining the St Lucia lake system near Mtubatuba in Natal. It is approximately 6000 hectares in size and represents the best example of Lowland Coast Forest remaining in South Africa.<sup>59</sup> It has high conservation value because of its size and the protection it offers to numerous rare and threatened species of wildlife. It is a critical reservoir of viable populations of a great many forms of flora and fauna. Until July 1990, the forest was under the management and control of the Department of Forestry.

During 1988, informal settlements began to appear in the forest and the number of residents in the forest increased rapidly. Their presence was not detected initially as the forest is not fenced nor regularly patrolled. Conservation organisations were first to raise comment when aerial examinations and field work revealed that a substantial portion of the forest had been destroyed by the end

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<sup>58</sup>In dealing with the particular case studies, debate will not be entered into on the merits of the position taken by the various participants nor will opinion necessarily be expressed as to whether or not any of the participants are morally or legally correct in their contentions. Instead, it is the dispute resolution process which will be examined given the factual circumstances of the particular dispute. The author has participated, to a degree, in both the Dukuduku squatter issue and the St Lucia dune mining issue and information is drawn from file personal file notes and correspondence unless otherwise indicated.

<sup>59</sup>KH Cooper *The Conservation Status of Indigenous Forests in Transvaal, Natal and OFS South Africa* (1985) 108.

of 1988. The issues around which the dispute revolved were complex. On the one hand, the squatters contended a traditional right to inhabit the forest and also claimed that they were forced to do so as a result of having been dispossessed of their traditional tribal lands adjoining the forest. This they stated, occurred when land which they had previously inhabited and which was under the control of the State, was leased to a farmer who used it for agricultural purposes.<sup>60</sup>

Criminal action,<sup>61</sup> initiated by the Department of Forestry, commenced to evict the squatters<sup>62</sup> in February 1989 and culminated in a Magistrate's Court judgment on 6 July 1990 when six of the leaders charged were found guilty. Sentence was suspended provided the convicted people vacate the forest on or before 6 August 1990, and on the condition that they did not commit a similar offence within a period of 5 years. During the hearing, a representative of the Wildlife Society of Southern Africa was called to give evidence on the conservation value of the forest. During his evidence he suggested that the Wildlife Society should act as mediator in an effort to find a solution to the problem. This was prompted by concern for the forest on the one hand and the welfare of the squatters who faced eviction on the other. The squatters and their legal representatives immediately accepted the offer and thereafter the

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<sup>60</sup>Maputaland has a long history of conflict between conservation and the interests of the local community. See the Association for Rural Advancement *Maputaland: Conservation and Removals* Special Report 6 (January 1990) 5. It is reported that the people of Maputaland have generally experienced conservation as a highly politicised form of state intervention. The Centre for Community Organisation, Research and Development (CORD) reports that at least 30% of the people of Maputaland have been removed at least once in their lifetime and that if proposed plans for 'development' and conservation proceed, this figure will double to 60%. See CORD 'Overcoming Apartheid's Land Legacy in Maputaland' (1990)7.

<sup>61</sup>Under the Prevention of Illegal Squatting Act 52 of 1951.

<sup>62</sup>Only six people( all tribal leaders) were charged although it is estimated than at least 3000 people inhabited the forest.

Department of Environment Affairs agreed to allow the Wildlife Society to play the role of mediator.<sup>63</sup>

A meeting between the squatters, their legal representatives and members of the Natal Provincial Administration was convened and held on 25 July 1990. At the outset, the squatters showed intransigence and indicated that irrespective of the consequences they would not move from the forest within the deadline imposed by their suspended sentences. The attitude of the authorities was that they would enforce eviction, if necessary. Both parties to the dispute faced dilemmas. The squatters were threatened with criminal sanction which was likely to be violently enforced should they not obey the court order imposed upon them. The authorities recognised that although they were supported by a court order, its violent enforcement would cast them in a bad political light.

During the discussions, the Wildlife Society representatives indicated that they had considered various land alternatives which may be suitable for occupation by the squatters. The squatters immediately indicated a willingness to consider alternative sites and agreed that they would not blatantly disregard the terms of the court order because of the consequences that would have. They also agreed that provided there was a continued suspension of their sentences, they would participate in negotiations. The authorities, whilst expressing some difficulties with the allocation of alternative land sites, agreed that in the interests of reaching a settlement, the matter would be investigated. The meeting was adjourned pending the deeper investigation of the proposed alternative sites and such other sites as may be available and suitable. On the following day, 26 July 1990, the Minister of Environment Affairs transferred responsibility from the State to the provincial authority with the result that the provincial representatives present at the meeting assumed the responsibilities formerly held by the State.

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<sup>63</sup>The author was a member of the mediation team.

At that point, the province indicated that there was no further need of the services of the Wildlife Society as mediators and that the negotiations would proceed directly between the parties. The squatters expressed an unhappiness that the services of the Wildlife Society had been terminated but appeared to be happy to continue negotiations on the basis that if they broke down they would again turn to the Wildlife Society.

Although the issue is not finally resolved, it appears to be heading towards a solution along the lines suggested at the meeting held on 25 July 1990. The final obstacle, is the allocation of alternative land, the most suitable of which is either in private ownership or is under the control of the Department of Forestry which is reluctant to part with any plantation land but appears to have little concern for the indigenous Dukuduku forest, has now been removed. Land to the north of the presently occupied areas has been made available and has been accepted by the leaders of the squatters. The matter will finally be resolved when the people actually move.

Whilst it cannot be claimed that mediation has completely and successfully resolved the issue, it has gone a long way to doing so. It at least achieved communication between the participants, a feature previously lacking. In the process, the environmental cause has been well served since part of the responsibility undertaken by the leaders present, who were representative of the general body of squatters, was to ensure that further widespread destruction of the forest would not occur. Furthermore, it highlights a reluctance on the part of the authorities to enforce legally legitimate powers which may not be politically or socially legitimate. On the part of the squatters, the option of self-help and defiance was abandoned in favour of negotiation and settlement.

## 8.2. *The St Lucia Dune Mining Issue*

The St Lucia estuarine system is the largest in South Africa, contains five distinct ecosystems and is regarded as one of the most important wetland systems on the planet.<sup>64</sup> Ownership of the lake system and the surrounds considered necessary to support its complicated ecological functioning is scattered between private ownership to the north, KwaZulu ownership extending from its northern boundary to its core, and the rest in State ownership, either as State forest or nature reserve. State owned land is under the management and control of the Natal Parks Board, except for those areas planted with commercial timber.

The St Lucia region is also rich in deposits of the heavy minerals titanium, rutile, ilmenite, zircon and the rare earth element, monazite. Despite being recognised as an important conservation area deserving of consolidation and permanent legal protection,<sup>65</sup> it has suffered a number of negative environmental impacts over the last century.<sup>66</sup> A dispute centres around proposals to mine in the Eastern Shores state forest by Richards Bay Minerals<sup>67</sup> and the public outcry against

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<sup>64</sup>It is registered as a wetland of international importance under the Ramsar Convention (the International Convention on Wetlands of International Importance, Especially as Waterfowl Habitat 1971) to which South Africa is party. It satisfies the credentials for registration as a World Heritage Site (UNESCO) (United Nations Education, Scientific and Cultural Organisation) and it has been South Africa's political isolation only, which has prevented it from being so registered.

<sup>65</sup>See the report of the Kriel Commission (1964-1966) Transvaal Archives Depot K230 and the joint policy statement of the Natal Parks Board and the Department of Environment Affairs (1983) NPB/DEA 1/1983 which were both the result of extensive research and which conclusively found that the region was deserving of permanent legal protection as a conservation area. The reluctance of the Government to appoint the Kriel Commission, which was to 'consider the alleged threat to animal and plant life in the St Lucia Lake' is an early indication of the Government's true concern for the conservation of the lake and its surrounds. It was public pressure which ultimately triumphed.

<sup>66</sup>Widespread game hunting, missile testing ranges, the introduction of commercial timber plantations, tsetse-fly eradication procedures by the widespread spraying of DDT, and more recently a threat to mine part of its eastern shores, considered a crucial part of its natural functioning. For a brief history of human involvement in Maputaland see M N Bruton & K H Cooper (eds) *Studies on the Ecology of Maputaland* (1980) 433-459.

<sup>67</sup>A general reference to the individual companies making up the group of companies, a party to the dispute.

such proposals by concerned members of the public who fear for the safety of the St Lucia system.

The mining company holds prospecting leases granted under s 13 of the Mining Rights Act 20 of 1967 and has applied for a mining lease under s 25.<sup>68</sup> In order to satisfy the provisions of s 25(3)(b),<sup>69</sup> the mining company was required to submit a detailed environmental impact assessment. Later, probably as a result of the public outcry against the proposals to mine, the Cabinet ordered a comprehensive study in accordance with the IEM procedure. A decision on the mining issue is suspended until completion of the study.<sup>70</sup> The participants in the process are the State, through the Government departments who have responsibility over the resources and activities,<sup>71</sup> the mining company itself and

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<sup>68</sup>The Mining Rights Act 20 of 1967 was repealed by the Minerals Act 50 of 1991 which came into operation on 1 January 1992. Section 44(1)(a)(ii) of the latter Act preserves the existing rights of the mining company. However, the prospecting lease is deemed to have been granted under s 6 of the new legislation and accordingly the issue of any mining authorisation (or lease) will be subject to the provisions of s 9(3) which requires the regional director to be satisfied: that the mining company has the ability to mine 'optimally and safely'; with the 'manner in which the applicant intends to rehabilitate disturbances of the surface which may be caused by his mining operations'; that the minerals exist in reasonable quantities (ie. more than in limited quantities which will be mined on larger than limited scale and for a period of more than two years). More importantly, the mining company will be obliged to comply with ss 38 and 39 which require the land surface to be rehabilitated in accordance with layout plan which must be submitted to the regional director for approval before commencement of mining operations.

<sup>69</sup>Section 25(3)(b) required the minister, after consultation with the Mining Leases Board, to be 'satisfied' that 'the scheme according to which the applicant proposes to carry on mining under such lease is satisfactory'.

<sup>70</sup>At the time of writing key issue reports are in the process of being prepared following the comments of interested and affected parties on the specialist consultants' reports, all of which is part of the preparation of the 'class 1 draft report' stage of the procedure devised by the Council for the Environment.

<sup>71</sup>The Departments of Finance, Trade and Industry, Mineral and Energy Affairs, Transport, Forestry and Environment Affairs.

interested parties being members of the public as individuals or represented by non-government conservation bodies.<sup>72</sup>

The mediator in this instance is not a single person but a group consisting of a 'co-ordinating committee',<sup>73</sup> which in turn has appointed an 'assessment management committee' on which is represented the Department of Environment Affairs, the principal consultants employed by the mining company, representatives of the mining company, and such co-opted members as are deemed necessary. The function of the assessment management committee is to identify affected parties and interested groups, conduct a scoping procedure in order to generate main alternatives to be evaluated, identify interested and affected groups, generate specialist studies and draw up a 'class 1' environmental impact assessment in accordance with the IEM procedure.

During the process, public participation is obtained and agreement reached on matters of procedure and in the determination of the main land use alternatives. Specialist consultant reports on thirty one issues have been prepared and these will be used to compile an environmental impact report for review by interested and affected parties, whose comments and concerns will be included in a final report. The final report will be reviewed by a panel of five respected, knowledgeable and impartial individuals. The review panel will make recommendations to the co-ordinating committee who, in turn, will make recommendations to the Cabinet with whom the final decision rests.

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<sup>72</sup>For example the Wildlife Society of Southern Africa, the Wilderness Action Group and the Campaign for St Lucia, the latter, which is opposed to the mining, has had its mission statement endorsed by over 200 organisations and bodies.

<sup>73</sup>Representing the Government departments concerned and the Natal Provincial Administration.

Although the matter is far from resolved, the process whereby a solution is sought is similar to that contemplated in the USA's NEPA.<sup>74</sup> The solution, if indeed it is found, will be the culmination of consensus, bargaining, compromise and finally acceptance of a decision which will, through its process, have considered social, political, economic and environmental aspects, all of which necessary to determine what is in the best public interest, since the land in question is public land.<sup>75</sup>

## 9. CONCLUSIONS

As in the Dukuduku issue, the legal remedies open to the participants in the St Lucia controversy were not the most attractive solutions. For the Government authorities who have the power and discretion to make a decision, it was necessary to balance the economic incentive for the Government against public perceptions, both domestically and internationally, against their concern for conservation. They would furthermore be in breach of their obligations under the Ramsar Convention.<sup>76</sup> The mining company were reluctant to enforce what they

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<sup>74</sup>Section 102(C) requires the federal agency to prepare detailed written statements of the environmental impacts and possible alternatives. The statement must be circulated to local, state and federal agencies for comment. Section 101 implements state policy (absent in South Africa in any legislatively articulated form), and § 102(2)(C) is the mechanism for coordinating views from various specialised agencies and in the process, assembles information on particular impacts and alternatives. § 102(2)(A) requires the integrated use of natural and social sciences. § 102(2)(C)(iii) stresses the seeking out of less damaging alternatives.

<sup>75</sup>The proposed mining lease area is in the Eastern Shores State Forest, a state forest demarcated under s 10(1)(a) of the Forest Act 122 of 1984.

<sup>76</sup>At the Fourth meeting of the Contracting Parties to the Convention held at Montreux, Switzerland in July 1990, concern was expressed about St Lucia's threatened future and it was recommended that:

'The Government of the Republic of South Africa should:

i) Take action so that it and Richards Bay Minerals follow measures which retain the St Lucia Wetland as a protected area because of its natural and international conservation importance.

ii) Prohibit any mining activity which will damage the ecological character of the site.'

It is submitted that in its broadest interpretation mining will conflict with this recommendation, more particularly in the light of the specialist reports (vegetation, hydrology, rehabilitation ecology)

might have considered to be a legal right because it had the negative connotation of adverse public opinion locally, and because of their foreign shareholding, they feared an unfavourable reaction from shareholders who might have been unhappy with both the political and environmental implications for the company, should the mining proceed in the face of strong public opposition. For the public who demonstrated concern and opposition to the mining, they are presented with no direct legal remedy because the matter is one of public, not privately enforceable interest, and not one for which specific legislation exists or is available to members of the public to enforce.

The issue furthermore highlights the great public concern for the environment that now exists and marks a move away from the purely economic considerations which have tended to dominate decisions on activities detrimental to the environment. As a precedent for the resolving of disputes which may arise during the process of major developments, it is important as it represents the first practical application of the IEM procedure devised by the Council for the Environment in the interests of a balance between development and the environment, and in which the public has vigorously participated as part of the process.

For environmental lawyers who are more concerned with the true evolution of the field of environmental law as a discrete branch of the law in South Africa, the success of 'alternative methods' before the judicial process has had played its role, they will be left with a sense of frustration. Mediation should be seen as a supplement rather than an alternative to legal action in environmental disputes.<sup>77</sup> In South Africa for the time being it is likely to be the principal

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which indicate that there could be changes in the ecological character of the site.

<sup>77</sup>See Allan R Talbot *Settling Things- Six Case Studies in Environmental Mediation* (1989) 97, where the important observation is made that it was impending court action which provided the impetus for mediation in most of the disputes studied.

mode of environmental dispute resolution.<sup>78</sup> As long as disputes are being resolved by mediation there will be little pressure to introduce appropriate legislation to address those short-comings which exist in South African environmental law.<sup>79</sup> Environmental lawyers will feel cheated out of the important contribution to the evolution of the law which Jung recognised in conflict:

‘Conflict creates the fire of affects and emotions and like every fire it has two aspects: that of burning and that of giving light.’<sup>80</sup>

Lawyers must continue to press for law which both fans the fires of conflict and provides for its extinguishment.

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<sup>78</sup>The results of the study referred to in note 57 show that both business leaders and ecologists favour the introduction of compulsory environmental impact studies as part of the development process. Section 26 of the Environment Conservation Act 73 of 1989 empowers the Minister of Environment Affairs to make regulations which would make impact reports compulsory, and one can assume that such regulations are likely to be promulgated before any dramatic changes in the law occur opening the door to environmental litigation.

<sup>79</sup>Talbot op cit note 76 91 concludes that although mediation is appropriate in environmental disputes, mediators who were involved in cases studied estimated that only 10% of environmental disputes can be successfully mediated. Mediation should therefore not be regarded as the ultimate solution to the problem.

<sup>80</sup>CG Jung *Psychological Reflections* (Jolande Jacobi & RF Hill eds) 1971 76.

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