
LEGAL RIGHTS *for* natural things

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The locus standi constraint and the environment: a need for environmental friends.

Morals and the law

The etymology of ethics includes two basic aspects. The first is concerned with the individual character or intrinsic value of what it means to be a good person. The second is concerned with the social rules that govern and limit our conduct. In any society the ultimate rules that govern ethics is what we call *morality*. Moral standards consist of several characteristics, two of which are relevant to this paper. The first is concerned with behaviour that can be of a serious consequence to human welfare, that is, behaviour which can profoundly injure or benefit people. The second relates to the *soundness* which depends on the adequacy of the reasons that support or justify them.

Morality is reflected in *law* in that the law codifies customs, ideals, beliefs and the society's moral values. However, the law does not itself establish moral standards; they are developed from the ethics of the society. In our society ethics has traditionally been anthropocentric in nature. That is, only actions and relationships between human beings are considered of ethical significance. This implies that humans are at the centre of ethics, since human nature is a constant. Hence good and bad can be easily determined. Humans therefore have *intrinsic* value whereas all else has only *instrumental* value.

The anthropocentric morality is reflected in the traditional business attitude toward the environment of viewing the natural world as a *free and unlimited good*.

Towards an holistic ethic

Recently, there has been a move away from the anthropocentric approach to ethics toward a holistic approach that includes the *rights* of the environment. However, to use the word recent is a misnomer as Saint Francis of Assisi argued that animals helped to glorify God in their own way, independent of their usefulness to human beings, and that they deserve ethical treatment based on their *intrinsic* right to existence.¹ Salt in 1894 extended the intrinsic right of animals from merely glorifying God to having rights of their own.² In considering social progress Salt proposed that if humans have rights so should animals. Leopold in 1949 extended this ethical discussion to include relationships between human beings and the land.³ The land included soil, water, plants and animals collectively.

By 1964, law philosophers were extending the ethical debate to include the legal framework. A benchmark essay was developed on *nature's legal rights* by Morris where he argued that conservation laws should be thought of as expressing a presumption in favour of the natural environment.⁴ Morris included birds, flowers, ponds, feral beasts, outcroppings of stone, primeval forests and the air as natural environment. Stone in 1972 and again in 1974 proposed that all inanimate objects should have legal rights.⁵ He included humanoids and computers as well as the environment within his ethical framework. Stone observed that some inanimate objects such as trusts, corporations, banks and ships had been seen by the courts to have rights so why not all inanimate objects? Technological change, was pos-

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tulated by the ethical philosopher Jonas as the catalyst needed to change the traditional anthropocentric ethical framework.⁶ The distinction between an intrinsic right and an instrumental right was elaborated in 1983 by Gendron who proposed that *all* objects in the world have intrinsic rights, therefore such objects cannot be used as a mere instrument by some human being.⁷ Genetics and human values have also generated discussion as to the need to transform ethics to include *genethics*. The word *genethics* was used by Suzuki and Knudson in 1989.⁸

In general, the debate for a change in the framework of ethics can be characterised as conferring intrinsic rights on all objects with a requirement for a change in social rules that governs and limits our conduct. This change, from *instrumental* to *intrinsic* rights in ethics, is reflected in moral values which in turn is a generator of change in *law* that governs the behaviour of individuals and society.

The social rule of law

The current codification of our society's customs, ideals, beliefs, and moral values as reflected in the *law*, mitigates heavily against inanimate objects. Prior to moving a court for remedy, applicants are required by the common law of *locus standi* (standing) to show that they have 'legal capacity' to challenge the impugned act or decision. The law starts from the position that remedies are correlative with *rights*, and that only those whose *rights* are at stake are eligible to be awarded remedies. *Rights* are interpreted as the level of *personal or special interest* that qualify the threshold of an applicant's eligibility to stand before the court. The restrictive rules of standing have been seen by Blackshield as an impediment to public interest groups that wish to work within and not merely against the legal system.⁹ In consequence, a private person or group, with no greater interest than any other member of the public, is therefore incapable of bringing proceedings before a court as they lack standing. Special interest has been defined in the 'Boyce' test (*Boyce v Paddington Borough Council* (1903) 1 Ch 109). The Boyce test requires that there be:

- interference with the public right in a way that some private right is at the same time interfered with; and
- where no private right is interfered with, the public right of a plaintiff, suffers special damage peculiar to him or herself from the interference with the public right. An exception to this requires leave from the Attorney-General.

How has the special interest test been applied in Australian environmental cases?

In the *Australian Conservation Foundation v The Commonwealth and Others* (1980) 146 CLR 493, the Australian Conservation Foundation (ACF) instituted proceedings for an injunction to enforce compliance with the *Environment Protection Act 1974*. The first limb of the special interest test was upheld (where the interference with the public right at the same time interfered with a private right) but rejected the argument that the ACF had been directly invested with any private right as an environmental group by this 'environmental' legislation. That is, the court rejected the second limb of the *special interest* test. However, the special interest test was extended to *some special interest in the subject matter of the action*.

In another test of the nature of *special interest* Aboriginal plaintiffs sought to rely on a private right for the preservation of Aboriginal relics conferred by s.21 of the *Aboriginal Relics Preservation Act 1972* (Vic.), which made the damage or interference with Aboriginal relics an offence (*Onus and Frankland*

v Alcoa of Australia Ltd (1981) 149 CLR 27, 38). The court rejected the first limb of the *Boyce* test on the basis that all Australians and not just Aborigines were to be the beneficiaries of s.21.

Special interest was again tested by the ACF and the Conservation Council of South Australia when they sought standing in relation to preserving the aesthetic quality of the Flinders Ranges in South Australia (*Australian Conservation Foundation and the Conservation Council of South Australia v State of South Australia and Ophix* (1990) 53 SASR 349). Special interest was sought on the basis of diminution of use and enjoyment of the National Park. Standing here was rejected in that individual members could claim loss of use and enjoyment but corporations could not. Further, individual members are simply ordinary members of the public with no *special interest*.

The implications of these cases are that groups have difficulty in establishing *special interest*. One form of group action is the class action which is a special utility for providing improved access to courts for many who otherwise have a theoretical right to justice but no practical means of achieving it. However, the class action creates no new rights or liabilities. Neighbours may band together to object to diminished enjoyment of their land but a person who normally spends holidays in such a location could not be joined. Hence, the class action adds no new right other than what a neighbour already has. In consequence, class actions would appear to be limited by the same *special interest* test as a means of protecting the rights of the environment.

The courts have therefore interpreted special interest in a narrow sense and have rejected group interest as being no greater than any member of society's interest. If objects of the environment cannot obtain standing before the courts through the *special interest* of an individual or group who are friendly to the cause of the object, then the individual or group must turn to the Attorney-General to obtain a *fiat* to appear before the court. However, matters concerning objects of the environment are political in nature. The object lacks a voice of its own and is *lobbied* for by some *friend*. In consequence, the debate takes place between third parties and is philosophical in nature and content as the parties cannot know the *feelings* of the object.

Conflict of interest and the role of an Australian Attorney-General

An Attorney-General (AG) is both the guardian of the public interest and a Member of Parliament. The AG's discretion to grant or refuse a *fiat* is absolute and unimpeachable, and may not be reviewed by the courts. This dual role and the absolute discretion places the AG in a position of conflict over matters of public interest. In two matters frequently cited in environmental concerns, where the AG has acted, the political nature of the debate is clearly evident in the decision taken.¹⁰

In one instance involving a challenge to the Tasmanian Hydro-Electric Commissions' decision to flood Lake Pedder, the Tasmanian AG was prepared to represent the public interest. However, cabinet exerted pressure on the AG to refuse the *fiat*. The AG resigned and the Premier took responsibility for the decision and refused the *fiat*. In the other instance, there was a challenge to the erection of a communications tower on Black Mountain in Canberra by the Postmaster General's Department. Although the Australian AG's *fiat* was granted to the environmentalist petitioners, the AG took pains to have all reference to the nature of the proceedings removed through enforcement of the *Public Interests Ordinance Act 1973*.

Conclusion

There has been a movement away from anthropocentric morality to holistic morality within the general community. A holistic morality would require that all the environment be given intrinsic value not instrumental value. Intrinsic value carries with it a right. The law codifies the social morality but does not set the standards of that morality; however rights are protected by the law.

Given the political nature of the environmental debate and the potential *conflict of interest* of the Attorney-General and the unwillingness of the courts to grant standing to special interest groups, the right of the general environment is not represented in the codification of social rules that govern and limit our conduct. The law is the arbiter on matters of behaviour within the community. If the environment's intrinsic value cannot be represented in the courts and the political nature of obtaining a *fiat* creates difficulties for special interest groups, then only anarchistic behaviour can follow.

We argue that there is a need for administrative law to be enacted which would give the right to special interest groups to be defined as *friends of the environment* with special leave to appear before courts in matters concerning the environment. Such definition would enable a broader view of special interest to be interpreted and would minimise the potential for anarchistic behaviour by a group or individual who has genuine concerns but no legal capacity.

The effective thrust of such a law should be to overcome the difficulties encountered within the courts as to the conferring of special interest. This then leaves the court to adjudicate on mat-

ters of rights and enable friends of the environment to work within the law rather than against the law. It is argued that such a change in law would enable the law to reflect the moving ethical values within society.

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[Editor's note: Readers who are interested in the issues raised in this article are referred to (1991) 16(4) *Legal Service Bulletin* on 'Law and the Environment' and to our Legal Issues Resource Kit on 'Environment' which comprises 13 articles on legal issues relating to the environment published in past issues of the *Legal Service Bulletin/Alternative Law Journal*.]

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Dear Editor

I am writing to clarify some of the issues raised in an article, 'Resolution or resoluteness?' in the April 1994 edition of the journal which commented on the mediation of a particular social security matter.

Whilst I do not wish to comment on the role of mediation in social security matters, it is apparent that the author of the article has misunderstood important legal issues related to the outcome of mediation. Her misunderstanding has given the wrong impression of the quality of reasons given by the SSAT.

As we are told in the article, the SSAT, to use the author's words, had 'found in favour of the client and decided to waive the debt. The DSS then appealed to the Administrative Appeals Tribunal'. We are also told that 'a resolution was finally made to vary the SSAT decision'.

When mediation at the AAT takes place the parties reach agreement and propose a decision which is endorsed by the Tribunal. The Tribunal then issues an order in the form of a decision only; there are no reasons given.

Your readers need to be reassured that the reasons provided by the SSAT are fulsome and sufficient and play no part in matters mediated at the AAT.

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