WILD LAW
The philosophy of Earth Jurisprudence

PETER BURDON

From 16 to 18 October 2009, participants from each state and territory in Australia gathered in the Adelaide Hills for Australia's first conference on Wild Law. All 63 participants were motivated by a shared view that our current system of law and governance was failing to protect the natural world from destruction and were seeking a new path forward. At the conclusion of the conference, the following declaration was developed, which summarises the themes and outcomes of the conference.

> We the participants of Wild Law, declare that the perceived separation between nature and human beings is a fundamental cause of the current environmental crisis. Our law reflects this in treating nature as property and by restricting rights to human subjects. We assert that law needs to transition from an exclusive focus on human beings and recognise that we exist as part of a broader earth community.
>
> We recognise that the universe is composed of subjects to be communed with, not objects to be used. Each component member of the universe is thus capable of having rights.
>
> We commit to evolving law so that it protects the natural world from destruction and cultivating Wild Laws that are consistent with the philosophy of Earth Jurisprudence.[1]

My intention in this article is to pull out key points from this declaration and expand their meaning. The first pertinent contention in the declaration is that the present environmental crisis is a crisis of culture, manifest in a perception that human beings as separate and superior to nature. This perception is called anthropocentrism. Law is a significant description of the way a society perceives itself and projects its image to the world. As a result, I will consider how law reflects anthropocentrism and how this leads to environmental harm. In the second half of my article, I will illustrate that human beings are deeply connected and dependent on nature. As an evolving social institution, law needs to adapt to reflect this understanding. I will illustrate two examples of wild law in the United States and Ecuador where law has been passed granting nature the right to exist and flourish.

Environment and culture

The current environmental crisis can be measured on many fronts. As carbon has been collecting in our atmosphere, it has also been accumulating in the ocean and as time has passed, deforestation, soil erosion, vanishing wetlands and a whole host of other problems have continued unabated. While climate change is most prominent in the public consciousness, we face a convergence of crises, all of which are a concern for life on earth. The UN Millennium Assessment documented the extent of this crisis in 2001. The study involved 1300 scientists from 71 countries and found that every living system[2] in the biosphere was in a state of decline and the rate of decline is increasing.[3] It further estimated that humans are responsible for the extinction of between 50 and 55 thousand species each year,[4] a rate unequalled since the last great extinction, some 65 million years ago.[5]

In seeking to understand this crisis, there is a growing consensus that these statistics represent a deeper, cultural crisis. Speaking to this point, psychotherapist Thom Hartmann notes:

> The problem is not a problem of technology. The problem is not a problem of too much carbon dioxide. The problem is not a problem of global warming. The problem is not a problem of waste. All of those things are symptoms of the problem. The problem is the way that we are thinking. The problem is fundamentally a cultural problem.[6]

John Livingston supports this analysis in his classic text, *Arctic Oil*. Reflecting on our environment crisis Livingston notes that disasters are commonly portrayed as a series of separate issues. Indeed, he notes, 'oil spills, endangered species, ozone depletion and so forth are presented as separate incidents and the overwhelming nature of these events means that we seldom look deeper.'[7] But as he notes,

> issues are analogous to the tip of an iceberg, they are simply the visible portion of a much larger entity, most of which lies beneath the surface, beyond our daily inspection.[8]

Consistent with the critique made in eco-feminism and environmental ethics more broadly, Thomas Berry (1914–2009) described this cultural problem as a 'mode of consciousness that has established a radical discontinuity between the human and other modes of being.'[9] This view is termed anthropocentrism and was defined by Albert Einstein as an 'optical delusion of human consciousness' where we come to regard 'humanity as the centre of existence.'[10] To this base definition, anthropocentrism also encompasses the view that human beings are the final aim and end of the universe and that the universe exists to satisfy the needs and desires of human beings.

Anthropocentrism and law

Law is a social creation and a legal conclusion[11] and as legal philosopher Philip Allot notes, 'law cannot be

REFERENCES

1. For further information visit <adelaide.foe.org.au/?page_id=233>
2. Living systems are defined broadly as ocean, forests, desert, wetlands and other geographical areas.
3. Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Biodiversity* (2005) 79.
4. David Suzuki, *The 11th Hour* (DVD, 2007).
5. Thomas Berry, *Evening Thoughts* (2006) 107.
6. Thom Hartmann, *The 11th Hour* (DVD, 2007).
7. John Livingston, *Arctic Oil* (1981) 24.
8. Ibid.
9. Thomas Berry, *The Great Work* (1999) 4.
10. Albert Einstein, quoted in Klaus Bosselmann, 'The Way Forward: Governance for Ecological Integrity' in Laura Westra, Klaus Bosselmann & Richard Westra (eds), *Reconciling Human Existence with Ecological Integrity* (2008) 319.
11. Charles Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 744.
12. Philip Allott, *Eunomia: New Order for a New World* (1990) 298.
13. Nicole Graham, *Lawscape: Paradigm and Place in Australian Property Law* (D Phil Thesis, University of Sydney, 2003) 19.
14. James Harris, *Legal Philosophies* (2004) 16.
15. Graham, above n 13, 16. Outside Earth Jurisprudence, important work has been done in law-geography to consider the role of place, space and the land in jurisprudence. See Nicholas Blomley, *Law, Space and the Geographies of Power* (1994); Nicholas Blomley, David Delaney and Richard Ford (eds) *The Legal Geographies Reader: Law, Power and Space* (2001).
16. Eric T. Freyfogle, *Justice and the Earth: Images for our Planetary Survival* (1993) 49.
17. Barry Lopez, 'The Leadership Imperative: An Interview with Oren Lyons' in *Orion Magazine* (2007) 208 <orionmagazine.org/index.php/articles/article/94/> at 7 May 2010.

... human beings are deeply connected and dependent on nature. As an evolving social institution, law needs to adapt to reflect this understanding.

better than society's idea of itself.'[12] As a consequence, it should not be surprising that many aspects of our law reflect an anthropocentric view of the earth. To begin, theories of law in western jurisprudence, despite enormous variation are predominately anthropocentric. Nicole Graham states:

> Legal theory and theories about the law are concerned with relations between individuals, between communities, between states and between these elementary groupings themselves. Rarely do modern Western philosophies of law explicitly theorise relations between humans and land...the separation and hierarchical ordering of the human and non-human worlds constitutes the primary assumption from which most Western legal theory begins.[13]

In contemporary jurisprudence, the dominant school of law is termed legal positivism. This school claims that law is a science and can be described from an objective perspective. Legal positivism identifies and defines law through 'abstract' categories or doctrines, which it posits as authoritative rules. In this view, 'there is no law but positive law'[14] and the influence of external factors such as the natural world is considered 'remote, inappropriate and unnecessary to the operation of law.'[15]

From this starting point, anthropocentrism can be witnessed in distinct legal disciplines such as property law. Theorist Eric T. Freyfogle notes:

> When lawyers refer to the physical world, to this field and that forest and the next-door city lot, they think and talk in terms of property and ownership. To the legal mind, the physical world is something that can be owned.[16]

While this is a common understanding in western society, it is a deeply cultural perspective. Faithkeeper of the turtle clan among the Onondaga people, Chief Oren Lyons illustrates this point when commenting on the disposition of his nation:

> The idea of land tenure and ownership were brought here. We didn't think that you could buy and sell land. In fact, the ideas of buying and selling were concepts we didn't have. We laughed when they told us they wanted to buy land. And we said, well, how do you buy land? You might as well buy air, or buy water. But we don't laugh anymore, because that is precisely what has happened.[17]

In western society, property law provides some of the most foundational ideas about the land and about our place in the environment. Many of these ideas are so ingrained that we rarely give them second thought. The common 'idea' of private property is individual or absolute entitlement over a thing (what Blackstone called 'sole and despotic dominion'[18]), which is protected by the will of the state.[19] Our home is our castle, our zone of personal influence 'where we make the rules'. Our legal conception of property also tells us that the land can be divided into discrete and distinct bundles of legal relations, which individuals hold in relation to each other.[20] Freyfogle notes, 'once a dividing line gains the imprimatur of law, it suddenly ceases to be arbitrary and artificial; it gains a certain soberness, something we can respect.'[21] Contrary to elementary ecological principles, the law's implicit message is that the physical world divides easily into component parts, with the water owned by 'A', the land by 'B', the surface mineral rights by 'C' and the airspace by 'D'.

While much more can be said, it should be plain that this image of ownership stands in the way of environmental protection. The implications of this view are exacerbated further by the fact that our law stacks rights in favour of human beings and corporate persons. Indeed, while I do not wish to overlook the significant ground that has been made by animal rights advocates and conservationists; the playing field is far from level. Speaking generally, Berry comments:

> All rights have been bestowed on human beings. The other than human modes of being are seen as having no rights. They have reality and value only through their use by the human. In this context the other than human becomes totally vulnerable to exploitation by the human.[22]

The combination of these ideas renders the natural world profoundly vulnerable to the needs of a growing industrial economy. In response, theorists have begun articulating a new vision of law, premised on a shift from human beings to the comprehensive Earth Community.

Earth community

An anthropocentric perspective of the earth boasts few contemporary advocates[23] and has lost all credibility in philosophy and science. Its current place in law reflects more the slow moving nature of the institution, than the views of the profession. Today we understand that 'to be, is to be related.'[24] Relationship is the essence of existence, a revelation that is illustrated in many modern scientific disciplines. Ecology is the key discipline that informs the world most intimately about our interconnectedness with the natural world. Ecologists have enriched the way we think about the natural world by two new concepts, community and network. These concepts shift our perception of an ecological community from

18. Private property is 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.': William Blackstone, *Commentaries on the Laws of England: Volume II, Of the Rights of Things* (first published 1766, 1979 ed) 2.

19. Laura Underkuffler, *The Idea of Property: Its Meaning and Power* (2003) 1.

20. Joseph William Singer, *An Introduction to Property* (2005) 2.

21. Freyfogle, above n 16, 59.

22. Berry, above n 9, 72.

23. A contemporary example is a debate on the preservation of the spotted owl in America. Journalist Krauthammer said, '[n]ature is our ward, not our master ... it is man's world and when man has to choose between his well-being and that of nature, nature will have to accommodate': Charles Krauthammer, 'The Spotted Owl' *Time Magazine* (17 June 1991) 82. In solidarity, Rush Limbaugh noted, 'If the owl can't adapt to the superiority of humans, screw it ... if a spotted owl can't adapt, does the earth really need that particular species so much that hardship to human beings is worth enduring in the process of saving it?' Rush Limbaugh, 'The way things ought to be' (1992) quoted in Dale Jamieson, *Ethics and the Environment: An Introduction'* (2008) 181–82.

24. Thomas Berry & Brian Swimme, *The Universe Story* (1992) 77.

25. Fritjof Capra, *The Web of Life: A New Scientific Understanding of Living Systems* (1996) 33–34

26. Professor Ian Lowe quoted in David Suzuki, *The Sacred Balance* (1997) 16.

27. Berry, above n 9, 4. For more background on this statement refer to Berry & Swimme, above n 24; Thomas Berry, *The Dream of the Earth* (1988); Brian Swimme, *The Universe is a Green Dragon*, (2001); and Brian Swimme, *The Hidden Heart of the Cosmos* (1998).

28. Thomas Berry reignited this debate in 'Ten Principles for Jurisprudence Revision'; cited in Thomas Berry, *Evening Thoughts: Reflecting on Earth as Sacred Community* (2006) 149–150.

hierarchy and toward 'an assemblage of organisms, bound into a functional whole by their mutual relationships'.[25] Professor Ian Lowe relates a story that illustrates this point:

> In a study of truffles that grow in the dry eucalyptus forest of New South Wales, it was found that the truffles perform a service for the trees near which they are found. Because both truffles and trees extract water and minerals from the soil, trees with truffles in their roots obtain more water and minerals and grow better than those without. The truffles are a favourite food of the longfooted poteroo, a marsupial that is now classified as rare, which then excretes the spores of the truffles and thereby enhances the health of the forest. Poteroo, truffle, eucalypt — three very different species of mammal, fungus and plant — are all bound together in a remarkable web of interdependence.[26]

The concept of network has become increasingly prominent in ecology. Since living systems (at all levels) are networks, we can visualise them as 'webs of relationships' interacting in a network fashion with other systems. Nature consists of networks, operating within networks. Reflecting on this modern understanding, Berry expains:

> In reality there is a single integral community of the Earth that includes all its component members whether human or other than human. In this community every being has its own role to fulfil, its own dignity, its inner spontaneity. Every being has its own voice. Every being declares itself to the entire universe. Every being enters into communion with other beings. This capacity for relatedness, for presence to other beings, for spontaneity in action, is a capacity possessed by every mode of being throughout the universe.[27]

The challenge before Wild Law is to develop both theory and law that reflects this modern understanding of the earth and our relationship to the natural world. Indeed, if for the vast majority of western culture our laws have reflected an anthropocentric perception of the universe — how can law, as an evolving social institution, shift to reflect the notion of earth community?

The Rights of Nature[28]

Advocates of Wild Law approach this task from many different angles.[29] One popular idea within the movement is that 'every being has rights to be recognized and revered.'[30] Legal recognition of rights is useful for its recognition of bilateral legal relations.[31] This has the potential to place *duties* on human beings and establish 'relationship' as the context for interaction. However, others have questioned whether the recognition of legal rights is the best method for recognising value and integrity in the natural world.[32] It is not my intention to enter this debate further here, and instead will discuss how this idea has been given legal recognition in the newly amended, constitution of Ecuador.

Some background to this precedent is important. For the past fourteen years a legal battle has waged on behalf of approximately 30 000 Amazonians against Chevron, oil giant and parent company of Texaco. The suit alleges that Texaco dumped nearly 16 million gallons of oil and 20 billion gallons of waste into 17 000 acres of pristine forest. As well as immediate ecological consequences, Indigenous groups have claimed that the dumping has resulted in higher rates of cancer and miscarriages. The litigation is presently locked in a series of counterclaims in both American and Ecuadorian courts, with little hope of an immediate settlement.[33]

This case, coupled with a long history of deforestation in the Amazon caused NGO Pachamama Alliance to seek help from the Community Environment Legal Defence Fund ('CELDF') in Pennsylvania, USA. CELDF has gained notoriety for helping American communities pass binding municipal ordinances that recognise the rights of natural communities and ecosystems to exist and flourish. In 2009, CELDF supported Spokane Washington to become the first city in the world to legislate for the rights of nature.

> Ecosystems, including but not limited to, all groundwater systems, surfacewater systems, and aquifers have the right to exist and flourish. River systems have the right to flow and have water quality necessary to provide habitat for native plants and animals, and to provide clean drinking water. Aquifers have the right to sustainable recharge, flow, and water quality.[34]

Director of CELDF, Thomas Linzey notes that the driving concern of the Pachamama Alliance:

> was to give the indigenous people of Ecuador the rights that have been denied to native tribes throughout the Americas, rights that would in turn empower the tribes to protect their natural environment and rainforests.[35]

Linzey and associate Mari Margil began presenting the legal framework for 'rights of nature' to different communities and eventually were able to brief the president of the Ecuador Constitutional Assembly. As a result of this work and the environmental advocacy of countless local citizens, Ecuador became the first country in the world to codify nature's rights in their constitution. The new provision reads:

> 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.[36]

At present this is just 'language' and it remains to seen the extent President Correa's government will uphold this provision in the face of industry and social pressure to relive corresponding issues such as poverty and jobs.

A legal revolution

For many, the idea of 'wild law' will sound like a contradiction in terms. Cormac Cullinan notes:

> [l]aw, after all, is intended to bind, constrain, regularise and civilise...[it is] designed to clip, prune and train the wilderness of human behaviour into the manicured lawns and shrubbery of the civilized garden.[37]

Wild on the other hand, is defined as 'living in a state of nature as animals that have not been tamed or

29. See Peter Burdon, *Wild Law: A Reader in Earth Jurisprudence* (2010) forthcoming Wakefield Press and UKELA, *Wild Law: Is There Any Evidence of Earth Jurisprudence in Existing Law and Practice* (2009). An online version can be downloaded at <earthjurisprudence.org/documents/WildLaw_Report.pdf> at 11 May 2010.

30. Berry, above n 9, 5.

31. Hohfeld, Wesley Newcomb 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) 23 *Yale Law Journal* 16; 'Fundamental Legal Conceptions as Applied to Judicial Reasoning' 26 *Yale Law Journal* (1917) 710–770.

32. For example see John Livingston, *Rogue Primate: An exploration of human domestication* (1994); 'Interview' in Derrick Jensen, *Listening to the Land* (2004); Holmes Rolston III, *Environmental Ethics: Duties to and Values in the Natural World* (1988); Val Plumwood, *Feminism and the Mastery of Nature* (1993).

33. Lucy Mayhew, 'Rights for Nature' (2009) *Resurgence* 253: 8–9.

34. See <http://envisionspokane.org/index.html>

35. Thomas Linzey & Anneke Campbell, *Be the change: How to get what you want in your community* (2009) 133.

36. Ibid 134–135.

37. Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2002) 31.

38. Macquarie Library, *Macquarie Dictionary* (1985) 1950.

39. Henry David Thoreau, 'Walking' in *Excursions, The Writing of Henry David Thoreau* (1893) 275.

40. Cullinan, above n 37, 31.

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domesticated.'[38] It is precisely this rigid dichotomy between 'nature' and 'civilization' that we need to overcome. As Henry David Thoreau once noted, 'in wilderness is the preservation of the world.'[39]

In law, wilderness can only be known by staying off the orthodox path and embodying associated characteristics such as creativity, passion and wisdom.[40] We will need all of these characteristics in developing law that truly reflects our place in nature and facilitates a mutually enhancing relationship with the earth.

PETER BURDON is a PhD student at the University of Adelaide, member of Friends of the Earth, and organiser of this Wild Law conference.

email: peter.d.burdon@adelaide.edu.au

MENTIONS

Law conferences

16 July

The Annual Castan Centre for Human Rights Law Conference
Location: State Library of Victoria
Phone: 9905 3327
Email: castancentre@law.monash.edu.au
Website: <law.monash.edu.au/castancentre/events/2010/conference-2010.html>

22–23 July

Delivering Administrative Justice
Location: Faculty of Law, University of Sydney, Eastern Avenue, Camperdown Campus
Host: Australian Institute of Administrative Law
Contact: Jessica Keyes
Phone: 02 6251 6060
Email: jessica.keyes@act.ipaa.org.au

24–25 July

Keeping the Fire: Cultural Integrity, Wild Law and Economic Development
Location: University of Wollongong
Phone: 0450 968 930
Email: keepingthefire@earthlaws.org

27–28 August

3rd National Access to Justice and Pro Bono Conference
Access to justice at the crossroads — where to now?
Location: Sebel & Citigate Hotel, King George Square, Brisbane
Host: Law Council of Australia, Queensland Law Society, National Pro Bono Resource Centre
Phone: 07 3842 5842
Website: www.a2j10.com.au/

28–30 September

23rd ANZ Society of Criminology conference
Cross-border and Transnational Crime: Risks and Responses
Location: Alice Springs
Phone: 08 89357661
Website: http://dreamediant.com.au/anzsoc%202010/anzsoc-welcome.htm

4–5 October

Criminal Justice Cooperation: Comparing European, United States', Asia-Pacific and Australian approaches
University of Canberra
Contact: Saskia Hufnagel
Email: crimjusticecoop@canberra.edu.au

18–22 October

14th Biennial National Family Law Conference
Location: National Convention Centre, Canberra
Host: Family Law Section, Law Council of Australia
Contact: Administrator, Family Law Section
Phone: 02 6246 3719
Fax: 02 6257 6503
Email: mail@familylawsection.org.au

6–7 December

Comview
Location: Victorian University, Melbourne CBD campus
Contact: VCTA
Phone: 03 9419 9622
Email: vcta@vcta.asn.au
Website: <vcta.asn.au/professionallearning/callpapers>