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Recognising Rights for Nature: A Negotiation of Principle and Pragmatism

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Earth Jurisprudence: Principles and Praxis

There is no one set of principles concerning just one form of value that provides ultimate government for our actions (Brennan 15-33)

Earth jurisprudence and wild law are emergent fields which seek to redefine the legal relationship between human and non-human entities and to develop strategic (arguably anthropocentric), law based interventions which might operate to support the integrity and health of ecological systems. [1] A central concern of earth jurisprudence is to translate various forms of ecocentric thinking into practical legal interventions that can extend ethical, political and legal consideration to all components of the natural world. [2] At its most visionary level, earth jurisprudence aims to develop “non-anthropocentric” earth justice systems capable of recognising and representing the “rights of nature.” [3]

Earth jurisprudence is predicated upon the view that while the human species has no special moral or spiritual authority in relation to the cosmos, it has an ethical responsibility to respond to and arrest human activity which is harmful to ecological systems. While such a description indicates a broad and loosely defined agenda, Cormac Cullinan provides a greater level of exposition with his suggestion that earth jurisprudence requires the “re-alignment of human governance systems with the fundamental principles of how the universe functions” (Cullinan 30). In order to change completely the purpose of our governance systems, he argues, we must develop coherent new theories or philosophies of governance to supplant the old, ones which will raise normative questions relating to their political and ethical legitimacy (Cullinan 30).

The consensus definition for earth jurisprudence recently endorsed by the Centre for Earth Jurisprudence at Barry Law School, Florida provides that earth jurisprudence:

[S]eeks earth-centered approaches to law and governance. As an integral part of the broader earth community, humanity has responsibility to act for the well-being of the planet and future generations. Earth jurisprudence draws forth earth-centered comprehensive solutions from *within* as well as *beyond* existing law. (Centre for Earth Jurisprudence 32)

This suggests that what is required is an expansion of the idea of law and of justice to enable the articulation and evaluation of juridical interventions with reference to their capacity to give effect to an “earth-centered” approach to ecological issues. One approach could be to assert that an

ecologically “legitimate law” will be one which complies with ecocentric ethics and in which human conduct is oriented to support the vitality of other biotic communities. Such an approach, however, runs the risk of reinscribing a contestable “natural law” doctrine grounded in quasi theological precepts and of becoming ensnared in the conceptual cul-de-sac of the positivism-natural law debate (Davies 79). The challenge for earth jurisprudence will be to articulate a more workable premise for the evaluation of appropriate legal interventions; for example, whether Cormac Cullinan's suggestion of developing legal regulatory frameworks that are “aligned with the known operating principles of the physical universe” is able to provide an empiric and practical means for evaluating the appropriateness of laws and which avoids the risks inherent in proceeding from ethical assertions alone.

The concerns of earth jurisprudence then, are both philosophical and pragmatic. The identification of precise conceptual frameworks to inform, and of strategic responses to give effect to, effective earth justice systems remain the subject of negotiation and may be perplexing to scholars and practitioners in an emergent field. While theorists and ethicists problematise the meaning of terms such as “nature,” struggle to define concepts such as eco-centrism and biocentrism, and debate the appropriateness of employing liberal humanist frameworks to pursue rights for nature, lawyers and policy makers concerned to identify pragmatic ways to respond to ecological crises are more likely to submit to anthropocentric calculi to achieve strategic outcomes.

Negotiating Nature

All questions concerning the essence of nature are at best speculative approximations
(Whitehead 39)

Concepts such as “nature,” “earth community,” “ecocentrism” and “mutually enhancing relationships” have become terms around which exponents of earth jurisprudence seek to identify and organize non-anthropocentric claims to justice. However, the paradox of a non anthropocentric system of human governance is one which confounds the development of frameworks for earth jurisprudence, causing theorists and practitioners to question how “nature’s laws” might be identified and articulated for the purposes of their incorporation into human juridical processes. While Thomas Berry opined that earth jurisprudence is not a human creation but “something that already exists in nature” (Berry) and Mike Bell suggests that “it is unlikely that a human jurisprudence can serve as a suitable framework for an earth jurisprudence” (Bell 69), Christopher Stone suggests that, at the level of praxis, an earth justice system will be unavoidably anthropocentric. He concedes that because an entity cannot be said to hold a legal right unless and until some (human) authoritative body provides a mechanism to enforce that right or to review actions inconsistent with that right, the concept of “rights of nature” is inherently problematic (Stone 4): “To shift from . . . a lofty fancy as the planetarisation of consciousness to the operation of our municipal legal system is to come down to earth hard” (Stone 30).

Timothy Clark notes that “nature has become the latest entity to be embraced by the ever-expanding frontier of the liberal tradition” (103). And while some in the movement have sought to dissociate earth jurisprudence from an endorsement of the liberal humanist project, arguing that the rights of nature should not be conceived in terms of anthropocentric conceptions of human rights, others such as Roderick Nash have unproblematically endorsed a juridical concept of rights for nature as a logical extension of liberal doctrine. The danger of approaches such as Nash’s, Bob Pepperman Taylor remarks, is that, as the extensions of rights to non-humans becomes progressively more inclusive, the concept is progressively reduced to meaninglessness. Because bearers of rights have special claims that take precedence over the claims of others, Taylor argues, “if all things in the natural universe have equal rights, all rights are equally meaningless” (581).

There are other ways in which the inclusion of nature within the liberal humanist discourse of rights might be critiqued. One enduring rationalisation of rights within liberal legalism stems from the ontological premise that humans beings existed prior to centralised systems of governance and willingly surrendered some rights to the State in a form of limited social contract (Hobbes 227). However, non human “nature” also existed prior to anthropogenic social institutions and has never participated in a fictional social contract nor surrendered its priority to the apparatus of State. In this sense, the “rights of nature” remain both prior to, and ontologically beyond, human legal systems.

Determining juridical rights for nature which respect the “fundamental principles” of nature is further compounded by what Kate Soper calls the “elusive” (Soper 1) and Noel Castree the “promiscuous” (Castree 5) concept of nature itself. Edgar Morin argues that nature is a “polysystematic whole” (Morin 136) which shifts in relation to epistemological, social and political ethical changes and that “at a profound level in nature nothing is fixed; everything is in continual movement; even a rock is a continual dance of subatomic particles” (Morin 128). And as Michael Carolan notes, the term “nature” is used to speak of any number of things: from the “not natural,” such as the urban landscape, to the nature of unspoiled wilderness, to the forces of nature, such as gravity and natural selection, to the nature of the universe, of dark matter and galaxies, and finally, to human nature (Carolan 399). Is there any hope, Carolan asks, of “unsnarling this terminological quagmire,” (399) or will we be “forced to abandon the concept in any quest for conceptual and analytic specificity”? (399). The development of an earth jurisprudence based on the rights of nature, then, involves a negotiation of a “nature” inscribed by philosophical and paradigmatic assumptions and by political, economic and historical practices. And as Catriona Sandilands argues, if “nature” is presupposed as a distinct and knowable subject apart from human relations, the potential for environmental justice, one which requires the mobilisation of diverse publics, is seldom fulfilled (14).

So where does this discussion leave “nature” other than as a confounded and contestable concept and what are its implications for an earth justice system informed by an ecocentric perspective? While emergent earth jurisprudence discourse has problematised the human-nature dualism, an investigation of the ontological and epistemological issues associated with the *idea* of nature has received less philosophical exposition.

To speak of “nature” is to also to speak of a socio discursive concept, a product of power relations and varieties of discursive subjugation. Because of this, any “earth justice system” needs to pay careful regard to the asymmetrical power relations that persist in the world, no matter how holistic or “ecophilosophical” its conceptions of nature purport to be. And because human power relations are implicated in any attempt to derive legal principles from any ethical framework, we cannot assume that ecological justice will in itself align with other conceptions of justice. As Cormac Cullinan cautions, “the diversity of nature and our limited knowledge of it allow ample scope for everyone from fascists to nihilists and beyond to claim that nature supports their theories” (5).

Arguably, the development of effective frameworks for earth jurisprudence will require a more exhaustive investigation of the meaning of nature. For strategic purposes, scholars and practitioners in the field may be obliged to accede to a ‘working’ conception of nature while acknowledging its limitations.

Negotiating Human Exceptionalism

No one ever promised that clarifying and applying ethical theory should be easy. But it is obligatory on moral agents to try (Ferré 60).

It is axiomatic to suggest that a continuation of the privilege afforded *homo sapiens* as a

consequence of human exceptionalism destabilises the development of an effective earth jurisprudence. While the negotiation of the space between human and earth-centred systems of governance presents significant political challenges, to conceive of anthropocentric and ecocentric frameworks as oppositional and/or incommensurable obscures the complex dynamic between them.

Indeed, comprehensive debates between anthropocentrism and non anthropocentrism, individualism and holism, and monism and pluralism have shaped the development of contemporary environmental ethics. But, as Andrew Light suggests, while the field is most clearly defined, it is “not always adequately defended” (434-35). For this reason, the assumption that anthropocentric views are antithetical to ecocentrism is regarded by many as the natural starting point for the development of an effective earth jurisprudence (Berry 1999).

The pressing question which emerges is what responsible “earth citizens” are capable and indeed, *willing* to do to address ecological crises. This is particularly so in developed countries where, as Timothy Clark observes, the tensions between environmental ethics and liberal individualism confound practical efforts to resolve ecological problems. Our habits of consumption and production, he suggests, ones which “destabilise modern criticism in bizarre and uncomfortable ways,” are perhaps of greater environmental significance than any professed philosophical or political stance (107). As a result, the complex and often discomfiting relationships between human interests and environmental politics require clear articulation lest ecocentrism become a form of persuasive rhetoric which deflects attention away from our responsibilities as individuals, members of society and as a species. Such sentiments remind us that as a branch of philosophy, environmental ethics must be careful to avoid becoming a field of intramural debate rather than a means to assist the resolution of ecological problems.

Consequently, it is incumbent upon exponents of earth jurisprudence to consider whether an avoidance of anthropocentrism as a philosophical and/or pragmatic framework for human juridical interventions is possible or even desirable. William Grey suggests that, “the attempt to provide a genuinely non-anthropocentric set of values or preferences seems to be a hopeless quest” (473) and that “a genuinely non-anthropocentric view delivers only confusion” (466). And, as Andrew Light argues, non anthropocentric theories will not in practice lead to the elimination of the rational concern of moral agents about their own well being: “Every non anthropocentrist who has taken seriously the question of conflicts of value in a non anthropocentric approach acknowledges that in many cases human interests will still trump nonhuman interests where these interests directly come into conflict” (438).

Indeed, where they seek to enforce laws or policies in tension with traditional human centred approaches, non anthropocentric holism faces significant hurdles. As Light argues, to negotiate environmental priorities from an irreconcilable and intractable moral view opposing human interests would be “naïve and imprudent” (439) and to make questions of human benefit and satisfaction irrelevant at the bargaining table, especially when humans are the only ones able to represent the interests of non human entities, would render negotiation “irrevocably caustic if not impossible” (439).

He cautions that the concern to locate a philosophically sound basis for the moral consideration of nature has left agents of change out of discussions and has avoided discussion of the beneficial ways in which arguments for ecological protection can be based on human interests. Light suggests that anthropocentric forms “are at the centre of most practical efforts to resolve ecological problems” (427-28) and that as long as environmental ethicists spend most of their time debating non anthropocentric forms of value theory, they are less likely to contribute to the resolution of ecological crises. While attempts to identify a single “meta ethical” framework for the diverse objects of moral concern: other humans, other animals, living organisms, ecosystems, species and earth itself, might provide an uncluttered methodology, it may be unhelpful to the

resolution of competing interests and claims; ones which require a consideration of the particularities of each situation to which an ethical claim can be applied. To this extent, as Light suggests, environmental ethics are “arguably more practical than philosophical” and their resolution in practical terms is of greater significance than their resolution in philosophical terms (435).

Frederick Ferré states that he finds it “impossibly grotesque” (“Personalistic Organicism” 68) to think of humanity as “just another species” (68). He argues, along with Mary Midgley (111), that “perspectival anthropocentrism” is inevitable and “perfectly licit” (72). Although humans are right to be anguished and outraged about what we have done to harm earth, Ferré argues that “there is no point in feigning that we are not distinctly human” (“Personalistic Organicism” 72). Rather, he suggests, humans need to explore a relational ethic that is “healthily polycentric” (59):

Many environmental thinkers are torn in two opposing directions at once. For good reasons we are appalled by the damage that has been done to the earth by the ethos of heedless anthropocentric individualism. . . . But also for good reasons we are repelled, at the other extreme, by environmentally correct images of mindless biocentric collectivism in which precious personal values are overridden for the good of some healthy beehive “whole.” (59)

Ferré acknowledges that humans “are organisms, too, and properly in solidarity with all that that means.” (“Obstacles” 238) One thing it means is that “we do wrong to continue our magisterial alienation from the rest of the organic world” (238). He suggests that one way to address the tension between biocentrism and anthropocentrism is through the development of “personalistic organicism” (“Personalistic Organicism” 59), a form of ethical holism which recognizes organic interconnectedness and what it means for human persons: “If we humans are both persons and organisms, then we are not forced to choose between ‘biocentrism’ and ‘anthropocentrism,’ as though these were in opposition. We are organisms; we are persons. We are in nature; we are in culture” (“Obstacles” 238).

Ferré suggests that while the tensions between the imperatives of “personalism” (“Obstacles” 231) and “organicism” (231) are sharp, the quest to harmonise vital intuitions reflected by these imperatives is not futile. He argues that while, at first blush, their combination may appear paradoxical, it is a paradox that admits of coherent resolution. A personalistic organicism, Ferré argues, may provide a paradigm for resolving intellectually and environmentally dangerous dualisms that separate civilization from nature, mind from body, and intrinsic from instrumental values. His approach is a “both/and” (“Obstacles” 238), one which advocates that we “distinguish without separating” (238). It is one predicated on what Alan Wittbecker calls humanity’s “unavoidable anthropometric condition” (261): that humans have no choice but to think as humans and to take a human point of view even while they struggle to transcend egoism by cultivating sympathy and concern for other entities having intrinsic value. Ferré says that fate forces humans into “perspectival anthropocentrism” (“Personalistic Organicism” 72), and that because of this, personalistic organicism cannot be regarded as anthropocentric in any ‘objectionable way’ (59). He goes on to say: “But this carries no moral penalty, since . . . we literally can do no other than see from our own point of view. In another harmless sense, we are obliged to measure values (and all else) as humans” (59). Ferré’s “personalistic organicism” (“Personalistic Organicism” 231) acknowledges types as well as grades of value. He argues that the universe is full of both intrinsic and instrumental values, each of which deserve ethical respect “to the degrees appropriate to the intensity of the values concerned” (239). While he concedes that values may be difficult to measure and to weigh against one another, a paradigm of personalistic organicism recognises that values are in dynamic tension and that “with hard work, patience and good will” (239) can “energise personal ethics and transform social policy” (239).

Conclusion: An Ecocentric Anthropomorphism

The main future challenge for ecocriticism may lie in the way in which environmental questions will continue to resist inherited structures of thought and are uncontainable within the competence of any one intellectual discipline (Clarke 203).

The development of effective earth governance system demands an acknowledgement that any attempt to derive legal principles from “natural” ones will be fraught with tension. It also requires a problematisation and negotiation of irreconcilabilities between anthropocentric and ecocentric frameworks. If understood as oppositional categories, anthropocentrism and ecocentrism are likely to be counterproductive to the progress of earth jurisprudence. Indeed, any assertion that anthropocentrism cannot be reconciled with ecocentrism in any strategic sense will hamper both the articulation of conceptual frameworks to inform, and strategic interventions to give effect to, earth justice systems capable of responding to ecological crises.

As conceptual and practical frameworks, “personalistic organicism” (Ferré, “Personalistic Organicism” 231) and ecocentrically informed anthropocentrism may provide means for circumventing the opposition of anthropocentrism and ecocentrism and allow for the development of forms of praxis aimed at addressing ecological issues. These approaches acknowledge that legal systems are human artifacts capable of little more than regulating the activities of the humans and corporate entities that are subject to them. They recognise that human systems of governance are not competent to regulate nature, but only the activities of humans vis-a-vis other humans and the non-human natural world. For this reason, some form of strategic anthropocentrism appears to be an unavoidable compromise in any attempt to incorporate an ecological ethic into regulatory practice.

Cormac Cullinan's notion of “realigning human governance systems with the fundamental principles of how the universe functions” (5) provides us with a framework for the development and deployment of empirically based ecocentric interventions in a radical redesign of the anthropogenic project of law. It recognises that the acceptance by humans of their unavoidable anthropocentric condition need not obstruct the development of a more humble and inclusive sensibility in relation to the value of *homo sapiens* within the cosmos, the recognition of the a priori status of non human ecologies, and the development of practical juridical interventions capable of giving effect to this sensibility.

Central to the project of earth jurisprudence is a willingness to observe and accept our relative unimportance as a species while at the same time affirming our capacity and responsibility to respond in ethical and pragmatic ways to arrest harmful practices for which humans, both as legal subjects and as a species, are responsible. The incommensurabilities between a theory of earth justice and the practice of an earth justice system will, no doubt, continue to involve exponents of earth jurisprudence in a host of philosophical, legal, political and ethical entanglement and will require of its scholars and practitioners a negotiation between the “official” philosophy of ecologism and strategic interventions which are arguably anthropocentric. Whether rights are conceptualised and represented in moral, ethico-political and/or juridical terms, or whether a more modest project of strategic alignment of human systems with ecological constraints is pursued; the philosophy and practice of earth jurisprudence will continue to demand significant paradigmatic shifts to inform and engender strategic interventions into normative legal frameworks and processes.

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Endnotes

1. Broadly speaking, earth jurisprudence embraces the concept of earth justice systems based upon allegedly universal "laws of nature." It is predicated on the idea that in nature there is an intimate connection between all animate and inanimate entities in the universe which determine and influence physical laws and which provide the elements upon which entities depend. As Thomas Berry wrote in *The Great Work*, an earth jurisprudence is one in which human laws are conducive to the establishment and maintenance of "mutually enhancing relationships" between humans and all other members of the "earth community" (3). Cormac Cullinan sought to explain earth jurisprudence in formal legal terms and to explore ways in which its principles might be integrated into legal systems. He introduced the term "Wild Law" to describe the content of earth law systems derived from "laws of nature" (30). See Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 2003) and Peter Burdon (ed.) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011)
2. An ecocentric ethic treats natural systems as intrinsically valuable and / or morally considerable. Traditionally, ecocentric ethics has relied on "holistic" ecological theory to provide its empirical foundation, one which evaluates human impacts on the environment primarily in terms of their effect on the integrity, stability, and balance of ecosystems. (See Hettinger and Throop).
3. In 2008, Ecuador became the first country in the world to introduce constitutional reforms mandating the legal recognition of ecosystems' "right to exist" and to entrench constitutional "rights of nature." Ecuador's *Constitutional Rights for Nature* provides that "Nature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes" and "a right to an integral restoration." Importantly, it identifies juridical mechanisms for the recognition, regulation and enforcement of these rights. <celdf.org/rights-of-nature-ecuador-articles-of-the-constitution> Bolivia is set to legislate the "Law of Mother Earth" which identifies eleven specific rights for nature, and in 2010, Bolivian President Evo Morales convened a World Conference of Peoples on Climate Change and Mother Earth's Rights in Cochabamba. One outcome of that conference was the drafting of a *Universal Declaration on the Rights of Mother Earth*, a document which ">demands a paradigm shift and a conscious effort on the part of man to own up to our errors and settle on amending our patterns of production and consumption." The Declaration was presented to the United Nations Climate Change Conference in June 2011. motherearthrights.org/ In the United States, local ordinances have been passed in some states which recognise rights for nature within local communities. See for example www.yesmagazine.org/people-power/pittsburg-bans-natural-gas-drilling

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