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The Value of Ecofeminism for Environmental Regulation

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Abstract

The following dissertation introduces the reader to ecofeminism, a philosophy which combines the tenets of ecological ethics and feminism. Ecofeminism explores the conceptual connections between the oppression of women by men and the oppression of nature by humans. The primary insight of ecofeminism is that all matters of oppression are interconnected. In the ecofeminist vision, there is no such thing as a struggle for women's rights separate from a struggle to repair earth. It grapples with questions relevant to law, politics, and academia.

As its core there are seven fundamental principles of ecofeminism. Ecofeminism (1) is Ecocentric and values humans' dependence on Earth, (2) seeks the end of patriarchy and links it to all forms of oppression, (3) is inclusive of diverse experiences and opinions, both of women, men and nature, (4) place value on the 'local.' It seeks to tackle environmental degradation using specialized solutions relevant to the community in question. (5) incorporate ethics into any discussion of people and the Earth, (6) challenge the status quo, but oppose personal and military violence, and (7) demonstrate the way gender and other forms of oppression, often unconsciously, is deeply implicated in the ecological crisis

These principles are used in this dissertation to find solutions to some of the limitations of traditional approaches to environmental regulation. The five limitations are land ownership and environmental regulation, the lack of an ethical foundation for environmental regulation, decision making and environmental regulation and vesting rights in the wrong party, issues of scale and international environmental regulations compared to specialized solutions, and finally issues of process (permitting) and environmental regulation and the need to increase public participation.

The five examples of potential solutions highlighted are: the Public Trust Doctrine, the 2008 Ecuadorian Constitution, vulnerable communities and movements for environmental justice, the Kyoto Protocol, and permitting procedures.

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Chapter I

Introduction to the Ecological Crisis and Ecofeminist Theory

Environmental degradation happens in every country, at every level and scale, in many forms, throughout the world. It affects the Earth, its ecosystems, as well as people, animals, and plants. While everyone is affected, the poor are the most vulnerable to the ravages of environmental degradation.¹ Humans are the drivers of such ruin and creators of this crisis. The situation is not improving, but rather deteriorating at an alarming rate.² It is for these and many other reasons that this emergency and its effects on living things must end or at least be decelerated.

While some facets of the crisis are barely noticeable; the shrinking of summer sea ice as a result of climate change is not something most of us encounter³, other occurrences, like deforestation or smog as a result of pollution, greatly effect the populations where they occur. There are ecological battles fought everyday in communities across the globe. People are striving against nuclear reactors built in their neighbourhoods, depletion of resources, and unwanted 'progress'.

Sustainable development is often given as the solution, or a major part of the solution, for preventing or reducing the effects of environmental damage. There is now clear scientific evidence that humanity is living unsustainably, and that an unprecedented collective effort is needed to return human use of natural resources to within sustainable limits.⁴ For humans to live sustainably, the Earth's resources must be used at a rate at which they can be replenished.

¹ United National Environment Program, *Global Environment Outlook – environment for development (GEO 4 Report)* Chapter 7 'Vulnerability of People and the Environment: Challenges and Opportunities' (2007) at 336.

² Intergovernmental Panel on Climate Change, Working Group I, 'Summary for Policymakers' *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) at 15.

³ *Ibid* at 16.

⁴ Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Biodiversity Synthesis. Summary for Decision-makers* (2005) at 16.

The solution is complex and requires cooperation from every level of society and across academic disciplines. The purpose of this dissertation is to look at one part of the solution, environmental regulation, and the part it can play in solving this most urgent challenge, i.e. living within sustainable limits.

Even under many current legal regimes from developed to developing countries; those facing environmental injustices often struggle to find solutions in environmental law. This is due to flaws in the legal system which favours polluters. Local governments argue that the problem is too huge to be solved by them, while international conventions are irrelevant if not implemented domestically. These failings in the legal system make it especially difficult for those most affected by environmental damage, low-income groups, women, and children to find effective remedies for the environmental hazards in their communities. Because of such imperfections, rethinking aspects of environmental regulation is imperative. There is a place for ethics and a diversity of opinion in environmental regulation. Regulations that are more inclusive of the experiences of local communities and the voices of those most affected by ecological damage within those communities are essential. This dissertation examines a philosophy, ecofeminism, and the positive influence it can confer to environmental regulation.

Traditional Western systems, from politics and education, to economics, are ‘premised on the beliefs that humans are separate from and superior to the natural world’.⁵ The patriarchal system of the West makes decisions based on this premise, and uses them to exploit natural resources for human ‘benefit’. Even though such a belief is widespread, humans are in fact obviously dependent on Earth. We need it for food, air, shelter, clothing, water, and are subservient to it. As humans we are only one small aspect of Earth.⁶

⁵ Cormac Cullinan, ‘Do Humans Have Standing to Deny Trees Rights?’ (2008) 11 *Barry L. Rev.* 11 at 15.

⁶ *Ibid* at 16.

Human beings are natural beings, yet, our culture is founded on the repudiation and domination of nature. This has a special significance for women because, in patriarchal thought, women are believed to be closer to nature than men. This gives women a particular stake in ending the domination of nature, in ending the patriarchy, and ‘healing the alienation between human and nonhuman nature.’⁷

Ecological feminism (ecofeminism) has begun to receive a fair amount of attention lately as an alternative feminism and environmental ethic. Françoise d’Eaubonne coined the word *eco-feminisme* to describe this more holistic understanding of ‘liberation’. She argued in 1974 that when the fate of the human species and of the planet is at stake, ‘no male-led revolution will counteract the horrors of overpopulation and destruction of natural resources’.⁸ Modern ecofeminism, as it is used in this dissertation, disagrees with such a position, and is inclusive of everyone; it happily accepts men and people of all professions, countries, classes, and races. Ecofeminism is the position that there are important connections: historical, experimental, symbolic, and theoretical between the domination of women and the domination of nature, an understanding of which is crucial to both feminism and environmental ethics.⁹

This dissertation asks the question: What can ecofeminism, an academic and liberating field, contribute to environmental jurisprudence and how could such jurisprudence create an ethical shift in the way humans relate to the Earth? This dissertation argues that ecological feminism provides a positive framework for enhancing feminism and for developing environmental constructs that take seriously the connections between the domination of women and the domination of nature. This topic is broad and dense and the

⁷ Ynesta King ‘The Ecology of Feminism and the Feminism of Ecology,’ in *Readings in Ecology and Feminist Theology*, ed. Mary Heather MacKinnon (1995) at 150.

⁸ Françoise de Eaubonne *Le Feminisme où la mort* (1974) at 213-52; cited in Mary Daly *Gyn/Ecology: The Metaethics of Radical Feminism* (1978) at 9.

⁹ Karen J. Warren ‘The Power and the Promise of Ecological Feminism,’ in *Readings in Ecology and Feminist Theology*, ed. Mary Heather MacKinnon (1995) at 172.

areas for further study are vast. My concern is in identifying promising areas where the traditional approaches to environmental regulation could be revised in ways consistent with an ecofeminist environmental jurisprudence.

This dissertation is structured into five Chapters. In this first Chapter, I have introduced the focal point of the essay. I have explained some tenets of the environmental crisis facing our Earth. I then reveal that there are imperfections within environmental regulations and therefore discussing a revision of such laws is relevant. I briefly introduced ecofeminist theory and then the research question for this dissertation.

Chapter II delves deep into ecofeminist theory, its roots, and what makes it distinct from competing philosophies. I outline the two terms, ecology and feminism, which form ecofeminism. I then look at the reasons the two are linked and the benefit that derives from this union. To further explain this theory I examine the rise of ecofeminism and the need for its creation. To help explain what it is and its relevance, I then tease out and describe the seven essential traits of this theory. To distinguish ecofeminism from feminism, I compare the two and their legal methods. Lastly, I look at Earth jurisprudence, which has similar goals to ecofeminism. I compare these two, but ultimately demonstrate that ecofeminism takes Earth jurisprudence an extra step forward because it offers a gender component which Earth jurisprudence lacks.

Chapter III builds on Chapter II by demonstrating the need to implement ecofeminism into environmental regulation. While still a relatively new area in law, many flaws remain. I provide a critique of five limitations to the traditional approach to environmental regulation. First, this chapter will examine the idea of land ownership and environmental regulation. It critiques environmental regulations' current over-reliance on property law and ones ability to 'own' the environment. With its foundation in property law, environmental regulation can be ill-suited to correct environmental injustices. Second, this chapter examines the issue of

ethics and the lack of an ethical foundation for environmental regulation. An ethical foundation would provide environmental regulation a system that values the environment and humans' reliance on it for sustenance. Third, I examine the limitations of present-day decision-making in environmental regulation. I look at who is making the imperative decisions about the environment and what the process entails and how these decisions affect vulnerable communities. Fourth, because environmental degradation can occur on a global as well as a local scale, and both have immediate and long-term consequences, present environmental regulations must wrestle with issues of scale and prioritization. I examine how international environmental laws have grown over time, but are not necessarily inclusive of all the societies they represent. Fifth, I examine the limitations of present-day processes in environmental regulation. These processes need to include more public participation, especially in vulnerable communities where environmental degradation is more likely to occur.

Chapter IV offers examples of the value ecofeminism can bring to environmental regulation. This Chapter uses the five limitations outlined in the previous chapter to demonstrate ecofeminism's ability to rethink environmental regulation. It then provides five example of how ecofeminist principles have already, or have the potential to, influence change for environmental regulation. The five examples I use are from a variety of jurisdictions and areas of environmental law. The purpose of this diversity is to demonstrate the vastness of ecofeminist theory and its applicability in formulating viable solutions.

The first example demonstrates the role ecofeminism can play in rethinking land ownership. Land ownership as it relates to property law was the first limitation presented in Chapter III. As a possible solution for this limitation I look at the law on public trust in the United States and other common law jurisdictions. Public trust, by granting right and access to valuable land to all, incorporates the values of ecofeminism and demonstrates a valuable

potential legal strategy to be used by environmental advocates. Second, because ecofeminism prioritises environmental ethics, it can introduce an ethical foundation to environmental regulation. As an example I analyse the 2008 Ecuadorian Constitution which, building upon traditional aboriginal values, grants rights to nature, or *pachamama* as she is lovingly referred to in aboriginal culture.¹⁰ Third, environmental regulation should revisit its decision making to ensure that diverse opinions are being heard. For this example I look at movements for environmental justice. These women (and men), became environmental advocates after some form of environmental degradation occurred in their own backyard. They are able to prioritise the Earth and their community in a unique and relevant way. Fourth, I examine the Kyoto Protocol to demonstrate the value in local, specialized solutions to some environmental regulations. I apply ecofeminist principles to the protocol to demonstrate how it would benefit from ecofeminist philosophies. Fifth, I look at permitting procedures as part of the environmental regulation process. As my example I critique the supposed neutrality of Environmental Impact Assessments. These permits reinforce the status quo and need to include the public in the development process from its inception to help level the playing field.

The fifth and final Chapter looks at ways to take ecofeminism even further. It discusses the importance of giving legal effect to ecofeminism. Ecofeminisms' value is in its ability to unite a diverse array of opinions and experiences into one narrative. Aligned with current legal thinking surrounding environmental regulation; it should be taken seriously as a legal theory because of all that it can remedy. This Chapter examines how society should move to implement environmental regulation based on the examples given in the previous chapter. It offers recommendations and conclusions.

¹⁰ República del Ecuador, 'Constituciones de 2008' (Republic of Ecuador Constitution of 2008). Available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html> [Accessed June 2009].

At first glance, ecofeminist politics may appear anarchist. However, this dissertation works within the existing world order. It uses government, nongovernmental organizations, transnational corporations, and international agencies along with law, domestic and international, to create change. Ecofeminism can be incorporated into the legal system without a complete overhaul of prevailing regulation.¹¹ While the emergent ecofeminist politics holds the possibility of creating a democratic politics that can transform modern politics, that discussion is too vast for a dissertation of this size and purpose. The ultimate extension of ecofeminism is a society which grants right to nature. This argument is presented within the confines of the current legal system.¹²

¹¹ Irene Diamond *Fertile Ground: Women, Earth and the Limits of Control* (1994) at 28.

¹² *Ibid.*

Chapter II

Finding Theoretical Ground: Feminism, Ecology, and Ecofeminism

Ecofeminism is a field bridging ecological ethics and feminism that seeks to explore the conceptual connections between environmental degradation and sexist oppression. This Chapter will discuss the **two strands of ecofeminism** – The first is feminism itself: the awareness of the existence of patriarchal or masculinist structures and an attempt to liberate people from such systems. The second is a recognition of and deep concern about, the domination and exploitation of nature by such patriarchal society. For ecofeminists the ‘same habitual structures of thought, feeling and action that devalue and harm women’ also harm nature.¹³ Thus, ecofeminism brings to the critique a dimension that is missing from all other ecological ethics: gender. Ecofeminism, by adding this missing element, incorporates an ethical and multi-voiced behaviour in laws which anthropocentric ethics cannot.¹⁴

Ecofeminist politics are not solely rooted in feminism nor in ecological ethics, but the roots of activism for many of its participants are feminists or ecologists, and in the absence of these contemporary movements, this new form of politics would never have come to be.¹⁵

This Chapter discusses the theoretical components of ecofeminism and why a joining of the two terms is beneficial. It first considers the two fields separately. It discusses each one and their relationship with the law. It then joins them together and fully elaborates on what exactly ecofeminism is, discussing its rise out of a necessity to label a term felt and understood by many. I discuss its seven essential elements. I then compare ecofeminism to

¹³ Patrick Curry *Ecological Ethics* (2006) at 95.

¹⁴ **Anthrocentrism** is the belief that humans are at the centre of, and above any other aspect of, reality. The term has been posited by some environmentalists as the underlying reason why humanity dominates and sees the need to ‘develop’ most of the Earth. Anthropocentrism, or human-centeredness, is believed by some to be the central problematic concept in environmental philosophy, where it is used to draw attention to a systematic bias in traditional Western attitudes to the non-human world. Ecofeminism argues for a different world outlook.

Ecocentrism is a term used in ecological political philosophy to denote a nature-centred, as opposed to human-centred, system of values. Ecocentrism takes the view that humans are both part of, and a partner with, nature - and environmental concerns should take precedence over the needs and rights of human beings considered in isolation.

¹⁵ Diamond (note 11) at 42.

feminism and then ecofeminism to Earth jurisprudence to demonstrate the differences between the two, and the superiority of ecofeminism as a potential solution to the limitations of environmental regulation.

Feminism

Feminism is a complex ‘political, cultural, and economic movement aimed at establishing equal rights and legal protection for women’.¹⁶ Feminism is also an awareness of women’s oppression and exploitation in society, at work and within the family. It is a conscious action taken by women and men to change this situation.¹⁷ It involves ‘political, cultural and sociological theories’, as well as philosophies concerned with issues of ‘gender difference’.¹⁸ The movement advocates ‘gender equality’ for women and ‘campaigns for women’s rights and interests’.¹⁹ For the purpose of this dissertation, feminism can be broadly understood as the general agreement that a) sexist oppression exists and b) should be eradicated. Using such a wide net, even those who might typically not think of themselves as feminists, could potentially consider themselves as such.

Types of Feminism

There are three major categories of feminist theory – liberal, radical, and socialist.²⁰ Each has their own philosophies and set of priorities.

Traditional/Liberal feminism, sometimes called ‘equal rights’ feminism, ‘idealizes a society in which autonomous individuals are provided maximal freedom to pursue their own

¹⁶ Drucilla Cornell *At the heart of freedom: feminism, sex, and equality* (1998) at 15.

¹⁷ Georgina Ashworth *A Diplomacy of the Oppressed, New Directions in International Feminism* (1995) at 1.

¹⁸ Maggie Humm *Modern feminisms: Political, Literary, Cultural* (1992) at 9.

¹⁹ Cornell (note 16) at 15.

²⁰ One feminist philosopher discusses seven varieties (liberal, Marxist, radical, psychoanalytic, socialist, existentialist and post-modern). Philosopher Alison Jaggar prefers four: liberal, Marxist, radical, and socialist. Other feminists combine the socialist and Marxist categories. See Allison Jaggar *Feminist Politics and Human Nature* (1980).

interests'.²¹ They challenge the idea of 'natural' roles of women in societies. The biological make-up of men and women is not so different, and gender they say, is created socially, not biologically.²² Sex determines such matters as physical appearance and reproductive capacity, but not psychological, moral, or social traits.²³ Liberal feminism asserts that women are 'just as rational as men' and therefore should have equal opportunity to make their own choices. They challenge the assumption of male authority and 'seek to erase gender-based distinctions recognized by law; thus enabling women to compete in the marketplace.'²⁴ For them, the liberation of women requires the elimination of those legal and social constraints that prevent women from exercising their right of self-determination.²⁵

Radical/Cultural feminism embraces the view that the biologically based ideology of women being closer to nature is the root cause of domination of women by men. Those who hold this view focus on the differences between men and women and 'celebrate those differences'.²⁶ Radical feminists find woman's connection with nature potentially emancipatory, politicising women's bodies, particularly the child bearing and child rearing functions. They emphasize a 'women's way of knowing' which involves 'intuition, caring, feelings, spiritual or mystical experiences and the integration of these experiences into feminist theory and epistemology'.²⁷ Some of these feminists advocate a separate women's culture. Following the research of psychologist Carol Gilligan, this group of philosophers asserts that women emphasize the importance of relationships, contexts, and reconciliation of conflicting interpersonal positions, whereas men emphasize abstract principles of rights and logic. The goal of this school of thought is to give 'equal recognition to women's moral voice

²¹ Karen J. Warren 'Feminism and Ecology: Making the Connections' (1989) 9 *Environmental Ethics* 3 at 3.

²² Bell Hooks *Feminist Theory: From Margin to Center* (1984) at 34-35.

²³ Legal Information Institute, Cornell University Law School Dictionary 'definition of Feminist Jurisprudence'. Available at http://topics.law.cornell.edu/wex/feminist_jurisprudence [Accessed November 2009].

²⁴ *Ibid.* Examples of gender-based distinctions in law are provided later in this Chapter.

²⁵ Mary Joe Frug *Postmodern Legal Feminism* (1992) at 3.

²⁶ Maggie Humm *The dictionary of feminist theory* (1990) at 255.

²⁷ Mary Ann Hinsdale 'Ecology, Feminism, and Theology,' in *Readings in Ecology and Feminist Theology*, ed. Mary Heather MacKinnon (1995) at 200.

of caring and communal values'.²⁸ These feminists argue against traditional approaches that take 'maleness as their reference point'. For them, sexual equality must be constructed on the basis of woman's difference from man and 'not be a mere accommodation of that difference'.²⁹

Socialist feminism is the attempt to integrate the insights of traditional Marxist feminism with those of other forms of feminism by linking the domination by class and gender to women's oppression.³⁰ Socialist feminists point out how the economic system and the 'sex/gender system are reinforced in historically specific ways'.³¹ Like traditional feminists, they contend that differences between men and women are social constructions, not biological imperatives. Capitalism is a result of patriarchy; women's liberation requires both to end.³² Socialist feminism focuses on inequality. It asserts that men, as a class, have dominated women as a class, creating gender inequality.³³ For socialist feminists gender is a question of power. It focuses upon both the 'public and private spheres of a woman's life and argues that liberation can only be achieved by working to end both the economic and cultural sources of women's oppression'.³⁴

To summarize, feminism has traditionally been construed as the movement to end the oppression of women by men, and sometimes by Capitalism. Though feminists share common commitments to equality between men and women, their theories are not uniform. The ideological categorization of different feminisms made sense at the times they were created, but less so today.³⁵ In emphasizing differences within feminism, these feminists limit

²⁸ Linda Alcoff 'Cultural Feminism versus Post-Structuralism: the Identity Crisis in Feminist Theory' (Spring 1988) Vol. 13, no. 3. *Signs* 405 at 406.

²⁹ Legal Information Institute (note 23).

³⁰ Humm (note 26). See also 'What is Socialist Feminism?' Available at <http://www.feministzine.com/feminist/modern/SocialistFeminism.html> [Accessed October 2009].

³¹ Hinsdale (note 27) at 201.

³² Warren (note 21) at 16-17.

³³ Legal Information Institute (note 23).

³⁴ Alcoff (note 28) at 406.

³⁵ Diamond (note 11) at 45.

the discourse and value of the movement. Instead, a broad overarching definition, such as the one given in the introduction of this chapter, opens up the inclusive vocabulary required for a social transformation.

Feminism and the Law

As a field of legal scholarship, feminist jurisprudence, a philosophy of law based on the political, economic, and social equality of the sexes, began in the 1960s.³⁶ It now holds a 'significant place in domestic and international laws and legal thought and influences many debates' relevant to the well-being of women, children, and men.³⁷ Through various approaches, feminists have identified gendered components and gendered implications of seemingly neutral laws and practices. Laws affecting employment, divorce, reproductive rights, rape, domestic violence, and sexual harassment have all benefited from the analysis and insight of feminist jurisprudence.³⁸

The rule of law purports to be neutral and universal. The problem, say feminist scholars, is that such laws assume that 'normal' is synonymous with the experience of the 'average white, educated and socially privileged male'.³⁹ Thus, the viewpoint that claims to be the view that all reasonable people would agree upon is, in actuality, privileging the perceptions and social reality of dominant groups. [The penultimate example of this occurs within rape and sexual-harassment law, where it is precisely because women within patriarchal society are perpetually vulnerable to sexual victimization,⁴⁰ that women need legal protection. Yet the law, fixated on enforcing an 'abstract notion of neutrality', is unable to provide the needed protection, because to interpret the law from the perspective of the

³⁶ Marilyn Pearsall *Women and values – Readings in Recent Feminist Philosophy* (1992) at 176.

³⁷ Legal Information Institute (note 23).

³⁸ Pearsall (note 36) at 176.

³⁹ Ariel Salleh *Ecofeminism as Politics; nature, Marx, and the Postmodern* (1997) at 54.

⁴⁰ Catharine A. Mackinnon *Toward a Feminist Theory of the State* (1989) at 179. MacKinnon argues that this need for legal protection is a large part of the definition of 'woman' itself.

‘harassed, the violated, the terrorized’—that is, to see things from a woman’s perspective—would be, according to traditional jurisprudence, ‘biased’ and thus ‘unjust’.⁴¹] Another relevant example of bias towards the ‘normal’ is given in Chapter IV when I discuss environmental impact assessments.

The rule of law strives to disregard difference; law searches for commonality of protection and enforcement. When judges and courts cannot find this point of commonality, or when women’s experience is too ‘alien for a masculine court to understand’, the law does not function as an adequate forum for addressing the harms which occur to women.⁴² The well-known feminist jurisprudentialist Catherine MacKinnon puts it this way:

Many readers [of feminist or standard treatises on jurisprudence] say that if a discourse is not generalized, universal, and agreed-upon, it is exclusionary. The problem, however, is that the generalized, universal, or agreed upon never did solve the disagreements, resolve the differences, cohere the specifics, and generalize the particularities. Rather it assimilated them to a *false universal that imposed agreement, submerged specificity, and silenced particularity*.⁴³

MacKinnon is referring to the threat that those in positions of power feel when there is a disturbance in the status quo. Such groups tend to be uncomfortable with such a liberal outlook on law.⁴⁴ She goes on to say that:

The anxiety . . . is particularly marked among those whose particularities formed the prior universal. What they face from this critique is not losing a dialogue but beginning one, a more equal and larger inclusionary one. They . . . face losing the advance exclusivity of their point of view’s claim to truth — that is, their power.⁴⁵

Ecofeminists benefit from the decades of feminists who strived to change the way most of society thinks about law. For law to serve as a vehicle for social change, legal institutions must be persuaded that they will be more just if they embody the experiences of

⁴¹ Ibid.

⁴² Pearsall (note 36) at 177.

⁴³ Mackinnon (note 40) at 179.

⁴⁴ Salleh (note 39) at 59.

⁴⁵ Mackinnon (note 40) at xv.

both sexes.⁴⁶ Feminist legal theory argues that utilizing women's experiences as well as men's 'would produce a better and more inclusive model for legal decision-making than the current legal standard of applying abstract and depersonalised legal rules, which are considered 'fair'.⁴⁷ Ecofeminists extend feminist theory to include the experiences of more 'others'; minorities, low-economic groups, homosexuals, and potentially non-human groups (nature and animals) that can contribute to creating unprejudiced and relevant laws.

Feminist Legal Methods

An appreciation for the feminist theoretical approach to law is a prerequisite for understanding its application to environmental law. Feminists see themselves as outside the patriarchal system and therefore their work within law is somewhat different. They are typically less concerned with legal specifics, and instead concentrate on the actual. As opposed to legal theories, they look at real people in real life situation and urge the law to examine the whole picture. They argue that broad principles and rules cannot lead to justice unless applied in ways that acknowledge the real life experiences of those affected.⁴⁸

Capturing this idea, Mari Matsuda writes, 'who makes breakfast, who gets a pay check, who gets whistled at in the street -- all the experiences of daily life are a part of the distribution of wealth and power in society'.⁴⁹

Feminist legal methods strive towards flexibility in their goal to identify these missing points of view.⁵⁰ There are three methods most strongly associated with the feminist approach to the law:⁵¹

⁴⁶ A. Dan Tarlock, 'Is There a There There in Environmental Law?' (2004) 19 *Florida State University Journal of Land Use and Environmental Law* 213 at 214.

⁴⁷ Michael E. Zimmerman 'Feminism, Deep Ecology, and Environmental Ethics' in *Readings in Ecology and Feminist Theology*, ed. Mary Heather MacKinnon (1995) at 128.

⁴⁸ Anne Bottomley and Joanne Conaghan *Feminist Theory and Legal Strategy* (1993) at 1.

⁴⁹ Mari J. Matsuda 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 *New Mexico L. Rev* 613 at 619.

⁵⁰ Hilaire Barnett *Sourcebook on Feminist Jurisprudence* (1997) at 95.

Asking the woman question examines laws deemed neutral by lawmakers and through a series of questions uncovers the male bias inherent within the law. The bias may not be intentional, but neutrality should never be assumed.⁵² For example, ‘when applied to environmental justice issues, liberal feminist questioning has revealed that decisions regarding the location of polluting facilities are often made with little effort to incorporate the values and experiences of women and minorities’.⁵³ In relation to the constant battle between land use and environmental rights, this method argues that patriarchy plays a strong role in the motivation for the distinction between the two. ‘Distinction queries whether neutral factors such as private property rights, history, or state and local government prerogatives account for the distinction’s existence, or whether the distinction can be traced to some form of gender oppression or isolation’.⁵⁴

Feminist practical reasoning is broad in scope and incorporates the perspectives uncovered by other (non-legal) feminist methods.⁵⁵ It seeks to identify perspectives not represented in the dominant culture.⁵⁶ This method ‘erodes the distinction between the objective and subjective, applies to diverse legal problems, and can uncover gender oppression and isolation’.⁵⁷ When directed at environmental justice, feminist practical reasoning can be used to encompass the perspectives of minorities who see connections between their health, living conditions, and the environment. ‘Traditional legal methods had long overlooked these viewpoints, resulting in numerous examples of distributive injustice’.

⁵¹ Zimmerman (note 47) at 128.

⁵² Barnett (note 50) at 96.

⁵³ Nancy Perkins Spyke ‘The Land Use – Environmental Law Distinction: A Geo-Feminist Critique’ (2002) 13 *Duke Environmental Law & Policy Forum* 55 at 77.

⁵⁴ Zimmerman (note 47) at 128.

⁵⁵ Barnett (note 50) at 97.

⁵⁶ Spyke (53) at 63.

⁵⁷ Bottomley (note 48) at 1.

By expanding the scope of who is an environmentalist, this method offers a new way to look at environmental problems.⁵⁸

Thirdly, **Consciousness-raising** is about education via shared experience. It is ‘an interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate their experiences’.⁵⁹ This method seeks to encourage people to share knowledge at the local level. In the arena of environmental justice, community education can be used to accomplish consciousness-raising.⁶⁰ As Frances Farenthold observes, ‘after talking and listening comes education -- educating oneself and the community about the issues. Becoming an expert and establishing credibility are closely associated with this process, and they become foundations for action’.⁶¹ Many ecological activists get their start at the local level, almost accidentally discovering a cause because of a personal relationship. For example, the farmer who refuses to use pesticides after learning of its harm from other farmers, or a mother concerned about her children playing in a river downstream from a chemical plant.

Ecology

The concept of ecology provides a poetic image for understanding the various oppressions that women and men face. Ellen O’Loughlin writes the following metaphor bridging the two shared oppressions:

An ecologist cannot just add up the parts of a pond and think she is coming close to describing that ecosystem and how it functions. A fish in a pond and a fish in an ocean, looked at ecologically, must be understood as inhabiting different, maybe similar but not the same, places. Likewise women are in different places [in terms of occupation, class, and identity]. Whether I am in a

⁵⁸ Ibid at 3.

⁵⁹ Katherine T. Bartlett ‘Feminist Legal Methods’ (1990) 103 *Harvard L. Rev.* 829 at 863-64.

⁶⁰ Anne Witte Garland *Women Activists* (1988) at xx.

⁶¹ Ibid.

field or an office, what I do there, my niche, is at least partially determined by the interconnection of societal environmental factors.⁶²

Ecology is the study of the interdependence and interconnectedness of all living systems.⁶³ Ecology teaches us that life is in a constant state of change, as species seek ways to fit in particular environments that are, in turn, being shaped by the diversity of life within and around them. As ecologists look at the consequences of changes in the environment caused by human behaviour, they are compelled to be critical of society. The natural world has been thought of as a resource, exploited without regard for the life that it supports. Ecology helps us develop an awareness of the need to incorporate adaptation into our most general views of the world – those views that ‘shape the way humans will be in the world’.⁶⁴

Ecological Ethics is a branch of philosophy that attempts to understand what constitutes an ecologically and ethically appropriate relationship between human beings and the natural world.⁶⁵ Ecological ethics seeks ways to harmonize human and nonhuman nature, exploring how humans can meet their requirements for life and still live in harmony with their environment.⁶⁶ Both ecology and ecological ethics add to the value of ecofeminism, but it is *ethics which is at the heart of ecofeminism*, and will be elaborated below.

Ecological philosophers describe a moral way to govern human interactions with the environment that could eliminate the social harm that these interactions currently generate.⁶⁷ The need for such thinking was created because of the absence of an approach to the relationship between humans and nature that directly considered the ethical dimensions of the association.⁶⁸ Alyson C. Flournoy has described the field in this way:

⁶² Ellen O’Loughlin ‘Questioning Sour Grapes: Ecofeminism and the United Farm Workers Grape Boycott’ in *Ecofeminism: Women, Animals, Nature*, ed. Greta Claire Gaard (1993) at 149.

⁶³ Diamond (note 11) at 50.

⁶⁴ Judith Plant ‘Searching for Common Ground: Ecofeminism and Bioregionalism’, in *Reweaving the World: The Emergence of Ecofeminism*, eds. Irene Diamond and Gloria Femen Orenstein (1990) at 155.

⁶⁵ Curry (note 13) at 1.

⁶⁶ Diamond (note 11) at 50.

⁶⁷ Joseph DesJardins *Environmental Ethics: An Introduction to Environmental Philosophy* (1993) at 13.

⁶⁸ Kenneth M. Sayre ‘An Alternative View of Environmental Ethics’ (1991) 13 *Environmental Ethics* at 195-96.

Although ethics traditionally has been the branch of philosophy concerned with the criticism and proper ordering of values governing interactions among persons, the values that have fuelled our environmental crisis are norms not so much of personal interaction as of interactions between nature and human society generally. Because of this difference, a new branch of ethics has been initiated to oversee our dealings with the rest of nature.⁶⁹

The root of ecological ethics is a set of principals and justifications designed to distinguish 'good from bad human conduct insofar as it affects the environment'.⁷⁰ The identification of values is an integral part of the study of ethics and of ecological ethics is no different. The merits of the principals derived to advance these values require an analysis and justification of these ethics.⁷¹ When someone has reached an ethical position regarding a specific action, an analysis of his/her values, such as 'pleasure or protecting life', must be a significant part of the justification and merit of this particular action.⁷² Certainly, the heart of any inquiry into ethics must consider values. The study of ethical questions can focus on the ethics or values expressed through social institutions, like law, or on the ethics of diverse groups of people, or on the behaviour and ethics of individuals.⁷³

Ecological ethics is concerned with the values that underlie the definition of what is good and the justification for considering given conduct as good or bad. Therefore, the principals that distinguish good from bad in human conduct as it relates to the environment are also the concern of ecological ethics. A given ecological ethic can be tested against a particular decision or action to see if it serves the values of the ethic. Similarly, the coherence

⁶⁹ Alyson C. Flournoy 'In Search of an Environmental Ethic' 28 *Columbia. J. Envtl. L.* 63 at 72.

⁷⁰ Barbara MacKinnon *Ethics: Theory and Contemporary Issues* (1995) at 5.

⁷¹ DesJardins (note 67) at 5.

⁷² James Rachels 'Can Ethics Provide Answers?' in *Applied Ethics and Ethical Theory* 3ed. eds. David M. Rosenthal & Fadlou Shehadi (1988) at 18-20.

⁷³ Aldo Leopold *A Sand County Almanac: With Other Essays On Conservation From Round River* (1966) at 238-39

or logic of the ethic can be examined to determine if the outcome of the decision compromises these factors.⁷⁴

Ecology and the Law

In most legal systems today, Earth remains mere property, natural ‘resources’ to be exploited, bought, and sold. This means that environmentalists are frequently seen as ‘criminals who infringe upon the property rights of others’ instead of as activists fighting to uphold fundamental rights.⁷⁵ It also means that actions that damage the ecosystems and the natural processes on which all life depends, such as Earth’s climate, are poorly regulated.⁷⁶ This concept is elaborated in the following chapter. Some experts point to climate change as a dramatic symptom of the failure of government to regulate human behaviour.⁷⁷ Ecological ethics wishes to create laws in a manner that takes account of the fact that human welfare is directly dependent on the health of our planet and cannot be achieved at its expense.

The work of ecological ethics philosophers helps ecofeminists to understand the ethics embedded in our laws in several ways. Primarily, the work of these philosophers establishes important background by questioning the implications of applying established human-centred ethics to human relationships with the non-human world.⁷⁸ Also, alternative ethics are the subject of exploration and theorizing by these philosophers. The basis of these ethics is in finding alternative ways of, and justifications for, valuing the environment that may be currently woven into our laws, or at least be minimally compatible with them in their existing form. One benefit of this labour – identifying candidate values and building new

⁷⁴ Eugene Hargrove *Foundations of Environmental Ethics* 2ed (1989) at 68.

⁷⁵ Cormac Cullinan, ‘If Nature had Rights?’ *Orion Magazine* (January/February 2008). Available at <http://www.orionmagazine.org/index.php/articles/article/500> [accessed September 2009].

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ F. Herbert Bormann and Stephen R. Kellert *Ecology, Economics, Ethics: The Broken Circle* (1991) at 31.

theories – is instrumental in helping lawyers and legal scholars develop a vocabulary for a more complete discourse about the ethics and values of our laws.⁷⁹

Ecologists agree that reforming environmentalism – including stiff international laws against pollution – is necessary, at least in the immediate future. In the end however, mere reformism is incomplete and ‘will not be sufficient to prevent the destruction of the Earth’.⁸⁰ They argue for a revolution in humanity’s understanding of itself and its place within nature to bring about the dramatic changes in human behaviour that are necessary for continuing life on planet Earth. This view is consistent with those argued by ecofeminists.

Just as ecofeminist politics does not have a single lineage within feminism, ecological ethics and politics must also be understood within the context of various contemporary, sometimes competing, ecological movements. Individual groups within the ‘worldwide Green movement’ differ in the specific issues and strategies they pursue. Ethical discourses can vary within cultures and places and times.⁸¹ Irene Diamond offers the following example; Indian grass-roots movements protest the construction of massive dam projects, saying “no” to the development schemes of both the state and the World Bank, while movements in the industrialized North are saying no to the use of bovine growth hormones in the dairy industry and animal experimentation in the cosmetics and medical research industries.⁸² Yet, they both question modern science and the displacement of traditional healing and agricultural practices. This insistence on taking heed of marginalized knowledge and people is essential to the ecological understanding of humans and Earth.⁸³

⁷⁹ Flournoy (note 69) at 75.

⁸⁰ Michael E. Zimmerman ‘Deep Ecology and Ecofeminism: The Emerging Dialogue,’ in *Reweaving the World: The Emergence of Ecofeminism*, eds. Irene Diamond and Gloria Femen Orenstein (1990) at 143.

⁸¹ Mick Smith *An Ethics of Place: Radical Ecology, Postmodernity, and Social Theory* (2001) at 24.

⁸² Diamond (note 11) at 50.

⁸³ Ibid.

Ecofeminism

With a solid grasp of feminism and ecological ethics this dissertation now examines the theoretical underpinnings of ecofeminist theory. **Ecofeminism** is a field bridging ecological ethics and feminism that seeks to explore the conceptual connections between environmental degradation and sexist oppression.⁸⁴ Ecology is incomplete without feminism, because it does not recognise the necessity of ending the oppression of women; and feminism is disembodied without the ecological perspective, which ‘asserts the interdependence of living things’.⁸⁵

The primary insight of ecofeminism is that all matters of oppression are interconnected. In the ecofeminist vision, there is no such thing as a struggle for women’s rights separate from a struggle to repair earth. It grapples with questions relevant to law, politics, and academia. Some ecofeminists link man’s destructiveness to woman’s reputed capacity to heal in a way that assumes an essential connection between women and ‘the natural’. This dissertation is wary of arguments claiming that women are closer to nature and endorses a questioning of this presumption.⁸⁶

Ynesta King describes ecofeminism as a ‘holistic way of thinking’.⁸⁷ Ecofeminism is continuously connecting issues like violence against women, military violence, and degradation of the planet. ‘You can take any issue and see how these relationships work together’.⁸⁸ Everything on the feminist agenda--equal rights, quality of work, child care, reproductive choice, and domestic violence-- is interconnected, just as the feminist agenda is irrevocably connected to the environmental agenda.

⁸⁴ Warren (note 9) at 172.

⁸⁵ Ynesta King ‘Healing the Wounds: Feminism, Ecology, and Nature/Culture Dualism,’ in *Gender/Body/Knowledge: Feminist Reconstruction of Being and Knowing*, eds. in Alison Jaggar and Susan R. Bordo (1989) at 119.

⁸⁶ Diamond (note 11) at 29.

⁸⁷ King (note 85) at 121.

⁸⁸ Ibid at 122.

To create laws that incorporate ecofeminist theories, the essential traits of the movement and its subsequent call to action must be illustrated. I outline seven principles below.

First, ecofeminists come from an **eccocentric position** and believe that humans must understand and appreciate their finite dependence on Earth. For ecofeminists, part of the reason why the world is characterized by injustice, lack of care, and huge socioeconomic disparities between different people is that we treat the natural world with indifference and sometimes even contempt. We ‘stockpile weapons of mass destruction, consume energy resources as if they were infinite, dump waste into our waters, and slaughter animals for meat we really do not need to eat’. In doing so, we manifest our belief that it is our right to abuse and control nature to create a better world for ourselves.⁸⁹ But, as Ynesta King describes; we are suffering from a delusion in our feverish attempt to dominate nature. Nature is rebelling and the human species is setting its own annihilation in motion as it ‘detrees forests and extinguishes animal species’.⁹⁰

Because of the influence from ecology, ecofeminists view humans as one feature of a living Earth. The Earth’s biosphere is so interdependent that none of its components can survive, except within a cohesive ecosystem. This establishes the wellbeing of the Earth as a whole as supreme. Each member of the Earth community is derived from and cannot supersede the intertwined needs of the Earth as a whole.⁹¹ Therefore, in the ecofeminist view, the interest of any individual or human society must defer to the survival, health and prosperity of the whole community. Humans are not superior to Earth, just as men are not superior to women, just as the developed world is not superior to the Third World.

⁸⁹ Tong, Rosemarie and Williams, Nancy, ‘Feminist Ethics,’ *The Stanford Encyclopaedia of Philosophy* (Fall 2009). Available at <http://plato.stanford.edu/archives/fall2009/entries/feminism-ethics/> [accessed November 2009].

⁹⁰ Ibid.

⁹¹ Cullinan (note 75).

For many people, the survival of biodiversity and the ecological crisis is so abstract as to be virtually meaningless. Through activism ecofeminists hope to bring awareness and alter such apathetical viewpoints. With intense cultural and political work, creative as much as intellectual or legal, 'saving' our Earth can become part of our collective reality. While an eccocentric viewpoint is central to the overall goal of ecofeminists, some ecofeminists would argue that using an anthropocentric viewpoint to help people understand the crisis is acceptable. Some see caring for the Earth as the best way of securing the long-term interests of humans. To cease in this commitment, we would betray the Earth Community which sustains us as a species.⁹²

Second, Ecofeminists link **patriarchy** with destroying the environment and oppressing women and minorities. Combining the feminist and ecological perspectives, ecofeminism establishes the woman/nature connection: the domination, exploitation, and fear of both women and nature are characteristic of patriarchal thinking. In other words, pollution of the planet and oppression of women are caused by the same set of mores.⁹³

Ecofeminists use the feminists' view of patriarchy and its use of language and laws to control and dominate, as discussed earlier in this chapter. They link the domination of women by men, people of colour by white people, non-human nature by human beings, and so on, understanding that the connection between ecological sustainability and social justice is structural, not just a 'campaigning strategy based on coalitions of different groups'.⁹⁴ They seek to end any form of oppression.

Western patriarchal thinking is based on 'dualism', a world view that orders the world by dividing it into opposed pairs of concepts: Mind is split from body, spirit from matter,

⁹² Ibid.

⁹³ Kitty Mattes 'The Goddess Revived, The Rise of Ecofeminism' *The Amicus Journal* (Fall 1990). Available at <http://www.holysmoke.org/fem/fem0095.htm> [accessed September 2009].

⁹⁴ Zimmerman (note 47) at 128.

male from female, culture from nature.⁹⁵ One concept in each pair is deemed superior to the other. This ‘other’ is sometimes demonized and always discriminated against. Concepts on both sides are bound into complex relationships which become mutually reinforcing. The patriarchal belief system valorises ‘male’ qualities of reason and analysis and characterizes intuitive, emotional ‘female’ qualities as passive, weak and irrational, and therefore inferior.⁹⁶ Groups that are oppressed in our society are often associated with the body rather than the mind and may be portrayed as intuitive but overemotional.⁹⁷ The classic form of this paradigm creates a hierarchy of value as follows: (1) God, (2) Man, (3) Woman, (4) Children, (5) Animals, and (6) Nature.⁹⁸ Many historical aspects of racism, classism and imperialism operate through this same hierarchy.

In dualistic and hierarchical modes of thinking, the dominating party often sees the dominated party as lacking (or possessing) the allegedly superior (or inferior) qualities, and the dominated party often internalizes false stereotypes of itself as given by its oppressors.⁹⁹ More important, according to ecofeminist analyses, the valuing of attributes of one polarized side and the devaluing of those of the other, the idea that domination and oppression can be justified by appealing to attributes like masculinity, rationality, being civilized or developed, etc., is in itself problematic.

Ecofeminism demands a radical critique of the categories of ‘nature’ and ‘culture’ together with an affirmation of the ‘degraded partner in all the patriarchal dualities’. ‘Female’ qualities such as co-operation, nurturing, being supportive, nonviolent and sensual are especially appropriate for creating an environmentally aware society. At the same time, ecofeminists believe that traditional ‘male’ qualities like competitiveness, individuality,

⁹⁵ Institute of Women’s Studies, The University of Michigan *Ecofeminism Reader* (2009) at 9.

⁹⁶ Val Plumwood *Feminism and the Mastery of Nature* (1993) at iii.

⁹⁷ Richard T. Twine ‘Ecofeminisms in Process’ (2001) at 6. Available at <http://www.ecofem.org/journal> [accessed November 2009].

⁹⁸ ‘Ecofeminism Reader’ (note 95) at 9.

⁹⁹ Karen Green ‘Freud, Wollstonecraft and Ecofeminism’ (1994) 16 *Environmental Ethics* 117 at 121.

assertiveness, leadership, and intellectuality, are valuable in appropriate contexts and should be integrated with 'female' qualities in a balanced persona. The feminist critique of patriarchy is not just an intellectual attack on men. Most feminists, though not all, do not see men as 'the enemy'. Patriarchy is a particular way of thinking which can be used by any gender and ecofeminism can be a common ground for both sexes.¹⁰⁰ Ecofeminism represents a radical challenge for environmental thinking, politics, and traditional social ethical perspectives. It promises to link environmental questions with wider social problems concerning various kinds of discrimination and exploitation, and fundamental investigations of human psychology.¹⁰¹

Third, ecofeminism is **inclusive**. It is their goal to frame issues in ways that include women of different backgrounds and experience, to enable women to work together across race, class and national lines. Ecofeminists also speak for those whose needs might otherwise go unrepresented. In particular, they speak for non-human species, for nature, for future generations, and those humans sidelined from decision making. Environmental disputes often take the form of a struggle to recognize the needs of those in such categories. With no voice (and no votes) of their own, these groups are at the mercy of the interests of dominant groups who compete for the right to define their needs – a new highway, a prosperous chemical industry, or a clean environment.¹⁰²

Ecofeminism embraces the experience and perspectives of women dealing with ecological issues as a matter of survival, such as subsistence farmers in the Third World, but also Western women, who may or may not have encountered personal examples of environmental degradation. Ecofeminists demonstrate that environmental issues are not

¹⁰⁰ Brennan, Andrew, and Lo, Yeuk-Sze, 'Environmental Ethics' *The Stanford Encyclopaedia of Philosophy* (Winter 2009). Available at <http://plato.stanford.edu/archives/win2009/entries/ethics-environmental/> [accessed September 2009].

¹⁰¹ Ibid.

¹⁰² Kay Milton *Environmentalism – a View from Anthropology* (1993) at 12.

simply the survival of trees, but involve economics, politics, social justice, and law. They affect every person on the planet, some more than others. Both rich and poor countries are living beyond their 'ecological footprint', but the sustainability argument has been directed at the 'poorest and most powerless'.¹⁰³ For example, women, without the right to control their own bodies or livelihoods, are blamed for 'over-population'. Ecofeminists ask women in industrialised countries to educate themselves as to how the international economy and their lifestyle choices impacts their 'sisters' elsewhere, as well as upon themselves. 'Agendas for action' in the form of laws that responsibly incorporate ecological ethics, incorporate these marginalized 'others'.¹⁰⁴

As a result, many women have become, almost accidentally, environmental advocates. This is because women understand through their daily struggles the connections between deteriorating physical environments, economic inequity and racism. Women have a history of involvement in urban politics: campaigning against high rents, unsafe streets, bad housing conditions, lead in gasoline, toxic dumps in their neighbourhoods and many other demoralizing injustices. The agenda for change amongst these activists is not limited to 'altering these built environments'; however, social justice and equity are certainly central.¹⁰⁵ This labour not only makes such women indispensable in the global struggle to realise eccocentric values; it means that a vital basis for an essential eccocentric virtue ethic, not of laws nor of calculations, but of character, already exists.¹⁰⁶

Fourth, place value on the '**local.**' The environmental crisis is one of global scope, but that does not necessarily mean there is a global solution. Ecofeminists look at the work of community activists and grassroots movements which bring about local transformation and value the changes advocated by such groups. Ecofeminists value flexibility in making

¹⁰³ Ashworth (note 17) at 16.

¹⁰⁴ Ibid.

¹⁰⁵ Ashworth (note 17) at 81.

¹⁰⁶ Curry (note 13) at 99.

change. What might work to reduce emissions in one country could have the opposite effect in another. The ecofeminist goal is to work with the local population and decide, collectively, what the right solution is for that community. Especially in developing countries, where the effects between human behaviour and environmental degradation are more obvious, locals will have experiences and information that will be helpful and should be recognized as instrumental to the movement.

Through education and activism, ecofeminists see their ideas as spreading at the grassroots level. They urge men and women to become eco-citizens who then create ecological cities, and so on. An ecological city would be tailored to the needs of its citizens and the nuances of its environment. Such cities would be capable of sustaining life within their borders while not simultaneously eroding it from the outside (in rural areas or other parts of the world as is frequently the case today). In such a city the basic physical necessities; housing, food, health, clean air, security, income and education, would be provided, but based on ethical and sustainable methods.¹⁰⁷ As mentioned above, not only do ecofeminist principles incorporate land use planning concerns, but also draw attention to other critical aspects of urban life, as violence, personal safety, toxic waste, affordable housing and environmental health in the workplace and in the home. In this way ecofeminists tackle many elements of a society at a local level on a small scale.

Fifth, **incorporate ethics** into any discussion of people and the Earth. A society whose concern is to maintain the integrity or wholeness of the Earth must also refine its ideas about what is 'right' and 'wrong' - or correct and incorrect. It is more useful to condone or disapprove of human conduct by considering the extent to which an action increases or decreases the health of the entire community and the quality of the relationships between its members.

¹⁰⁷ Ashworth (note 17) at 82.

Ethics need not be from a ‘western’ or ‘eastern’ point of view. They need to be applicable to the community they concern and incorporate all members and diverse opinions of that group. As Aldo Leopold’s famous land ethic states, ‘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’.¹⁰⁸ From this perspective, individual and collective human rights must be contextualized within, and balanced against, the rights of the other members and communities of Earth.¹⁰⁹

Sixth, challenge the status quo, oppose personal and military violence.

Ecofeminists oppose unsustainable governmental policies, but express their opposition in non-violent ways. The existing industrial and agricultural production processes, are being challenged by the movement. The oil-intensive transport of goods, often over great distances, so that consumers can choose from a wider range of products, however similar, is one method ecofeminists oppose. They also forbear methods which involve the routine use of excessive packaging and waste, the pollution of surrounding environments and the workplace, and the routine use of toxic substances.¹¹⁰

Ecofeminist theory recognises the ‘linear expansion of market economies as fundamental to the ecological crises; and racist, classist, and sexist social institutions’. Depleting natural resources in a race to ‘develop’ a country is not a sustainable practice. They also recognise the devastating environmental consequences of state socialism, for example in Eastern Europe, the former Soviet Union and China. Ecofeminists develop a politics of opposition and resistance as well as a politics of reconstruction and hope. There are two fundamental questions feminists in industrialized countries who are concerned about ecological issues should ask themselves. (1) How do we stop our governments and

¹⁰⁸ Curt Meine *The essential Aldo Leopold: quotations and commentaries* (1990) at 170.

¹⁰⁹ Cullinan (note 75).

¹¹⁰ Ashworth (note 17) at 81.

corporations from continuing to harm people in developing countries, particularly women and children? (2) How can we change the way we relate with the natural world.

Women in developing countries offer developed countries trenchant critiques of First World models of development, science, and technology, driven by an exploitative economy that puts profit before human needs.¹¹¹ They are struggling not to be ‘decoupled’ from ecological practices, to use appropriate technology, and to draw on longstanding ethnocentric knowledge. Some grassroots environmentalists in North America and Western Europe have a similar approach.¹¹² This agenda also means questioning what constitutes valid knowledge and who can claim authority and expertise. The claim of valid authority and expertise is questioned by the ecofeminist agenda, as well as what now constitutes usable knowledge. It requires research that is of interest and value to activists and policy makers, rather than abstract academic feminism. It requires context and organizations wherein activists, policy makers and researchers can develop flourishing, working relationships.¹¹³

Ecofeminists do not flinch from naming and resisting abuses of power, but unlike more traditional resistance movements, their strategy of change generally does not insist on heightening existing conflicts. Ecofeminist practices creatively resist institutionalized authority and its tendencies toward violence, while envisioning more connected, fluid, and embodied modes of being. Ecofeminists claim that diversity is a source of strength and unity. Taking a cue from the diversity that sustains healthy ecosystems, they celebrate the experience of being intertwined, to experience the common bonds that sustain life. Through their insistence on calling attention to the multitude of connections between a fertile Earth

¹¹¹ Diamond (note 11) at 81.

¹¹² Ibid.

¹¹³ Ashworth (note 17) at 82.

and the well-being of its inhabitants, ecofeminists point to richer, more inclusive versions of feminism and ecology.¹¹⁴

Seventh, Ecofeminists demonstrate the way **gender and other forms of oppression**, often unconsciously, is deeply implicated in the ecological crisis, not only at the international level of ecological devastation but also in the ‘minute practices and assumptions of daily life’.¹¹⁵ In other words, since the domination of nature originated in society it therefore must be resolved in society or by the destruction of society. As Ellen O’Loughlin explains, because most women ‘experience [oppression] in more than one way (that is, through the dynamics of racism, classism, heterosexism, and ageism, as well as sexism, ecofeminism, in order to fight the oppression of women and nature, must look at more than just the ways in which sexism is related to naturism’.¹¹⁶

Under ecofeminism, all forms of oppression intersect, illuminating that the oppression of nature and of women are related.¹¹⁷ This leads to a ‘multi-layered analysis of environmental exploitation in the context of many kinds of discrimination’.¹¹⁸ The benefit of ecofeminism is not only looking at gender, but also its link with other forms of oppression. Ecofeminist legal methods have the benefit from incorporating and learning from the prior legal battles of those who came first. Because traditional legal channels have proved to be limited in their dealing with these forms of oppression; ecofeminism uses feminist and /or creative legal methods to advocate for environmental justice.

An ‘ecofeminist issue’ is any issue that contributes in some way to understanding the oppression of women, nature, animals, or minorities. Equal rights, comparable pay for comparable work, and food production are ecofeminist issues wherever and whenever an

¹¹⁴ Diamond (note 11) at 40.

¹¹⁵ Curry (note 13) at 118.

¹¹⁶ O’Loughlin (note 62) at 146.

¹¹⁷ Maria Mies and Vandana Shiva *Ecofeminism* (1993) at 14.

¹¹⁸ Ibid.

understanding of them contributes to an understanding or lessening of the continued exploitation of marginalized groups. Carrying water and searching for firewood are ecofeminist issues wherever and whenever women's primary responsibility for these tasks contributes to their lack of participation in decision-making, income production, or high status positions engaged in by men.¹¹⁹ What counts as an ecofeminist issue therefore, depends largely on context.

Environmental degradation and exploitation are ecofeminist issues because an understanding of them contributes to an understanding of the oppression of others. In India, for example, both deforestation and reforestation through the 'introduction of eucalyptus intended for commercial production' are ecofeminist issues because the loss of indigenous forests and multiple species of trees has 'drastically affected rural India women's ability to maintain subsistence household'. Indigenous forests provide a variety of uses for 'food, fuel, fodder, household utensils, dyes, medicines, and income-generating uses'.¹²⁰ A look at the global impact of environmental degradation on women's lives, on those in poor urban and rural areas, and on those in the developing world suggests important respects in which environmental degradation is an ecofeminist issue.

To summarise, Ecofeminism simultaneously celebrates interconnectedness and diversity. Life is a web, not a hierarchy; within it diversity is essential for both healthy ecosystems and healthy societies. We are all different, but no one's difference is more important than another's. Since our very differences are valuable, all forms of domination are unhealthy. On a political level this stand can be linked to the recognition of the intrinsic worth of nonhuman life (hence animal rights), of indigenous peoples (cultural survival), and of the integrity of minority cultures (as opposed to assimilation).

¹¹⁹ Warren (note 9) at 173.

¹²⁰ Ibid.

Ecofeminists seek to establish both a long term plan and continuing to progress in small victories through many local prefects. Given the contradiction between a world without environmental destruction or violence, widespread success may appear impossible, yet many women tackle these issues and make appropriate changes. Women's networks, at every level, connect policy makers, activists and researchers to positions on environmental health, development, and anti-militarism. Certainly, these issues require expansion and strengthening. As Asoka Bandarage points out, 'solidarity between women is tenuous' and divisions of race, class, nationality and ethnicity tear at the entity that brings women together.¹²¹ Both rich and poor countries would profit from a greater dialogue between them. However, as Chandra Mohanty explains, 'this needs to move from a politics of solidarity – implying support for others in struggle – to a politics of engagement, where we are in struggle together'.¹²²

Ecofeminism v. Feminism

The final part of this chapter outlines the differences between both ecofeminism and feminism and ecofeminism and Earth Jurisprudence. While the two share similarities with ecofeminism, it is important to distinguish ecofeminism as its own separate and necessary entity. Mainly, neither is as flexible and all-encompassing to solve the ecological crisis as well as ecofeminism does.

To clarify the distinction, I outline the three areas of feminism discussed earlier in the chapter, and why none is able to confront the ecological crisis as effectively as ecofeminism.

The primary aims of ecofeminism are not the same as those typically associated with **Traditional/Liberal feminism**. Ecofeminists do not seek equality with men as such, but aim for liberation of women *as* women. For example, women are now looking beyond the goal of

¹²¹ Diamond (note 11) at 48.

¹²² Ashworth (note 17) at 82.

integrating themselves into the work force, and are instead questioning the nature of work and the structure of the workplace itself. Day-care is no longer the more appealing alternative to mothering, as women and men are revaluing child care, and questioning the role the state plays in it.¹²³ Ynesta King argues that ‘liberal feminism, with its individualist, rationalist, utilitarian bias’, in the least able to appropriately address environmental justice, because it is by and large a ‘white middle-class movement, concerned with the extension of male power and privilege to ‘women like themselves’, rather than women as a whole.¹²⁴ To the extent that they address ecological concerns, liberal feminists will be ‘environmentalists’¹²⁵ rather than ecologists, ‘basing any claims to moral consideration for nonhumans either on the alleged rights or interest of humans, or on the consequences of such consideration for human well-being’.¹²⁶ Meaning that, these traditional feminists would solve ecological problems from an anthropocentric view. Some ecofeminists contend that liberal feminism leads women into absurdly ‘unsisterly’ positions.¹²⁷ With regard to a view of nature and women’s connectedness to it, liberal feminism’s position involves the ‘rationalization and ultimately, the domination of nature.’¹²⁸

Ecofeminism has been most often associated with **Radical/Cultural feminism**, though recently a substantial critique of it has emerged from within ecofeminism. There is concern that the wide scope of beliefs and practices that comprise the ‘feminist spiritual movement’ tends to mystify women’s experience and pays little attention to the ‘historical and material features of women’s oppression’. Radical feminism has a propensity to ‘ignore race and class issues and fails to see the extent to which women’s oppression is grounded in

¹²³ Diamond (note 11) at 48.

¹²⁴ King (note 7) at 150.

¹²⁵ Warren (note 21) at 5.

¹²⁶ Hinsdale (note 27) at 199.

¹²⁷ Ibid. For example, supporting the draft and maintaining women’s contract credibility in surrogate motherhood cases (which denies the natural mother right to her child).

¹²⁸ Valerie Bryson *Feminist Political Theory* (1992) at 107.

concrete diverse social structures'.¹²⁹ One of the strengths of ecofeminist politics today is that it has inherited the important political history of radical feminisms' peace politics.¹³⁰

Ecofeminists reject violence as a method for spreading their philosophy.

Socialist feminism is problematic for ecofeminists because while 'socialist feminists have articulated a strong economic and class analysis, they have not sufficiently addressed the domination of nature.' Socialist feminists have addressed domination between persons, but they have not seriously attended to the domination of nonhuman nature.¹³¹ They have failed to realise that there is a 'female political imagination which manifests itself in the political practice of a feminism of difference'. They 'forget that no revolution in human history has succeeded without a strong cultural foundation and a utopian vision emerging from the life experience of the revolutionary subjects'.¹³²

As elaborated above, feminist theory is far from perfect. The foremost complaint of most scholars is that feminists view gender discrimination as superior to other forms of discrimination. In addition, feminist scholarship has also been criticized for overlooking dimensions of race and class.¹³³ On the political level, 'feminist campaigns, mainly headed by white women have historically ignored the differing political priorities of women of colour or have wrongly assumed that a difference in priorities did not exist'.¹³⁴ Such an approach is a turnoff for many interested primarily in justice and some approach feminism and feminist campaigns with 'understandable scepticism'.¹³⁵ Thus, it is reasonable that an attempt to

¹²⁹ Ibid at 108-9.

¹³⁰ Diamond (note 11) at 48.

¹³¹ King (note 7) at 151.

¹³² Ibid at 154.

¹³³ Robert R.M. Verchick 'In a Greener Voice: Feminist Theory and Environmental Justice' (1996)19 *Harvard Women's L. J.* 23 at 37.

¹³⁴ Angela P. Harris 'Race and Essentialism in Feminist Theory' (1990) 42 *Stanford L Rev.* 581 at 586-87. Harris explains, "In the first wave of the feminist movement, black women's realization that the white leaders of the suffrage movement intended to take neither issues of racial oppression nor black women themselves seriously was instrumental in destroying or preventing political alliances between black and white women within the movement".

¹³⁵ Ibid at 586-88.

combine feminist theory and environmental justice would be questioned, even by ardent supporters.

However, ecofeminists and some feminists eloquently argue for an enlightened, ‘multi-vocal’ feminism that embraces the experiences of women who have been traditionally left out of feminist discourse, like women of colour, poor women, and lesbians.¹³⁶ The feminist methods¹³⁷ of asking the woman question, practical reasoning, and consciousness raising are transferable to other forms of oppression or multiple oppressions.¹³⁸

In addition, the feminist movement traditionally postulates that a women’s freedom is dependant primarily upon her establishing control over her body and sexuality. Ecofeminism questions this belief, concluding that certain contradictions and dangers are inherent in this position. Our dependence on a living Earth is something to celebrate rather than fear. Ecofeminist doctrine illustrates this stance through their insistence on our connection to all forms of life, their refusal to accept the ‘dominant culture’s limited approach to knowing’ and the struggle to both empower women and to save the planet.¹³⁹

Ecofeminism is the missing link feminism needs to apply its theories to environmental protection and rights. To solve the ecological crisis, the movement must be inclusive of those typically sidelined from lawmaking. At its core, ecofeminism acknowledges the presence of shared oppression. It is the oppression of women and nature, but argues that environmental concerns are of global scope.¹⁴⁰ Neither form of feminism is inclusive enough to include the diverse perspectives required to formulate lasting environmental change. Ecofeminists argue for something different. They are about the ‘organic forging of a genuinely anti-dualistic’ theory.¹⁴¹ Ecofeminism has transformed itself beyond the current debate over the other

¹³⁶ Ibid at 586.

¹³⁷ As outlined earlier in this Chapter, under a sub-heading of the same name.

¹³⁸ Harris (note 134) at 587.

¹³⁹ Diamond (note 11) at x.

¹⁴⁰ Verchick (note 133) at 27.

¹⁴¹ King (note 7) at 157.

leading versions of feminism towards a responsible ‘ecological perspective central to feminist theory and practice’.¹⁴²

Ecofeminism v. Earth Jurisprudence

Similarly with feminism, ecofeminism is often linked with Earth jurisprudence. Earth jurisprudence seeks to create value systems for governments and legal systems which support, rather than undermine the ‘integrity and health of the Earth’.¹⁴³ Similarly with ecofeminism, it sees humans as dependent on the Earth, integrated as a part within the whole. Earth jurisprudence situates human needs – in the broadest sense as including physical, mental and cultural well being – within a wider ecological whole.¹⁴⁴ Because of this thinking, Earth jurisprudence also seeks to extend rights to non-humans, mainly nature and animals.¹⁴⁵ They argue that legal questions can no longer be restricted to how to treat other human beings, or even animals, but must embrace the entire natural world.¹⁴⁶ While sharing some similar tenets, ecofeminism and Earth jurisprudence are separate and this dissertation argues that ecofeminism is the better situated to tackle the ecological crisis.

Ecofeminists would not disagree with Earth jurisprudence ideologies. In fact, many ecofeminists see nature as a ‘marginalized other’ in desperate need of representation. They would however see the theory as lacking because it only addresses one of those others, and ignores the human element. It does not mention patriarchy, nor sexism, racism, classism, or any of the other rifts between human societies that leads to the destruction of the Earth.

While ecofeminists would agree that granting rights to nature is a step to ending the ecological crisis, it will not necessarily be the right first step for many communities. Because

¹⁴² Warren (note 21) 117.

¹⁴³ See generally Cormac Cullinan *Wild Law: A Manifesto for Earth Justice* (2003).

¹⁴⁴ Ben Ponten, ‘Wild Law: sustainable development and beyond?’ (2007) 19 *Environmental Law and Management* 59 at 59.

¹⁴⁵ Cullinan (note 5) at 12.

¹⁴⁶ Curry (note 13) at back cover.

humans created the crisis through their actions, ecofeminists argue that logically, the healing must come from human action as well.¹⁴⁷

Taking ecofeminism into mainstream political processes requires a commitment to the agenda of making known and heard the ‘others’ – be they women, minorities, or even nature.¹⁴⁸ Ecofeminists can learn from the legal strategies of those who argue for Earth jurisprudence. The strategy is to change participation, priorities, procedures, processes, policies, and representation in the interests of those disadvantaged by society.¹⁴⁹

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¹⁴⁷ Verchick (note 133) at 63.

¹⁴⁸ Zimmerman (note 47) at 128.

¹⁴⁹ Cormac Cullinan *Wild Law: A Manifesto for Earth Justice* (2003) at 34.

Chapter III

Limitations of Traditional Approach to Environmental Regulation

Environmental regulation started approximately some forty plus years ago as people realised that the existing patterns of economic activity, law and policy was creating havoc on Earth.¹⁵⁰ In particular, human health and the environment were suffering unprecedented and unacceptable degradation. The legal and policy response to this awakening was a dramatic and prolonged one: the enactment and implementation of environmental law in statutes and jurisdictions all across the globe.¹⁵¹

Environmental law as a field is dynamic and alive and very much in the process of development. Almost every aspect of life is touched by it. It has its hands in many jurisdictions and spreads across many fields of law. Environmental law is an amalgam of state and federal statutes, regulations, and common-law principles. Other areas of law, criminal, contracts, tax, and common have been built up at the city, state and national levels over the centuries and environmental regulation is a new field in comparison.¹⁵² There is no large pile of jurisprudence yet; lawyers and activists have a limited framework and few previous precedents from which to retrieve information and resources.

In a society structured and determined largely through legal discourse, environmental law and policy should be viewed as a necessary and important means of addressing the state of the ecological crisis being faced by the planet's inhabitants. Unfortunately, environmental injustices are occurring at rapid rates, all over the world. This is due, in part, to the major flaws in environmental regulation.

Chapter III builds on Chapter II by critiquing five limitations of environmental regulation. The limitations mostly stem from the fact that environmental regulation was

¹⁵⁰ Susan Paulson and Lisa L. Gezon *Political Ecology across Spaces, Scales, and Social Groups* (2005) at 114.

¹⁵¹ *Ibid* at 16.

¹⁵² 'Special Report – Getting Warmer' (5 December 2009) *The Economist* at 4.

developed in a short period of time and was not created from the ground up, as perhaps it should have been, but on the backs of existing law. It was not developed from an organic mutation of the common law system and thus is vulnerable to ‘marginalization as support for environmentalism ebbs and flows’.¹⁵³ The rapid rise and great success of Environmental law is a ‘mixed blessing,’ because it postponed consideration of the hard questions about the ‘content and legitimacy’ of the field and environmental protection generally.¹⁵⁴ The five limitations discussed below are only a sampling of those found in environmental regulation, but help create a base understanding which will be used to demonstrate the value ecofeminism can bring to environmental regulation.¹⁵⁵ In Chapter IV I will re-examine these initiations and offer ways to rethink about them from an ecofeminist perspective.

a. Land Ownership and Environmental Regulation

As one of the foundations for environmental law; one way in which humanity expresses its conception of the relationship between itself and the rest of nature is through property law. Under Roman law, property was defined as a persons right to ‘use and abuse a thing’, within the limits of the law.¹⁵⁶ In regards to land ownership, such a premise does not accurately reflect our dependence on a healthy Earth. Property rights and environmental rights are typically viewed as competing with each other. Modern environmental law as it first emerged focused on abating what are called ‘noxious uses’ or ‘nuisances’. The term stems from notions of uses of private property that diminish the amenity values enjoyed by owners of adjacent properties.¹⁵⁷ Plainly anthropocentric at their core (and thus partially responsible for hindering the spread of ideas which recognize the intrinsic value of nature),

¹⁵³ Richard J. Lazarus ‘Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law’ (1995) 83 *Georgetown. L.J.* 2407 at 2413 (noting the instability of Environmental Law).

¹⁵⁴ Tarlock (note 46) at 216.

¹⁵⁵ For general reading on the issue see: Tarlock (note 46).

¹⁵⁶ Micheline R. Ishay *The Human Rights Reader: Major Political Essays, Speeches and Documents from Ancient Times to the Present* 2ed (2007) at 209.

¹⁵⁷ Zygmunt J.B. Plater et al *Environmental Law and Policy: Nature, Law, and Society* Vol. 2 (1994) at 97.

these laws are not concerned with the damage done by particular human uses to the environment *per se*; rather, suits filed under nuisance law seek to enjoin the perpetrator from interfering with the *human* use and enjoyment of neighbouring lands.

Environmental law has evolved since its inception. Under the teachings of Jeremy Bentham, positivism is a theory which claims that the law is in constant need of reform and thus assumes that the law is changeable.¹⁵⁸ Positivism is the most logical basis for environmental law because it is a discipline that is largely the product of ‘legislative acts, administrative regulations, and judicial decisions interpreting the legislation’.¹⁵⁹ Adaptation to new knowledge and experimentation should be the hallmark of environmental law.¹⁶⁰

Even as environmental law changes with time, it still has its roots in property law. If as its foundation, environmental laws are based on property law, from the viewpoint that nature is something to be owned and exploited, then it's time to rethink this outdated premise. Under our current legal system, many environmental injustices cannot be corrected through the use of environmental laws. Because of flaws in our legal system, legislative and administrative change is necessary to ensure effective remedies for low-income and minority communities who are faced with an unfair and potentially harmful share of environmental hazards.¹⁶¹ By fully developing the scope of current legal remedies, advocating for legislative and administrative reform, and encouraging community activism for environmental justice in both impacted and non-impacted communities, ecofeminism can influence environmental justice advocates and activists to be the force for necessary changes.

¹⁵⁸ Neil MacCormick *Legal Reasoning and Legal Theory* (1978) at 229-33.

¹⁵⁹ George P. Fletcher *Basic Concepts of Legal Thought* (1996) at 33 (stating that ‘the simplest working definition of positivism is this: Positivism holds that all law is enacted law’).

¹⁶⁰ Tarlock (note 46) at 232.

¹⁶¹ Alma Lowry ‘Achieving Justice; The Case for Reform’ 20 *Thomas M. Cooley L. Rev.* 335 at 358.

b. The Lack of an Ethical Foundation for Environmental Regulation

Scholars who compare the values found in common-law and non-environmental statutes find that they are substantially similar to the environmental statutes.¹⁶² Meaning that, environmental statutes tend to reflect human concerns that predate environmental awareness.¹⁶³ These laws represent an anthropocentric viewpoint and are simply extensions of the structure of tort, property and criminal law. The ethics, objectives, processes, and liability, reflected in current laws are designed to protect person and property, not necessarily the environment. They do not embody a special valuing of the environment, and our reliance on it for our existence. For these reasons it is important to re-examine and re-think the foundation of environmental regulation and the ethics behind them. For some jurisdictions, this may mean creating laws which place inherent value on the environment, for other it may be deciding on a new Constitution which prioritises nature.

Professor DesJardins writes that our culture tends to treat environmental issues as simply scientific, technological, or political problems, instead of as a problem which effects our daily lives and raises fundamental questions about what we as human beings value, about our place in nature, and about the kind of world in which we might flourish.¹⁶⁴ Similarly, Alyson C. Flournoy writes, environmental law often focuses on the scientific, technological, political or legal dimensions rather than the ethical content of the law.¹⁶⁵

Both the language of the law and the substance of public debate over environmental law reveal scant attention to its ethical content. Alyson C. Flournoy writes, ‘Our environmental laws remain politically controversial and subject to continuous debate over directions for reform. Yet there is only superficial discourse about the complex mix of values

¹⁶² MacKinnon (note 70) at 9.

¹⁶³ Flournoy writes, ‘My contention is that it is almost impossible to know whether or not these laws accurately reflect our values as a democratic society. Until we know more precisely what values the laws currently reflect, we are only guessing at what non-technical reforms are needed’ at 66.

¹⁶⁴ DesJardins (note 67) at vii-viii.

¹⁶⁵ Alyson C. Flournoy ‘In Search of an Environmental Ethic’ 28 *Columbia. J. Env'tl. L.* 63 at 113.

at stake. This limited discourse does not reflect the richness of the possibilities in this area'.¹⁶⁶

The embryonic nature of the ethics of environmental law is one reason why so little attention has been paid to the ethical content of environmental law. Articulating an ethic in this field remains challenging. It involves - as environmental protection decisions do - 'complex technical decisions, significant uncertainty, a focus on the impacts of human actions on non-humans who may or may not be valued, and issues that may have long-term effects that extend far beyond a human lifetime'.¹⁶⁷ Environmental issues are so complex that determining the values enhanced by any given law or regulation is very difficult.¹⁶⁸ Thus, environmental decisions are unavoidably tainted by uncertainty. This uncertainty necessarily complicates decision making and can also enable advocates to 'shift the debate away from values'. The discussion on many environmental issues has become polarised, as many hear only the media reports, lack access to the facts, and must rely on others' 'judgement and characterizations'.¹⁶⁹

Serious debate about environmental issues by the general public is hampered by the deep uncertainty created by all these factors: complexity, uncertainty, and polarisation. Treating environmental problems as technical problems, rather than questions of value, exacerbates the public's tendency to frequently retreat from confronting these issues.¹⁷⁰ Thus, experts, who make value choices for us all, receive 'excessive deference'.¹⁷¹ Also, when we focus 'excessively on a technical solution without having first correctly identified the values at stake in a given situation', the problems experienced by the majority may not have even been correctly diagnosed. If the problem is mis-defined we will more likely choose an

¹⁶⁶ Holly Doremus 'The Rhetoric and Reality of Nature Protection: Toward a New Discourse' (200) 57 *Wash. & Lee L. Rev.* 11 at 54-61.

¹⁶⁷ DesJardins (note 67) at 4-5.

¹⁶⁸ Jerry L. Anderson, 'The Environmental Revolution at Twenty-Five' (1995) 26 *Rutgers L. J.* 395 at 411-16.

¹⁶⁹ *Ibid.*

¹⁷⁰ DesJardins (note 67) at vii-viii.

¹⁷¹ DesJardins (note 67) at 4-5.

inappropriate solution.¹⁷² So, better value identification can improve and guide the technical choices by insuring that the experts are given the correct questions to answer. A clearer sense of our values and less focus on the technical could help to lessen these problems and promote democracy.

C. Decision Making and Environmental Regulation – Vesting Rights in the Wrong Party

Next, this dissertation highlights how environmental regulation is often ill-equipped to provide adequate protection for certain vulnerable populations. Communities deemed particularly vulnerable are those where environmental degradation is occurring, but the voices of those affected are not heard. Factors in a community that lead to particular vulnerability may be the age of the population, access to health care, or existing medical status. For example, increases in particulate levels would be more problematic in a community with a high rate of asthma, than a community with a lower incidence of the disease.¹⁷³ Similarly, elderly communities or those with young children may be more seriously hampered by overall pollution than other communities.¹⁷⁴

Although there are certainly many problems and gaps in the laws that contribute to the difficulty of correcting environmental injustices through the courts, one fundamental flaw is at the heart of this problem; environmental laws vest rights in the wrong party. Vesting rights in the wrong party means that corporations have the right to pollute, within certain specified limitations, while communities do not have a right to clean and safe environments. In other words, in many jurisdictions, where there is uncertainty regarding the effects of environmental pollutants, the benefit of the doubt goes to the polluting facility or industry.¹⁷⁵

¹⁷² Ibid at 5.

¹⁷³ Lowry (note 161) at 351.

¹⁷⁴ Ibid at 54.

¹⁷⁵ Doremus (note 166) at 70-72.

To disrupt a company's right to pollute, the government or the community must demonstrate that particular levels or types of pollution are unsafe in general or in light of particular circumstances unique to the facility or the affected community.¹⁷⁶ The company does not need to demonstrate that particular levels or types of pollution are safe, either in general or in light of the particular characteristics of the affected community, to be permitted to pollute and to potentially disrupt communities.¹⁷⁷

A system that vests rights in corporations over human beings and in property and profit interests over basic health and welfare is inherently wrong. In environmental justice cases, the system places the burden of proving harm on the affected community, the party with the least access to information and technical expertise, rather than on the polluting industry.¹⁷⁸ This allocation of rights and burden of proof must be changed. Environmental laws must be able to reach the heart of the environmental injustice claim, which is that certain communities are being overburdened with and harmed by exposure to an unfairly and unhealthy high level of pollution sources.

d. Issues of Scale – International Environmental Regulations v. Specialized Solutions

Because environmental degradation can occur on a global as well as local scale, and have immediate and long-term consequences, present environmental regulations must wrestle with issues of scale and prioritization. Just as there is no 'one size fits all' solution to other areas of legal justice, there is no standard solution for environmental degradation. To find specific solutions lawmakers must engage in cooperation. Public participation in environmental regulation must be valued. In addition, while some areas of environmental regulation benefit from a global perspective, many others do not.

¹⁷⁶ Ibid.

¹⁷⁷ Daniel A. Farber *Eco-Pragmatism: Making Sensible Environmental Decisions In An Uncertain World* (1999) at 1.

¹⁷⁸ Ibid.

The subject matter of international environmental law ‘proliferated and changed’ from traditional concerns such as ocean boundaries, fishing rights, and protection of species to ‘worldwide efforts to control pollution in all environmental media, conserve natural habitats, protect the global commons, and preserve resources’. International conventions and legislation on almost all and any environmental concern have dramatically increased since the first such convention on sustainable development, ‘the Earth Summit’ in Rio in 1992. While an international focus on the environment is certainly positive, the issue has become political and the rhetoric involved has been diluted. Alyson C. Flourney writes that presently, the relative significance of ‘environment’ is now on par with ‘apple pie’ or ‘motherhood.’¹⁷⁹ No one can say that they don't support protecting the environment, and it may in fact be the case that everyone is in favour of it; people simply disagree on how much to do so, or at what cost to other values.¹⁸⁰

The term ‘caring about the environment’ has lost meaning, making discussions surrounding environmental degradation more difficult.¹⁸¹ Unlike an issue where a given person’s position is generally clear, like abortion, the discussion on ‘valuing the environment’ is obscured by a lack of vocabulary and requires a subtler dialogue about values.

Ecofeminists view international environmental law as part of the larger patriarchal system dominating the Western world. International environmental law, therefore, might favour the Western, capitalistic system which favours corporations and white upper-class males. For these reasons, those architects of the purpose and objectives of environmental law could greatly benefit from an ecofeminist perspective. In their article Joyner and Little argue that there are two core questions at the heart of the combined plights of women and the environment: ‘How might international law be used to induce state governments and

¹⁷⁹ Doremus (note 166) at 70-72.

¹⁸⁰ Farber (note 177) at 114-116.

¹⁸¹ Farber (note 177) at 138.

transnational enterprises to refrain from actions that adversely impact upon both women and the natural environment? In the same vein, what can be done to persuade male-controlled governments that the quality of the natural environment is closely connected to the quality of life for women in society?’¹⁸²

Ecofeminists claim that societies have much to learn from each other. A framework that fails to recognize the cultural and moral complexities of other societies and their environmental regulations is doing itself a disservice.¹⁸³ At the same time, if we are to listen attentively to the multifarious voices of modern societies, then we have to recognize that they are not always equal. The residents of Harlem and the corporate executives motivated by economic growth occupy very different places within the populace. Ecofeminists realize that what may work for Ecuador, may not be the solution required in another part of the world. Different groups may need to express their relationship with the environment in different ways, and this is encouraged, as long as it is done in an ecologically ethical manner. Such incongruity may be taken as primitive or uncertainty. In reality, ecofeminists celebrate difference and are wise in their rejection of a ‘one size fits all’ environmental policy.

e. Issues of Process and Environmental Regulation – A Need to Increase Public Participation

The final limitation discussed in this Chapter is a need to increase public participation in environmental regulation. Public participation is especially important in environmental regulation because by the time a plaintiff brings a case to court, the damage may already be irreversible. Additionally, to make a viable claim under environmental laws requires a high burden of proof. A plaintiff must show non-compliance with the emission levels prescribed in a statute, regulation, or permit, or a plaintiff must show serious procedural flaws in the

¹⁸² Christopher C. Joyner and George E. Little ‘It's not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law’ (1996) 14 *Boston University Int'l L.J.* 223 at 250.

¹⁸³ Smith (note 81) at 109.

issuance of a challenged permit. Because procedural flaws may be corrected without ‘significantly changing permitted emission levels or the resulting impact on the host communities’, such victories sometimes do little more than delay construction of a polluting facility.¹⁸⁴ Therefore, a facility's compliance with federal and state environmental laws may not mean that the impacted community will be safe from harm.¹⁸⁵

Communities need to have a meaningful role in permitting and other up-front environmental decision-making. Under most environmental laws, community participation is provided only after basic decisions have been made. The public is invited to comment only after ‘an agency has invested considerable time and effort into creating draft permits, developing zoning plans, or evaluating and reaching tentative decisions about the legality and safety of a facility's initial proposal’.¹⁸⁶ As a result, many environmental regulatory agencies fall into a ‘decide-announce-defend’ strategy.¹⁸⁷ Therefore, regulatory agencies are often already invested in the status quo of an existing permit and may feel public comments or concerns are an attack on their competence.¹⁸⁸ The permit applicant or developer may believe that any changes to the permit or the development plan are ‘concessions to the community’, even though the plan is still subject to revision and the developer has no right to adopt his tentative version of his permit or development plan.

Also, community groups are disadvantaged by a lack of technical knowledge, leadership, and financial resources.¹⁸⁹ This may be particularly true for low-income communities and communities of colour.¹⁹⁰ The public-participation provisions in most environmental laws do not provide or guarantee the additional resources necessary to help environmental justice communities effectively evaluate and critique draft permits or other

¹⁸⁴ Lowry (note 161) at 340.

¹⁸⁵ Lazarus (note 153) at 2414.

¹⁸⁶ Lowry (note 161) at 353.

¹⁸⁷ Swanston (note 270) at 589.

¹⁸⁸ *Ibid.*

¹⁸⁹ Lowry (note 161) at 355.

¹⁹⁰ Harris (note 134) at 587.

environmental proposals.¹⁹¹ Finally, public comments are often limited to one round of comment and response, making meaningful dialogue about proposed environmental action impossible.¹⁹²

Without an opportunity for the community to rebut or raise questions about agency responses to their initial comments within an administrative process, the only remedy for community groups concerned about the adequacy of an agency's response to their comments is an appeal.¹⁹³ This process is too cumbersome and adversarial to provide a truly meaningful method of incorporating community concerns into environmental decision making.

In conclusion, there are some limitations to the traditional approach to environmental regulation. The conditions of the environment are not only created by the polluters, but also by the architects of policy, science, and health care. People and businesses will change when governments give them clear, consistent signals.¹⁹⁴ As it is aligned with contemporary legal theory, ecofeminism should be taken seriously by decision-makers. There is value in rethinking about how and why these flaws exist and how to change them or how people are already going about solving them in an ethical manor. Land ownership, ethics, vulnerable communities, local solutions and public participation all deserve a place of importance in environmental regulation. Environmental problems are not for those in the 'global south', or women, or farmers, but for all.¹⁹⁵

¹⁹¹ Lazarus (note 153) at 2414.

¹⁹² Harris (note 134) at 587.

¹⁹³ Robyn Eckersley *Environmentalism and Political Theory: Toward an Ecocentric Approach* (1992) at 57-59.

¹⁹⁴ The Economist (note 152) at 4.

¹⁹⁵ Plant (note 64) at 185.

Chapter IV

Chapter IV assesses the value ecofeminism can bring to environmental regulation. Ecofeminism's worth is in its ability to unite a diverse array of opinions and experiences into one narrative. This Chapter uses the flaws outlined in the previous chapter to demonstrate ecofeminism's ability to rethink environmental regulation and provides an example of how it has or has the potential to, create progressive change. The examples I use are from a variety of jurisdictions and areas of environmental law. The purpose of this diversity is to demonstrate the vastness of the applicability of ecofeminist theory. There are many parallels between environmental regulation and ecofeminism and while the ones below are certainly not exhaustive, they are instructive.

a. Rethinking Land Ownership - Potential Legal Strategies and the Public Trust Doctrine

Part (a) of Chapter III discussed how under current environmental regulation, many environmental injustices cannot be corrected through the use of current environmental laws.¹⁹⁶ Environmental regulation, with its foundation in property law, would benefit from an ecofeminist approach to land ownership. In addition, those who advocate for environmental justice may find that the creative legal methods advocated in an ecofeminist approach would be useful in helping them achieve their goal.

Ecofeminist principles encourage an ecocentric approach to environmental regulation and support those who defend their environment. Because of property law, many advocates for environmental justice have been unsuccessful in their pursuits. For this reason, environmental regulation would benefit from a different approach to ownership. Ecofeminists do not necessarily advocate a particular legal strategy, but stemming from their relationship

¹⁹⁶ Lowry (note 161) at 358.

with feminism, they advocate using creative and relevant legal methods to fight against environmental injustices.

One such way of rethinking ownership is via the Public Trust Doctrine. In law ‘public trust’ has come to mean that certain resources are preserved for public use, and that the government is required to maintain them for the public’s reasonable use. The philosophy behind the doctrine is that certain kinds of property should be open to the public, subject to public rights of use, and managed for the public interest.¹⁹⁷ The precise renditions of the law limit it mostly to the foreshore and tidewaters, but there is nothing inherent in the law that it could not be used to support broad environmentalist claims or be tailored to the needs of a certain community. This concept also has been found to apply to the natural resources (mineral or animal) contained in the soil and water over those public trust lands.

The law originates from ancient Rome when Emperor Justinian held that seashore land not appropriated for private use was open to all.¹⁹⁸ This principle was included in the Magna Carta and further strengthened by English laws when nobles were instructed to remove their fishing weirs which obstructed free navigation of rivers. Today the doctrine is part of the common law in the United States and England.¹⁹⁹ This doctrine has played a decisive ideological role in maintaining and changing both access to resources, and responsibility for human impacts on nature.²⁰⁰

According to the American public trust doctrine, the submerged lands of all navigable waters below high-tide mark are the property of the state, which holds this property in trust for citizens of the state, who are the true owners.²⁰¹ Part of this doctrine is that state

¹⁹⁷ New Jersey Department of Environmental Protection ‘Public Access in New Jersey: The Public Trust Doctrine and Practical Steps to Enhance Public Access (2006). Available at http://www.state.nj.us/dep/cmp/access/public_access_handbook.pdf [accessed September 2009].

¹⁹⁸ Joseph L. Sax ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’ (1970) 68 *Michigan L. Rev.* 471 at 473.

¹⁹⁹ *Ibid* at 474.

²⁰⁰ Milton (note 102) at 88.

²⁰¹ *Ibid* at 86.

governments should manage the waters for the benefit of the people. The doctrine is seen as an ‘unusual legal doctrine’ in continuing to support public interests and claims that are often vague, ill-defined and customary against private property claims that are definite and precise. The law is both ambiguous and multivalent. Negotiations over alternate meanings and their application to particular situations and bodies of fact are central to legal practice, and environmental regulation is no exception.²⁰²

Arnold v. Mundy (1821) was the first American use of public trust doctrine.²⁰³ It was a New Jersey Supreme Court case that considered access to oystering lands in a river.²⁰⁴ Basically Arnold had an oyster farm on a public river and Mundy took the oysters to prove a point; the river land was public, not private. It is because of these oysterman and their dependence on common rights to marine resources and their insistence on those rights which helped define the concept.²⁰⁵ Through their litigation they helped keep the public trust a possibility and, from time to time, a reality; while in turn lawyers and judges played their parts in defining ‘permissible and actionable reality’.²⁰⁶

The concept of public trust gained new strength as part of the environmental movement of the 1960s and 1970s.²⁰⁷ It also has become extremely important in the adjudication of cases concerning public rights to access to the beaches.²⁰⁸ The public trust in relation to shellfish lands was maintained due to the persistence and the actions of people

²⁰² Kay Milton *Environmentalism and Cultural Theory – Exploring the Role of Anthropology in Cultural Discourse* (1996) at 23.

²⁰³ *Arnold v. Mundy* Supreme Court of New Jersey 6 N.J.L. 1 (1821).

²⁰⁴ Milton (note 102) at 88.

²⁰⁵ Richard M. Frank ‘Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest’ (1983) 16 *U.C. Davis L. Rev.* 579 at 590.

²⁰⁶ Milton (note 102) at 88.

²⁰⁷ Jan S. Stevens ‘The Public Trust: A Sovereign’s Ancient Prerogative Becomes the People’s Environmental Right’ (1980) 14 *U.C. Davis L. Rev.* 195 at 200.

²⁰⁸ *Matthews v. Bay Head Improvement Assoc.* Supreme Court of New Jersey 471 A.2d 355 (1984).

engaged with the conflict over time. The public trust requires constant vigilance and organized conflicts to keep it relevant.²⁰⁹

When a trustee does not correctly manage a resource, private citizens have the right to take protective action. Ecofeminists could use the public trust doctrine and the *locus standi* it extends to citizens to challenge governments to improve their stewardship over the public trust. Imagine if landowners who abused and degraded land lost the right to use it, for example. Public trust in an of itself could not offer such solutions, but combined with an ecofeminist reading of the law or subsequent laws, the way we view property rights could be changed. Such a doctrine must be integrated into a broader plan for generating legislative or administrative reforms and community activism. Instead of viewing the Earth as a thing to exploit, it would be viewed as a thing which is necessary for life and thus must be protected. In an Earth-centred community, all institutions through which humans act collectively would be designed to require behaviour that is socially responsible from the perspective of the whole community. More and more lands would be given to the public and therefore more diverse voices would have the opportunity to speak for and protect those lands. To fulfil their role of protecting the environment, ecofeminists and legal scholars should continue to investigate other potentially useful strategies.²¹⁰

b. Rethinking an Ethical Foundation for Environmental Regulation – An Example from Ecuador

Part (b) of Chapter III discussed how, because of the lack of an ethical foundation, the discourse surrounding environmental ethics is murky at best and therefore environmental law has less potential as a tool for achieving environmental justice. A number of environmental philosophers have posited that the development of an ecological ethic is a logical step to

²⁰⁹ Stevens (note 206) at 201.

²¹⁰ Lowry (note 161) at 355.

expect at this time in the history of human (and particularly Western) ethical development.²¹¹ One need not accept that a uniquely ecological ethic is developing or will develop to agree that since the 1970's societies have been facing new environmental issues that raise the desirability of a uniquely ecological ethic. Support for valuing conservation is gaining stride throughout the world. This provision may reflect a profound change in the identity of what we value and why.²¹²

Environmental ethics are often discussed in isolation, as if not a part of the actual understanding of the law. This differs from the study of other laws and regulations, where analysts detail what factors are taken into account and how decisions are made and who made them. To identify the values that are embedded in the law's standards and procedures requires that we go a step farther.

Ecofeminism, in borrowing from feminist legal methods and ecological ethics, provides an insight into how to move environmental law away from a technical approach and towards an ethical and practical approach. One way for a State to incorporate ethics into environmental law from the bottom up is to identify society's relationship with the environment in its constitution. Constitutions trump all other laws in a particular society and by prioritizing that relationship in such a document demonstrates the level of importance the environment holds in a society. The following example demonstrates how a constitution which contains a spirit of inclusiveness and diversity can help laws and lawyers think differently about environmental justice.

In September 2008, Ecuadorian citizens voted on a new constitution. Among the 444 acts, the constitution explicitly gives rights to nature.²¹³ The Constitution also calls on the

²¹¹ Michael P. Vandenberg 'An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law' (1996) 85 *Kentucky L.J.* 803 at 861-64.

²¹² *Ibid* at 866.

²¹³ República del Ecuador, 'Constituciones de 2008' (Republic of Ecuador Constitution of 2008). Available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html> [Accessed June 2009].

Ecuadorian government to avoid measures that would destroy ecosystems or drive species to extinction. With this vote, the people of Ecuador are leading the way for countries around the world to fundamentally change how we protect nature.²¹⁴ An extract is below.

Extract (translated) from the Constitution of Ecuador adopted on 28 September 2008²¹⁵
Chapter: Rights for Nature

Art. 1. Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.

Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution.

[Note: 'Public organisms' in Article 1 means the courts and government agencies, i.e., the people of Ecuador would be able to privately enforce nature rights].

Art. 2. Nature has the right to an integral restoration. This integral restoration is independent of the obligation on natural and juridical persons or the State to indemnify the people and the collectives that depend on the natural systems.

In the cases of severe or permanent environmental impact, including the ones caused by the exploitation on non-renewable natural resources, the State will establish the most efficient mechanisms for the restoration, and will adopt the adequate measures to eliminate or mitigate the harmful environmental consequences.

Art. 3. The State will motivate natural and juridical persons as well as collectives to protect nature; it will promote respect towards all the elements that form an ecosystem.

Art. 4. The State will apply precaution and restriction measures in all the activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles.

The introduction of organisms and organic and inorganic material that can alter in a definitive way the national genetic patrimony is prohibited.

Art. 5. The persons, people, communities and nationalities will have the right to benefit from the environment and form natural wealth that will allow well-being.

²¹⁴ 'Ecuador: Referendum Upholds the Rights of Nature' (December 2008) *Community Ecological Governance* No. 9. Available at <http://www.earthjurisprudence.org/documents/CEGnewsletter9.pdf> [accessed October 2009].

²¹⁵ Cullinan (note 5) at appendix 21.

The environmental services cannot be appropriated; its production, provision, use and exploitation, will be regulated by the State.

The constitution is the first in world history to grant nature legal rights, and to allow individuals *locus standi* to sue on nature's behalf in the courts. These rights mark a 'watershed in the trajectory' of environmental law.²¹⁶ Ecuador is engaged in an effort to redefine the relationship between human beings and the natural world.

Lawyers from the Community Environmental Legal Defense Fund (CELDF) were invited to Ecuador because of their environmental litigation and legislative work with municipalities in the United States. They made several trips to Montecristi (Ecuador's capital) throughout 2008 where they worked with members of Ecuador's constitutional assembly on drafting legally enforceable Rights of Nature.

The new constitution redefines people's relationship with nature by asserting that nature is not just an object to be appropriated and exploited by people, but is rather a rights-bearing entity that should be treated with parity under the law.²¹⁷ 'In this sense, the new constitution reflects the traditions of indigenous peoples living in Ecuador, who see nature as a mother and call her by a proper name, Pachamama'.²¹⁸ It represents an ethically responsible way of incorporating the needs of humans and nature.

The pro-nature aspects of the constitution have their roots in Ecuador's resentment toward international companies. This diverse country contains every South American ecosystem within its borders, but has had 'disastrous collisions with multi-national

²¹⁶ Cyril Mychalejki 'Ecuador's Constitution Gives Rights to Nature' (25 September 2008). Available at www.pachamama.org.ec/archivos/derechosnaturaleza/cyрил.pdf [accessed May 2009]. The quote is from Mari Margil, Associate Director of the Community Environmental Legal Defense Fund.

²¹⁷ Ibid. A quote from Dr. Mario Melo, a lawyer specializing in Environmental Law and Human Rights and an advisor to Fundación Pachamama-Ecuador.

²¹⁸ Margil (note 215). Margil and other members of the Defense Fund were invited as a result of their environmental litigation and legislative work with municipalities in the United States.

companies'.²¹⁹ From 'banana companies to natural gas extractors', many have depleted its natural resources and 'left little but pollution and poverty in their wake'.²²⁰

Currently, Ecuadorians are in a lawsuit with Chevron Oil. The oil company allegedly dumped billions of gallons of crude oil and toxic waste into the Amazonian jungle over two decades and did not clean it up, causing extreme pollution to ecosystems and deadly health problems for numerous communities. It has been described as the 'Amazon Chernobyl'.²²¹ A court-appointed expert announced in a report that, should Chevron lose, it would have to pay up to \$16 billion in damages.²²²

Ecuador's leadership on this constitutional issue may have a global domino effect as the Defense Fund is now 'fielding calls from other countries such as Nepal', which is presently creating its first constitution. 'This could begin to make neoliberal development models obsolete and have a tremendous impact on multinational corporations, especially those in the extractive industries, from entering new markets and conducting 'business as usual''.²²³

The Ecuadorian constitution example demonstrates the importance using local solutions to solve global problems. It demonstrates the power and importance of listening to traditional knowledge. The people of Ecuador rallied behind their farmers and rural populations, those traditionally left out of lawmaking. An ecofeminist approach allows us to see environmental management and resource use as an interactive process. The people of Ecuador reclaimed their land. They adopted specific legislation for the environmental injustices in their part of the world. They listened to regional groups and empathised with their plights. They recognised the inherent value of the Earth.

²¹⁹ Clare Kendall 'A New Law of Nature' *The Guardian* (24 September 2008). Available at <http://www.guardian.co.uk/environment/2008/sep/24/ecuador.conservation> [accessed May 2009].

²²⁰ Ibid.

²²¹ Michael Isikoff 'A \$16 Billion Problem' (4 August 2008) *NEWSWEEK*.

²²² Ibid.

²²³ Mychalejki (note 99).

The connection between the indigenous population and their connection and respect for their Earth can also be witnessed in similar legislation elsewhere. As in the New Zealand Resource Management Act²²⁴ which incorporates Maori, the indigenous people of New Zealand, concepts and values. Both forms of legislation adopt the philosophy that the whole is recognized as better than the sum of its parts. They also value nature for its intrinsic worth and contain notions of obligations to future generations which helps reconceptualise our relationship with nature.²²⁵ While neither act may intend to apply ecofeminist theory, both reflect the idea of shared oppression between nature and human beings and offer a solution.

c. Rethinking Decision Making – Vulnerable Communities and Movements for Environmental Justice

Part (c) of Chapter III demonstrates how vesting rights in polluters can be harmful for particularly vulnerable communities. In creating a concerned citizenry, ecofeminist theory can be used to find solutions for this injustice. Examining oppression of all humans as ‘inevitably linked’ to environmental harm presents a better understanding of how to improve the environment as well as the lives of women. It also explicitly recognizes, ‘indeed demands, the participation of members of many oppressed groups to build a platform for societal and environmental transformation.’²²⁶ In the face of climate change and other enormous environmental challenges, our future as a species depends on those people who are creating the legal and political spaces within which our connection to the rest of our community on Earth is recognized.

When an ecological crisis strikes, those in vulnerable communities are often unable to delegate responsibility to the government. Citizens feel forced to take matters into their own

²²⁴ ‘Resource Management Act 1991’ (RMA), available at <http://www.mfe.govt.nz/rma/> [accessed May 2009]. New Zealand’s main piece of legislation that sets out how to manage their environment.

²²⁵ Alastair S. Gunn and Carolyn McCallig ‘Environmental Values and Environmental Law in New Zealand’ (Fall 1997) Vol. 2, no. 2. *Ethics and the Environment*.

²²⁶ O’Loughlin (note 62) at 149.

hands – and movements for environmental justice emerge.²²⁷ The relationship between environment and justice came together in the 1980s in the United States with the ‘environmental justice’ movement that began in Warren County, North Carolina, ‘when a group of poor blacks resisted a government plan to put a toxic waste dump in their district’.²²⁸ There are countless others of these types of campaigns. For example, the Greenbelt Movement led by Wangair Maathai in Kenya, in which women have planted trees to stop erosion, and then gone on to fight for democratic reforms²²⁹; protests in Poland, where women have alerted the people to the danger of burning toxic waste²³⁰; meetings of groups such as Women in Europe for a Common Future; activities in Kazakhstan, where women have confronted the tragic outcome of testing atomic weapons; and the Ogoni people of Nigeria, where the government-supported oil companies have destroyed the land, polluted the air and executed environmental activist Ken Saro-Wiwa.²³¹ Each movement challenges governments as women and men advance to reclaim the land and fight for human dignity and self-determination.²³²

Grassroots environmental movements grow from the values and experiences of real people. When law-makers are unable or unwilling to create laws or offer other solutions for those incurring environmental harm in their communities, they are flawed in their decision-making. Environmental justice activists bring previously unheard ‘bottom-up’ perspectives to environmental issues.²³³ Whatever their situation, these people see pollution first hand. Because of their personal experience they are able to expand the ‘traditional scope of

²²⁷ Temma Kaplan ‘Uncommon Women and the Common Good: Women and Environmental Protest,’ in *Women Resist Globalization: Mobilizing for Livelihood and Rights* eds. Sheila Rowbotham and Stephanie Linkogle (2001) at 40.

²²⁸ *Ibid* at 38.

²²⁹ By teaching women to plant trees to reforest their own areas, the Green Belt movement has legitimated women’s participation in political demonstration, such as the Mothers’ Hunger Strike in 1992. These women have been beat fighting for their rights. See Maathai in Amnesty International 1995, cited in Kaplan (note 226).

²³⁰ ‘Action Line: Poland’ (summer 2000) *Everyone’s Backyard* Vol.18, no.2 at 25.

²³¹ Kaplan (note 227) at 43.

²³² *Ibid*.

²³³ Verchick (note 133) at 72.

environmentalism, supplement the ways in which we identify environmental problems, and propose new explanations for them'.²³⁴

Many people, men and woman, are wary of the term feminist, and most have no idea what an ecofeminist is or would look like.²³⁵ An important aspect of ecofeminist jurisprudence is to bring those that see themselves as outside the movement, into the fold, because environmental issues affect everyone. Many non-feminist women rationalize their participation in the pursuit of the common good by their identity as mothers.²³⁶ In most contemporary cultures, that means they are responsible for preserving the health of their children, who depend on a safe environment. If that environment begins hurting their children, many women will act.²³⁷ 'As mothers these women have the obligation to feed, clothe, house and nurture their families and communities, they also have the rights those obligations entail'.²³⁸ Without these on-the-ground whistle-blowers, most of us would have no resistance to, and little knowledge about, what ails us.

Environmental crises, like a nuclear accident where a widespread incidence of miscarriages follows, or dangerous waste left by war, or a sewage facility in a low-income community can unite ordinary women to organize into a grassroots movement. These movements claim democratic control over resource allocations. These women's environmental movements frequently challenge rights of private property and sovereignty.²³⁹ This role of mother, although stemming from an anthropocentric approach, is an example of ecofeminism in practice.

²³⁴ Ibid.

²³⁵ Irene Diamond and Gloria Feman Orenstein *Reweaving the World – The Emergence of Ecofeminism* (1990) at 175.

²³⁶ Kaplan (note 227) at 29.

²³⁷ Marlene Longenecker 'Women, Ecology, and the Environment: An introduction' (1997) 9.3 *National Women's Studies Association Journal* 1.

²³⁸ Kaplan (note 227) at 29.

²³⁹ Ibid at 30.

In the spring of 2000, a group called Mothers Organized to Stop Environmental Sins (MOSES) took off from Winona, Texas to march from one contaminated community to the next across the United States. They demanded reparations for the damage they suffered under poor environmental conditions and ‘declar(ed) environmental injustice a human rights abuse which must be addressed’.²⁴⁰ Such women stress that governments must place human need above private profit and government expediency. Frequently these women have viewed themselves as doing just what they were raised to do – ‘sustaining human life’.²⁴¹ The activities of MOSES resonated with other movements pursued by other ordinary women and men all over the world.

An underlying theme of grassroots environmental movements is the idea that a clean environment is a human right. As the women from MOSES and other groups all over the world claim, human rights are about what humans need. By placing an emphasis on human rather than legal rights, ‘the women in grassroots environmental struggles are redefining human rights to mean the common good; the right to a fulfilling life, in which safe housing, proper health conditions, nourishing food, education, clean air and water are assured’.²⁴²

These movements are leading to real change. More recently for example, in Africa, nongovernmental organizations in eleven countries are also asserting local community rights in order to promote the conservation of biodiversity and sustainable development. Members of the African Biodiversity Network (ABN) have coined the term ‘cultural biodiversity’ to emphasize that knowledge and practices that support biodiversity are embedded in cultural tradition. The ABN works with rural communities and schools to recover and spread traditional knowledge and practices. This is part of a wider effort to engage local communities, protect the environment by encouraging those communities to value, retain, and

²⁴⁰ ‘Action Line: Texas’ (summer 2000) *Everyone’s Backyard* Vol. 18, no. 2 at 12.

²⁴¹ Plumwood (note 96) at 3.

²⁴² Kaplan (note 227) at 29.

build on traditional African cosmologies, and to govern themselves as part of a wider Earth community.

In September 2006, the Tamaqua Borough of Schuylkill County, Pennsylvania, passed a sewage sludge ordinance that recognizes natural communities and ecosystems within the borough as legal persons for the purposes of enforcing civil rights. It also strips corporations that engage in the land application of sludge of their rights to be treated as ‘persons’ and consequently of their civil rights. One of its effects is that the borough or any of its residents may file a lawsuit on behalf of an ecosystem to recover compensatory and punitive damages for any harm done by the land application of sewage sludge. Damages recovered in this way must be paid to the borough and used to restore those ecosystems and natural communities.

According to Thomas Linzey, a lawyer from the Community Environmental Legal Defense Fund (CELDF – who also assisted with the Ecuador Constitution) who assisted Tamaqua Borough, this ordinance marks the first time in the history of municipalities in the United States that something like this has happened. Coming after more than ‘150 years of judicially sanctioned expansion of the legal powers of corporations’ in the United States, this ordinance is revolutionary.²⁴³ Since then, with the assistance of CELDF, thirteen communities in the United States have adopted ordinances that recognize rights for ‘ecological communities’.²⁴⁴

The lessons learned from these women are that environmental policies have much to gain by listening to local concerns. This focus on the local allows for policy which reflects understanding of the impact of global systems on the nation and on the local community. In addition, these examples demonstrate that both formal and informal structures are relevant to policy change. They ‘link the state, the organizations of society, the community, the

²⁴³ Cullinan (note 5) at 20.

²⁴⁴ Ibid.

household, the individual'.²⁴⁵ Environmental regulation should be representative of global issues and local experiences.²⁴⁶

d. Rethinking Issues of Scale – Finding Specialized Solutions

As outlined in part (d) of Chapter III, environmental regulation struggles with issues of scale. Because environmental law is special, it is dealing with highly specific concerns of localized communities as well as international regulations of global scope, not all legislation drafted at the international level will be appropriate for national and regional solutions. Ecofeminism, with its emphasis on the local, would provide specific solutions when required. As an example I look at the Kyoto Protocol. I apply ecofeminist principles to the protocol to demonstrate how an international agreement would benefit from its principles.

The Kyoto Protocol²⁴⁷ is an excellent example of a law created, at least in part, for the gain of Earth and its inhabitants, but one that could have benefited from an understanding of ecofeminism. The Kyoto Protocol is an amendment to the United Nations Framework Convention on Climate Change (UNFCCC), an international treaty intended to bring countries together to reduce global warming and to cope with the effects of temperature increases that have occurred after 150 years of industrialization.²⁴⁸ The provisions of the Kyoto Protocol are legally binding on the ratifying nations, and stronger than those of the UNFCCC.²⁴⁹

Countries that ratify the Kyoto Protocol agree to reduce emissions of six greenhouse gases that contribute to global warming: carbon dioxide, methane, nitrous oxide, sulphur

²⁴⁵ Barbara Thomas Slayter et al 'Feminist Political Ecology' in *Feminist Political Ecology – Global Issues and Local Experiences* eds. Dianne Rocheleau et al (1996) at 299-300.

²⁴⁶ Diane Rocheleau et al *Feminist Political Ecology – Global Issues and Local Experiences* (1996) at 4.

²⁴⁷ 'Kyoto Protocol' *United Nations Framework Convention on Climate Change*. Available at <http://www.kyoto2.org/page5.html> [accessed May 2009].

²⁴⁸ United Nations Framework Convention on Climate Change (UNFCCC). Available at <http://unfccc.int/2860.php> [accessed May 2009].

²⁴⁹ Joanna Depledge, UNFCCC 'Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History' (25 November 2000) at 6. Available at <http://unfccc.int/resource/docs/tp/tp0200.pdf> [accessed May 2009].

hexafluoride, hydroflurorocarbons (HFCs) and Perfluorocarbons (PFCs).²⁵⁰ Signatory countries are allowed to use emissions trading to meet their obligations if they maintain or increase their greenhouse gas emissions. Emissions trading allows nations that can easily meet their targets to sell credits to those that cannot.

Arguments against the Kyoto Protocol generally fall into three categories: it demands too much; it achieves too little; or it is unnecessary. The failures of Kyoto are due in part to its design, in trying to solve a problem of global scale, all at once, using only global solutions. Critics of the regulation claim that the policies adopted in Kyoto to avoid dangerous climate change have been ‘partly misconceived and largely inadequate’ and send ‘too many wrong signals and not enough right ones’.²⁵¹ This example demonstrates the potential of an ecofeminist approach and rethinking the scale of environmental regulation.

Firstly, the protocol tries to include six greenhouse gases in a single agreement.²⁵² These six gases have difference causes, and different effects, and are more prevalent in certain parts of the world than others. Its writers may have thought that by packing all the gases into one document, the problem could be solved with a single set of numbers. Compared with the less ambitious Montreal protocol, which cuts ozone-depleting gases fast and cheaply, Kyoto is less successful. Montreal worked better than Kyoto largely because it dealt with gases similar in nature and origin. Comparing the two protocols leads some experts to argue that the greenhouse gas problem should be ‘unpacked’ and dealt with under many different agreements.²⁵³

The principles of ecofeminism would amend this aspect of Kyoto to place value on the local, call for a piecemeal approach to global warming, and incorporate all levels of

²⁵⁰ Ibid at 13.

²⁵¹ The Economist (note 152) at 4.

²⁵² Only half of man-made global warming comes from CO₂. The rest comes from a variety of sources, including hydroflurorocarbons (HFCS), black carbon (soot), methane and nitrogen compounds.

²⁵³ The Economist (note 152) at 4.

society. They would argue for a solution that would stop trying to deal with the big picture all at once all the time. As noted in *The Economist Magazine*, more emission cuts could be made if they were targeted at specific polluters. For example, methane and nitrous oxides are produced by agriculture. To target these gases, cattle and sheep breeding programmes would be advised, as well as less grassy diets. Similarly, black carbon is a particular problem in the Arctic and Himalayan glaciers, but not as big of a problem in other parts of the world. It is produced by diesel engines and primitive stoves burning wood and cow dung. Mechanisms appropriate for dealing with large-scale emissions from power plants and factories will have little impact on black carbon caused from peasants' cooking techniques. Instead, providing villagers with a personalised solution, cheap, cleaner stoves, would be more effective.²⁵⁴

Additionally, Kyoto ignored some crucial sources of emissions. Deforestation, the source of around 12% of man-made greenhouse gas emissions, more than the European Union contributes in total, was left out of Kyoto. It would be one of the cheapest ways of cutting emissions.²⁵⁵ However, working out how to do so, especially on a global scale, is difficult, which is 'why deforestation got left out of Kyoto'.²⁵⁶ Dealing with deforestation at the regional level, providing laws or incentives which work with the local people, might prove the most helpful.

Secondly, by including many countries in detailed negotiations, Kyoto reduced the chances of agreement. Most notably, the United States, the world's largest emitter of greenhouse gases, did not sign the agreement.²⁵⁷ Additionally, the document, by dividing the world into developed and developing countries, deepened a rift between the two groups. The idea of 'common but differentiated responsibilities' on which the UNFCCC is based – that

²⁵⁴ 'Special Report on the Carbon Economy –Unpacking the Problem' (5 December 2009) *The Economist* at 24.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ G. Tyler Miller and Scott Spoolman *Living in the Environment: Principles, Connections, and Solutions* (2009) at 519.

everybody is in it together but some countries are more responsible than others – is accurate.²⁵⁸ But the way it is being applied means that the developed (‘Annex 1’) countries bear all the burden of mitigations whereas developing (‘Annex 2’) countries benefit from the Clean Development Mechanism (CDM)²⁵⁹ and are ‘not required to limit their emissions at all’. This binary division has fostered an ‘us-and-them attitude’ that gets in the way of the agreement and forces together countries that may have little in common.²⁶⁰ For example, Mexico and South Korea are on the list of Annex 2 countries, but also members of The Organisation for Economic Co-operation and Development (OECD)²⁶¹, the ‘club of rich countries’. Annex 2 countries now, as opposed to when the lists were formed 17 years ago, have widely different concerns. China wants money for cutting emissions. Africa wants generous provisions for forestry. Brazil has hydropower and bio fuels, so it wants a regime that favours those. South Africa’s economy is based on coal, so it wants investment in carbon capture and storage.

An ecofeminist approach would try to increase the documents effectiveness by dealing with fewer players all at once. With 192 participants, the annual UNFCCC conferences are ‘too big to do anything very useful’.²⁶² Most green-house-gas emissions are produced by the seventeen countries that meet in the Major Economic Forum (MEF).²⁶³ The MEF has ironically turned out to be a ‘good forum’ for tackling difficult environmental

²⁵⁸ UNFCCC (note 248).

²⁵⁹ The Clean Development Mechanism (CDM) is an arrangement under the Kyoto Protocol allowing industrialised countries with a greenhouse gas reduction commitment (called Annex 1 countries) to invest in ventures that reduce emissions in developing countries as an alternative to more expensive emission reductions in their own countries. A crucial feature of an approved CDM carbon project is that it has established that the planned reductions would not occur without the additional incentive provided by emission reductions credits, a concept known as ‘additionality’. The CDM allows net global greenhouse gas emissions to be reduced at a much lower global cost by financing emissions reduction projects in developing countries where costs are lower than in industrialized countries. However, in recent years, criticism against the mechanism has increased.

²⁶⁰ Miller (note 257) at 520.

²⁶¹ The Organisation for Economic Co-operation and Development (OECD) is an international organisation of 30 countries that accept the principles of representative democracy and free-market economy. Most OECD members are high-income economies with a high Human Development Index (HDI) and are regarded as developed countries.

²⁶² The Economist (note 254) at 24.

²⁶³ A group put together by George Bush in what was widely regarded as an attempt to sabotage the UNFCCC.

questions relevant to its members.²⁶⁴ The UNFCCC should therefore stick to big statements of principle and leave the details to the MEF or other small groups. Interestingly, this years conference in Copenhagen saw more mayors than ever before, demonstrating that ‘acting locally’ is gaining popularity for cities and citizens all over the world.²⁶⁵

e. Rethinking Processes – Increasing Public Participation in Environmental Impact Assessments

As discussed in Chapter III part (e), not having a voice in environmental processes and decision-making can be damaging for affected communities. Permitting is a major part of environmental regulation. In this next example I argue that this process would greatly benefit from an ecofeminist influence. Almost all jurisdictions rely on permitting, but South Africa may be the best example.

In South Africa’s National Environmental Management Act (NEMA) the frameworks of an Environmental Impact Assessment (EIA) permit are outlined.²⁶⁶ Ecofeminism could play an essential role in environmental protection if applied to the EIA. EIAs are a form of risk assessment which arm decision makers with the ability to make good decisions concerning the environment.²⁶⁷ It is a practical tool to give effect to sustainable development. Codified in NEMA, the law screens for which types of activities need an EIA, what type of assessment a developer must undertake, and evaluate whether and to what extent a developer must study the potential impacts the proposed project will have on the environment. This process and its requirements are fairly ambiguous in NEMA and therefore very important to lawyers.

²⁶⁴ The Economist (note 254) at 24.

²⁶⁵ UN press release, United Nations Framework Convention on Climate Change (UNFCCC) (19 December 2009). Available at <http://unfccc.int/2860.php> [accessed May 2009].

²⁶⁶ ‘National Environmental Management Act’ (NEMA) Chapter 5. Available at http://www.capetown.gov.za/en/EnvironmentalResourceManagement/publications/Documents/NEMA_1998.pdf [accessed May 2009].

²⁶⁷ Veronika Bennholdt-Thosen and Maria Mies *The Subsistence Perspective* (1999) at 258.

The broad scope of EIAs could greatly benefit from an application of the principles of Ecofeminism. In his article, Robert Verchick illustrates the practical link between feminist theory and environmental justice by applying them to risk assessments.²⁶⁸ He argues that:

- (a) That health studies currently used for risk assessments fail to consider the variation in vulnerability to environmental threats among different groups, and
- (b) That the process of identifying and evaluating risk does not sufficiently incorporate community perceptions and fears.

Through his analysis he illustrates how the feminist methods discussed in Chapter II of asking the women question, practical reasoning, and consciousness-raising can be used to develop a theoretical framework that could be adopted by policymakers working to address environmental justice issues.²⁶⁹

If applied to EIAs, ecofeminism could shift the thinking beyond ‘one size fits all’ towards specialized and personalized risk assessments. This would be done by training permit givers to recognise that people do not respond to environmental hazards in the same way. ‘Women, for instance, may be more susceptible to PCBs, dioxins, and other dangerous chemicals that bioaccumulate in fatty tissue’.²⁷⁰ Verchick explains further that certain chemical exposures are more likely to cause damage to women’s immune systems.²⁷¹ For example, women in childbearing years may be more susceptible to ozone exposure,²⁷² and environmental degradation threatens women’s capacity to bear and nurse healthy children.²⁷³

While the existence of such variations in the way humans respond to environmental degradation is widely acknowledged, little is done to protect these more ‘sensitive groups in

²⁶⁸ Verchick (note 133) at 80.

²⁶⁹ These methods are discussed on page 14.

²⁷⁰ Samara F. Swanston ‘Race, Gender, Age, and Disproportionate Impact: What Can We Do About the Failure to Protect the Most Vulnerable?’ (1994) 21 *Fordham URB L.J* 577 at 592. Because women have a greater percentage of body fat than men, they tend to accumulate more damaging levels of such toxins.

²⁷¹ *Ibid.*

²⁷² Susan D. Fox ‘Enhanced Response to Ozone Exposure During Follicular Phase of the Menstrual Cycle’ (1993) Vol. 101, no. 3 *Environmental Health Perspective* at 242-44. This may be attributed to fluctuations in the blood progesterone levels during the menstrual cycle.

²⁷³ Jean Macchiaroli Eggen ‘Toxic Reproductive and Genetic Hazards in the Workplace: Challenging the Myths of the Tort and Workers’ Compensation Systems’ (1992) 60 *Fordham L. Rev.* 843 at 848-51. Toxic exposures can cause infertility, miscarriages, and harm to the foetus.

any consistent way'.²⁷⁴ Risk assessments are instead done based on information based on the 'average' person and their susceptibility to pollution.²⁷⁵ However, having learned from feminists; the average person is usually a white male and such assessments do not reflect the 'higher sensitivity levels of certain minorities, young children, fetuses, or women in childbearing years'.²⁷⁶ It is further argued that those in positions of power to make EIAs based on personal vulnerabilities are not likely to challenge an 'arrangement that ignores distributional effects' because the policy makers are themselves white men. Verchick writes, 'Here I do not mean to suggest that environmental policymakers are intentionally colluding to promote standards designed primarily for men, but that such results follow, consciously or unconsciously, where decision making bodies are made up overwhelmingly of one demographic group'.²⁷⁷ Those who grant EIAs must therefore be provided with more information about the susceptibility among different groups. Until that time stricter provisions must be made for all.²⁷⁸

Because risk assessment is based on statistical measures and the scientific process, policymakers view it as an accurate and objective tool in establishing environmental standards. To incorporate ecofeminist theory into EIAs, community perception must be incorporated. As argued by many people involved in the grassroots movements for environmental justice, most people do not need a scientist to tell that something toxic in their community is bad and wrong.

Ecofeminism challenges the model of scientific risk assessment on at least three levels. First, feminism questions the assumption that scientific inquiry is value-neutral, that

²⁷⁴ Swanston (note 270) at 589.

²⁷⁵ Ibid at 590.

²⁷⁶ Ibid at 590-91.

²⁷⁷ Verchick (note 133) at 80.

²⁷⁸ Verchick (note 133) at 81.

is, free of societal bias or prejudice.²⁷⁹ Western science is infused with its own ideology, perpetuating, cycles of discrimination, domination, and exploitation.²⁸⁰

Second, even if scientific inquiry was neutral, any regulation based on the inquiry would contain biased elements. Environmental regulation, ‘like any other product of democracy, inevitably reflects elements of subjectivity, compromise, and self-interest’.²⁸¹

Finally, ecofeminists would argue that questions involving health and the risk of death and disease should not even aspire to value neutrality. These permit decisions which affect present and future generations ‘should be made with all related political and moral considerations plainly on the table’.²⁸² Policymakers should ‘look to all perspectives, especially those of society’s most vulnerable members, to develop as complete a picture of the moral issues as possible’.²⁸³

According to ecofeminists the tug of war between those who assess and common everyday citizens is not merely a ‘contest between science and feelings, but a broader discussion about the sets of methods, values, and attitudes to which each group subscribes’.²⁸⁴ There are more than just two points of view, us and them, there are legion. Because one’s world view is premised on many things, including personal experience, subgroups within either category might differ in significant ways. An ecofeminist perspective would ‘anticipate a broad spectrum of views concerning scientific risk assessment and public values’.²⁸⁵

To understand a diversity of risk perception and to see how attitudes and social status affect the risk assessment process, we must return to the feminist inquiry that explores the

²⁷⁹ Feminists are not the only ones who have questioned the objectivity of science. See, Clayton P. Gillette & James E. Krier ‘Risk, Courts, and Agencies’ (1990) 138 *University of Pennsylvania L. Rev.* 1027 at 1070-99.

²⁸⁰ Frank B. Cross ‘The Surviving Significance of the Unitary Executive’ (1990) 27 *Houston L. Rev.* 599 at 664-65. He notes that even ‘experts have their own political agendas and selfish interests’.

²⁸¹ Catharine A. MacKinnon ‘Feminism, Marxism, Method, and the State: An Agenda for Theory’ (1983) Vol. 7 no. 3 *Signs* 515 at 519.

²⁸² Bartlett (note 59) at 862.

²⁸³ Cross (note 280) at 889.

²⁸⁴ Verchick (note 133) at 77.

²⁸⁵ *Ibid.*

relationship between attitudes and identity. Ecofeminism can propel environmental justice advocates and policymakers in the right direction by ‘always challenging them to unmask hidden biases behind environmental law, to bring personal experience to the fore, and to remain committed to broad and open dialogue with the community’.²⁸⁶

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²⁸⁶ Ibid.

Chapter V

Giving Ecofeminism Legal Effect

Communities have always used laws to express the ideals to which they aspire and to regulate how power is exercised.²⁸⁷ Law is a social tool that is usually shaped and wielded most effectively by the powerful. Consequently, law tends to entrench a society's fundamental idea of itself and of how the world works. A powerful way for ecofeminist theory to formulate change is to incorporate it into law. Law influences the relationship between humans and nature by refining and codifying particular strands of the nature/culture narrative.²⁸⁸ The law tells its citizens where nature and culture intersect. When the law discusses human beings, it dictates our relationships with other humans and with the State. When the law addresses environmental issues, the law discloses the way that society views nature.²⁸⁹ When the law does not recognize environmental problems as social problems, or addresses them inadequately, it insinuates that nature, and how we treat it, does not matter, and does not count. To be effective, laws must examine the underlying assumptions regarding nature and its place in our society.

For law to serve as a vehicle for social change, legal institutions must be persuaded that they will be more just if they embody the experiences of a diverse group of people. Feminist legal theory argues that utilizing women's experiences as well as men's 'would produce a better and more inclusive model for legal decision-making than the current legal standard of applying abstract and depersonalized legal rules, which are considered 'fair'.²⁹⁰ Currently, the domination of nature is inextricably bound with the domination of persons, and both must be addressed.²⁹¹ There is no point in liberating people if the planet cannot sustain

²⁸⁷ Cullinan (note 75).

²⁸⁸ Salleh (note 39) at 54.

²⁸⁹ Zimmerman (note 47) at 125.

²⁹⁰ Ibid at 128.

²⁹¹ Plant (note 64) at 185.

their liberated lives, or in saving the planet by disregarding the preciousness of human existence.²⁹² The law has much to gain from an ecofeminist perspective.

Taking ecofeminism into mainstream political processes requires a commitment to the process of making known and heard the 'others' perspectives. The strategy is to change participation, priorities, procedures, processes, policies, and representation in the interests of those without a voice in society.²⁹³ Understanding the connection between racism, classism, sexism and other shared oppressions is necessary to any adequate understanding of the oppression of women and the oppression of nature. For ecofeminists, at least part of the answer to ending environmental degradation lies in creating a legal language which accurately reflects the diversity of human experience.²⁹⁴ Ecofeminists 'shape laws from a framework of oppression to a framework of resistance'.²⁹⁵

Ecofeminism must be brought to the attention of both the relevant authorities and the public, but not in the same way. Authorities must be helped to reconceptualise their perceived political and economic remits in relation to the ecological dimension; the public, to imagine plausible cultural and social-life narratives which include that dimension. Somewhere in between, sharing both these challenges are the community decision-makers.²⁹⁶ For the law to shift, a primary task is to position ecofeminist and ecocentric ideas and values into the collective mindstream of Non-Governmental Organisations, think-tanks, quasi-academic institutes and the media, which tend to determine what become 'issues' and how they are treated, and which are themselves trying to influence state/government policy regarding these

²⁹² Brennan, Andrew, and Lo, Yeuk-Sze, 'Environmental Ethics' *The Stanford Encyclopaedia of Philosophy* (Winter 2009). Available at <http://plato.stanford.edu/archives/win2009/entries/ethics-environmental/> [accessed September 2009].

²⁹³ Ashworth (note 17) at 227.

²⁹⁴ Diamond (note 11) at 48.

²⁹⁵ Carolyn Merchant *Radical Ecology: The Search for a Livable World* (1992) at 194.

²⁹⁶ Curry (note 13) at 118.

issues. This can be more important than lobbying the government directly. Getting an idea 'onto the table' is often a prerequisite for getting it to influence jurisprudence.²⁹⁷

To create change, laws must be revised to provide remedies for environmental injustice. The first step in creating change was to identify the flaws, and offer examples of solutions. There is a clear need in environmental regulation to include ethics, to create environmental justice specific legislation, to listen to the plights of those most affected by environmental degradation, create specific, local solutions, and to open a dialogue between effected communities and future developments. These five are just a sampling of the potential for ecofeminism. There are more solutions to be found and environmental justice advocates should continue to investigate other potentially useful legal strategies.

Conclusion

The radiation seepage from Chernobyl, the prospect of global warming, the discovery of an ozone hole, the ugliness of medical waste on ocean beaches, and the massive Exxon Valdez oil spill have lent a new sense of urgency to the environmental crisis. Real people all over the world are fighting ecological battles. Ecofeminism is a largely unknown part of the solution, and an excellent resource for lawmakers, lawyers, and average citizens concerned with the environmental degradation happening in their community.

Today, people all over the world, and the grassroots organizations in which they are involved, are more concerned than ever about the fate of their environment and the linkages among declining ecosystems, degraded resources, and their increasing poverty. By inquiring into the arena wherein the subordination of women by men and the domination of nature by humans intersect, ecofeminism can be part of the solution for environmental ethics to thrive.

²⁹⁷ Ibid.

Together, this investigation could establish an ecologically and ethically appropriate relationship between human beings and the natural world.

Ecofeminism offers a new perspective on structures and processes of social change. Through its recognition of threats to equity and diversity, and its promotion of social and environmental justices, it helps to strengthen the balance between men's and women's rights and responsibilities in local communities. It clarifies linkages among gender, environment, livelihoods, and poverty, in ways that benefit both women and men. In doing so, it addresses economic and political barriers to environmental sustainability and social justice.

Ecofeminism gives a voice to women's rich and varied relationships with both society and nature. This diverse voice and inclusive spirit gives ecofeminism an advantage in finding solutions for environmental degradation. By listening to local populations it can help find specialised solutions for regional environmental degradations. It can examine the way different communities think about property and land and the rule of law. In drawing on the creative legal methods of feminism it can provide environmental advocates different avenues for thinking about regulation. In eradicating patriarchy and other forms of oppression it can incorporate the missing ethical foundation into environmental regulation. It can learn from countries and communities who decide to give value to nature in their constitutions or laws and spread and expand those ideas. In advocating an inclusive voice it can offer environmental permitting procedures a new way to examine how to incorporate local communities into development projects that affect them. It can incorporate those traditionally marginalized from law into today's jurisprudence.

Not all of ecofeminists principles and methods need to be used all the time to make a difference. But, as this theory spreads and gains momentum, people will begin to change the way they think about nature, and insist that law-makers do the same. Those in Third World and low-income communities have already learned of their dependence on a clean, healthy

Earth, and have begun to use ecofeminist methods unconsciously in their fight for survival. People in Ecuador and small towns across the globe have realized the inherent value and power of finding local solutions for their environmental problems. Women understand the connection between corporations, pollution, and their children.

Environmental law do not provide an adequate solution to the problems of environmental injustices. An ecofeminist perspective offers several reforms to fill these legal gaps. By fully developing the scope of legal remedies to include an ecofeminist analysis, environmental regulation, nature, and humankind can only benefit.

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