A Just and Rights Based Framework for Nature?
Professor Jacqueline McGlade

27 April 2021

Introduction

International negotiations concerning our environment are increasingly entwined with issues of human-centred justice and rights-based approaches. Over the past five years this has led to a rise in court-room cases around climate justice and traditional land rights of indigenous peoples. With the growing awareness of the impacts of biodiversity loss on ecosystems, this has re-opened the broader discussion about the need for a just and rights-based framework for nature. In this lecture, I first look at climate justice and traditional land rights and then move on to earth jurisprudence or wild law, as it is sometimes called, and *chthonics* coming from the Greek *kthonos* or earth, one of oldest of all legal traditions which situates humans in nature.

Climate Justice in the Court Room

The increase in climate justice cases is making court rooms increasingly important as a venue for addressing climate change around the world and pushing governments and corporations to implement climate commitments. The cases generally fall into one or more of six categories: (1) climate rights; (2) domestic enforcement; (3) keeping fossil fuels in the ground; (4) corporate liability and responsibility; (5) failure to adapt and the impacts of adaptation; and (6) climate disclosures and greenwashing.

Over the past three years, climate cases have nearly doubled. In 2017, 884 climate change cases were brought in 24 countries. By the end of 2020, that number had nearly doubled, with at least 1,550 cases filed in 38 countries – 39 including the European Union's court system. While climate litigation continues to be concentrated in high-income countries, recent cases have also occurred in Colombia, India, Pakistan, Peru, the Philippines and South Africa. Climate litigation is projected to increase, spurred on by national and international bodies, especially surrounding commercially based misreporting of climate risks, governments failing to adapt to extreme weather events and cases brought to enforce previous court decisions. There is also likely to be an increase in cases related to climate change displacements.

The background of plaintiffs is increasingly diverse and includes non-governmental organizations, political parties as well as senior citizens, migrants and indigenous peoples. These petitioners are often most vulnerable to climate change – enduring extreme weather, rising sea levels and high levels of pollution. Courts can equalize the power imbalances in society and give force to the rule of law.

Common litigation charges include:

- Violations of "climate rights" impacting fundamental human rights including the right to life, health, food, and water.
- Government failure to enforce climate change mitigation and adaptation commitments.
- Corporate messaging that contains false or misleading information about climate change impacts.

Several of the more recent cases in international fora have asserted and, in some cases established, that climate change impacts an expanding set of international human rights:

In November 2017, the Inter-American Court of Human Rights issued Advisory Opinion OC23/17, in response to a request from Colombia, in which the court concluded that the right to a healthy environment is a human right under the American Convention on Human Rights. The opinion addresses climate change throughout, acknowledging that climate change is widely understood to interfere with the enjoyment of human rights, and specifically stating, "To respect and to ensure the rights to life and to personal integrity of the persons subject to their jurisdiction, States have the obligation to prevent significant environmental damage within or outside their territory and, to this end, must regulate, supervise and monitor activities within their jurisdiction that could produce significant environmental damage."

In May 2019, a group of eight Torres Strait Islanders submitted a petition against the Australian government to the United Nations Human Rights Committee, alleging that Australia is violating their human rights under the International Covenant on Civil and Political Rights by failing to establish sufficient greenhouse gas mitigation targets and plans, and by failing to fund adequate coastal defence and resilience measures on the islands, putting them at risk of inundation due to sea level rise. The petitioners allege Australia's failures violate Article 27 (the right to culture), Article 17 (the right to be free from arbitrary interference with privacy, family and home), and Article 6 (the right to life) of the ICCPR.

In September 2019, 16 children filed a petition alleging that Argentina, Brazil, France, Germany, and Turkey have violated their rights under the United Nations Convention on the Rights of the Child by making insufficient cuts to greenhouse gases and by failing to use their role in the G20 to encourage the world's biggest emitters to curb carbon pollution. The petitioners claim that climate change has led to violations of their rights under the convention to life, health, the prioritization of the child's best interest, and the cultural rights of petitioners from indigenous communities.

In January 2020, five U.S. tribes in Alaska and Louisiana submitted a complaint to 10 U.N. Special Rapporteurs claiming that the U.S. government and state governments are violating the tribes' fundamental rights. The tribes argue that they are being forcibly displaced from their ancestral lands as a result of climate change, and that the U.S. government has failed to engage, consult, acknowledge, and promote the self-determination of the tribes as they develop adaptation strategies, including resettlement, in violation of the tribes' rights to, among others, life, health, housing, water, sanitation, a healthy environment, and food.

Cases brought in domestic fora have argued that climate obligations emerge from existing constitutional and fundamental rights secured under domestic law.

In Urgenda, the Supreme Court of the Netherlands ruled that Articles 2 and 8 of the European Convention on Human Rights (ECHR), as integrated into domestic Dutch law, impose enforceable obligations on the state to protect the right to life and the right to respect for private and family life. The court concluded that those obligations require the government to take steps to reduce carbon emissions consistent with limiting warming to an average of 1.5°C.

In Future Generations v. Ministry of the Environment and Others, a group of youth plaintiffs filed a tutela alleging that their fundamental rights to a healthy environment, life, health, food, and water were threatened by climate change and the government's failure to reduce deforestation in the Amazon. The Supreme Court of Colombia recognized that the constitutional rights to life, health, minimum subsistence, freedom, and human dignity were substantially linked to the environment and the ecosystem and ordered the government to develop and implement a plan to halt deforestation in the country.

In Juliana et al. v. United States ("Juliana"), the trial court allowed the youth plaintiffs' claim that their constitutional rights to life, liberty, and property were violated by U.S. policies allowing fossil fuel production, consumption, and combustion at "dangerous levels. "The Court of Appeals reversed that decision. As discussed further below, the court held that while "[t]here is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular," the court lacked the power "to order, design, supervise, or implement the plaintiffs' requested remedial plan." (The plaintiffs have sought rehearing of the court of appeals' decision.)

In ENvironnement JEUnesse v. Canada, an environmental non-profit organization brought a climate change-related class action against the Canadian government on behalf of Québec citizens aged 35 and under in the Superior Court of Québec. Their claim alleged that by setting a greenhouse gas reduction target insufficient to avoid dangerous climate change impacts and by lacking an adequate plan to reach its greenhouse gas emission target, Canada failed to meet its obligations to protect the fundamental rights of young people under the Canadian Charter of Rights and Freedoms and the Québec Charter of Rights and Freedoms. The court agreed that the impact of climate change on human rights is a justiciable issue and that the charters apply in this context, but the court dismissed the lawsuit because the proposed class of plaintiffs was based on an arbitrarily decided cut-off of persons aged 35 and younger. The plaintiffs appealed the court's decision, and their appeal is now pending before Quebec's Court of Appeal.

In PSB et al. v. Brazil, four political parties filed an action alleging that the government has failed to properly administer the Amazon Fund, a mechanism created to combat deforestation in the Amazon. The parties allege that by disbanding the fund's technical committee responsible for calculating deforestation and disbanding the fund's governance body, the government has failed its constitutional duty to preserve ecological processes and to protect the natural environment. In June 2020, the Supreme Court accepted the lawsuit and directed the government to provide information on, among others, how it has managed the fund and activities related to the fund that have been implemented or suspended.

In Canada, indigenous groups filed a suit in the Federal Court of Canada alleging that the Canadian government's approach to climate change violates their constitutional and human rights. The plaintiffs argue that Canada's constitutional duty to legislate for "peace, order and good government" requires that it pass laws mitigating GHG emissions. The plaintiffs further contend that they are deprived of their right to life by increased risk of premature death; their right to liberty because climate change will deprive them of the freedom to choose where to live within their territories; and their right to security of person because of their increased risk of injury, disease, and psychological trauma brought on by extreme weather events.

Cases brought by or on behalf of young people asserting unique harms to future generations have also been filed in other jurisdictions.

In Kim Yujin et al. v. South Korea, thirty youth activists filed a complaint in the South Korean Constitutional Court in March 2020 alleging that the nation's climate change law violates their rights to life and to a clean environment. In particular, plaintiffs allege that South Korea's Framework Act on Low Carbon, Green Growth commits to reducing annual nationwide greenhouse gases at a rate that is insufficient to keep global warming below 2°C.

Similarly, in Álvarez et al v. Peru, a group of Peruvian youth plaintiffs filed a lawsuit in December 2019 alleging that their government's failure to prevent deforestation violates their right to enjoy a healthy environment, and their rights to life, water, and health. Their complaint seeks an order requiring the government to implement policies to reach zero net deforestation in the Peruvian

Amazon by 2025. And in Youth Verdict v. Waratah Coal, a group of plaintiffs 30 years old and younger filed an objection to Australia's approval of a new coal mine. The plaintiffs alleged that approving the mine would violate their rights to life, the protection of children, and to culture, each of which is protected by Queensland's Human Rights Act 2019.

Older plaintiffs have also brought comparable claims.

In Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council a group of Swiss seniors argued that by failing to take steps to reduce global temperature increases, the government had violated their right to life. The court rejected the claims, citing the fact that the petitioners are not the only demographic affected by climate change, so neither the injury nor remedy was particularized to the petitioners.

Cases in domestic fora also rely on fundamental and constitutional rights to challenge more particular government policies.

In Pakistan, a group of women filed a petition arguing that Pakistan has not followed through on its Paris Agreement pledge to reduce GHG emissions, citing the country's failure to permit any renewable energy projects over a period of 14 months preceding the petition. Noting the disparate impact of climate change on women in Pakistan, they argue that the government has violated their constitutional right to life, to be free of discrimination on the basis of sex, and to a clean and healthy environment.

In Austria, Greenpeace and over 8,000 individual petitioners filed an action alleging that the government's tax structure for domestic and cross border flights makes it cheaper to fly than to take the train.36 The structure, the petitioners allege, violates their rights under both the European Convention on Human Rights and the Charter of Fundamental Rights by contributing to climate change.

In Victoria Segovia v. Climate Change Commission, a group of plaintiffs—including youth plaintiffs and a class of car owners who would rather not use cars if public transportation were available—challenged the Philippine government's failure to carve out pedestrian and bicycle space on the country's roadways. They argued that the government's failure violated their rights to health and a healthful ecology, as well as executive orders requiring roadways to be designed in a way that facilitates pedestrians and bicycles. The court denied the plaintiffs' claims, finding the plaintiffs failed to show a causal connection between the government's inaction and climate harms, and adding that that the government has discretion over how it chooses to implement the executive orders.

Finally, some cases challenge specific projects on the basis of climate rights.

In Norway, a coalition of environmental groups sought a declaratory judgment from the Oslo District Court that Norway's Ministry of Petroleum and Energy violated the Norwegian constitution by issuing a block of oil and gas licenses for deep-sea extraction from sites in the Barents Sea. Their petition argued that issuing Global Climate Litigation Report: 2020 Status Review the licenses was inconsistent with Article 112 of the Norwegian Constitution, which establishes a "right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained." The lower courts rejected the plaintiffs' claims, finding that the government had appropriately considered the licenses' relevant climate impacts before reaching its decision, but the plaintiffs have been granted leave to appeal to the Norwegian Supreme Court.41 As the examples above demonstrate, these cases seek to have significant impacts, ranging from orders that require a government to overhaul its climate policy to, for specific projects, orders that resolve extended and sometimes permanent delays. Given the scope of the potential remedies available

where plaintiffs succeed, litigants are likely to continuing filing cases premised on fundamental and constitutional rights.

Bringing the Rights of Nature into a Legal Settings

Since 2017, a body of cases asserting fundamental rights of nature, as opposed to persons, have also been litigated in jurisdictions around the world. These cases are similar to those asserting human rights to the extent that they argue that the existence of certain rights necessarily implies enforceable obligations on governments, even without legislation or regulation explicitly extending those rights to climate change rights.

Rivers are frequently the subject of such cases. Notably, some of these cases explicitly relate to climate change and if a court or legislature agrees that an object in nature possesses rights, those rights could then be the basis of a new action arguing that climate change implicates those rights.

The Center for Social Justice Studies et al. v. Presidency of the Republic et al., a Colombian tutela (special constitutional claim), provides an example. Plaintiffs filed the claim seeking to compel the government to restrain the mining and logging activities that threatened the ecological integrity of the Atrato River and the health of nearby indigenous communities. In granting the plaintiffs' request, the Colombian Constitutional Court noted that "the relationship between the Constitution and the environment is dynamic and in constant evolution," and describing "nature as a real subject of rights that must be recognized by the States and exercised under the protection of its legal representatives, such as, for example, by the communities that inhabit nature or that have a special relationship with it."

Other jurisdictions have reached mixed results.

In New Zealand, both the Whanganui river and a national park called Te Urewera were given personhood-type rights by legislation.

In India, a pair of cases sought to establish rights relating to the Ganges and Yamuna rivers and the glaciers at the source of each river. The lower court granted those rights, but the decision was later overturned.

In the U.S., plaintiffs filed an action seeking a declaration that the Colorado River Ecosystem is a person capable of possessing rights to exist, flourish, regenerate, be restored, and naturally evolve. The attorney bringing the case withdrew the action before any decision was reached however, after the government threatened to seek sanctions available where an attorney files a case for (among others) an improper purpose or to raise frivolous arguments for extending the law. Similarly, in 2019 a city government amended its charter to include a provision that "Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve." In early 2020 a court struck down the provision as too vague to enforce.

Despite their many differences, a common set of issues pervades all these cases. These include questions about who the appropriate party is to bring the case, what source of climate-related rights or obligations is implicated by the harms they experienced, and whether the tribunal to which they bring their claim is equipped to provide a remedy.

Justiciability

Justiciability encompasses all the threshold barriers that may prevent a plaintiff's claim from being considered by the court. Justiciability includes both formal, legal dimensions and practical questions for courts with discretion in how they apply these doctrines. The specific barriers vary by jurisdiction,

but the two that pose notable challenges for climate change litigants are common to most jurisdictions. First, a plaintiff must have standing to bring the case. Second, a plaintiff's claim must not require the court to resolve questions that are reserved for other branches of government to decide. Although the contours of justiciability questions vary across jurisdictions, most share two critical elements. First, justiciability questions are preliminary, meaning that courts apply them before reaching any review of the substance of a plaintiff's claim. Second, justiciability doctrines are theoretically agnostic as to the merits of the claim, meaning that neither the importance of the question nor the strength of a plaintiff's likely evidence is relevant if the claim cannot be heard.

Two of the most famous climate cases, Juliana v. United States and Urgenda Foundation v. State of the Netherlands, highlight how complex a court's inquiry into standing can be, and how even judges who hear the same evidence from the same parties may reach different, even contradictory conclusions about whether the case may proceed. In Juliana, 21 youth plaintiffs filed suit against the U.S. government asking it to develop a plan to phase out fossil fuel emissions and stabilize the climate system to protect vital resources upon which the plaintiffs depend. They argued that the climate system is critical to their constitutional rights to life, liberty, and property; that the government violated plaintiffs' rights by allowing fossil fuel production, consumption, and combustion at dangerous levels; and that the government failed to maintain the integrity of public trust resources within the sovereign's jurisdiction for present and future generations. The plaintiffs asked the court to "[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 so as to stabilize the climate system." The trial court agreed that plaintiffs had standing and could proceed to the substance of their claims.

On appeal of that decision, however, a 2–1 majority of the appellate court concluded that plaintiffs did not have standing because they could not show a decision in their favour would remedy their harm. Even accepting that "[t]he record leaves little basis for denying that climate change is occurring at an increasingly rapid pace," and that "[t]he government affirmatively promotes fossil fuel use in a host of ways," the majority expressed scepticism about whether halting U.S. policies promoting fossil fuel use would actually help heal plaintiffs' injuries. Further, the majority went on to conclude that it lacked the power to grant the relief plaintiffs sought, since doing so would require "a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." In contrast, the dissenting judge wrote that even a small step toward slowing climate change would help, and plaintiffs could therefore pursue their claim: "The majority portrays any relief we can offer as just a drop in the bucket. But we are perilously close to an overflowing bucket. These final drops matter. A lot." In concluding that the court has a duty to remedy a constitutional harm, the dissenting judge pointed out that courts are often compelled to "fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that [they] instruct the other branches as to the constitutional limitations on their power." The majority's decision is binding despite the points raised by the dissent. The plaintiffs are seeking review of the majority's decision.

In Urgenda, the lower court held that Urgenda had standing on its own behalf under a Dutch law specifically allowing class actions brought by interest groups. The court rejected the argument that the 886 individual claimants had standing, however, "partly in view of practical grounds" because their claims could not result in a different outcome than Urgenda's claim as an organization. The District Court's decision was upheld at the Court of Appeals and not disputed when the parties ultimately reached the Dutch Supreme Court.

These two climate cases have proceeded under theories that combine elements of common law, constitutional rights, and statutory provisions. In Urgenda, the Supreme Court cited a duty of care owed by the government to its citizens. Duties of care generally exist at common law and define the standard of conduct a party must meet to avoid a negligence claim. The duty of care at issue in Urgenda was codified in the Dutch Code, however, and the Supreme Court defined the scope of

that duty in reference to Dutch constitutional rights and human rights under the European Convention on Human Rights (ECHR). The public trust approach taken in Juliana can similarly be understood as a hybrid, arguing that the common law doctrine is informed by, and enforceable because of, constitutional provisions. In many of the cases seeking to hold governments to their policy commitments, plaintiffs argue that violating statutory mandates to undertake mitigation efforts violates human rights or rights to a clean and healthy environment.

Attribution Science

In the case of climate justice attributing a defendant's emissions to climate change overall ("source attribution") and linking climate change to specific climate change impacts ("impact attribution") plays a major role in many climate cases, including those seeking to compel national governments to take action on climate change and those seeking to hold corporations liable for their contribution to climate change. In Juliana, for example, the plaintiffs submitted over 1,000 pages of expert reports detailing the fundamental science of climate change, its observed and projected impacts, and the ways in which the U.S. government and the fossil fuel industry contributed to the problem. In response, defendants submitted hundreds of pages of their own expert reports contesting the reliability, soundness and validity of the plaintiffs' experts' submissions.

Source attribution has been a key challenge in several cases, and courts have reached varying results. For example, in Dual Gas Pty. Ltd. v. EPA, the Victorian Civil and Administrative Tribunal in Australia noted, "The emission of a few tonnes of GHG from a small factory. would not in our view give rise to standing. Even though it represents an incremental GHG increase." In Smith v. Fronterra Co-Operative Group Limited, the court observed that "defendants' collective emissions are miniscule in the context of the global greenhouse gas emissions which are causing climate change and it is the global greenhouse gas emissions which are pleaded as being likely to cause damage to Mr Smith. In these circumstances, in my view, reasonable persons in the shoes of the defendants could not have foreseen the damage claimed by Mr Smith." In contrast, courts have found emissions associated with projects and programs ranging from individual airport runways to fossil fuel leases to national vehicle emissions standards sufficient. In all of these examples, a robust articulation of how emitters or producers bear responsibility for a share of global climate change may be necessary to sway the courts in favour of the plaintiffs.

Impact attribution is a challenge for parties that must show that a particular extreme weather event was or was not caused by climate change. For example, in *In re Upstream Addicks and Barker (Texas) Flood Control Reservoirs v. United States*, plaintiffs sued the government after extensive rainfall during Hurricane Harvey inundated government-controlled reservoirs and caused plaintiffs' properties to flood. Both parties cited climate change to support their arguments: Plaintiffs alleged that the amount of rainfall was unusual, but that the known effects of climate change suggest that the amount of rainfall could have been foreseen. The government argued that the fact of climate change is the reason that extreme rainfall could not have been foreseen. Both parties, thus, run into the question of whether and to what extent a particular weather event can be caused or worsened by climate change. The court ruled that the flooding was foreseeable and that the plaintiffs were entitled to compensation but did not address the parties' discussion of the role of climate change.

Attribution will continue to play a central role in nature-based and climate change litigation, and courts will require both plaintiffs and defendants to address these critical questions in a persuasive way.

Chthonic Legal Tradition

Amongst the legal traditions of the world, globalisation and ruling the world through truth has emerged as an important factor in persuading large numbers of people to gather around issues such

as climate change and protecting nature. In both these cases, advocacy has also been necessary; this has been based on the premise that there is a need to extend the benefits of scientific knowledge to others so that they may also be aware and benefit from this understanding. But it should be recalled that information is not dominant in creating new traditions. Information may underpin advice, but people have to decide what to do and how it applies to a particular problem.

Tradition is a persuasive authority but often lacks authoritativeness. Rather than thinking of the way we act as a function of one legal tradition and its underpinning information, or another, it is potentially better to also consider how it is used, because building a new legal tradition around nature will be linked to societies through a mixture of information, containing varying and even conflicting views.

The chthonic legal tradition is the original tradition of peoples. It simply emerged as experience grew and orality and memory worked. Since all people on earth are descended from the chthonic tradition, all other traditions e.g. Talmudic Law, Roman Law and European Law, have emerged on contrast. It is evident that as a tradition, the chthonic legal framework carries information that is as diverse as humanity itself, and carries within it lives as diverse as those of the northern Inuit, southern Polynesians and Maasai; practices as distinct as farming and hunting; beliefs as heterogeneous as theism and animism; and structures as different as monarchy and democracy. Yet amongst such human diversity, there are constants and characteristics which tell us what a chthonic person is.

The most evident feature is orality. The teaching of the past is preserved through the informal, though highly disciplined, means of human speech and memory. This may appear highly unreliable and vulnerable to external influence, but from my own experience in the Maasai, it is clear that the tradition is preserved for hundreds and most probably thousands of years. So we can say that it is not over-burdened with voluminous detail – it cannot rely on having people looking things up for example. This does not mean that detail is not transmitted – this occurs through ceremonies and techniques of life. The chthonic legal tradition thus rejects formality in the expression of law. In some instances, this has been written down by anthropologists, comparative lawyers and colonial administrators. By not being written down, no one individual can occupy the role of scribe or translator; instead, the law is vested in a repository in which all can share and participate. Transmission of the tradition is through the dynamic practice of oral education, in daily life, and the dialogical character of the tradition as daily practice for all ages. The orality and communal nature of the tradition are powerful inducements to consensus.

A tradition which is oral, such as in the Maasai, does not lend it self to complex institutions. This is of benefit to the peoples as the tradition faces less danger of monetary and institutional corruption, offering fewer position of prestige and authority. These are often seen as a council of elders, people who through their own assimilation of tradition, speak with greater authority. Elders are supplemented by chiefs; chiefs have no armies and can only function to the extent that they generate consensus. Dispute resolution is usually informal and can sit alongside “courts” and other forms of adjudication. There appears to have been no distinct judiciary in the Pacific islands or Arctic and in Africa informal types of arbitration co-exist with more formally established courts. In this sense some information is common to both chthonic and non-chthonic traditions. Procedure is also informal, and reconciliation of interests requires a slow, careful determination of the circumstances of a case, described as a process which is neither confusing or alienating and with a primary goal of reconciliation rather than adjudication. There is however procedural sophistication. Among the Maasai and other tribes such as the Dinka, the closest relative or best friend of a disputant assumes responsibility for presenting the position of the adversary. The system of dispute resolution is open and immediately accessible. There are no de facto barriers of cost and no de jure barriers of preliminary screening or permission, such as those of both roman law and common law. The law is also immediately applied, by the adjudicators and the parties themselves. According to western law this means that the chthonic legal tradition is “substantive law”. Crucially there is nothing analogous to what we call in common law – formal sources, sharply delineated rules, there is only shared information on the way to live a life.

Furthermore, in contrast to roman law and the common law of England, there is little recognisable chthonic law of obligations (contract and tort). It is the people living close to the land and from it, i.e. the land itself, its harvests and the personal relations of the people living on it that are the objective. Living close to the land an in harmony with it means that technologies that can destroy the nature and its functioning would be limited. There is no incentive for the development for complex machine and for accumulating wealth through their use. BY extension, and this remains the case amongst the Maasai, there is little reason to accumulate personal or moveable property or to accumulate land. In this way, the human person living within a chthonic tradition is not elevated to a position of domination or dominium over the natural world.

Land of course can be occupied, and western notions of adverse possession or prescriptive acquisition are signs of ownership – a very important question in the Americas, Africa and Australasia, where chthonic use of land is being recast into various western concepts of property at the behest of chthonic peoples. The chthonic use of land consists of communal or collective enjoyment, with no formal concept of property crystallizing this loose relationship between groups of people and the soil and nature upon which they lived. It could be used for farming, hunting, for limited forms of excavation and ceremonial uses. There is no right of alienation. This concept is not at odds with long established concepts such as the Allmend or communal pasture in Swiss law (allen gemein ist) and the ejido in Mexican law. In Canada, the Supreme Court borrowed from civil law terminology to decide a chthonic claim coming from a common-law province, referring to a "chthonic community usufruct" over land, cognisable by common law jurisprudence.

There are many further aspects of chthonic law that are relevant to a just and rights-based approach for nature. For example, it is clear that chthonic peoples have a sense of their own identity through social memory and tradition, rather than a sharp, institutionalised version. More crucially for current debates on nature and climate change is the "principle of respect" and "a need for harmony". This is not a religious tenet – there is no church or structure of implementation – rather it is as a constant presence. There is an absence of structures; the forest is the church, the hunt or harvest a gift from "god". The natural world is the nest embodiment of a religion. There is no such thing as a secular world or simple facts of nature. The chthonic legal tradition is the divine tradition. This leads to two major conclusions relating to the environment and nature. If the natural world is divine, it is not something to be chopped down, dug up, extracted and burned or dumped upon. Would you do such things to your god or yourself? Chthonic law is thus environmental law – it is not green; it is all the colours of the universe. It is not about repairing damage to the environment; chthonic law means that you have to live entire lives which accord as much respect to natural things as to yourself. "Do unto all things as you would have them do unto you." Thus, if we are to have a just and rights-based framework for nature – an ecological world-view - our overriding behaviour pattern must be to preserve the critical order of the natural world. The laws of nature are neither prescriptive nor positive, they are normative and there is a moral duty to obey the law.

Since animals and plants are part of nature, they too enjoy its "sanctity". There is no necessity of founding their entitlements on utilitarianism or an extended form of rights. They cannot be disentitled because of a lack of speech, tradition and culture. Indeed, as humans are part of nature, the human tradition must encompass both human and animal life. The chthonic tradition avoids mistreatment of animals, thus circumventing the problems of western law to change its treatment of animals. Chthonic law can be seen as profoundly conservationist; this does not mean it is immutable to change, but instead is wrapped up in a version of time which is built upon intergenerational equity. The community includes the ancestors and successors. This is a profound reinforcement of the conservationist character of the tradition since there are present members of the community (though not yet born) for whose benefit the natural world must be preserved. The community members are not simply making their own decisions about the environment; they are acting as surrogates for all those whose dependency on the natural world will come about after they have died. These are not

stakeholders or people who stand outside a place or thing and declare an interest in it, which could be transferred to something or someone else. They are an inextricable sacred part of a sacred whole. To destroy the environment is thus to commit a double wrong –to that which is immediately destroyed and to all that which may be dependent on it wherever this occurs in the envelope of time.

Chthonic lives can be different from one another and can differ across seasons and time. The key point is that when nature is not inexhaustibly depleted, there is no change in the harmony of nature and life. Those yet to be born will find it supporting them. The nature of the chthonic tradition very much controls the perception of change; if they need to live an alternative life, they are perfectly free to do so as long as it does not destroy nature.

We Are All Part of Nature

The theme of the chthonic tradition is a recurring one, and it has been rejected many times by those within it who wish to create a better way. The tradition therefore has to show why other ways are not better ways. Since chthonic peoples have not constructed the institutional means of resisting expansion by other peoples or preventing the destruction of nature, they are often ill-equipped to undertake a systematic response to other legal systems. Yet today we are seeing a move towards the self-evident argument that the world should be preserved and that those who do not accept this will eventually bear the burden of not accepting it.

Nearly twenty years ago, Cormac Cullinan released his book “Wild Law – Governing People for Earth”. It was a response to the call by Father Thomas Berry, the eminent social historian, “geologian”, author and poet, who pointed out that many legal and political systems actually legitimise and encourage the exploitation of Earth. He stressed for many years the importance of redefining our ideas of law and governance in order to establish a sound basis for developing laws and political institutions that strengthen mutually beneficial relations between humans and the biosphere. Cormac responded to this by formulating in his book on the philosophy of law “Earth jurisprudence” and Earth governance.

Earth governance is government of people by the people for Earth. It is, as in the chthonic tradition, based on the recognition that in the long-term humans will not thrive unless we regulate ourselves in a manner that is consciously oriented towards and prioritises the wellbeing of the Earth system from which human wellbeing is derived. Earth jurisprudence varies from society to society but has common elements. These include:

- recognition that the source of fundamental “earth rights” of all members of the earth community comes from the planet and nature;
- means of recognising the roles of non-human members of the earth community and of restraining humans from unjustifiably preventing them fulfilling these roles;
- concern fro reciprocity and the maintenance of a dynamic equilibrium between all member of the earth community determined by what is bets for the whole system (earth justice);
- an approach to condoning or disapproving human conduct no the basis of whether or not it strengthens of weakens the bonds that constitute the earth community.

Out of this work has come the Earth Jurisprudence Movement, and Earth Justice - “because the Earth needs a good lawyer” with many cases and battles being fought… Their work is saving irreplaceable wildlands, cleaning up the air we breathe, protecting countless species on the brink of extinction and secured limits on polluting industries. As they say “When we go to court, we get results”.

My hope is that in the aftermath of the Covid pandemic and with climate and biodiversity crises yet to overcome, we will pay more attention to the traditions of the chthonic peoples and consider conserving nature as a way of life not something which requires special membership.

© Professor McGlade, 2021