"The Legal Status of Nature in the Australian Legal System"

Presentation by the Hon. Justice Brian J Preston to

"Exploring the Legal Status of Nature Seminar"

30 August 2017

Southern Cross University, Gold Coast

As the title of this seminar is "Exploring the legal status of nature", I will start that exploration. I am not going to necessarily give you answers. I hope to spur your thinking about what it means to give nature status in law. Like any good lawyer, I will unpack the title, "the legal status of nature".

What is "nature"?

The first thing we need to unpack is what is "nature"? What do we mean when we refer to "nature"?

The way we refer to things reflects the way we see the world. Language is the means by which different cultures conceptualise, interpret and understand the natural and social world and communicate such a worldview to others. If a plant, animal or object in the natural world is important in the life of a culture, it and its important attributes and qualities are named. But the determination of what is important to a culture depends on that culture's ways of knowing. Epistemology is the study of the nature and scope of knowledge. Discussion of epistemology in the context of exploring the legal status of nature needs to recognise that there are different ways of knowing nature and hence linguistically describing it.

When we talk about the legal status of nature, for most of us, we will employ a Western perspective of what we mean by nature. We will use our Western knowledge to conceive of it. Western knowledge is also known as Western science. It relies on certain "laws" that have been established through the application of the scientific method to natural phenomena.

Division of biotic and abiotic environments

One approach of Western knowledge is the division between the biotic and abiotic environments. We put the plants and animals and other biota into one category (the biotic environment). We put the rocks and the soil and the air and the waters into another category (the abiotic environment).

Why do we effect this division? Every person, every tree, every animal is a combination of living and non-living things. And every non-living thing has within it living things. When we think of the soil, what do we mean by the soil? It has earth-

worms and cockroaches and mycorrhizal fungi and other living things within it. When we think of the water, water does not just exist itself but has aquatic or marine biota within it. The division between the biotic and abiotic is artificial.

Taxonomical classification of nature

We can continue our querying of the Western way of knowing nature when we consider of the way in which we classify biotic organisms. Linnaeus came up with a system of taxonomy for classifying and naming organisms. He developed a hierarchical system of classification of nature. Today, there are eight taxa: domain, kingdom, phylum, order, family, genus and species. Organisms are classified and named within this classification system. For example, when we think of an endangered plant like *Tetratheca juncea*, *Tetratheca* is the genus and *juncea* is the species. How do we know what is *Tetratheca juncea*? A botanist has to scientifically describe and publish a paper identifying and classifying the distinguishing characteristics of the species. For *Tetratheca juncea*, these characteristics include having flowers with four petals, which range from white to pink to dark purple in colour, borne singly or in twos along the stem, with the stem usually leafless with two to three narrow wings that gives the stem an angular appearance.

But if any of you have ever done or used such taxonomic classification, you will know that when you go out into the wild, you find that nature has a habit of just not complying with the classification. And I have never yet been able to find a plant that meets the taxonomic description 100%. You are always left with the dilemma, is 60% good enough?

It is even worse with the concept of endangered ecological communities. An ecological community is an assemblage of species occupying a particular area. An endangered ecological community is an ecological community that some government body lists as endangered. To do this, the body must come up with a description of the ecological community, including describing what is the assemblage of species and what is the particular area. Again, I am yet to find an ecological community that meets that description 100%. The same dilemma arises, is 60% good enough? Or which criteria is more important than the other criteria for the classification?

These are just games humans are playing. Nature is perfectly happy in its own environment without humans putting a taxonomic classification upon it. But we feel the need to do so.

The point I have been endeavouring to make is that when we think of nature, we have to first ask what do we mean by nature? What are the divisions or taxonomic classification we are making? It was wonderful having our last speaker, an Indigenous elder, because she showed that there are completely different ways of knowing. The Western conception of what is nature is completely foreign to indigenous peoples all over the world. We have to recognise that. When we give, I'm going to use a neutral expression, a thing legal status we have to work out what is that thing and we shouldn't make the assumption that it is a thing we have always assumed to be a thing by our classifications.

Separation of humans and nature

The next approach, in our Western way of knowing, is that we separate humans from non-human nature. There are a number of reasons why we do this but before I address the reasons I want us to think about the significance of doing so for a moment. How long are we humans going to live if we do not have a relationship with non-human nature? Not very long. We can survive without eating but not for a long time. We need food. And food comes from nature. So we have a dependent relationship. Although we like to put ourselves in a special category, we are no different to any other biota on this earth. There is a food chain, and that's not McDonalds by the way, that we depend upon. There are also many other ways in which humans depend on nature.

How did we get to this position of separating ourselves from nature? That is often said to be because of our Judeo-Christian religion. If you have read the famous essay by Lynn White on the historical roots of our ecological crisis, he blames the Genesis creation story.[1] The Bible asserts humans' domination over nature and Judeo-Christian theology distinguishes between humans (made in God's image) and the rest of creation (which has no soul and is inferior to humans). That is one particular way of knowing and it has been adopted over time because it is convenient for humans to have domination over nature, and by that the subordination of nature to our needs.

It is not, however, the only way of looking at the Judeo-Christian religion. St Francis of Assisi challenged the dominant view and said there were other ways of understanding out relationship with nature. St Francis tried to depose humans from their self-imposed monarchy over creation and set up a democracy of all of God's creatures. He tried to substitute the idea of the equality of all creatures, including humans, for the idea of human's limitless rule of creation.

Nevertheless, the dominant view has been that nature is a commodity which we are able to exploit and it is not a community to which we belong. This ethic of domination of nature has been crucial to the development of those colonising nations that have wrought ecological destruction to much of the world. England, Spain, Portugal, the Netherlands, run yourself round all the world where colonisation occurred, are the nations with the Judeo-Christian religion. And they are the ones that embrace the viewpoint, that nature was created for human's benefit and rule, and it has given those nations enormous wealth.

Western philosophers build upon that ethic of domination of nature. We can think of Descartes, who viewed nature as something separate and apart from humans, to be transformed and controlled at will. He divided the word into two parts: conscious, thinking substances or minds and extended, mechanically arranged substances, the rest of nature. This sharp ontological division resulted in the alienation of humans from the natural world. Descartes' mechanistic conception of nature leads to the view that it is possible in principle to obtain complete mastery and technical control over

[1] Lynn White Jr, 'The Historical Riots of Our ecological Crisis' (1967) 155 (3767) *Science* 12.

the natural world. A natural corollary of Descartes' mechanistic conception of nature is the role played by reductive thinking. In order to understand a complex system, one should break it into its component parts and examine them. Such an approach encourages an atomistic and disintegrated view of nature. It is the antithesis of an holistic or systematic approach. This mechanistic and reductionist approach is convenient if you want to dominate the earth. It is not convenient to have interrelationships between humans and nature. So, the Cartesian philosophy assisted humans' domination and destruction of nature.

And then you have philosophers like John Locke. The Lockean way of looking at nature is influenced by the protestant work ethic that things can be made good and valuable by your labour. Labour is the source of use-value or utility of a thing. We can see that view coming through in the law of intellectual property. The original legal view of intellectual property is that you cannot take out a patent or have intellectual property rights in nature as it is. You have to have some invention. You have to mix your labour with nature in some way. This might be by plant breeding or gene splicing or other modification of the plant's DNA. That invention is what you can patent. This original view is breaking down. Corporations are starting to call for plant variety rights for plants collected from the forest but without having to change the plant's DNA in any particular way. This call infringes indigenous knowledge and can have terrible ecological consequences.

We can see this Lockean labour theory of value manifested in another way. In Australia, governments granted leases of Crown land to the early European settlers on the condition that they "improve" the land. If they did not improve the land, they lost the lease. What did they do to improve the land? They cleared the land. They could not cut down all of the trees. They did not have huge bulldozers with great chains to clear thousands of hectares in days, as the farmers out west now do. They had to cut the trees by axe or handsaw. They could not cut down all the trees. So what did they do? They just ringbarked the trees. They did not even use the timber. They just killed them by ringbarking. The clearing of the trees by felling or ringbarking was considered improvement. The labour of felling or ringbarking the trees gave value to (improved) the land.

Ethics shape the law

I have been examining Western philosophical and ethical viewpoints because these shape the law. Everything we look at in our Western law is influenced by Western philosophy and ethics and the Western way of seeing and knowing the natural world.

Now law, Lon Fuller says, is just a form of social ordering, nothing more than that.[2] What forms of ordering are we doing in our society? Firstly, it is an ordering of the relationships between individuals in society. We come up with laws to stop each other killing and doing other things to each other that are said to be socially undesirable. Secondly, it is a form of ordering of the relationships between citizen and the state, between people and whatever form of governance has been created in a society. Thirdly, it is a form of ordering of the relationships between people and

[2] See, for example, Kenneth Winston (ed), *The Principles of Social Order: Selected Essays of Lon L Fuller*, Hart Publishing, 2002.

the environment. Note what I have just been saying that from the Western perspective, the environment is seen to be separate and apart from humans. Because otherwise, if humans were seen as being part of the environment, it would be relationships of people and the environment which are both part of the one community. However, that is not the dominant conception; rather it is between people who are part of the community and the environment which is outside that community.

Our Western philosophies and ethics, therefore, lead to particular forms of social ordering and particular forms of law. We can contrast that to, say, indigenous people's philosophies and ethics and how they lead to completely different forms of social ordering and relations with land and country, with the result that their laws are starkly different to Western laws.

We could unpack all our Western laws and identify the dominant influence of Western philosophies and ethics but it will suffice if I look at just one area of law and that is in relation to property law. Where are we deriving our concepts of property law? A great deal of how we classify the natural world in property terms comes from Roman law. Roman law divided things (res) into various categories. One of the significant classifications was between those things that were capable of individual appropriation and trade and those that were not. Those things that were capable of individual appropriation could be put into private property. A house or chattels within the house were capable of individual appropriation and ownership. Then there were the things that were incapable of individual appropriation and ownership. There were things subject to divine law (such as temples, alters and tombs). There were things belonging to the state (such as bridges, public roads, theatres and parks). There were things that belonged to everyone and were part of the commons. The air was an example. We cannot individually appropriate air. Yes we can pollute air but we cannot capture it. We can momentarily get a container I suppose and let the air go into it but we really have not captured it.

Then there was an interesting category when we came to nature. Land was capable of individual appropriation. It could either be private or public. Anything that was fixed to the land ran with the land. All plants are part of the land. So therefore they are all capable of individual appropriation. Wild animals are trickier. Some animals, corals are an example, get stuck in the one place, but mostly wild animals move around, in the air, across the land, along the rivers. Wild animals were capable of individual appropriation but only when you caught them. Until you have caught them, they were considered to be no one's property but once you caught them they were individual property. If you herded reindeer and put them in a corral, momentarily they are yours. If they happen to run away and go back to being wild, they return to be no one's property. If you kill them, of course, then they are yours and whatever meat, hide and antlers you get from them is your property.

You can see that the law's view as to what is capable of appropriation will, firstly, depend upon the nature of the thing but it will also depend upon our ethical view. On the nature of the thing, I have given illustrations of communal resources such as air. Another example is running water. You cannot appropriate running water as such. You can put a dam across it and stop it so that it is no longer running and then you

can use it. But it is still not capable of being individually appropriated and owned. That is why running water was considered to be a communal resource.

Coming back to the second point, that is what is capable of appropriation depends on our ethical view, this depends on how we see and know the thing.

Let me illustrate this point with a discussion of things that might be seen to be outside trade and commerce (res extra commercium). About 30 years ago there was a constitutional law case in the High Court of Australia about interstate trade in wildlife.[3] A fauna dealer in Sydney had captured from the wild and had transported by train around 70 live sulphur crested cockatoos, to a buyer in Brisbane. A Queensland fauna officer heard of this interstate trade and seized the birds in Brisbane and charged the dealer in Sydney with breaching a particular section of the Queensland *Fauna Conservation Act* that required a permit to send to and to bring fauna into the State. The dealer conceded that he had breached the State law by sending the birds without a permit but said that the State law infringed the freedom of interstate trade guaranteed under s 92 of the Australian Constitution. The effect of s 92 is that it strikes down the infringing provision of the State law.

The High Court held that the provision of the *Fauna Conservation Act* was invalid insofar as it sought to prohibit interstate trade in fauna. There is a little throwaway line in the judgment of the Chief Justice that:

> "It is immaterial that wild birds were the subject of the transaction – there is no legal reason whatever why there should not be trade or commerce in wild birds or animals."

30 years ago, I wrote an article about this case challenging that throwaway line.[4] I argued that there are certain things that we can say ought not to be the subject of trade and commerce, they should be regarded as extra commercium. That is a moral question. The cases are replete with examples of where the courts have said that there are some things in which it is morally unacceptable to trade. I referred to the old case in America of Dred Scott about slaves where the US Supreme Court held that there was no legal reason to ban trade in human beings (slaves were not extra commercium). Of course that decision was later overturned and now we would think it is morally repugnant.

If, for example, that fauna dealer in Sydney was sending human slaves to Queensland and that infringed a law banning slavery, the dealer would not be able to argue that that law should be struck down because of s 92 of the Constitution because the Court would clearly say, I have no doubt about this, that the thing which is the subject of the trade, humans, is extra-commercium. It is outside those things which we consider it is acceptable to trade in.

What I was arguing was that we could well come to the point of saying that trade in wildlife, whether it be all native wildlife or certain species of native wildlife, has

[3] *Ackroyd v McKechnie* (1986) 161 CLR 60.
[4] Brian Preston, 'Section 92 and Interstate Trade in Wildlife: A Moral Question' (1987) 4 *Environmental and Planning Law Journal* 175.

become unacceptable and therefore s 92 would not strike down a law preventing or regulating such trade. Section 92 of the Constitution depends upon a moral view. And moral views change. The law has not changed but its application has because we say there are certain things that are extra-commercium, that is outside those things in which we can trade. In that sense, the law can be ambulatory and can change its application depending upon the ethical view of the time. We can see, therefore, coming back to our property classification, what is capable of appropriation can change according to our ethical view.

My remarks so far have been about unpacking "nature". I wanted to start you thinking about what is the "thing", nature, that is to have legal status.

What is "legal status"?

Let's now look at the next concept, the legal status. What do we mean by legal status? The first thing to observe is that the law frames the analysis. We slot nature into existing categories of legal status. We look at our laws and try and find out how things get legal status. Then we try to slot nature into those categories. And we do so with the past conditioning that we have as to what we mean by those categories. We cannot disassociate our ethical view but also we cannot disassociate our view as to what the law means. The challenge of this project is to rethink the legal status of nature. We need to take a step back and ask why do we make these assumptions about the legal status of things? Often it is simply that we have always looked at something in that way.

In short, there are two limitations in the way we view the legal status of nature: the first is that the categories of legal status are confined to certain existing categories and the second is the way we view those categories. We need to rethink both of these things.

The limitation on how we view legal status

Let me start with the second limitation of the way we view the existing legal categories. Let's look at an example: the Indian case about the Ganga and Yamuna Rivers in 2017.[5] The High Court of Uttarakhand took an existing legal category, juristic or legal persons, and said that, although historically only people have been put into that category, the Court was going to put something else in that category, certain sacred rivers. Interestingly, although it was innovative for the Court to put a river into the category of a juristic or legal person, the Court did not change the rights that come from being in that category. So the rivers were given the same rights as a human, not the rights of a river.

There are two problems here. As I noted a moment ago, first, we use the existing legal categories but, second, we keep viewing those categories with the same eyes and thinking. In this case, the Court took the existing legal category but, viewing it with the same eyes and thinking, gave the river the rights of a human. I do not know how this is going to work in practice, every time the issue arises in court, to say that

[5] *Mohd Salim v State of Uttarakhand* Writ Petition (PIL) No. 126 of 2014, 20 March 2017.

the river is a legal person and has human rights. What human rights does a river want to exercise? What the river really wants to do is be a river, to run down to the sea, have fish in it, or not have pollution in it. But that may not be what the human right is. So we have got that problem.

Let's contrast another case about Asiatic Lions.[6] This was a Supreme Court of India decision of 2013 about Asiatic Lions and what should be done about them. Some lions were in captivity and some were in the wild. What was interesting, I am not going to go through a lot of the judgment, was the discussion of 'anthropocentric versus ecocentric' and sustainable development. The Court said (at paragraphs 39 and 40):

> "Sustainable development, it has been argued by various eminent environmentalists, clearly postulates an anthropocentric bias, least concerned with the rights of other species which live on this earth. Anthropocentrism is always human interest focused thinking that non-human has only instrumental value to humans, in other words, humans take precedence and human responsibilities to non-human are based benefits to humans. Eco-centrism is nature-centered, where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. Eco-centrism is, therefore, life-centred, nature-centred where nature includes both humans and non-humans.
>
> We re-iterate that while examining the necessity of a second home for the Asiatic lions, our approach should be eco-centric and not anthropocentric and we must apply the 'species best interest standard', that is the best interest of the Asiatic lions. We must focus our attention to safeguard the interest of species, as species has equal rights to exist on this earth."

We can see, in these comments, that the Court was looking at the existing categories in the law but recognising that it needed to look at those categories from a different perspective. It is not what is in the interest of humans, such as children wanting to go to the zoo and see Asiatic lions and feel happy about that (Jeremy Bentham would approve of that outcome), but what is in the best interests of the lions, which may have nothing to do with what is in the best interests of humans. In a family law context, when deciding which parent should have custody of children after a divorce, the principal concern is what is in the best interests of the child, not what is in the best interest of either parent. The Supreme Court was adopting a similar approach of deciding what is in the best interests of the lions, not what is in the best interests of the people or the government of India. We can contrast the anthropocentric decision in the Ganga and Yamuna Rivers case with that ecocentric decision about the lions.

[6] *Centre for Environmental Law, WWF-1 v Union of India* [2013] INSC 427 (15 April 2013).

Some difficulties with giving nature rights

Let me come back to the first limitation that the categories of legal status are confined. The obvious category of legal status is rights. By giving rights to some thing, our laws recognise that thing's legal status. Are rights appropriate to be given to nature?

The first point to note about rights is that they are human constructs. And with human rights, particularly after the Second World War, they are individualistic. They are not communal. This is one of the reasons why China has so many problems with human rights because their conception is that individuals' relations with others is about communal rights, not individual rights. When we take an individualistic rights concept and start applying it to nature, how is it going to work? Are individual rights appropriate to be applied to nature?

The first difficulty is that nature is relational and not individualistic. No biotic organism exists independently of any other biotic organism. An obvious illustration that nature is relational and not individualistic is the food chain and the food web linking organisms. Another illustration is evolution whereby the DNA of an organism today is a snapshot in time. It is the embodiment of an evolutionary process. It has a relationship with the past but it has also got a relationship with the future. Where it is today is different from where it was in the past and where it is going to be in the future is going to be different from where it is today. We have to think of that dynamism over time. We have dynamism in relation to the food chain and the food web but we have also got this dynamism over time.

Hence, there is difficulty in taking the concept of an individual human right and applying it to a biotic organism. A biotic organism does not have an individual right. It has got a relational right: its relationship to all the other organisms both in space and in time. We would need to reconceptualise rights not as individualistic but relational if we are to apply them to nature.

Interestingly, Helena Howe similarly argues for a reconceptualising of the concept of private property by taking a relational perspective of the law relating to the land, recognising the relationships of dependence between people and the natural world.[7]

The second difficulty is the problem I raised earlier: What is the boundary of the thing in nature that is to be the rights holder? Is it the individual organism? Is it a collection of organisms of the same type, such as a species? Is the rights holder to be a population, that is to say, individuals of a particular species occupying a particular area and having a relationship with others in that area and, if so, what are the boundaries of that population? For example, for migratory birds flying along the East Asia/Australasian Flyway, what is the population? Where are the boundaries of that population? If we move to an ecological community, that is an assemblage of different species occupying a particular area, does it have rights? Is the rights holder an ecosystem? Or can we go up to a bioregion? It is like those Russian nesting dolls, Matryoshka: differently sized taxonomical units nesting within each other. We have

[7] Helena Howe, 'Making Wild Law Work – The Role of "Connection with Nature" and Education in Developing an Ecocentric Property Law' (2017) 29 *Journal of Environmental Law* 19.

to recognise that we are trying to apply a very artificial construct of individual human rights to some thing or some unit in nature that does not comprehend or accommodate that concept.

Let's look at the problem another way. Law frames humans' relations with nature. It frames what we can and cannot do in relation to nature. It classifies nature. I have talked about endangered species. We come up with laws which say what things will be endangered species, populations, or ecological communities. These are artificial constructs. We can see this illustrated by the differences between the Commonwealth law, the *Environmental Protection and Biodiversity Conservation Act 1999*, and State laws, such as the *Biodiversity Conservation Act 2016* (NSW), in describing and listing different species and ecological communities as endangered. The difference is marked with ecological communities, as the Commonwealth classifies ecological communities differently to NSW. Each jurisdiction draws and applies a different conceptual overlay on what exists in nature depending on what it sees to be important.

The artificiality of the constructs under endangered species laws is also illustrated by the concept of a species itself. What criteria do we use to group organisms together as a species? It can be biological species concept, grouping together similar organisms capable of interbreeding naturally to produce fertile offspring. So if a horse and a donkey breed, they produce a mule. A mule is not a species because it cannot interbreed with other mules and produce fertile offspring. Sounds good? No, it is not. Go to the plant world. They interbreed with other species all the time. It also happens in the animal world. You will get many organisms of different, but related, species that are able to interbreed even though we have put them into different species. Conformity with the biological species concept remains a hypothesis, rather the actuality.

Do we go to morphological criteria? Under a morphological species concept, species are defined by a set of morphological characters that are shared by members of that species, and are distinguished from other species by morphological discontinuities. Recognition of species is based on the amount of variation and gaps in the variation of phenotypical features. Or do we look to evolutionary lineages? The phylogenetic species concept identifies a species as the smallest aggregation of populations (sexual reproduction) or lineages (asexual reproduction) diagnosable by a unique combination of character states in comparable individuals. It defines species on the basis of evolutionary lineages, without a necessary requirement for reproductive isolation.

These are some of the ways of trying to work out what is a species. But we have to recognise that all are highly artificial and there is no bright line in demarcating organisms to be a species. Yet we create these taxonomical classifications. Does it make any sense to say a species has a right when the concept of species is such an artificial construct?

I have so far dealt with individual organisms of plants and animals, but we also have classifications based upon geographical factors. We divide between the terrestrial and the aquatic. In New South Wales, the silliness is we have endangered species

legislation which deals only with terrestrial flora and fauna and we have fisheries legislation which deals only with aquatic flora and fauna. We have certain organisms like dragon flies, which start in one environment (aquatic) and move to another environment (terrestrial), being governed by different legislation.

We do not just artificially divide organisms on the land, we also do so with the sea. We have a completely different legal regime for the sea, the marine environment. Yet we know there is interrelationship between the land and the sea. Turtles do not just stay in the marine environment, they return to the terrestrial environment for laying eggs. We have barramundi and salmon swimming up freshwater streams to spawn and returning to the sea. Eels do the same. What is the boundary and where is it? Why do we make laws based on these artificial constructs?

Recognising nature as a subject in law

Another question about the legal status of nature that we need to consider is what does it mean to say that nature is recognised by the law. Nature can be recognised by the law either as a subject or as an object. Nature can be recognised as a subject if it has rights. What sort of rights could they be? They could be a substantive right, such as a right to life. We have talked about individual rights we could give nature. Or they could be procedural rights such as rights to access information, to participate in the polity or to access the courts. You could do that directly such as the Indian Court did with the Ganga and Yamuna Rivers or as the New Zealand Parliament did by enacting legislation recognising the rights of the Whanganui River. Or you can do it indirectly by appointing a human steward, a representative that can speak and act for nature. An example is where the Supreme Court of the Philippines recognised human stewards as representatives for marine mammals to bring court proceedings challenging oil exploration in the marine mammals' habitat.[8]

Recognising nature as an object in law

Apart from being the subject, we can also make nature the object of the laws, so that humans owe duties or obligations towards nature. That is giving nature legal status. What sort of duties or obligations could our laws impose? There can be a public duty to achieve some environmental outcome. Public duties are reasonably rare in legislation. The writ of mandamus is available to compel the exercise of a public duty. An example concerned Manila Bay in the Philippines. Quite unusually, there was a statutory duty on the Metropolitan Manila Development Authority to keep Manila Bay at a certain state of environmental quality. That duty was probably breached since the time it was legislated. An environmentalist discovered the statutory duty and successfully applied to the Supreme Court for a continuing mandamus compelling the Authority to clean up Manila Bay to the standard set in the legislation.[9] Another example was the duty in the relevant European Directive to improve air quality by reducing nitrogen dioxide levels. The UK Supreme Court said

[8] *Resident Marine Mammals of the Protected Seascape Tanon Strait v Secretary Angelo Reyes* GP No 180771, 21 April 2015.
[9] *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* GR No 171947-48, 18 December 2008.

that the UK Government had an obligation to comply with that directive within the time specified.[10]

Another duty could be not to harm nature, whether it be threatened species, native vegetation or a river. That duty can be enforced, not because there is any correlative right for the object, but rather simply to enforce the law. If the law says that there is this obligation to do something or not do something, proceedings can be brought to restrain the breach of the law if there is non-compliance with the obligation. There can also be a duty to consider nature or the impacts upon nature in carrying out or determining to grant approval to carry out an activity likely to impact nature.

At a previous conference, on earth-centred law, I gave a paper about internalising ecocentrism in environmental law.[11] I suggested ways in which our laws could be changed to implement an ecocentric ethic and thereby recognise the legal status of nature in various ways. The Wild Law Judgment Project, the book of which was recently launched, suggested other ways of giving legal status to nature.[12]

Recognising inter-species equity

I have talked about the legal architecture, the laws that regulate nature and humans' relationships with it, but it is also important to consider the legal rules and criteria for making decisions within that architecture. One of the things our laws do badly concerns equity or fairness. Fairness is about fairness between humans and between humans and non-human nature. We can see three concepts of equity: intergenerational equity, between present and future generations; intragenerational equity, within this present generation; and interspecies equity, between humans and non-human nature. We need to look at how we can achieve those equitable outcomes and that involves essentially looking at the criteria we use to achieve distributive justice, how we distribute the benefits and burdens of exploitation of the environment. It should not always be humans getting the benefits and nature getting all the burdens. That is not interspecies equity. We need to come up with criteria adopting an ecocentric ethic, which could echo, for example, Aldo Leopold's approach that a thing is right when it preserves the biotic community and it is wrong when it does not. Our laws could adopt such criteria in order to achieve equity between humans and nature.

The task ahead

Hopefully, my remarks might have inspired ideas about what it means to give legal status to nature. We need to identify what we mean by nature and what things in nature are to be given legal status. We need to identify what legal status we want to give nature. We need to rethink the categories of legal status and what they involve.

---

[10] *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.

[11] B J Preston, "Internalizing ecocentrism in environmental law", in M Maloney and P Burdon (eds), *Wild Law – In Practice*, Routledge, 2014, 75.

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

We should not apply existing legal categories by habit and uncritically. We need to be inventive to create new categories of legal status that are appropriate for nature and innovative to improve on existing categories of legal status for nature.