"The challenges of approaching judging from an Earth-centred perspective"

An address and launch of the book by N Rogers and M Maloney (eds), Law as if Earth Really Mattered: The Wild Law Judgment Project (Routledge, 2017)

by

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Laws and legal systems are human constructs. Laws are forms of social ordering. They regulate the interactions of people and institutions (both private and public) in societies as well as between these entities and the environment. The legal system, including the judicature, enables the implementation and enforcement of the laws.

As human constructs, laws and legal systems are inevitably anthropocentric (human-centred) in their orientation. The action of judging disputes under existing laws will, therefore, also have an anthropocentric orientation.

Does this anthropocentric orientation of laws, legal systems and judicature mean that there is no scope for the judicature to employ an ecocentric perspective in judging? An ecocentric perspective involves taking a nature-centred or Earth-centred approach. Can the judicature take a nature-centred approach in resolving disputes arising under human-centred laws?

I would suggest that there are opportunities in judging disputes concerning the environment legitimately to apply an ecocentric approach. This involves finding, interpreting and applying what Cormac Cullinan, in his book *Wild Law*[1], described as "the flashes" of wild law in existing laws. By recognising and realising these flashes of ecocentrism in otherwise anthropocentric laws, judges recognise and respect and give value to all of nature, and not just humans.

Where might we find these flashes of wild law in our laws? I will focus on four areas: rights, duties, considerateness and remedies. I will briefly highlight where in these four areas there might be opportunities to find flashes of wild law. I will then explain how courts, by upholding the rights of, imposing duties with respect to, requiring considerateness for and granting remedies in favour of nature, can recognise, respect and value nature.

[1] C Cullinan, *Wild Law* (Siber Ink, 2002), 10.

I will start with rights. Nature is rarely accorded rights under existing laws. But there are some exceptions. A few constitutions and statutes expressly recognise the rights of nature. The *Constitution of the Republic of Ecuador 2008* (Articles 71-74) and the Bolivian *Law of the Rights of Mother Earth 2010* are two well-known examples. Legislation in New Zealand has expressly recognised certain rivers, including the Whanganui River, as legal entities under the law (*Te Awa Tupua (Whanganui River) Claims Settlement Act 2017*).

Recognition can also come by courts extending the application of constitutional or statutory provisions giving human rights, such as a right to life and right to dignity, to non-human nature. These constitutional or statutory provisions might be silent as to whether the living entities who can hold such rights are restricted to only humans. Anthropocentrism has traditionally led courts only to recognise humans as holders of rights such as the right to life or right to dignity.

However, in 2017, the Uttarakhand High Court in India recognised the Ganga River and Yamuna River as "juristic/ legal persons/ living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna".[2] The High Court gave legal status as a living person/ legal entity to the rivers under Articles 48-A and 51A(g) of the *Constitution of India* (at [18]). Although the High Court was moved to do so for anthropocentric reasons, to protect the Hindu faith of society, it nevertheless held that the government was bound to promote the health and well-being of the rivers. The Court said (at [17]):

> "All the Hindus have deep Astha in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of Indian population and their health and well-being, The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. Rivers Ganga and Yamuna have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea."

The Court declared the Director of NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand as "*persons in loco parentis* as the human face to protect, conserve and preserve the Rivers Ganga and Yamuna and their tributaries. These officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well-being of the rivers" (at [19]). The Court directed the Advocate General to be the representative of the rivers at all legal proceedings to protect the interests of the rivers (at [20]).[3]

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[2] *Mohd. Salim v State of Uttarakhand* Writ Petition (PIL) No. 126 of 2014, 20 March 2017, Rajiv Sharma and Anok Singh JJ at [19].

[3] See also "A First in India: Uttarakhand HC Declares Ganga, Yamuna Rivers As Legal Entities" *Live Law News Network*, 20 March 2017 at <http://www.livelaw.in/first-india-uttarakhand-hc-declares-ganga-yamuna-rivers-living-legal-entities/> and A Kothari and S Bajpai, "Can the Ganga have human rights?" *The Hindu*, 1 April 2017.

The High Court did not specify the rights that the rivers held, other than to say that they included all of the rights of a living person. These rights of a living person would include the right to life (see Article 21 of the *Constitution of India*) but also a right to dignity. The right to dignity requires beings to be valued, respected and receive ethical treatment. The Uttarakhand High Court's decision to recognise the Ganga and Yamuna Rivers as legal entities with corresponding rights, gives the rivers recognition and respect and values them.

Earlier, in 2013, the Supreme Court of India held that Asiatic Lions had a right to life protected by Article 21 of the *Constitution of India*:

> "Article 21 of the Constitution of India protects not only the human rights but also casts an obligation on human beings to protect and preserve a specie becoming extinct, conservation and protection of environment is an inseparable part of right to life".[4]

Recognition of the rights of nature can come indirectly. Section 92 of the *Constitution of Australia* provides that trade and commerce within the Commonwealth shall be absolutely free. In *Ackroyd v McKechnie*,[5] the High Court struck down, as infringing s 92, a provision of the *Fauna Conservation Act 1974* (Qld) that regulated interstate trade in wildlife and wildlife products (s 64 of the Act). The High Court accepted that there may be things that might be considered extra commercium, or outside those things that can be considered articles of trade, commerce or intercourse. However, the High Court did not consider that the wildlife that was the subject of the interstate trade in that case, sulphur crested cockatoos, were extra commercium.

In 1987, I published an article on this decision arguing that native wildlife could be considered extra commercium for the purposes of s 92 because trade, commerce or intercourse in such wildlife offends the prevailing morals of society. I argued that, under an ecocentric ethic, the idea of trading in wildlife is as repugnant to society as is the idea of trading in human slaves.[6] If courts were to accept this argument that native wildlife is extra commercium, they would impliedly accept the intrinsic value of native wildlife and its rights, including a right to live in its wild natural habitat, which would be infringed by being collected from the wild and traded in interstate commerce.

The Supreme Court of India held that statutory duties on persons to ensure the well-being of animals and to prevent the infliction of unnecessary pain or suffering on animals conferred corresponding rights on the animals as against the persons-in-charge or care of the animals.[7] The Supreme Court made orders prohibiting bullock–cart races that failed to ensure the well-being of the bulls and prevent the infliction of unnecessary pain and suffering on the bulls.

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[4] *Centre for Environmental Law, WWF-I v Union of India* [2013] INSC 427 (15 April 2013) [41].
[5] (1986) 161 CLR 60.
[6] B Preston, "Section 92 and interstate trade in wildlife: a moral question" (1987) 4 *Environment and Planning Law Journal* 175.
[7] *Animal Welfare Board of India v A. Nagaraja* [2014] INSC 401 (17 May 2014) [27], [28].

Courts can also recognise the standing of nature, through human representatives, to access the courts concerning harm caused to nature. In 2015, the Supreme Court of the Philippines upheld the standing of marine mammals, through their stewards, to bring proceedings challenging the legality of a service contract allowing a petroleum company to conduct oil exploration in marine waters that were the habitat of the mammals.[8] The Supreme Court, although declining to extend the principle of standing beyond natural and juridical persons, held that "the need to give the Resident Marine Mammals legal standing has been eliminated by our Rules, which allow any Filipino citizen, as a steward of nature, to bring a suit to enforce our environmental law" (at pp 16-17). The Rules referred to were the special *Rules of Procedure for Environmental Cases* promulgated by the Supreme Court in 2010.

I move to the second area of duties. Duties can be correlative to rights, in a Hohfeldian sense: there can be a duty not to infringe a right of a right holder. But to restrict duties to only those for which there is a correlative right would be to circumscribe the duties existing under the law. If there are only a few rights afforded to nature, there would be few duties not to infringe those rights.

In fact, the law imposes many duties without there being any correlative right. Pollution laws impose duties not to pollute waters, such as a river, without giving the river a right not to be polluted. Native vegetation laws impose duties not to clear native vegetation, without giving native vegetation a right not to be cleared. Endangered species laws impose duties not to harm endangered species and ecological communities, without giving those endangered species and ecological communities a right not to be harmed.

Nevertheless, although there be no correlative right, the imposition of duties on humans not to harm nature, except with the required statutory authorisation, does afford recognition and respect to nature. Nature is made the object of the duty imposed on humans.

There can be duties under the doctrine of the public trust. The essence of this doctrine is that certain communal natural resources, such as rivers, seashores, forests and air, are held by the government in trust for the free and unimpeded use of the general public. The Supreme Court of India has upheld the applicability of the public trust doctrine to communal natural resources.[9] More recently, the Supreme Court held that: "The State, as a custodian of the natural resources, has a duty to maintain them not merely for the benefit of the public, but for the best interest of the flora and fauna, wildlife and so on". The Court held that the doctrine of public trust has to be addressed from an ecocentric perspective.[10]

There can also be public duties to protect or conserve some aspect of the environment or environmental quality, although these are rare in the law. One instance of a public duty on a regulatory authority to protect the environment that

[8] *Resident Marine Mammals of the Protected Seascape Tanon Strait v Secretary Angelo Reyes* GP No 180771, 21 April 2015.
[9] For eg, *M C Mehta v Kamal Nath* (1997) 1 SCC 388.
[10] *Centre for Environmental Law, WWF-I v Union of India* [2013] INSC 427 (15 April 2013) [41].

was judicially enforced was in the Manila Bay case.[11] The Supreme Court of the Philippines issued a continuing mandamus compelling the Metropolitan Manila Development Authority to perform its statutory duties to clean up and preserve the polluted Manila Bay and obliged the Authority to submit quarterly progress reports to the Court for monitoring. An example of a public duty to conserve an aspect of environmental quality (air quality) that was judicially enforced was in the UK Supreme Court's decision compelling the UK Government to perform its public duty under Article 13 of European Union Directive 2008/50 to reduce nitrogen dioxide levels throughout the UK by the directive deadline.[12]

I move to the third area of considerateness. The law may require humans to show consideration for nature, in various ways and to various extents.

At the weakest level, the law may merely require the consideration of nature in making decisions and taking action that might affect nature. Note the distinction: at this level, the consideration required is **of** nature and not consideration **for** nature. Courts have opportunities to play a role in interpreting legislation as requiring consideration of nature and the effects of a decision or action on nature, that is to say, that these are relevant matters to be considered. A relevant matter is a matter that the decision maker is bound to consider, either by the express terms of the legislation or by necessary implication from the subject matter, scope and purpose of the legislation. Within the confines of legitimate statutory interpretation, courts could find that nature and impacts on nature are relevant matters.

The courts can also interpret the relevant matter to be considered at greater levels of particularity, thereby increasing the extent of consideration required. For example, a legislative requirement to consider the impacts of a proposed development on the natural environment is undemanding and easily satisfied: any consideration of the generic matter of the natural environment could satisfy the requirement to consider the matter. The subject matter, scope and purpose of the legislation and the particular circumstances of the proposed development and the natural environment affected may, however, demand consideration of the matter at a greater level of particularity, such as the particular species or ecological community in the natural environment likely to be affected by the proposed development.

At a stronger level, the law may require that greater weight be given to a particular relevant matter relative to the weight to be given to other relevant matters. This prioritisation of consideration might be required by the express terms of the statute, although this is rare, but otherwise it would need to be found by necessary implication from the subject matter, scope and purpose of the legislation. An example of prioritisation of consideration is the principle of ecologically sustainable development that the conservation of biological diversity and ecological integrity should be a "fundamental consideration".

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[11] *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* GR No 171947-48, 18 December 2008.

[12] *R v Secretary of State for the Environment, Food and Rural Affairs* (C-404/13) [2015] 1 CMLR 55 and *R v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; [2015] CMLR 15.

At a still stronger level, the law may require consideration of whether the making of a decision or the taking of a proposed action will achieve some desired outcome or will not result in some undesired outcome. For example, a law could state that statutory powers and functions are to be exercised to achieve an outcome, such as ecological sustainability or the conservation of biological diversity and ecological integrity, and not merely to consider such matters. Courts can play a role in interpreting the legislation as requiring, either expressly or impliedly, the achievement of such an outcome and not merely the consideration of the matters.

These three levels of consideration all involve giving consideration **to** nature, but they fall short of having consideration **for** nature. Consideration for nature involves recognising and respecting nature. An exercise of statutory powers or functions having consideration for nature would involve consideration of the capabilities and needs of nature and ensuring that these capabilities and needs are met or maintained.

Sen and Nussbaum advocate a capabilities approach. It is concerned with what is needed to transform primary goods (in the abiotic and biotic environments) into a fully functioning life for a living entity and what it is that interrupts that process.[13]

Schlosberg argues that the capabilities approach can be applied to what is needed for the flourishing of individual organisms of different species, and of populations of organisms of the same species, as well as of ecological communities and ecosystems. The focus would be on the capabilities necessary for the organisms, populations, ecological communities or ecosystems to fully function and flourish.[14]

Courts could examine legislation to see whether it could legitimately be interpreted as requiring decision makers to exercise statutory powers and functions to have consideration for nature by applying a capabilities approach. For example, a legislative requirement that the conservation of biological diversity and ecological integrity is a fundamental consideration might be interpreted as not only requiring a process (the fundamental consideration of biological diversity and ecological integrity) but also an outcome (the achievement and maintenance of biological diversity and ecological integrity). The achievement of the outcome requires meeting the capabilities of the organisms, populations, ecological communities and ecosystems to enable them to fully function and flourish.

Approaching judging from this Earth-centred, capabilities approach is challenging but, in appropriate cases, attainable. It does not involve interrogating nature, or a human representative of nature, to understand the subjective desires of nature – that of course is impossible – but instead involves identifying and understanding the objective needs of nature to fully function and flourish. Ecological science has the knowledge and the tools to undertake this necessary task.

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[13] M Nussbaum and A Sen (eds), *The Quality of Life* (Clarendon Press, 1993); M Nussbaum, *Frontiers of Justice: Disability, Nationality and Species Membership* (Harvard University Press, 2006); A Sen, *The Idea of Justice* (Allen and Lane, 2009).

[14] D Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford University Press, 2007), 153-157.

I move to the fourth area of remedies. If a breach of the law be established, the court must decide what relief (if any) should be granted to remedy the breach. For breaches of environmental legislation, the relief could include orders to prevent, control, abate or mitigate any harm to the environment caused by the breach, to make good any resulting environmental damage, and to prevent the continuance or reoccurrence of the breach. The relief could also include compensation for loss or damage and payment of costs and expenses incurred as a result of the breach.

The granting of such relief involves reparative justice, repairing the harm caused to nature. Courts have an opportunity to take an ecocentric approach in crafting the reparative relief granted. Under an ecocentric approach, the environment would need to be repaired to a state and a quality that enables the organisms, populations, ecological communities and ecosystems in the environment harmed to fully function and flourish. It would not be sufficient to repair the environment so that it provides merely some of the ecosystem services that are valued by humans.

In criminal matters, courts have an opportunity to take a restorative justice perspective. A restorative justice approach is concerned with promoting harmonious relationships by means of restitution, reparation and reconciliation between offenders, victims and the wider community. Restorative justice conferencing (a form of victim-offender mediation) has been used in courts in New Zealand and Australia in sentencing for offences of environmental legislation.[15] This involves giving recognition and voice to nature as a victim of environmental crime.

I turn now to valuing nature. When courts uphold rights of, impose duties with respect to, require consideration for and grant remedies in favour of nature, they recognise and respect and give value to nature. Giving or upholding rights of nature involves recognising the intrinsic value of nature, that is to say, value for its own sake and not for the utility it affords humans. Imposing duties with respect to or requiring consideration of nature involves recognising the instrumental value of nature, that is to say, value for the utility nature provides to humans.

Economic value is one of the many different ways to define and measure instrumental value. The environment, including its biotic and abiotic components and ecosystems, produces goods and services that are useful to humans because they contribute to the wellbeing, welfare or utility of humans and are therefore valued by humans. Human activities that impact on the environment change the flow of goods and services produced by the environment, and thereby change the welfare or utility of humans. Economics identifies, quantifies and monetises this change in the flow of goods and services and hence the loss in the welfare or utility to humans. Economics does not value the environment and its components and ecosystems as such, only the changes in the flow of environmental goods and services that are of utility to and are valued by humans. Economics is, therefore, concerned with the

[15] M Hamilton, “Restorative justice intervention in an environmental law context: Garrett v Williams, prosecutions under the Resource Management Act 1991 (NZ) and beyond” (2008) 25 *Environmental and Planning Law Journal* 263; B Preston, “The use of restorative justice for environmental crime” (2011) 35 *Criminal Law Journal* 136; R White, “Reparative justice, environmental crime and penalties for the powerful” (2017) 67 *Crime, Law and Social Change* 117, 129-130.

utilitarian or instrumental value of the environment to humans, not its intrinsic value. Economic valuation of the environment is an anthropocentric approach.[16]

Nevertheless, economics can still ascribe a value to a particular environment or component of it by valuing the various goods and services the environment or component provides that affect the wellbeing of individuals and societies. By ascribing a monetary value to these goods and services, they are able to be compared and aggregated and set off against other monetary costs and benefits, and hence be taken into account in resource allocation and management decisions affecting the environment or components of it.

Economic valuation may not capture all of the value of the environment. It will not capture the value of ecosystem functions and services that do not affect the utility of humans, or the intrinsic value of organisms, populations, ecological communities or ecosystems. But at least economic valuation provides some (lower bounded) estimate of value – the value of the environment is at least as much as the total economic value. Economic valuation also does not assist in deciding issues of equity in the distribution of costs (burdens) and benefits among humans and between humans and non-human nature. Nevertheless, by facilitating the comparison and aggregation of costs and benefits, economic valuation assists in the integration of environmental considerations with economic considerations and thereby in making decisions about the wise and sustainable use of the environment and components of it. It therefore facilitates the meaningful consideration of nature in decision making, albeit from a human-centred rather than Earth-centred perspective.

I have spoken so far about some of the opportunities available for courts in judging disputes concerning the environment to find, interpret and apply the flashes of wild law in existing laws and how, by doing so, courts can give value to the environment and its components. The need to adopt an Earth-centred approach to judging disputes concerning the environment was the driving force behind the Wild Law Judgment Project. The idea of the organisers, Professor Nicole Rogers and Dr Michelle Maloney, was to explore how judgments, in various areas of law, could be viewed and rewritten through a wild law lens. As they observed in an earlier article, the rewriting project was "intended to disrupt and unsettle the established human and property-centred practices of the common law", by placing "all life, and all of life's support systems, at the centre of judgments", and "contesting the place of humanity at the centre of existing notions of justice".[17]

At the launch of the Project, I suggested that there may be at least two different approaches that could be pursued. One approach is to accept the law as it currently exists, but explore whether there is scope for finding, interpreting and applying the law to best meet the justice, including the ecological justice, of the situation. The suggestions that I have made so far of the opportunities available for courts in judging to recognise and realise the wild law flashes in existing laws pursues this first approach. The other approach is to challenge the existing law and to mould it to fit

[16] B Preston, "Economic valuation of the environment" (2015) 32 *Environmental and Planning Law Journal* 301.
[17] N Rogers and M Maloney, "The Australian Wild Law Judgment Project" (2014) 39 *Alternative Law Journal* 172, 173.

Earth's demands. The object of this second approach is to highlight the inadequacies of the existing law. Judgments would be rewritten to identify the reformed laws and show how the application would affect the outcome of the case.

The product of the Wild Law Judgment Project is the book entitled "Law as if Earth Really Mattered".[18] The book's contributors have drawn on both of these approaches. Some contributors have rewritten judgments based on existing legal principles. Other contributors have redrafted existing laws and rewritten judgments based on these rewritten laws. Some of the contributors have written hypothetical and/or futuristic judgments rather than rewritten existing judgments. However, all of the judgments have achieved the object of the Project organisers of looking at the law and judging through a wild law lens.

The editors of the book have structured the judgments by common themes. The first is extending membership of the community of justice entitled to access the courts to include all living entities. This involves an expansion of the class of holders of rights entitled to procedural justice. Two of the judgments give standing to sue to living organisms, one to green turtles and the other to lung fish. Two judgments extend standing to ecosystems, one to the marine community of the Great Barrier Reef and the other to the terrestrial and marine communities that comprise the country of the traditional people of the land. A further judgment extends political representation to all living things, and not just to humans, thereby expanding the concept of democracy.

A second theme concerns the wellbeing of non-human nature. One judgment explores the consequences of giving rights to other species (a bear) and the content of those rights, including not to be held in captivity, and to behave wildly (as a bear) if it escaped captivity. Another judgment explores the consequences of extending the duty of care in negligence to other species (a snail). These judgments highlight the need to look to the capabilities and needs of non-human nature.

A third theme explores the requirement for decision makers in the exercise of statutory powers and functions for considerateness towards nature. One judgment focuses on a wild law interpretation of the precautionary principle, holding that if there is a possibility of irreversible damage to protected areas, such as the Great Barrier Reef, from greenhouse gas emissions from a proposed coal mine, approval for the coal mine should be refused. This strong interpretation and application of the precautionary principle evidences consideration for nature, and not merely of nature. Another judgment adopts a wild law interpretation of what constitutes the "environmental impact" of the burning of coal from a proposed coal mine, extending the ecological footprint and the intensity of the impacts of the mine.

A fourth theme challenges and rewrites principles of statutory interpretation. Two judgments interpret the applicable legislation from a wild law perspective, including prioritising ecological integrity and adopting a holistic approach.

[18] Nicole Rogers and Michelle Maloney (eds), Law as if Earth Really Mattered: The Wild Law Judgment Project (Routledge, 2017).

A fifth theme concerns expanding the human membership of the community entitled to participate in the polity and subsequently to access the courts. One judgment explores local communities' rights to be consulted and to participate in decision making about mining projects potentially contaminating catchment areas and water sources. Two judgments explore the dispute concerned from the perspective of the traditional owners of the lands affected. This includes challenging the applicability and authority of Western law, rather than applying the law of the traditional owners who have care and custody for the land.

A sixth theme concerns international law. Two judgments examine international law disputes, one concerning whaling in the Antarctic and the other concerning a road down a trans-boundary river, from the perspective of the nature affected, the whales in the first and the aquatic environment and its biota in the second.

A seventh theme looks at how criminal law deals with environmental activists. One judgment looks at sentencing an environmental activist. Two judgments explore the liability of environmental activists, having regard to a defence of freedom of expression or a constitutional freedom of implied political communication, arising from Earth-centred concerns.

A final theme concerns ecological knowledge and information. A futuristic judgment concludes that biological data, falling within the domain of the information commons, cannot be privately appropriated.

As the editors rightly conclude, these judgments "constitute a coherent body of wild law judgments which may lack the 'force of law' or conventional legitimacy but which have a powerful political and educative value". The judgments provide insight and precedent (in a non-legal sense) into how to re-examine existing laws with "wide open, wild eyes" (as Cormac Cullinan says).

One of the problems when we try to see the future is that we do so with a mind, and through the eyes, that have been conditioned by the past. Christopher Stone in his seminal article, "Should trees have standing – towards legal rights for natural objects",[19] said that many new ideas at first seem unthinkable: "The fact is that each time there is a movement to confer rights to some new 'entity', the proposal is bound to sound odd or frightening or laughable." But once we give the right-less thing rights or have considerateness for it, the unthinkable becomes thinkable. We see it through fresh eyes.

The Wild Law Judgment Project has started this process of making the unthinkable become thinkable. The judgments in the book have begun the exploration of the law as if nature (the Earth) really mattered.

I commend the book and "wildly" launch it.

[19] C Stone, "Should trees have standing – towards legal rights for natural objects" (1972) 45 *Southern California Law Review* 450.