IS SUSTAINABILITY ENOUGH?

What we can learn from the rise (and rise) of rights of nature and Earth laws

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WHEN THE AUSTRALIAN EARTH LAWS ALLIANCE (AELA) was created in 2012 and began hosting workshops and conversations about Earth jurisprudence and Earth-centred law, the concept of "rights of nature" was seen as an unusual phenomenon that existed only in South America, in particular, in the Constitution of Ecuador and in national legislation in Bolivia. Since then, the idea of recognising the rights of nature has captured the imagination of activists and lawyers around the world and the past 10 years have seen a proliferation of different types of rights of nature laws and policies, which now exist in dozens of countries and jurisdictions globally.

Australia's ecological governance systems would benefit by engaging with the emerging Earth laws movement in Australia, and around the world. There are many different types of Earth laws emerging across the globe, with a focus on the rights of nature and ecocide laws. It is also critical to note the leadership of Indigenous communities in advancing Earth laws.

'Earth laws' – a framework for understanding diverse, emerging, life-centred legal approaches

Earth laws represent an effort to situate nature at the centre of our culture, society and legal system, to recognise we are in an interdependent relationship with the rest of the living world and that we have an obligation to nurture rather than destroy our living home.

"Earth laws" is a term used by advocates for Earth-centred law and governance to encapsulate the rapidly evolving field of Earth-centred legal theory and practice that includes: the philosophy of Earth jurisprudence, the legal issues and approaches within the emerging field of ecological law and governance, the law of ecocide and rights-based legal approaches such as recognising the rights of nature.

Earth laws are diverse but connected conceptually because the legal approaches in this emerging field typically share common traits. Their goal is to create new governance systems in industrialised countries, which centre around protecting and restoring the ecological integrity of the interconnected living world. They aim to do this by changing the dominant human-centred, extractivist, growth-focused culture and governance systems currently in place. Earth laws challenge anthropocentrism and the western legal tradition of treating nature simply as an object or human property.

The emergence of Earth laws in western positivist law owes a profound intellectual debt to the Earth-centred wisdom and legal traditions of Indigenous Peoples. For millennia, Indigenous Peoples around the world and on the continent now known as Australia have developed and maintained legal systems embedded in relationism with and respect for nature. Today, many Indigenous and non-Indigenous lawyers and commentators connect Indigenous legal systems, often referred to as "First Laws" in Australia, to the framing of Earth Laws.

Why Earth laws? The escalating ecological crises and perceived failures of environmental law

Since the 1970s, there has been a proliferation of environmental laws in Australia, in countries around the world and in international law. At the same time, the health of the natural world has continued to deteriorate. It has been acknowledged that we are currently in a human-created "sixth mass extinction" event, with around one million animal and plant species are now threatened with extinction. Climate change, biodiversity loss, degraded ecosystems and loss of "the wild" threaten the very fabric of life on earth, and the foundations of human existence.

This century has seen an increasing sophistication in our ability to understand human impacts on the planet. In 2009, the concept of planetary boundaries introduced a powerful methodology for understanding the outer limits of the

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functioning Earth system. The most recent planetary boundaries update stated that five out of the nine Earth-system boundaries have been crossed as a result of human activity. These include climate change, loss of biosphere integrity, land system change, altered biogeochemical cycles (phosphorus and nitrogen) and novel entities (pollutants including plastics).

In Australia, the destruction of ecosystems has been occurring at an increasing rate since the colonisation of the continent by the British Empire. According to the Wilderness Society, Australia has lost 27 per cent of its rainforest, 19 per cent of open forest, 11 per cent of woodland forest, and 28 per cent of mallee forest since 1750.

In 2021, the Federal Government's State of the Environment report provided a disturbing summary of the condition of our ecosystems:

> *'Overall, the state of the environment of Australia is poor and deteriorating as a result of increasing pressures from climate change, habitat loss, invasive species, pollution and resource extraction. Changing environmental conditions mean that many species and ecosystems are increasingly threatened. Multiple pressures create cumulative impacts that amplify threats to our environment, and abrupt changes in ecological systems have been recorded in the past five years.'*

Earth laws advocates argue that the root cause of our environmental crises globally and in Australia is the growth-focused world view and economic system that dominates western and other industrialised societies today.

Many existing environmental laws aim to minimise environmental harm, but they do so by allowing and regulating environmental harm, not by preventing harm or creating systems change across human and nature relations. Human practices such as mining, use of fossil fuels, land clearing, manufacture and production of harmful chemicals, plastics and other products, water extraction from ground and surface water continue unabated, and in many cases are escalating. As we have seen from the recent international commitments regarding biodiversity protection, the best efforts of humanity often still revert to accepting the commodification of nature, for example through markets and offsets rather than rethinking and restoring our deep relationship with nature. Earth laws aim to challenge the very foundations of growth economics, by urging humanity to think more deeply about the interconnected life on earth and our place in it, by placing the health of the living world at the centre of human priorities and endeavours, and by supporting human behaviour changes to support nature rather than allow harm to continue. Whether this is through recognising the rights of nature, treating ecocide as a legal crime or finding new ways to learn from Indigenous care and custodianship of the living world, Earth laws have emerged as a response to the perceived failings of western globalised culture, economies and law.

Exploring Earth-centred theory: Earth jurisprudence

When examining the growth of Earth laws in western law, it is helpful to begin with one of the theories that connects many of the Earth laws currently emerging around the world: Earth jurisprudence. This is a term coined by the late Thomas Berry, a deep ecologist and 'geologian', who called for a shift from human-centred to Earth-centred governance, a recognition of our interconnectedness with nature and the need to create new legal, economic and governance structures that support rather than destroy life on Earth.

In his book *The Great Work: Our Way into the Future*, Berry explored what he called the four underpinning structures of industrialised societies – law and governments, economics, education and religion – and suggested that currently, these systems are built on western colonial ideas of anthropocentrism,

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endless material growth and extractivism. Berry suggested "the great work" for people in the 21st century was to transform our thinking, so that we understand we are just one species within the wider, interdependent Earth community, and to transform our governance systems and activities to place care and custodianship of the living world at the centre of our culture, economy, law and society.

Berry acknowledged the wisdom and Earth-centred governance systems of Indigenous peoples around the world and suggested that people in western and industrialised societies need to reconnect with nature, especially to their local places and bioregions, and re-learn how to govern themselves as part of the Earth community.

Earth jurisprudence promotes the adoption of a number of key principles including: acknowledging and respecting the deep relationship and interdependence we have with the rest of the non-human world; respecting the intrinsic rights of nature to exist and flourish; creating governance systems that enable human societies to fit within our ecological limits; and the benefits of engaging with culturally diverse, Earth-centred governance systems, particularly those from Indigenous Peoples.

The theory of Earth jurisprudence has inspired rights of nature advocates, activists, researchers and academics around the world. It has also inspired the creation of organisations and international initiatives and continues to be a framework used by many people across many disciplines, including law.

Earth laws and Indigenous and First Nations Peoples' Laws

Indigenous Peoples play a critical role in the Earth laws movement. Philosophies such as Earth jurisprudence are directly inspired by Indigenous Peoples' knowledge systems and laws, and in many countries – including Ecuador, Colombia, Mexico, Canada, New Zealand and the USA - modern rights of nature laws exist today due to their advocacy, knowledge and continuing connection to land.

In the continent now known as Australia, Indigenous Peoples – hundreds of distinct First Nations communities – have lived on this continent since time immemorial and have one of the oldest continual cultures on Earth. Their legal systems are ancient and complex, woven from the land and guiding generations of people to live in relationship with nature (Country), and with each other.

Despite the violent disruption to Indigenous societies by colonisation by the British Empire, Indigenous laws – often referred to as "First Laws" – continue to guide Indigenous peoples and inspire non-Indigenous peoples. In Australia, Indigenous thinkers and writers such as Dr Mary Graham, Dr Anne Poelina and Professor Irene Watson articulate in their writings and public talks how the relationist ethos and law of obligation are foundational for First Laws.

Poelina writes that First Laws refer to the body of laws which have governed relations between and within First Nations Peoples and between the human and non-human since the beginning of time. Graham has reflected on the fact that First Laws are not rights-based, but rather built on the foundations of a "law of obligation" to Care for Country and care for each other. While some Indigenous lawyers and commentators suggest that the "rights of nature" is a western concept incompatible with Indigenous custodial obligations to Care for Country, others have suggested that rights of nature may be a useful construct to enable western law to take initial steps towards engaging with Indigenous Law and embracing concepts of Earth-centredness.

Poelina has written with other authors about the idea of recognising the rights of ancestral beings. The idea of an ancestral person is proposed as a novel and intersectional category of legal personhood located at the encounter between colonial

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legal systems and First Law. This conceptual category is not a creature of either the colonial Western legal tradition or of First Law, but rather is a tool to be negotiated as a bridge between the two.

Poelina is part of the Martuwarra Fitzroy River Council (the Council) in the Kimberley, Western Australia. The Council was established in 2018 by six independent Indigenous nations to preserve, promote and protect their ancestral river from ongoing destructive development. The Martuwarra Council believes it is now imperative to recognise the pre-existing and continuing legal authority of First Law, in relation to the river, in order to preserve its integrity through a process of legal decolonisation.

Another important example of how the pre-existing authority of First Law is shaping western legal approaches in Australia is the development of the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017.* The Act is the first legislation in Australia to be co-titled in a Traditional Owner language. *"Wilip-gin Birrarung murron"* which translates as "keep the Birrarung alive'"in Woi-wurrung, the traditional language of the Wurundjeri Woi-wurrung people. Woi-wurrung was used in recognition of the Traditional Owners' custodianship of the river and their unique connection to the lands through which the river flows. It is also a Victorian and Australian first in legally identifying a large river and its corridor, which transverses many boundaries, as a single living and integrated natural entity for protection.

Earth laws emerging within western law: rights of nature and ecocide

Rights of Nature laws

The rights of nature movement is growing worldwide and is seen as both a social and legal movement. Legal advocates see rights of nature laws as supporting a paradigm shift, as such laws reject the notion that nature is human property and recognise the legal rights of the natural world to exist, thrive and evolve. Recognising in law that the natural world is just as entitled to exist and evolve as we are necessarily changes the way humans act and is hoped to spearhead larger changes within our legal and social systems.

Since the emergence of rights of nature laws in the US and Ecuador, a range of different legal approaches have been created around the world that change the legal status of nature. In the work we do within the Australian Earth Laws Alliance, we have created a basic typology of these laws and emerging approaches. The first category of laws that change the legal status of nature are those that recognise the rights of all of nature, within and across an entire jurisdiction. Examples of this approach can be seen in the Ecuadorian Constitution, Bolivian National Law and recent national law in Uganda. A second category of laws are those that focus on changing the legal status of a specific ecosystem. This is the area where much of the growth in new laws is taking place.

Recognising the rights of nature across a jurisdiction

The first rights of nature laws were local ordinances in the USA (2006), the Constitution of Ecuador (2008) and national legislation in Bolivia (2010). In these legal instruments, the rights of nature were recognised for all of nature within a political jurisdiction. These were typically articulated as nature having the right to exist, persist, regenerate and be restored. These instruments also provide for open standing, so that any person in the relevant jurisdiction can defend the rights of nature in a court of law.

Today, more than 200 communities in the USA have worked to pass local ordinances that assert community self-determination and the rights of nature. In Ecuador, people have used the constitutional provisions to bring more than 30 court cases to

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protect different parts of the country. While the national law in Bolivia has apparently not been active, in Uganda, the rights of nature were recognised across the country in new provisions in Uganda's *National Environmental Act*.

In Australia, a Rights of Nature and Future Generations Bill was introduced to the Western Australian Parliament in 2019 by State MP Diane Evers. It recognised the rights of nature throughout Western Australia, and recognised First Laws and the custodial obligations of First Peoples across the state. It was not passed into law, but it stimulated important debate and discussions about rights of nature, Earth laws and Indigenous First Laws in Western Australia and all of Australia.

Ecosystem based approaches – legal personhood and rights bearing entities

In 2017, legislation was passed in New Zealand which recognised the Whanganui River as a legal person. Prior to this, in 2014, the Urewera Forest was also declared to have legal personhood. Legal guardians were created to speak for these new legal entities, made up of representatives from the relevant local Maori groups and the New Zealand government.

News of these legal developments reached international headlines and has continued to attract significant interest and attention from people around the world. These Acts were seen as a significant new approach to changing the legal status of nature, moving from a jurisdiction-wide approach to an ecosystem-specific approach. The developments in New Zealand inspired an acceleration of ecosystem-specific rights of nature and legal personhood claims around the world, and at present are the dominant approach being used to change the legal status of nature.

It should be noted that the developments in New Zealand did not emerge from a rights of nature framework. They were developed during compensation negotiations between Maori people and the New Zealand government, under the Treaty of Waitangi. However, activists, lawyers and change makers were inspired by the use of an existing legal construct – i.e. legal personhood – to transform an ecosystem from being an object in western law to a rights-bearing entity. Shortly after the Whanganui River legislation was passed, a court case in India found the Ganges and Yamuna Rivers as having legal personhood; however, that decision was ultimately overturned. One of the issues challenged with respect to legal personhood of the Ganges and Yamuna was that the exact nature of the rivers' rights and obligations and the custodial relationships for the rivers were problematic. Legal personhood was criticised by some commentators as being inadequate and different approaches have ince been created.

For example, a different ecosystem-based approach was used in Colombia in 2017, when Colombia's Constitutional Court recognised the Atrato River not as a "legal person" but as a subject of rights. The Court found the river has the right to "protection, conservation, maintenance and restoration." The decision articulates the rights of the river in more appropriate terms than the traditional definition of a legal person, and aims to offer protection to the Atrato River and guarantee the fundamental rights of the communities that live with and rely on the river. In Canada in 2021, the Innu Council of Ekuanitshit and the Minganie Regional County Municipality declared the Mutuhekau Shipu (Magpie River) as having nine rights – among them the right to flow, maintain biodiversity, be free from pollution and sue others to protect its rights.

Ecocide

In addition to rights of nature laws, there are arguments that western law should recognise ecocide as a crime. Ecocide can be defined as extensive loss, damage or destruction of ecosystems, such that the peaceful enjoyment of the inhabitants has been

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or will be severely diminished. More recently, an International Independent Expert Panel worked to create a more detailed definition of ecocide which is being proposed for adoption in a range of legal and policy forums. Australia's Ecocide Laws Australia working group will be hosting several webinars this year to discuss the different definitions and what such laws could look like in the Australian context. Today, there are 13 nations around the world that have ecocide laws in place and there are growing calls for ecocide to be recognised in international law.

The concept of ecocide was first raised at the 1970 Conference on War and National Responsibility in Washington, and later in 1972 at the UN Conference on the Human Environment. For several decades, the issue was raised at international forums and the international advocacy group, 'Stop Ecocide International', has been working for more than a decade to have ecocide recognised in the Statute of Rome as the fifth crime against humanity. It has made steady steps in building momentum for ecocide to be recognised and, if included in international law, would provide a powerful tool for preventing and addressing extensive ecological harm, because it would enable criminal prosecution of individuals and entities found responsible for mass ecological harm.

Reflecting on environmental law in Australia and ecologically sustainable development

The previous section has outlined how Earth laws and rights of nature laws aim to change the legal system and stimulate change more broadly within western societies by recognising the inherent right of nature to exist and thrive. It is timely to reflect on the foundations and themes within Australia's environmental laws.

Australia's modern environmental laws emerged in the 1970s, influenced like many other countries by command and control regulation in the US, such as the *Clean Air Act* and *Clean Water Act*. During the late 1980s and early 1990s, Australia joined much of the rest of the international community in embracing "sustainable development". After the 1992 Rio Declaration created at the United Nations Conference on Environment and Development, Australian law and environmental policy was infused with ecologically sustainable development (ESD). From the creation of the Intergovernmental Agreement on the Environment to the infusion of ESD principles into wide-ranging laws across all jurisdictions in Australia, ESD created a new and optimistic paradigm in Australian law.

The standard definition of ESD referred to the need to balance economic, social and ecological issues to ensure sustainable progress in Australia. This was articulated by some as "triple bottom line" thinking – i.e. not just factoring in economic and financial issues, but also social and environmental. However, since the late 1990s and early 2000s, ESD has been criticised by activists, researchers and others as being watered down, "greenwashed", meaning all things to all people, and thereby ineffective. In particular, it was pointed out by many commentators that ESD needed to adopt a "nested sustainability" approach, recognising the biophysical reality that our economy is simply a construct created by and within our society, and human society must live within the limits of our ecological systems. It has also been suggested that the commitment to ESD and enthusiasm for law reform was effectively maimed by the deliberate creation of misinformation in the late 1990s and early 2000s by fossil fuel industries wanting to stop effective responses to climate change and stop the call to end fossil fuel extraction. In the book *Merchants of Doubt*, Naomi Oreskes outlined the misinformation campaigns and how they have affected efforts to address climate change.

Today in Australian law, while ESD is still on the books and still in many environmental laws, it is now seen by many as outdated and irrelevant. For many progressive environmentalists,

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regeneration has come to replace the idea of sustainability, and we are seeing a flourishing of the terms "regenerative development" and "regenerative economies". However, for others – especially those in some sectors of government and business – the triple bottom line approach to ESD and to factoring in environmental issues remains alive and well.

If we look at the bigger picture of Australia's environmental laws, it could be suggested that there has been no major upgrade of the core principles of Australian environmental law since the development of ESD in the 1990s.

While we have seen piecemeal reform to some state and territory environmental laws, major revisions to planning laws (and back again) in jurisdictions like Queensland, and two major 10-year reviews of the federal EPBC Act, there has been no shared vision or zeitgeist for Australia's environmental laws or broader societal governance.

The potential of Earth laws in Australia

We propose Australia's legal system as a whole, and ecological governance in particular, would be enriched by incorporating elements of Earth-centred laws and Indigenous legal approaches.

At present, Australia's new approaches to environmental law seem to be dominated by efforts to commodify nature, climate change and biodiversity loss, without addressing the systemic changes that are needed. We believe that exciting and positive opportunities are possible for Australian environmental law, but we need to analyse deeply the foundations of our legal system and more thoughtfully connect with the concepts within Earth laws.

We leave readers with some comments recently articulated by Dr Graham, Indigenous political scientist and elder:

> *"The central concern of relations between the two different laws in Australia – the Aboriginal traditional law of great age and the Western positivist law with its postulates rejecting morality in law – is the question of how to bring together such different societies and legal systems, with such different world views. Aboriginal societies, with custodial ethics, ecological stewardship and Laws of Obligation, are built on a relationalist rather than a survivalist ethos. The monumentality of Aboriginal law resides not only in the old saying 'The Land is the Source of the Law', and in its integrity, gravity and authentic majesty, but in its moral foundation all without the contradictions inherent in Western law. Hopefully, with respectful and courageous discussions about what law could come to mean, there could emerge in an organic way the embryonic form of an intact, collective spiritual identity for all Australians, which will inform and support our daily, safe lives, our legal and political systems, aspirations and creative genius."*