

CHAPTER ONE: INTRODUCTION

1.1. The Aim and Purpose of this Study

This thesis is a multi-disciplinary study that focuses on specific elements of current legislation in Australia governing the protection of the environment and of nonhuman animals. The common thread that runs throughout this thesis is that it is argued from an ecological feminist (or ecofeminist) perspective, which fundamentally engages in the exploration of multi-disciplinary approaches to bring to light commonalities between the historical oppression of women and of ‘others’, such as nonhuman animals and nature, in patriarchal society.

The aim of this study is to demonstrate that the value and worth of nature and nonhuman animals is based on an arbitrary hierarchy that is constructed from an anthropocentric perspective.¹ Accordingly, the legislative protection afforded to both nature and nonhuman animals makes their subordinate position within this hierarchy painfully evident. Indeed, certain areas of the environment and categories of animals that are placed at the very bottom of the list are afforded very little, if any, legal protection at all. This study aims to destabilise established/traditional beliefs, with view to enabling legislative change.²

As demonstrated in the following chapters of this thesis, while environmental legislation is concerned with the protection and conservation of the environment, current laws and regulations are, at best, aimed at minimising damage, with penalties applied for breaches, and at worst, allow the destruction to continue, based on the rationale that it is economically viable to let it be so. The tension between law and justice thus becomes markedly evident in the distinct discord between a value system that is based on economics and the notion of property, and the corresponding legislative intent, which at least in theory, attempts to incorporate justice by protecting nature and nonhuman others. The fate of both farm and feral animals is particularly grim because

¹ Anthropocentrism, as it is applied in this thesis, represents the idea that humans are the centre of the universe, and conversely, understand and interact with nature and nonhuman others in terms of human values and experiences.

² Given that the law is a reflection of social attitudes and values – see Chapter 3.

they are both at the very bottom of the hierarchy and afforded the least protection. Farm animals exist purely for human consumption and use, and as such, have only economic value, while feral animals have no value at all because they are regarded as pests.

Consequently, the laws and regulations governing the slaughtering and culling practices of intensively farmed and feral animals, while directed at not causing ‘unnecessary harm or suffering’ for the purposes of justice, in fact sanction the infliction of ‘necessary’ harm and suffering on these animals. Not only is the legislative intent contradictory to the legislation itself, but also the notions of what is ‘necessary’ or ‘unnecessary’ are open to wide and conflicting interpretations, as they fundamentally disconnect from the pain and suffering experienced by the animals that are being slaughtered or culled. Moreover, since the concepts of ‘justice’ and ‘unnecessary harm and suffering’ have no fixed meaning or definition, it is not surprising that the penalties for breaches are lenient and infrequently applied. The core issues that really need to be addressed are thus firstly, whether these, or any other animals, should be allowed to be subjected to harm and suffering at all; and secondly, whether a hierarchy based on human values justifiably discharges humans from a moral obligation towards nonhuman others.

The purpose of this thesis is therefore to identify the gaps between law and justice, and to provide a framework within which a paradigm shift in cultural values, traditions and attitudes is able to take place, so that justice is able to be incorporated into the law. It is argued that an ecofeminist deconstructive analysis of the ideological foundations of patriarchal capitalist culture sheds light on the destructive attitudes, practices and behaviours that have led to the unjustifiable exploitation of nature and nonhuman others. Since women, nature and nonhuman others share a history of oppression, gender analysis from an ecofeminist perspective is thus an effective starting point, as it employs conceptual and rhetorical devices that are fundamentally grounded in feminist thought.

1.2. Methodological Approach

Derrida’s methodological approach to deconstruction is broadly applied in this thesis for the purpose of identifying and effectively dismantling the underlying historical,

conceptual, and practical connections between the domination of women and of nature and of nonhuman animals. So, by no means does this study involve a comprehensive or in-depth study of Derrida's theories and methodological approach that ventures beyond the purpose of this thesis. While it is acknowledged that a framework grounded in dualism, in which emphasis is placed on binary oppositions, is subject to various criticisms by both feminist and non-feminist theorists, it is nevertheless the approach taken in this thesis, as such polarities, or pairs of opposites, are evident not only in the organisation of human thought, but also in the social, political and legal structures that are examined in subsequent chapters. For the purpose of this thesis, therefore, the general application of Derrida's methodological approach, based on binary oppositions, allows for the debilitation of the hierarchy of values that characterise Western patriarchal capitalist society. This then allows for the opening of an imaginary space, in which *différance*,³ based on the ideal meaning and purpose of justice, is able to be brought into the conversation.⁴ The employment of Derrida's methodological approach further allows for a 'reflexive scrutiny' of the relationship between law and justice, and enriches the analytical approach that is typically employed by ecofeminists, who are 'primarily engaged with the manipulation and assessment of propositions', but do not necessarily deal with 'questions of power'.⁵

In terms of the thesis as a whole, chapters two and three provide the theoretical and methodological backgrounds and framework for the four case studies examined in chapters four and five. This is important for two reasons. Firstly, these chapters provide the reader with an overview and direction of the ideas and concepts that are examined in the case studies; and secondly, they provide a point of reference for the issues raised in chapters four and five, which serves to contextualise the framework within which critique as well as proposed solutions are able to be formulated.

3 The concept of *différance* as employed by Derrida is explained in detail in chapter three. *Différance* essentially means difference, and this term is most commonly associated with Luce Irigaray.

4 In chapter three, Derrida's example concerning the notion of hospitality, as it should be applied to illegal immigrants, is provided as a model.

5 Ariel Salleh, *Ecofeminist Reviews* (2011) <<http://www.arielsalleh.info/theory/book-reviews/warren-rev.pdf>>.

1.3. Justification for the Study

This research is a desk-based study and no empirical field work has been undertaken. The focus of this study is rather on the underlying theories as applied to the case studies, and it is presented from an ecofeminist perspective for the following reasons. Firstly, the fusion of feminist and ecological concerns allows for the exposition of the interconnecting oppression experienced by women, the environment and nonhuman animals. Secondly, because ecofeminism is essentially concerned with social justice, the feminist component serves to expose that the exploitation of others is based on an anthropocentric understanding of the world and that the rationale for this is clearly unjustifiable. Thirdly, as ecofeminists view all forms of oppression to stem from an arbitrary value system, they tersely address this evaluative framework by debunking the hierarchy of values that is accorded to all other beings on Earth, and the Earth itself. Fourthly, as both an established philosophy and environmental movement, ecofeminism successfully pushes the boundaries of Western political, social, ethical and ecological thought by ‘linking environmental questions to fundamental investigations into human psychology and to wider social problems’.⁶ Fifthly, as an engaged political movement, ecofeminists have been actively involved in the development of environmental action plans, and their past contributions have led to policy shifts in the fields of both gender and the environment.⁷

Derrida’s methodological approach is explored in this study because it is essentially compatible with the ecofeminist understanding of law and justice and is able to be applied to the dismantlement of institutionalised social and cultural values that are reflected in the law from an ecofeminist perspective. Derrida’s deconstructive methodology serves not only to demonstrate how the oppression of women extends to all excluded others, but also that the hierarchy of values afforded to human and nonhuman others are based on a contrived and biased understanding of reality. As Derrida and ecofeminists both take on a principled stance on behalf of all victims of oppression with the goal of bringing about social change, the imaginary space that is then created allows for a framework within which change is able to take place.

6 Miles T Woolen, *Ecofeminism: Their Viewpoints and the Problem with the Western World* (2011) <<http://carbon.cudenver.edu/stc-link/wmnecol/html/ecowolen.htm>>.

7 Susan Buckingham, ‘Ecofeminism in the Twenty First Century’ (2004) 170(2) *Geographical Journal* 146, 148.

Moreover, Derrida's model of deconstruction allows for multidisciplinary approaches to be employed in the dismantlement of institutional structures and ideological thought. This is not only a fundamental requirement for an ecofeminist analysis but also enables the deconstruction of environmental law and animal law, which equally employ multidisciplinary approaches in their construction. Environmental law involves the sciences, philosophy, politics, anthropology and economics, while animal law involves environmental law (including all above connections) as well as property law, torts, administrative law, criminal law, consumer law, constitutional law and legal theory.⁸ Although interdisciplinary and multidisciplinary studies are generally challenging because they embrace multiple schools of thought, including political, social, ethical, ecological, psychological and legal, the rationale of drawing on multiple disciplines lies in the fact that the problems embarked upon are complex and cannot be solved by using a singular approach. In turn, when approached from multidisciplinary levels, the deeper insight and more comprehensive understanding serve to expose the many contributing factors that have led to the perpetration of injustices against excluded others.

Environmental and animal ethicists essentially aim to construct ecologically and ethically appropriate ways for humankind to live in consort with nature and nonhuman others. Apart from addressing the problems associated with land management, the use of resources and current farming practices, issues such as economics and population growth, as well as popular (mis)conceptions about the value and purpose of nature and animals are also taken into account. Ecofeminists equally engage in the consideration of multiple factors that lead to the injustices against nature and nonhuman others, but their unique approach links gender discrimination and sexist oppression with environmental degradation and the mistreatment of animals. Ecofeminist theorists thus focus on the underlying motivations and reasoning for the injustices that have been historically perpetrated against women, nature and animals, and in doing so, connect environmental problems with issues of social and political justice through a feminist lens. At the same

⁸ Deborah Cao with contributions by Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Thomson Reuters Australia Ltd, 2010) 35, 97.

time, they equally acknowledge that there is no simple cause or solution to this complex problem.⁹

Politics, law and ethics are governed by the same conceptual frameworks that reflect traditional social values and, as a unified force and when institutionalised, they serve as powerful instruments that dictate the way in which people ought to think and behave. Indeed, the value placed on the environment, for example, plays a crucial role in whether or not a person views him or herself as part of or separate from nature.¹⁰ To effectively change people's mode of thinking and behaviour, the underlying motivations and reason for such thinking and behaviour must be deconstructed, and this is exactly what ecofeminists (and feminists in general) aim to do:

Feminism turns theory into itself, the pursuit of a true analysis of social life, into the pursuit of consciousness, and turns an analysis of inequality into a critical embrace of its own determinants. The process is transformative as well as perceptive, since thought and thing are inextricable and reciprocally constitutive of women's oppression, just as the state is coercion and the state as legitimating ideology are indistinguishable, and for the same reasons¹¹.

Conventional approaches towards nature, as exemplified in property law, view land as an abstract, economic-value producing entity to be used strictly for human purposes, without regard to its location or function within a specific ecosystem.¹² Ecofeminists

9 Chaone Mallory, *Toward an Ecofeminist Environmental Jurisprudence: Nature, Law and Gender*, <http://digital.library.unt.edu/ark:/67531/metadc2219/m1/1/high_res_d/Thesis.pdf>

10 Joanne Vining, Melinda S. Merrick and Emily A. Price, 'The Distinction between Humans and Nature: Human Perceptions of Connectedness to Nature and Elements of the Natural and Unnatural' *Human Ecology Review*, Vol. 15, No. 1, 2008, 2.

11 Catherine MacKinnon, *Toward a Feminist Theory of State*, (Harvard University Press, 1989) 84.

12 Mallory, above n 9. Mallory refers to Freyfogle, according to whom the evolution of property law followed closely the development and application of modernist conceptions of truth, legitimacy, and physical being. When the law could treat land as though it were something separate from human beings, from which humans can create economic value but is not valuable in itself, it was also possible to detach that value and transform it into an abstract concept, stripped of the annoying particularities that might render it less manageable, and certainly less transferable. Under the traditional concept of real property rights, the land (including waters other than communal waters (*res communes*)) is divided by arbitrary lines to create allotments. Each allotment is composed of the land and things so attached thereto as to be part of the land. This includes the minerals in the soil, the rocks and the plants growing on the land.

regard this to be a male rather than a human perspective that stems from the logic of domination, according to which people and things are hierarchically ordered in such a way that some beings or entities (that is male humans) are situated above other entities (that is women, nature and nonhuman others) and entitles the former to exploit the latter.¹³ This oppressive conceptual framework, in turn, reveals deep connections between the social domination of women (and animals) and the material degradation of nature. Due to the common history of oppression experienced by women, ecofeminists are in a prime position to address the injustices that are perpetrated against nature and nonhuman others and sanctioned by law. As the multi-faceted nature of ecofeminist jurisprudence not only contradicts traditional values but also moves beyond patriarchal constraints by constructing diametrically opposed discourses, based on attentive and empathetic communication with those who are situated differently,¹⁴ ecofeminism is able to offer a way forward. Hence, rather than arguing within a framework that is constrained by rational proof and truth seeking, ecofeminists challenge the nature of legal theory itself by addressing concerns about domination and exclusion, and encouraging discourses that enable healthy, sustainable, and inclusive relationships between humankind and nature to be considered in policy decisions:¹⁵

We exist in relationship, with other humans, with animals, with nature, and our interest in survival is tied to the survival of other participants in this world's processes in a way strikingly similar to the manner in which men's flourishing is tied to the liberation of women. Just as feminist jurisprudence sees patriarchy as the root source of social injustice and most, if not all, social problems (including poverty and violence),

Ownership of the allotment of land carries with it the right to use the land and exploit its resources. Ownership of land also provides an opportunity to graze tame animals on the land and to expropriate to the owner wild animals that enter the land. The Hon. Justice Brian J Preston, Chief Judge, Land and Environment Court of NSW (2008), 'The Environment and its Influence on the Law'

<[http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf/\\$file/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf/$file/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf)>

13 Karen Warren, 'The Power and the Promise of Ecological Feminism' (1990) 12(2) *Environmental Ethics* 125-146 (also cited in Mallory and previously discussed in chapters two and three of this thesis).

14 Mallory, above n 9.

15 Ibid.

ecofeminism sees patriarchy as at the root of all environmental problems.¹⁶

Although environmental law and animal law have experienced difficulty in establishing legitimacy, they have nevertheless increasingly gained credence, testifying that they have become areas of growing legal concern.¹⁷ The resistance on the part of the legal profession to incorporate legal theory critique that is advanced from non-traditional perspectives can be credibly explained from an ecofeminist perspective; namely that this is because women, nature and nonhuman others belong to the group of excluded others, which are traditionally not only excluded but also exploited on multiple levels. As masculine self-identity, and by extension patriarchal institutions, have been constructed in opposition to the feminine 'other', and since nature and nonhuman animals are also imaged as female, simply by virtue of their biological connectivity to women (who are indeed regarded as the embodiment of nature's cyclical processes), they have also been historically excluded, or at the very least grossly underrepresented in both politics and law. Moreover, politics and law are essentially about male domination, while ecofeminism is essentially about ending this domination; hence they are at polar ends. Nevertheless, the principles upon which environmental and animal laws are founded, or to which they are at least epistemically linked, essentially challenge the role of humankind's dominion over the Earth and its species. Since the law tends to assume or indeed proclaim itself as administrator of the environment and nonhuman others, there is thus in practice a distinct disconnect between the principles of justice and the actual laws that are in place. The effect is that neither the environment nor animals are afforded the legal protection they should be afforded.

Ecofeminists, such as Mallory recognise the 'radical potentiality' of environmental law to challenge the notion that 'human beings are/ought to be the rightful/lawful owners and possessors of nature, even though it is traditionally built on 'premises that reinforce the western, male, capitalist status quo''¹⁸ For Mallory, ecofeminism is able to raise awareness of "the divergent ubiquity of various forms of oppression [by shifting] the

¹⁶ Ibid.

¹⁷ D. Grinlinton, 'The Environmental Era and the Emergence of Environmental Law in Australia: a Survey of Environmental Legislation and Litigation 1967-1987' (1990) 7 *Environmental and Planning Law Journal* 76.

¹⁸ Mallory, above n 9.

episteme [and exposing] the political behind the personal, the dominance behind the submission, [allowing it to participate] in altering the balance of power subtly but totally”.¹⁹ In doing so, they demonstrate that “the liberal-industrial state operates through the appropriation of female (and that of males with ‘minority’ status and other ‘subordinates’) labour and reproductive ability, exploiting both in the maintenance of capitalism”.²⁰ Ecofeminism can thus be considered to be a worthy ambassador for challenging traditional politics and law, as they are able to ‘speak up’ (both literally and figuratively) on behalf of all oppressed others, with and without a voice.

1.4. Literature Review

This thesis fills the gaps in the literature that links the ecofeminist approach to the deconstruction of law and justice with Derrida’s methodological approach of bringing justice into the law. The focus of this thesis is therefore to firstly challenge the underlying ideologies that govern environmental and animal legislation in Australia today; and secondly to bridge the gap between law and justice through the application of *différance* from an ecofeminist perspective.

While extensive literature on ecofeminism exists since its birth in 1974, only few commentators have focused on the link between ecofeminism and nonhuman animals and very few have further extended this link to explore the ecofeminist approach to the deconstruction of patriarchy in light of Derrida’s methodological approach to deconstruction. Hence, there is very little literature that links ecofeminism with Derrida and with animal ethics and none that links this combined approach to Australian environmental and animal law. The positions of vanguard ecofeminists, such as Carol J. Adams²¹ and Catherine Mackinnon,²² who focus on the commonalities between the

¹⁹ Ibid.

²⁰ Ibid.

¹⁹ The works of Adams that are referred to in this thesis include: Carol J Adams (ed), *Ecofeminism and the Sacred* (Continuum, 1993); *Neither Man nor Beast: Feminism and the Defense of Animals* (The Continuum Publishing Company, 1995); and *The Sexual Politics of Meat: A Feminist–Vegetarian Critical Theory* (Continuum Publishing, 1990).

²² The works of MacKinnon that are referred to in this thesis include: ‘Of Mice and Men’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and new Directions* (Oxford University Press, 2004); *Feminism Unmodified: Discourses in Life and Law* (Harvard University Press, 1987); and *Toward a Feminist Theory of State* (Harvard University Press, 1989).

subjugation of women and of nonhuman animals, and of Drucilla Cornell,²³ who applies Derrida's deconstructive methodology to an ecofeminist analysis of the subjugation of others, are thus pivotal to this thesis and explored in detail in later chapters. Other influential ecofeminist writers who are also explored throughout this thesis include the founder of ecofeminism, Francoise d'Eaubonne,²⁴ and leading contemporary ecofeminist writers, such as Karen J. Warren,²⁵ Val Plumwood,²⁶ Chaone Mallory,²⁷ Catriona Sandilands,²⁸ Ariel Kay Salleh²⁹ and Vandana Shiva,³⁰ the principal contemporary ecofeminist of the South.

Since ecofeminism reconnoiters multi-disciplinary approaches to address commonalities between the historical oppression of women, nature and nonhuman others, and in doing so offers both reactionary and complementary arguments to the diverse positions upheld by its various authors, this thesis necessarily considers a plethora of literature that is

23 The works of Cornell that are referred to in this thesis include: *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (Routledge, 1991); Felicia Herrschaft's interview with Drucilla Cornell, *The Interview* (2004) <<http://www.fehe.org/index.php?id=16>>.

24 D'Eaubonne's major work and referred to in this thesis is *Le Feminisme ou la Mort (Feminism or Death)* (Pierre Horay, 1992).

25 The works of Warren that are referred to in this thesis include: *Ecological Feminism* (Routledge, 1994); 'Deep Ecology and Ecofeminism', *Philosophical Dialogues: Arne Naess and the Progress of Ecophilosophy*, Nina Witoszek and Andrew Brennan. Lanham (eds) (Rowman & Littlefield, 1999); *Ecofeminist Philosophy: A Western Perspective on What It Is and Why It Matters* (Rowman & Littlefield, 2000); 'Feminism and Ecology: Making Connections' (1987) 9(1) *Environmental Ethics* 3; 'The Legacy of Leopold's "The Land Ethic"' (1998) 3 *Reflections* <<http://ruby.fgcu.edu/Courses/Twimberley/IDS3920/LeopoldEssay4.htm>>; 'The Power and the Promise of Ecological Feminism' (1990) 12 (2) *Environmental Ethics* 125.

26 The works of Plumwood that are referred to in this thesis include: *Nature, Self and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism* <<http://onlinelibrary.wiley.com/doi/10.1111/j.1527-2001.1991.tb00206.x/pdf>> and (1991) 6(1) *Hypatia* 3; *Feminism and the Mastery of Nature* (Routledge, 1993); 'Feminism and Ecofeminism: Beyond the Dualistic Assumptions of Women, Men and Nature' (1992) 22(1) *The Ecologist* 8.

27 The works of Mallory that are referred to in this thesis include: *What is Ecofeminist Political Philosophy? Gender, Nature and the Political*, <<http://www38.homepagevillanova.edu/chaone.mallory/publications/EnvEthF10.pdf>>; *Toward an Ecofeminist Environmental Jurisprudence: Nature, Law and Gender*, <http://digital.library.unt.edu/ark:/67531/metadc2219/m1/1/high_res_d/Thesis.pdf>.

28 The work of Sandilands that is referred to in this thesis is *The Good Natured Feminist* (University of Minnesota Press, 1999).

29 The works of Salleh that are referred to in this thesis include: Gerry Canavan, Lisa Klarr, and Ryan Vu, *Embodied Materialism in Action: An Interview with Ariel Salleh* <<http://www.lancs.ac.uk/staff/twine/ecofem/SallehPolygraph.pdf>>; 'Epistemology and the Metaphors of Production: An Ecofeminist Reading of Critical Theory' (1988) 15 *Studies in the Humanities* 130; *Ecofeminism as Politics* (St Martins, 1997); *Ecofeminist Reviews* <<http://www.arielsalleh.info/theory/book-reviews/warren-rev.pdf>>; *Paper: Second Thoughts of Rethinking Ecofeminist Politics*, Australian National University, 1991 <<http://isle.oxfordjournals.org/content/1/2/93.full.pdf>>.

30 The works of Shiva that are referred to in this thesis include: *Ecofeminism* (Zed Books, 1993) – Vandana Shiva and Maria Mies and *Staying Alive: Women, Ecology and Development* (Zed Press, 1988).

posited from diverse perspectives, including non-ecofeminist perspectives. This is to provide a comprehensive and evaluative framework that is able to contextualize and support the ecofeminist arguments advanced in this thesis and analysed in detail in the corresponding chapters. As it is however impossible as well as impractical in terms of the focus, purpose and limitations of this thesis, to include all literature written that may have impact on this thesis, the literature selected includes the pioneers of the environmental and animal rights movements, such as Aldo Leopold,³¹ Arne Næss,³² Murray Bookchin,³³ Peter Singer and Tom Regan; the research undertaken by leading environmental scientists and economists, such as Donella Meadows,³⁴ Barry Commoner,³⁵ Michael Shellenberger and Ted Nordhaus,³⁶ and the contributions of prominent legal scholars and practitioners, such as for example Gary Francione,³⁷ Joel Feinberg,³⁸ Cass Sunstein,³⁹ David Favre,⁴⁰ Steven Wise⁴¹ and Mary Joe Frug.⁴²

31 The work of Leopold referred to in this thesis is *A Sand County Almanac, and Sketches Here and There* (Oxford University Press, 1987).

32 Næss's work referred to in this thesis is *The Shallow and the Deep, Long-Range Ecology Movement* (1973) <http://www.ecology.ethz.ch/education/Readings_stuff/Naes_1973.pdf>

33 The works of Bookchin that are referred to in this thesis include: *Post-Scarcity Anarchism* (AK Press, 2004); *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (AK Press, 2005); *What is Social Ecology?* (2011) <<http://greenfrombelow.wordpress.com/murray-bookchin-what-is-social-ecology/>>; *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (AK Press, 2005) and Murray Bookchin and Dave Foreman, *Defending the Earth: A Dialogue between Murray Bookchin and Dave Foreman* (South End Press, 1991).

34 Donella Meadows, Jorgen Randers and Dennis Meadows, *Limits to Growth* (2004) <<http://www.sustainer.org/pubs/limitstogrowth.pdf>>.

35 Barry Commoner, *The Closing Circle* (1971) <<http://combusem.com/COMMONER.HTM>>.

36 Michael Shellenberger and Ted Nordhaus, *Breakthrough: From the Death of Environmentalism to the Politics of Possibility* (Houghton Mifflin Co., 2007); Ted Nordhaus, *The Flawed Logic of the Cap and Trade Debate*, (2009) <<http://e360.yale.edu/content/feature.msp?id=2153>>.

37 Gary L Francione, *Animals, Property and the Law* (Temple University Press, 1995); 'Animals—Property or Persons?' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 108.

38 Joel Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, 1980).

39 Cass R Sunstein, 'Can Animals Sue?' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 251.

40 David Favre, 'A New Property Status for Animals: Equitable Self-Ownership' in C R Sunstein and Martha C Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 245–50.

41 Steven M Wise, 'Animal Rights: One Step at a Time' in C R Sunstein and Martha C Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004).

42 The works of Mary Joe Frug referred to in this thesis include: 'Re-Reading Contracts: A Feminist Analysis of Contracts Casebook' (1985) 34 *American University Law Review* 1065 <<http://www.wcl.american.edu/journal/lawrev/34/frug.pdf?rd=1>>; 'Rescuing Impossibility Doctrine: A Post-modern Feminist Analysis of Contract Law' (1992) 140 *University of Pennsylvania Law Review* 1029; *Post-modern Legal Feminism* (Routledge 1992).

This literature, which is dealt with in detail on a chapter by chapter basis, serves in sum to both highlight and reinforce the common concerns captured throughout this thesis (as demarcated in chapter two) in regard to the way in which humans interact with nature and the nonhuman world. To situate these concerns not only within a broader philosophical and legal framework but also within an Australian context, the positions aired by leading Australian legal scholars and practitioners, such as Deborah Cao,⁴³ Katrina Sharman⁴⁴ and Steven White,⁴⁵ and by spokespersons from key organisations, such as Glenys Oogies⁴⁶ and Lyn White⁴⁷ of Animals Australia, are further considered.

1.5. Synopsis of the Study

This thesis is divided into six chapters. Chapter one consists of a general overview of the thesis as a whole and addresses the background, significance, justification and methodological approach. An overview of the literature that is explored in detail and also critically evaluated in subsequent chapters is further provided.

Chapter two provides a contextual framework for ecofeminism in theory and in practice. The chapter begins with an historical overview of the development of environmentalism as an established philosophy and social and political movement, and explains that this has come about as a reaction to concerns regarding the effects of industrialised capitalism on the natural world. Chapter two further explains that ecofeminism has been selected for the purposes of this thesis because of its transformative eco-philosophical

43 Deborah Cao with contributions by Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Thomson Reuters Australia Ltd, 2010).

44 Deborah Cao with contributions by Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Thomson Reuters Australia Ltd, 2010); Katrina Sharman, *Animal Law in Australia, Animal Legal and Historical Web Center* (2004) <<http://www.animallaw.info/nonus/articles/ovaustailia.htm>> and *Voiceless, the Animal Protection Institute: Factory Farming* <http://www.voiceless.org.au/The_Issues/Fact_Sheets/Factory_Farming.html>.

45 Steven White, 'Animals and the Law: A New Legal Frontier?' (2005) 9 *Melbourne University Law Review* 298-316 <<http://www.austlii.edu.au/au/journals/MULR/2005/9.html>>. and Deborah Cao with contributions by Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Thomson Reuters Australia Ltd, 2010).

46 Glenys Oogies, *Problems with Current Animal Protection: Sentient Animals Slipping through the Net* (2011) <http://www.daff.gov.au/animal-plant-health/welfare/aaws/aaws_international_animal_welfare_conference/problems_with_current_animal_protection_sentient_animals_slipping_through_the_net#19>.

47 ABC News *Fresh Footage shows Indonesian Abattoir Cruelty* (29 February 2012) <<http://www.abc.net.au/news/2012-02-28/new-footage-shows-cruelty-at-indonesian-abattoir/3858230?WT.svl=news0>>.

approach, its effectiveness as a socially and politically engaged movement and its commitment to the creation of social justice.

Chapter three articulates the relevance of Derrida's view on law and justice, and his methodological approach to deconstruction to that of ecofeminism. It is argued that Derrida's political ethic and deconstructive methodology is aligned with, as well as complementary to, the ecofeminist position, as both aim to create social justice for all excluded others, human and nonhuman; and the root cause of the injustices are also the same. This chapter fundamentally provides the evaluative framework for the case studies explored in chapters four and five.

Chapter four considers the role of humans in the ecosystem and directly addresses current environmental concerns; namely environmental destruction and climate change. The theoretical component in this chapter considers the ethical meaning of 'moral obligation' in light of the concepts of social and environmental justice, and explores the contradiction between its original meaning and its application to the law. This chapter contains two decidedly topical case studies: Australia's response to climate change in the form of a carbon tax and the *Anvil Hill* case, which concerns the role of public participation in environmental decision-making in coal seam gas (CSG) mining. Connections are drawn between the exploitation of women and of nature through common mechanisms of oppression and evaluation based on their practical and economic worth.

Chapter five focusses on the treatment of animals and includes two case studies: the first concerning intensive farming practices, and the second concerning the sanctioned culling of feral or 'pest' animals. These two categories of animals have been specifically selected because they are the least valued and as such afforded the least legal protection. This chapter firstly illustrates the similarities between the traditional relationships between humans and nonhumans and the feminist interpretation of the relationships between men and women. Secondly, the legal framework is examined to determine the extent to which the law protects intensively farmed and feral animals. It is argued that because animals are regarded as property, the welfarist model is potentially able to protect intensively farmed animals from at least infliction of unnecessary suffering or

harm because these animals are regarded as the property of humans, however feral animals are not even afforded such protection.

Chapter six recaptures the main points raised in the thesis with view to a way forward. The chapter begins by providing an overview of the progress that has been made in the areas of environmental and animal legislation and the way in which the law has been effective, or alternatively compromised or ‘watered down’. Derrida’s notion of a promise is then presented as an effective means of incorporating *différance* into the law. Next, the ecofeminist vision of embracing the other is presented as a way forward, with emphasis placed on the importance of women’s participation in decision-making (including symbolically). The effectiveness of an ecofeminist deconstruction of existing laws is then considered in light of the elimination of hierarchies based on the dichotomy of inclusion/exclusion. Implications that may be drawn from the study are also included in this chapter.

CHAPTER TWO: THE THEORETICAL FRAMEWORK

2.1. Introduction

This chapter serves to explain and contextualise the ideological and legal frameworks that underpin the topics examined in subsequent chapters, and to reinforce the discussions and methodological approaches of deconstruction that are affianced in chapters four and five in particular.

The chapter begins with an overview of the rise and development of environmentalism as a committed social and political movement and of environmental ethics as an established and engaged sub-discipline of philosophy. The reasons for selecting ecofeminism are then discussed, based on the strength of the feminist component of its environmentalist approach, the transformative nature of its eco-philosophy and the accomplishments of ecofeminism as a social and political movement. The overview of the history of ecofeminism serves to identify and contextualise the many different influences that have contributed to the evolution of the various strands of the ecofeminist movement, and the different philosophical underpinnings that have shaped these movements. The exploration of the ecofeminist political agenda serves to illustrate that ecofeminism, as an engaged and active social and political movement, fuses feminist and ecological concerns. The ecofeminist use of Derrida's methodological approach of deconstruction is then explained and examples are provided to illustrate its effectiveness within the context of an ecofeminist analysis.

2.2. The Development of Environmentalism as a Social and Political Movement

The Industrial Revolution (1730–1850) marked the beginning of what has become the ecological crisis of today, as this era generated a previously incomparable upsurge of mining, forest clearance and land drainage. The emergence of scientific and technological progress facilitated the change from resource scarcity to resource surplus, and the necessary markets were created to accommodate the fast-tracking rise in

production.¹ Given that societies are not created by accident, but purposefully constructed, the ‘decision to direct industrial innovation toward producing unlimited quantities of goods’² changed the relationships between people and between people and nature, and paradoxically ‘required the nurture of qualities such as wastefulness, self-indulgence and artificial obsolescence’.³ As products were being manufactured purely for marketing and selling, people began to see one another through a ‘lens of profit and loss’ and to relate to one another ‘by a common anarchic drive for profit’.⁴ While workers may have some direct relationship to a commodity they produce, this relationship is lost when the commodity is sent to market, and even further lost with the consumer, who had no relationship to the product in the first place. Hence, from a Marxist perspective, the alienation that resulted from mass production and mass consumption further severed the relationship between people and nature and people and animals, and resulted in the objectification of both nature and animals as produce that is useful only in the production process.⁵ So rather than consciously working with nature, people began to exploit nature and its species, as they were now viewed merely as resources. Furthermore, nature and its species were exploited without any foresight in regard to the consequences of these actions, such as the production of toxic wastes and gases, the pollution of the Earth’s atmosphere and the consequent loss of biodiversity.⁶

Mass consumption was further identified with leisure, and workers were encouraged to work more and spend more.⁷ In turn, this created ‘the foundation for modern consumer culture to become a culture of work and spend’.⁸ The shift from the Protestant ethic of austerity to that of indulgence was met in the form of wages, and in turn, working long hours was signalled to build character, increase personal satisfaction and enable the worker attain a sense of dignity and self-worth.⁹ As consumption also appeared to allow

1 Gary Cross, *Time and Money* (Routledge, 1993). Also see Chris Cuomo, *Still Fooling with Mother Nature* (2001) 16(3) *Hypatia* 149.

2 Ibid, 5.

3 Roland Marchand, *Advertising the American Dream: Making way for Modernity, 1920–1940* (University of California Press, 1985).

4 Judy Cox, ‘An Introduction to Marx’s Theory of Alienation’ (1998) 79 *International Socialism*.

5 Ibid; also see *Marx Engels Collected Works*, Vol. 3 (Moscow: Progress Publishers, 1975), 225.

6 Cox, above n 4.

7 Benjamin Kline Hunnicutt, *Work without End: Abandoning Shorter Hours for the Right to Work* (Temple University Press, 1988).

8 Cross, above n 1.

9 Stuart Ewen, *Captains of Consciousness: Advertising and the Social Roots of the Consumer Culture*, (McGraw-Hill, 2001).

people at the lower end of the social hierarchy to feel that they have some ‘measure of access to the good life’¹⁰, the right to work ‘became a higher moral imperative than meeting basic needs’.¹¹ As a result, mass production and mass consumption became the nexus of a modern Western social organisation in the form of ‘commodity fetishism’,¹² which came to be regarded as an inevitable, if not a natural state of affairs.

For well over a century, concerns expressed about the undulate effects of industrialisation on nature by pioneers of the environmentalist movement were largely ignored by governments, politicians and the public.¹³ Even the relatively recent 1992 *World Scientists’ Warning to Humanity* had little, if any effect on decelerating deforestation, as a further 940,000 square kilometres of forests were converted into farmland and other commercial uses between 1990 and 2000.¹⁴ Environmentalists however remained undeterred and their concerted efforts to heighten public awareness about environmental degradation came to fruition in the 1970s, when environmentalism came to be recognised as an established social and political force.¹⁵ As the intellectual climate of the 1970s called for other values to be recognised, philosophers joined the environmental debate, and the investigation into the moral relationship, value and status of humans to the environment and its nonhuman contents had begun. This posed a challenge to traditional anthropocentric thought, in that it firstly questioned the assumed moral superiority of humans to members of other species on Earth, and secondly investigated the possibility of rational arguments for assigning intrinsic value to nature and nonhuman animals.¹⁶ The practical purpose of environmental ethics nevertheless

10 Ibid.

11 Cross, above n 1. There was also the fear that, given extra free time, people would turn to crime, vice, corruption and degeneracy, and perhaps even radicalism. Therefore, the common people had to be kept at their desks and machines, lest they rise up against their betters.

12 Cox, above n 4.

13 Andy Reynolds, *A Brief History of Environmentalism* (2011)

<<http://www.channel4.com/science/microsites/S/science/nature/environment.html>>.

Jean-Jacques Rousseau (1712–1778) may be considered the founder of modern day environmentalism, as he was perhaps the first to deplore the corrupting influence of reason, culture, and civilisation on the natural world. Other pioneers include Henry David Thoreau (1817–1862), George Perkins Marsh, Gifford Pinchot, John Muir (1838–1914) and William Hornaday (1854–1937).

14 Union of Concerned Scientists, *World Scientists’ Warning to Humanity* (1992)

<<http://www.ucsusa.org>>.

15 Reynolds, above n 13; Bron Taylor, *The Tributaries of Radical Environmentalism* (2008)

<http://www.brontaylor.com/environmental_articles/pdf/Taylor--Tributaries.pdf>.

16 Y S Lo, ‘Natural and Artifactual: Restored Nature as Subject’ (1999) 21 *Environmental Ethics* 247.

was, and still is, to provide moral grounds for social policies aimed at protecting the Earth's environment and remedying environmental degradation.¹⁷

The 1962 publication of Rachael Carson's *Silent Spring*,¹⁸ is frequently referred to as the impetus for the environmental movement of the 1970s, at least in America.¹⁹ In her book, Carson exposes the dangers of the insecticide dichlorodiphenyltrichloroethane (DDT) on humans, animals and the environment, challenging both agricultural scientists and the government. Carson describes how DDT enters the food chain and accumulates in the fatty tissues of both humans and animals, resulting in higher risks of cancer. Despite intense media criticism and attempts by chemical industries to ban her book, many reputable scientists validated Carson's claims.²⁰ President John F. Kennedy thereupon ordered an investigation into the issues highlighted in Carson's book, and after testifying before Congress in 1963 and urging for new policies to be introduced to protect human health and the ecosystem, Carson succeeded and DDT was banned.²¹ Once Carson's claims were validated, the effects of other chemicals were then also investigated.²² Carson's story brings to light the potential effectiveness of the role of public participation in decision-making processes as discussed in chapter four in the *Anvil Hill* case.²³

The 1970s witnessed the beginning of organised international responses to environmental concerns. On 22 April 1970, the first *Earth Day* was held to inspire awareness and appreciation for the Earth's natural environment. *Earth Day* was supported by countless demonstrations and in the following year, environmental pressure groups, such as *Friends of the Earth* and *Greenpeace*, were established. These groups introduced flagship campaigns for threatened species and informed the world of the trade in elephant ivory, rhino horn and seal fur. In 1972, the first *United Nations Conference on the Human Environment* (UNCHE) was held in Stockholm, Sweden, which is considered the defining event in international environmentalism. The UNCHE

17 Ibid.

18 Rachel Carson, *Silent Spring* (Houghton Mifflin Co., 2002).

19 Linda Lear, *The Life and Legacy of Rachel Carson* (2011) <<http://rachelcarson.org/>>.

20 Reynolds, above n 13.

21 Ibid.

22 Ibid.

23 *Gray v Minister for Planning* [2006] NSWLEC 720

was initiated by the developed world to address the effects of industrialisation on the environment and world leaders agreed to combat global warming, protect biodiversity and stop using dangerous poisons. The 26 principles of the Declaration of the UNCHE were produced, along with an Action Plan and an Environment Fund. Another significant outcome was the establishment of the United Nations Environment Program (UNEP), which is designed to promote environmental practices across the globe.²⁴ There was, however, a rift between the developed and the developing worlds in regard to the exploitation of natural resources in developing nations, which was regarded to not only be detrimental to the environment, but also to perpetuate the unequal distribution of wealth. In fact, this social and economic divide remains in place today, and has inarguably widened.

In an attempt to reconcile economic development with the consequences of its invasion on the natural environment, the term ‘sustainable development’ was coined in the 1987 Brundtland Report. In this report, sustainable development was defined as a ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.²⁵ Twenty years after the UNCHE in Stockholm, the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, was held in Rio de Janeiro, Brazil in 1992.²⁶ The central focus was on sustainable development, and emphasis was placed on the link between environmental problems and the economy in light of social justice issues. Discussions revolved around global problems such as poverty, war, and the increasing gap between industrialised and developing countries. The results of the UNCED included the Rio Declaration enunciating 27 principles of environment and development, Agenda 21 and a statement of principles for the Sustainable Management of Forests, which were all adopted by consensus.²⁷ The document *Women’s Action Agenda 21* was also incorporated into chapter 24 of Agenda 21.²⁸

24 United Nations Conference, *Conference on the Human Environment* (2011)

<http://climatelab.org/United_Nations_Conference_on_the_Human_Environment>

25 United Nations, *Report of the World Commission on Environment and Development: Our Common Future* (2011) <<http://www.un-documents.net/ocf-02.htm#I>>.

26 United Nations, *Conference on Environment and Development* (1992)

<<http://www.un.org/geninfo/bp/enviro.html>>.

27 Cuter Cleveland, Ida Kubiszewski and Peter Saundry (eds), *The Encyclopaedia of the Earth* (2011)

<http://www.eoearth.org/article/United_Nations_Conference_on_Environment_and_Development_%28U

The Rio Declaration on Environment and Development is effectively a set of legally non-binding principles designed to commit governments to ensure environmental protection and responsible development. It is intended to be an Environmental Bill of Rights, defining the rights of people to development, and their responsibilities to safeguard the common environment. The ‘precautionary principle’ was also established; that is the principle of ‘common but differentiated responsibilities’, along with the polluter pays principle,²⁹ which is the principle upon which the carbon tax is based. The institutional innovation resulting from the conference included an agreement on the operating rules for the Global Environmental Facility (GEF), the United Nations Convention on Biological Diversity, and the establishment of the United Nations Commission on Sustainable Development (CSD) on the basis of an Agenda 21 recommendation.³⁰ The United Nations Framework Convention on Climate Change (UNFCCC) and United Nations Convention on Biological Diversity were products of independent, but concurrent, negotiating processes that were opened for signatures at UNCED. However, the contents of the 27 principles are almost all weaker than the equivalent document signed in Stockholm 20 years earlier.³¹ Following the proposal at the 1992 Rio Earth Summit to keep environmental accounts in relation to decision-making, the Commonwealth government commissioned Australia’s first State of the Environment Report.³² However, to date, information about the environment is still not incorporated in the decision-making processes that impact the economy, as Australia has ‘failed to establish the institutional frameworks to track, in quantifiable and comparable units, the health of our environmental assets’.³³

In December 1997, the Kyoto Protocol was adopted in Kyoto, Japan and was entered into force on 16 February 2005. The purpose was to reduce carbon dioxide emissions by

NCED%29,_Rio_de_Janeiro,_Brazil>; Peter Haas, Marc Levy and Edward Parson, ‘Appraising the Earth Summit: How Should We Judge UNCED’s Success?’ (1992) 34(8) *Environment* 6.

28 Agenda 21, *Chapter 24: Global Action For Women Towards Sustainable And Equitable Development Changing Consumption Patterns* (2011) <<http://habitat.igc.org/agenda21/a21-04.htm>>.

29 Cleveland, Kubiszewski and Saundry, above n 27.

30 Ibid.

31 Ibid.

32 Peter Cossier and Jane McDonald, *Monitoring and Evaluating to Improve NRM Outcomes* (2011) <<http://www.wentworthgroup.org/uploads/NRM%20Monitoring%20Conference%20Speech%20Final.pdf>>.

33 Ibid.

five per cent between 2008 and 2012. In accordance with Article 24, the Protocol was open for signature from 16 March 1998 to 15 March 1999 at United Nations Headquarters, New York, and pursuant to Article 22, the Protocol is subject to ratification, acceptance, approval or accession by Parties to the UNFCCC.³⁴ While many nations signed up, countries with an economy dependent on the trade of oil, such as the United States and Saudi Arabia were reluctant to commit. Moreover, developing countries such as China and India were exempted from most of the Kyoto deadlines, in spite of being the fastest growing consumers of fossil fuels.³⁵ Although Australia became a signatory to the protocol on 29 April 1998, Australia did not ratify the Protocol until December 2007, which then came into force in March 2008.³⁶

In 2002, 65,000 politicians, NGOs and media representatives attended the World Summit on Sustainable Development, held in Johannesburg, South Africa.³⁷ Five areas were identified and brought to attention: water and sanitation, energy, health, agriculture and biodiversity.³⁸ The European Union and the United States had dominated previous summits; however, developing nations had become more vocal and demanded their interests be granted greater consideration. A commitment was made to halve the number of people who lack basic sanitation by 2015, to halt the loss of fish and forests stocks and reduce the agricultural and energy subsidies in the West.³⁹ Environmentalists however regarded this Summit to have been hijacked by corporate interests, and that the United States, Japan and major oil companies once again discouraged the promotion of renewable energy sources, such as wind and solar power, to favour their own economic interests.⁴⁰ The use of solar energy and wind power have nevertheless grown by more

34 United Nations Framework Convention on Climate Change, *Kyoto Protocol* (2011)
<http://unfccc.int/kyoto_protocol/items/2830.php>.

35 Reynolds, above n 13.

36 Parliament of Australia: Parliamentary Library, *The Kyoto Protocol* (2011)
<<http://www.aph.gov.au/library/pubs/climatechange/governance/international/theKyoto.htm>>.

37 United Nations, *Johannesburg Summit* (2002)
<http://www.un.org/jsummit/html/basic_info/basicinfo.html>.

38 UN Department of Economic and Social Affairs: Division for Sustainable Development, *Johannesburg Plan of Implementation, Chapter 111, Changing Unsustainable patterns of Consumption and Production* (2011)
<http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm>.

39 United Nations, *Johannesburg Plan of Implementation, Changing unsustainable Patterns of Consumption and Production* (2011)
<http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm>.

40 Reynolds, above n. 13.

than 30 per cent per annum in countries, such as Germany, Spain and Japan, due to national policies that encourage their use.⁴¹

Also in 2002, the Millennium Project was commissioned by the United Nations Secretary-General to develop a concrete action plan for the world to achieve the Millennium Development Goals (MDG), and to reverse the grinding poverty, hunger and disease affecting billions of people.⁴² In 2005, the independent advisory presented its final recommendations to the Secretary-General in a synthesis volume with the title, 'Investing in Development: A Practical Plan to Achieve the Millennium Development Goals'.⁴³ Ten thematic task forces carried out the bulk of the project's work, and also presented detailed recommendations in January 2005. The task forces comprised more than 250 experts from around the world, including researchers and scientists, policymakers, representatives of non-government organisations (NGOs), UN agencies, the World Bank, International Monetary Fund (IMF) and the private sector.⁴⁴ They focus on supporting developing countries to prepare national development strategies aligned with the MDGs.⁴⁵

According to the 2005 Millennium Ecosystem Assessment Report, 60 per cent of ecosystem services, such as climate regulation, fresh water, waste treatment and fisheries, have been degraded or are not being used sustainably.⁴⁶ Thus, when coupled with unsustainable population growth rates, significant disruptions occur to the Earth's climate and ecosystems, and ultimately, to human civilisation.⁴⁷ This report therefore authenticates the 1970s predictions, as discussed in 2.2.1 below. As of 1 January 2007, the Millennium Project secretariat team has been integrated into the United Nations Development Programme and the advisory work is being continued by the MDG Support team to assist countries with the preparation and implementation of MDG-based national development strategies, in partnership with other organisations of the UN system.⁴⁸

41 Cossier and McDonald, above n 32.

42 United Nations, *Millennium Project* (2011) <<http://www.unmillenniumproject.org/>>.

43 Ibid.

44 Ibid.

45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid.

Since 2005, thousands of government policies have been enacted and hundreds of billions of dollars have been invested in green businesses and infrastructures. Scientists and engineers have accelerated the development of a new generation of green technologies, and the mass media have turned environmental problems into a mainstream concern. Nevertheless, the 2010 Millennium Ecosystem Assessment Report is less favourable than the 2005 report. The report stresses the importance of improving human well-being in the long-term by: understanding how ecosystem services are connected to each other, both in supply and demand at different temporal and geographic scales; showing how the supply and demand of the ecosystem services depend on economic and social drivers; and demonstrating how ecosystems respond to the various pressures to which they are subjected, such as air pollution or pesticide contamination.⁴⁹ Ten years after the last Earth Summit in Johannesburg, stakeholders reunited in Rio de Janeiro in 2012 to renew commitments, assess progress and address new challenges. The Summit also focussed on two specific themes: a green economy in the context of poverty eradication and sustainable development, and an institutional framework for sustainable development.⁵⁰ Since 2002, many critical and interrelated problems have emerged: a global food crisis, high volatility in oil prices, increasing climate variability and the worst global financial crisis in almost a century. So the importance of ensuring a reasonable standard of living for a global population, and the preservation of the Earth's ecosystem and its natural resources remains at the forefront.⁵¹

Today, there is a market for everything, as consumption further serves as an indicator of social status and personal achievement. Having taken root in culture upon culture over the past half-century, consumerism has reached its apotheosis and has become today's *Ersatzreligion*.⁵² Hence, any change to this ideology would involve 'a wholesale transformation of dominant cultural patterns'.⁵³ Indeed, harnessing these drivers of

49 SEI International, *Millenium Development Goals* (2011) <<http://www.sei-international.org/.../SEI-PolicyBrief-LPersson-MillenniumDevelopmentGoals.pdf>>.

50 Cossier and McDonald, above n 32.

51 Ibid

52 Adrian Harris, *Sacred Ecology* (1994) <<http://www.thegreenfuse.org/harris/sacredeco.htm>>.

53 World Watch, *Transforming Cultures* (2011) <<http://www.worldwatch.org/node/6096>>.

cultural change is critical, if humanity is to survive and thrive for centuries and millennia to come.⁵⁴

Every minute, 23 hectares of productive land is lost through land degradation, which is equivalent to 12 million hectares of land every year and enough land to grow 20 million tons of grain. Nearly 1.1 billion poor people around the world have staked their livelihoods and survival on such marginal lands, but the increasing frequency, length and intensity of drought is now threatening their ability to survive. The various faces of this insecurity are becoming increasingly manifest, beginning with the food riots of 2007, and most recently, the famine in the Horn of Africa.⁵⁵

Managing natural resources bases in a sustainable and integrated manner is no doubt essential to the survival of the planet.⁵⁶ Moreover, the exploitation on the part of Western countries of both human labour and natural resources in developing nations not only exacerbates but also cumulatively contributes towards the accelerating loss in biodiversity. In the name of free trade, indebted governments are pressured into entering into the corporate-rule regime, which largely depends on the commoditisation of the livelihoods of unwaged peoples.⁵⁷ As a result, there is danger of exhaustion and depletion of resources because nothing is valued, replenished or maintained by either capital or states.⁵⁸ A further division between individuals and the society to which they belong therefore exists, just as Marx predicted. Since workers have no control over their lives or their work, and are dependent on those who own the means of production, they

54 Marchand, above n, 3, 158.

55 United Nations Convention to Combat Desertification, *Media Advisory* (2011) <<http://www.unccd.int/media/docs/gahlm%20media%20advisory%20190911.pdf>>.

56 Pamela Matson, *Seeds of Sustainability: Transitions to Sustainability in Agricultural Systems* (2011) <<http://www.land-environment.unimelb.edu.au/deanslectures/pamelamatson-DLS2011.pdf>>.

57 Christine Chinkin and Hilary Charlesworth, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 12.

58 Terisa E Turner and Leigh S Brownhill, *Gender, Feminism and the Civil Commons: Women and the Anti-corporate, Anti-war movement for globalisation from below* (2011) <<http://www.uoguelph.ca/~terisatu/gc.htm>>.

cease to be autonomous beings in any meaningful sense.⁵⁹ In effect, the worker has become an ever cheaper commodity than the goods he creates: cash crops are produced for the open market when workers themselves are underfed, houses are built, cars are manufactured and clothes and shoes are produced, all of which the worker himself will never be able to afford.⁶⁰

Responsible environmental management within companies and factories further fails to meet the regulations provided by the World Business Council for Sustainable Development (WBCSD).⁶¹ The WBCSD acknowledges that Corporate Social Responsibility (CSR) consists of complex connections between business and society. It urges companies to behave ethically to ensure sustainable economic development and the improvement of the quality of life for employees and their families, as well as for the local community and the broader society.⁶² It is against such conditions and injustices that there has been constant struggle on the parts of workers and entire communities, which is further evidenced in the attempts of social movements from indigenous to majority-world communities to deny supplies of cheap labour power, social space and nature to capital.⁶³

Most citizens today accept that many, if not most environmental problems are caused by humans, and that the environment needs to be protected, not only by us but also from us. To reverse the current trend in natural resource degradation, all countries should promote sustainable consumption and production patterns by assuming ‘common but differentiated responsibilities’ and benefit from the process, as set out in principle 7 of the *Rio Declaration on Environment and Development*.⁶⁴ Thus governments, international organisations, the private sector and public participation should all ‘play

59 Cox, above n 4. Labour is a matter of survival and an external force that represents forced labour. In turn, alienation lies behind the impersonal forces that dominate human productivity and have come about from a class society under capitalism.

60 Ibid. Most famously in the Luddite Rebellion of the early nineteenth century, where more troops were deployed than those sent to fight with Wellington at Waterloo.

61 World Business Council for Sustainable Development (2011) <<http://www.wbcsd.org/>>

62 Ibid.

63 Turner and Brownhill, above n 58.

64 Rio Declaration on Environment and Development, *United Nations Environment Programme*, <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>>

an active role in changing unsustainable consumption and production patterns',⁶⁵ and strategies should include targets, adopted at national and regional levels, to protect ecosystems and achieve integrated management of land, water and living resources, while strengthening regional, national and local capacities.⁶⁶

Nevertheless, there is still a degree of scepticism about human-induced climate change, even on the part of experts. Dr David Evans, former consultant to the Australian Greenhouse Office from 1999–2005, for example, argues that 'the alarmist climate theory is wrong',⁶⁷ and Ian Plimer, professor of mining geology at the University of Adelaide, and Dr Walter Starck, a pioneer in coral reef science, are also on the list of leading human-induced climate change sceptics.⁶⁸ On the other hand, Professor Brian Schmidt, the 2011 joint-winner of the Nobel Prize in Physics, held the view that even if science is never absolute and uncertainties about climate change will always exist, the evidence of human-induced climate change is quite strong.⁶⁹ Thus, opinions continue to be divided between those who do not believe that changes in temperature are caused by humans and that the Earth is able to regenerate on its own, and those who believe that climate change is human-induced, or must at least be factored into the equation, and that the Earth may not be able to regenerate with human cooperation.

There is also the further issue to be considered; namely, whether or not humans have a moral or ethical duty to protect the environment, based on either eco-centric motives or intrinsic values versus anthropocentric motives, or motives based on self-interest. In other words, the essential question asked by environmental ethicists since the 1970s still exists today; namely should the environment be protected because of its use, such as its source of energy, food and materials, or because nature has value in its own right? This is an important question, not only because it is central to this thesis (and indeed pivotal to chapters four and five), but also because the response to this question reflects

65 United Nations Division for Sustainable Development, *Johannesburg Plan of Implementation: Changing Unsustainable Patterns of Consumption and Production* (2011)

<http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm>.

66 Ibid.

67 David Evans, 'The Climate Change Sceptics Speak Out', *The Daily Telegraph*, 9 December 2009

<<http://www.dailytelegraph.com.au/news/climate-sceptics-speak-out/story-e6freuy9-1225808398590>>.

68 Ibid.

69 Suandra Creah (ed), *Climate Debate Diminished Standing of Science in Some Quarters: Nobel Prize Winner* (2011) <<http://theconversation.edu.au/climate-debate-diminished-standing-of-science-in-some-quarters-nobel-prize-winner-3709>>.

attitudes and value judgements that place what ought and ought not to be saved into an arbitrary hierarchy of worth. As detailed in chapter three, this hierarchy of worth is not based on principles of justice (in the sense of being just and doing justice), but on random values that have been adopted as the norm, and in which humans are always positioned at the top. The worst-case scenario would therefore be to leave things as they are because it is not considered our responsibility or duty to intervene, or to ensure that the Earth is able to recover at the expense of human exploitation.⁷⁰ The best case scenario would be to accept a moral duty to do the best we can to preserve the environment, respect nature and stop exploiting nonhuman others, simply because it is wrong and regardless of whether or not we believe that our actions are responsible for environmental degradation.

2.2.1 The Relationship between Ecofeminism and Non-feminist Environmental Theories

One of the most influential environmental theorists is Aldo Leopold, whose 1948 essay, *The Land Ethic*,⁷¹ surged to popularity after its posthumous publication in *A Sand County Almanac* in 1949. Leopold's essay, which inaugurated Tansley's idea of the ecosystem,⁷² was, for Leopold, reactionary to the unconscionable acceptance of the irreversible degradation of 'land and the animals and plants which grow upon it'.⁷³ In his essay, Leopold understands humans to be part of a 'biotic community' or a broader environment. Leopold rejects purely economic thinking and maintains that a decision is right 'when it tends to preserve the integrity, stability, and beauty of the biotic community' and wrong 'when it tends otherwise'.⁷⁴ Leopold's land ethic thus recognises the importance of land management and conservative and sustainable farming practices, but maintains that the environment should predominantly remain

70 Bruce Thom, *National Coastal Reform—2010 and Beyond*, (2010)

<<http://www.wentworthgroup.org/uploads/Coastal%20address%20in%20C2C%202010.pdf>>; Ove Hoegh-Guldberg, 'Four Scientists Have Their Say on Climate Change', *The Daily Telegraph* (online), 8 December 2009 <<http://www.dailytelegraph.com.au/news/four-scientists-have-their-say-on-climate-change-issues/story-e6freuy9-1225807905681>>.

71 Aldo Leopold, *A Sand County Almanac, and Sketches Here and There* (Oxford University Press, 1987).

72 Reynolds, above n 13; The word ecosystem was introduced by the Oxford botanist A. G. Tansley in 1935.

73 Ibid.

74 Ibid.

‘natural, wild, and free’.⁷⁵ Leopold further regards it to be our moral duty to apply the same ethical sense of responsibility that we extend to one another to nature.⁷⁶ Although Leopold’s passion for hunting would not sit well with animals rights advocates, including many ecofeminists,⁷⁷ Warren, points out that Leopold’s Land Ethic is nevertheless ‘a remarkable legacy’, as his description of land as property and association of land with ‘slave-girls’ led to the development of an ecological ethic based on the gendering of human and nonhuman relationships.⁷⁸

In the 1960s, two other influential papers were published in *Science* magazine; namely Lynn White’s *The Historical Roots of our Ecologic Crisis*,⁷⁹ and Garrett Hardin’s *The Tragedy of the Commons*.⁸⁰ In *The Historical Roots of our Ecologic Crisis*, White challenges the anthropocentric perspective that only humans matter and that nature and nonhuman animals are ordered to man’s use.⁸¹ White blames the exploitation of the natural world on the Judeo-Christian depictions of the superiority of humans over all other life forms on Earth.⁸² This position is aligned with the feminist argument that an artificial hierarchy of worth has been created by patriarchy; based on Judeo-Christian values, in which men and male attributes reign superior over women and all things associated with them.⁸³ White further argues that modern Western science is itself ‘cast in the matrix of Christian theology’ so that it too has inherited the ‘orthodox Christian arrogance toward nature’.⁸⁴ In *The Tragedy of the Commons* Hardin warns of the dangers of human overpopulation and the damage that individual actions may inflict on

75 Leopold, above n 71.

76 Lo, above n 16. Hence, the two elements of interest in Leopold’s theory are firstly that there is ‘a rejection of ethical individualism in favour of holism’, or one in which ‘the needs and interests of individuals must at times be sacrificed to protect larger biological wholes’, and secondly, the recognition of the intrinsic value of natural things.

77 Leopold, above n. 71, 109–10, 129–32. This would particularly apply to care ethic advocates such as Carol J. Adams, for example, as discussed in chapter 5.

78 Karen J Warren, *The Legacy of Leopold’s “The Land Ethic”* (1998) 3 *Reflections*.

79 Lynn White, *The Historical Roots of Our Ecological Crisis* (1967)

<<http://www.uvm.edu/~gflomenh/ENV-NGO-PA395/articles/Lynn-White.pdf>>.

80 Garrett Hardin, *The Tragedy of the Commons* (1968) <<http://dieoff.org/page95.htm>>.

81 White, above n 79.

82 Ibid. White views that the belief that humankind is created in the image of a God has led, by extension, to the radical separation of humans from nature and the sanctioning of its relentless exploitation.

Feminists argue in a similar vein, however from different angles, discussed in more detail below in 2.3.2 of this chapter.

83 See Section 2.3.2.

84 White, above n 79; see section 2.3.2 for a similar ecofeminist argument.

the environment.⁸⁵ According to Hardin, ‘the only way we can preserve and nurture other and more precious freedoms is by relinquishing the freedom to breed...Only so, can we put an end to this aspect of the tragedy of the commons’.⁸⁶ Hardin further uses a grazing example, in which unlimited open access to public resources will lead to the tragedy of the commons.⁸⁷ To avoid the over-exploitation of public resources, Hardin proposes to either sell them off as private property, or keep them as public property and allocate rights of entry. Hardin ultimately rejects Jeremy Bentham’s idea based on ‘greatest good for the greatest number’, as this would require food and energy to be used for subsistence purposes only, and at the level of the individual.⁸⁸ Notably, years later Hardin recognised that the situation he has described is not one of responsible (or moral) common ownership of a resource at all. In fact, propertisation of a resource exacerbates environmental degradation by allowing the holder of property to do with it as he or she sees fit, limited only by laws that may be enacted to prevent certain actions. Hardin maintains that his famous 1968 article would be more appropriately named “The Tragedy of the Unmanaged Commons”.⁸⁹ In a sense, Hardin’s later views can be aptly applied to the injustices perpetrated upon nature and animals by a society, whose vision is trapped or frozen within a theory that disallows other theories with a much broader vision to be embraced.

85 Hardin, above n. 80.

86 Ibid. Hardin’s sense of environmental crisis was intensified by Paul Ehrlich’s 1968 publication *The Population Bomb*, in which Ehrlich warns that human population growth is threatening the viability of planetary life-support systems, and by NASA’s 1968 production of a particularly powerful image of earth from space, featured in the *Scientific American* in September 1970.

87 Ibid. Hardin’s example is as follows: if the pasture is open to all and that there is no cooperation among the users, each herder will try to keep as many livestock as possible. Since the individual benefit for each herder of adding another animal is greater than the social cost of overgrazing, more animals will be added, which finally lead to the downfall of all.

88 Carlotta Balestra, Thierry Brechet, Stephane Lambrecht, *Property rights and biological spillovers: when Hardin meets Meade* (2010) <http://www.ucl.be/cps/ucl/doc/core/documents/E2M2_111.pdf>. Hardin’s basic argument, namely that common property systems allow individuals to benefit at a cost to the community, is based that of the Oxford economist, the Rev William Forster Lloyd who in 1833 in his book *Two Lectures on the Checks of Population* writes: “If a person puts more cattle into his own field, the amount of the subsistence which they consume is all deducted from that which was at the command of his original, [...] but if he puts more cattle on a common, the food which they consume forms a deduction which is shared between all the cattle, as well that of others as his own, stock”. Hardin takes Lloyd’s observation and transforms it by injecting the added ingredient of “tragic” inevitability: “Freedom in a commons brings ruin to all”.

89 Garrett Hardin, *Extension of the Tragedy of the Commons* (1998) <http://www.garretthardinsociety.org/articles/art_extension_tragedy_commons.html>

The 1971 publication of Barry Commoner's *The Closing Circle* directly links capitalist economics with ecological destruction;⁹⁰ a position which sits well with material ecofeminists. Commoner urges for environmentally conscious governments to intervene and initiate the development of solutions that bring industry into compliance with ecological limits.⁹¹ The following year, Donella Meadows and her team of researchers at MIT published the *Limits to Growth* study, which further enhances emerging environmental concerns by pointing to the Earth's vulnerability as triggered by NASA's image of the Earth from space.⁹² Meadows and her team put forward the view that any attempt to reach equilibrium by planned measures cannot be left to chance or catastrophe, but necessitates a basic change of values and goals at individual, national and global levels.⁹³ In line with Commoner's argument and again more recently with that of Shellenberger and Norhaus,⁹⁴ as discussed in chapter four, Meadows urged that technology be redesigned to make it compatible with the impact of industrialisation on the environment.⁹⁵

In 1973, the environmental philosopher, Arne Næss, published *The Shallow and the Deep, Long-Range Ecology Movement*,⁹⁶ which led to the deep ecology movement. Deep ecology departs from the anthropocentric worldview by looking at things from a planetary or eco-centric perspective. Inspired by Spinoza's metaphysics, Næss's deep ecology rejects atomistic individualism or the idea that humans are individuals who possess a separate essence.⁹⁷ Næss regards the radical separation of the human self from the rest of the world to lead to selfishness towards both people and nature.⁹⁸ He instead proposes that if a *relational* (or 'total-field') image of the world were to be adopted, all

90 Barry Commoner, *The Closing Circle* (1971) <<http://combusem.com/COMMONER.HTM>>; Hardin, above n 26.

91 Ibid.

92 Donella Meadows, Jorgen Randers and Dennis Meadows, *Limits to Growth* (2004) <<http://www.sustainer.org/pubs/limitstogrowth.pdf>>.

93 Ibid.

94 Michael Shellenberger and Ted Nordhaus, *Breakthrough: From the Death of Environmentalism to the Politics of Possibility* (Houghton Mifflin Co., 2007); Ted Norhaus, *The Flawed Logic of the Cap and Trade Debate*, (2009) <<http://e360.yale.edu/content/feature.msp?id=2153>>.

95 Ibid.

96 Arne Næss, *The Shallow and the Deep, Long-Range Ecology Movement* (1973) <http://www.ecology.ethz.ch/education/Readings_stuff/Naes_1973.pdf>.

97 Chelsea H Snelgrove, *Relation and Responsibility: Drawing the Boundaries of the Ethical Self*, (2011) <<http://www.bu.edu/wcp/Papers/Envi/EnviSnel.htm>>.

98 Næss, above n 96.

of nature, human and nonhuman, would be respected and valued.⁹⁹ The ‘shallow ecology movement’, as Næss calls it, is the ‘fight against pollution and resource depletion’, the central objective of which is ‘the health and affluence of people in the developed countries’. The ‘deep ecology movement’, in contrast, endorses ‘biospheric egalitarianism’, the view that all living things are alike in having value in their own right, independent of their usefulness to others.¹⁰⁰ Næss’s views at times merge with ideas that stem from Leopold’s land ethic; however Næss takes care to distance himself from advocating any sort of land ethic to avoid implications that may flow from Leopold’s position, namely that individual interests and well-being are to be subordinated to the holistic good of a biotic community.¹⁰¹ Warren and Plumwood deride the deep ecological theory of the ‘expanded self’ to represent a disguised form of human colonialism, as it is unable to give nature its due as a genuine ‘other’ that is independent of human interest and purpose.¹⁰² In *Ecofeminist Philosophy and Deep Ecology*, Warren nevertheless argues that, because Næss’s deep ecology position is not monolithic, a deep ecology-ecofeminism debate is possible.¹⁰³

Ecofeminism was born following the 1974 publication of *Le Feminisme ou la Mort* by Francoise d’Eaubonne.¹⁰⁴ D’Eaubonne linked environmental degradation to patriarchal culture and urged feminists to actively engage in environmentalism to create an alternative social structure that is able to protect the natural balance of the ecosystem, based on the feminist principles of equality.¹⁰⁵ Thus, through proliferous publications, conferences and organisations, the 1970s ecofeminists extensively explored the

99 Ibid.

100 Ibid; Samuel A Trumbore, *Deep Ecology* (1996)

<<http://www.unitedearth.com.au/deepecolology.html>>. A shallow approach to acid rain, for example, would be to replant acid resistant trees verses eliminating acid rain to preserve the original plants and animals and steering the economy away from the need for burning sulfurous fossil fuels rather than developing heavy polluting industry in under developed countries and encouraging export to developed markets at low prices.

101 Peder Anker and Nina Witoszek, ‘The Dream of the Biocentric Community and the Structure of Utopias’ (1998) 2 *Worldviews* 239.

102 Val Plumwood, *Nature, Self and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism* <<http://onlinelibrary.wiley.com/doi/10.1111/j.1527-2001.1991.tb00206.x/pdf>>.

103 Karen J Warren, ‘Deep Ecology and Ecofeminism’ in Nina Witoszek and Andrew Brennan (eds), *Philosophical Dialogues: Arne Naess and the Progress of Ecophilosophy* (Rowman and Littlefield, 1999) 255. Warren is referring to Plumwood’s essay ‘Nature, Self and Gender: Feminism, Environmental Philosophy’, and the Critique of Rationalism, which locates, discusses, and critiques three versions of the ‘self’ that are offered by deep ecologists.

104 Francoise d’Eaubonne, *Le Feminisme ou la Mort (Feminism or Death)* (Pierre Horay, 1992).

105 Ibid.

connections between women, nature and social change.¹⁰⁶ Furthermore, women were actively encouraged to participate in the economy; however by the late 1970s, it had become apparent that women already were an integral part of the economy and that their roles in modern society were already established.¹⁰⁷ Moreover, the realisation had emerged that women's economic participation did not lead to their emancipation but rather to a double burden of having to juggle their role in the workforce with the traditional roles of reproduction, mothering and the primary management of household activities. Ecofeminism was thus criticised of having failed to explore and successfully challenge the underlying power structures that continue to oppress women in modern society.¹⁰⁸

It was however Holmes Rolston III's 1975 paper, *Is There an Ecological Ethic* that brought environmental ethics into mainstream philosophy.¹⁰⁹ Rolston expands on Leopold's notion of 'biotic community' and discusses whether 'the intrinsic value of every eco-biotic component'¹¹⁰ ought to be recognised and, as such, universalised. In pointing to the formidable diversity and creativity of nature, Rolston draws attention to the interconnectedness of nature and humankind:

This idea of natural complexity as a counterpart to human intricacy is central to an ecology of man. The creation of order, of which man is an example, is realized also in the number of species and habitats, an abundance of landscapes lush and poor. Even deserts and tundras increase the planetary opulence.... Reduction of this variegation would, by extension then, be an amputation of man. To convert all 'wastes', all deserts, estuaries, tundras, ice-fields, marshes, steppes and

106 Influential writers of the 1970s include, for example, Rosemary Radford-Ruether, Susan Griffin, Mary Daly and Carolyn Merchant.

107 HK Manion, *Ecofeminism within Gender and Development* (2002) <<http://www.lancs.ac.uk/staff/twine/ecofem/manion.pdf>>.

108 Ibid. As is evidenced later in this chapter and in subsequent chapters of this thesis, ecofeminists have indeed moved beyond this limitation and have focussed their attention on the exploration of the underlying power structures that oppress all oppressed others.

109 Holmes Rolston III, 'Is there an Ecological Ethic?' (1975) 18 *Ethics: An International Journal of Social, Political, and Legal Philosophy* 93.

110 Ibid.

moors into cultivated fields and cities would impoverish rather than enrich life aesthetically as well as ecologically.¹¹¹

By the 1980s, the key environmental philosophers included the social ecologist Murray Bookchin and the ecological feminist Karen Warren. Both Bookchin and Warren argued that ecological problems cannot be resolved without resolving the history of its deep-seated social problems. Like d'Eaubonne before her, in her 1987 essay *Feminism and Ecology: Making Connections*,¹¹² Warren urges feminists to pay attention to environmental issues and to ecological interdependencies, but at the same time urges environmentalists to attend to the connections among ecological degradation and women's historical oppression.¹¹³ Hence, for Warren, feminism that is not informed by ecological insights, particularly by women-nature insights, and ecological philosophy that is not informed by feminist insights are equally inadequate.¹¹⁴ As Warren extends oppression beyond sexism to include all forms of social oppression, her overall argument is in that regard in line with Bookchin. In *Ecofeminist Philosophy: A Western Perspective on What It Is and Why It Matters*,¹¹⁵ Warren undertakes a detailed exploration of the limitations of traditional Western notions of distributive justice by linking gender and ecology in an empirical sense, and concludes that justice cannot be served by distributive processes that are lodged inside corrupted institutional contexts.¹¹⁶

For Bookchin, problems that lie at the core of ecological problems also lie in the core of economic, ethnic, cultural, and gender conflicts and 'cannot be clearly understood, much less resolved, without resolutely dealing with problems within society'.¹¹⁷ Bookchin's social ecology movement proposes that since environmental problems are also social problems, instead of turning against the very source from which human gifts

111 Ibid.

112 Karen J Warren, 'Feminism and Ecology: Making Connections' (1987) 9(1) *Environmental Ethics* 3.

113 Karen J Warren (ed), *Ecological Feminism* (Routledge, 1994).

114 Ibid.

115 Karen J Warren, *Ecofeminist Philosophy: A Western Perspective on What It Is and Why It Matters* (Rowman and Littlefield Publisher, 2000). For Warren, an oppressive conceptual framework consists of value hierarchy thinking, oppositional value dualisms, power over others, privilege and logic of domination.

116 Ibid.

117 Murray Bookchin, *What is Social Ecology?* (2011) <<http://greenfrombelow.wordpress.com/murray-bookchin-what-is-social-ecology/>>.

such as sociability, communication and intelligence derive, humans must strive towards becoming 'nature-rendered conscious'.¹¹⁸ This position largely echoes the position of Derrida, as explored in chapter three, who argues that in order for justice to take place, *différance*, or the existence of the excluded, or non-present other must be embraced,¹¹⁹ and thus, becoming 'nature-rendered conscious' is similar to embracing *différance*. According to Bookchin, in the framework of social ecology, the notion of the domination of nature by man stems from the real domination of humans by humans. While the domination of nature is seen as a product of domination within society, it reaches crisis proportions under capitalism.¹²⁰ Hence, like Commoner and ecofeminists, or material ecofeminists in particular, Bookchin directly links environmental destruction to Western capitalism:

The notion that man must dominate nature emerges directly from the domination of man by man... But it was not until organic community relation ... dissolved into market relationships that the planet itself was reduced to a resource for exploitation. This centuries-long tendency finds its most exacerbating development in modern capitalism. Owing to its inherently competitive nature, bourgeois society not only pits humans against each other, it also pits the mass of humanity against the natural world. Just as men are converted into commodities, so every aspect of nature is converted into a commodity, a resource to be manufactured and merchandised wantonly...the plundering of the human spirit by the market place is paralleled by the plundering of the Earth by capital.¹²¹

While Bookchin regards human intervention in nature to be necessary, he proposes that this intervention should focus on preservation, not exploitation. According to Bookchin, if humans place themselves at the service of natural evolution and aim towards

118 Ibid.

119 Jacques Derrida, *Force de Loi* (Galilée, 1994).

120 Murray Bookchin, *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (AK Press, 2005) 65.

121 Murray Bookchin, *Post-Scarcity Anarchism* (AK Press, 2004) 24–5.

maintaining its complexity and diversity as well as to diminishing suffering and reducing pollution, nature can be preserved.¹²²

2.3. Ecofeminism

Briefly defined, ecofeminism is a social movement that essentially views the oppression of women and nature as interconnected. As ecofeminist theories have extended to further consider the interconnections between sexism, the domination of nature and animals, as well as racism and social inequalities, it is now better understood as a socio-political movement that challenges the interconnected oppressions of gender, race, class and nature.¹²³

The ecofeminist vision links violence towards women with violence towards animals and nature. Their focus is on the creation of a better future for generations to come, in which justice for all is able to be achieved. While ecofeminists do not deny that both men and women are responsible for the exploitation of nature and nonhuman animals, they believe that women are capable of initiating the necessary change because they have experienced similar exploitation. Moreover, as women are essentially interconnected with nature and other species, they are more inclined to live in harmony with nature and nonhuman animals, rather than exploit them for their own purposes and needs.¹²⁴ Central to the ecofeminist position is therefore a political concern, coupled with a call for action that is directed at the protection of nature and nonhuman others, with the aim of improving the quality of life for all species on Earth.

Only by recognising that humanity is no more, but also no less,
important than all other things on Earth can we learn to dwell on the

122 Ibid.

123 Ecofem.org: Activist Educational Hub for Ecofeminism and Intersectional Politics
<<http://www.lancs.ac.uk/staff/twine/ecofem/whatisecofeminism.html>>

124 Kofi Annan, *Breaking Barriers: Gender Perspectives and Empowerment of Women in Least Developed Countries* (2011)
<<http://www.unohrrls.org/UserFiles/File/Publications/Genderperspectives.pdf>>.

planet within limits that would allow other species to flourish and to follow out their own evolutionary destiny.¹²⁵

2.3.1. Why Ecofeminism?

In challenging traditional social, cultural, political and economic value systems in light of both feminist and environmental critiques, ecofeminism offers a two-pronged approach, as there are two radical forces at play; namely feminism and environmentalism. For feminists, gender differentiation is at the core of all social formations, and feminism is the avenue through which women have fought and continue to fight for their rights and the right to have their voices heard; domestically, socially, economically and politically. Each wave of feminism has opened new doors for women in Western countries, who now have the right to vote, to be educated, to enter into the professional world, including male dominated professions, and to reclaim their bodies.¹²⁶ These and many other rights that Western women take for granted today in fact exist because of the feminist activists of the past. The tradition of feminism can be traced back to Mary Wollstonecraft and the first wave of feminism.¹²⁷ Wollstonecraft's essay, *A Vindication of the Rights of Woman*,¹²⁸ published in 1792 focused on women's rights and education, and *Maria: The Wrongs of Woman*,¹²⁹ published posthumously in 1798, linked women's oppression to the need for men to change. The 1960s feminists focused on women's quest for sexual equality and the right to abortion and divorce. Their motto was 'the personal is the political'. Kate Millett's book *Sexual Politics* and Germaine Greer's book *The Female Eunuch* became literary icons of the second wave of feminism.¹³⁰ Economic and social factors were brought into the equation by socialist, Marxist and anarchist feminists, which led to the separation of radical from liberal feminists, as white, middle class liberal feminists opted to focus only on biological and

125 M.E. Zimmerman (1990) Deep ecology and ecofeminism: The emerging dialogue. In I. Diamond & G. F. Orenstein (Eds.), *Reweaving the world: The emergence of Ecofeminism*, San Francisco: Sierra Club Books, 140.

126 Although legalised birth control, abortion and recognition of unconsented sex or rape, including in marriage and de facto relationships, were incrementally, rather than uniformly introduced in the West.

127 Cathleen McGuire and Colleen McGuire, *Ecofeminist Vision* (2003)

<http://eve.enviroweb.org/what_is/index.html>.

128 Mary Wollstonecraft, *A Vindication of the Rights of Woman* (2011) <<http://www.bartleby.com/144/>>.

129 Mary Wollstonecraft, *Maria: The Wrongs of Woman* (2011)

<<http://etext.virginia.edu/toc/modeng/public/WolMari.html>>.

130 Kate Millett, *Sexual Politics*, (Virago Press, 1977); Germaine Greer, *The Female Eunuch*, (first published by MacGibbon & Kee Ltd, 1970).

psychological differences. Drawing upon all of these strands and calling for a feminist revolution to ensure ecological survival, ecofeminism emerged in the mid-1970s, following d'Eaubonne's publication, *Le Feminisme ou la Mort* (Feminism or Death).¹³¹ This book was influential in terms of paving the way for a feminist politicisation of ecological concerns, and hence to the development of subsequent ecofeminist theories and successive development models.

As it is argued in this thesis that a paradigm shift must occur on an ideological as well as on a legislative level, ecofeminism is able to offer a unique approach that works towards creating such a radical shift, which is not explored in any other environmental trajectories. Because ecofeminism comprises of numerous strands and a myriad of trajectories, it is able to offer a deeper insight and analysis into social, moral and political issues through a feminist lens. Ecofeminism is also able to speak on behalf of others, including the voiceless, because of the shared history of women's oppression with other oppressed species. Ecofeminism is further able to generate change, as evidenced in the achievements of feminist movements of the past, which have all contributed to radical changes concerning women's rights, as disclosed in this chapter.

2.3.2. Theoretical Perspective: Ecofeminism as a Transformative Eco-philosophy

Theoretical perspectives help to shape political debates and the conversations that flow from these generally posit a moral and/or ethical stance on the topic that is central to the discussion. Conversations that flow from debates concerning the environment present theoretical perspectives that focus on the relationship between humans and the environment, and offer alternatives to the practices that are currently in place. Of the many different and at times polarised positions, ecofeminism has forged a unique and transformative eco-philosophy that differs significantly from others. As a discipline, ecofeminism is not simply environmentally-oriented feminism in any one-dimensional sense, but a more broadened methodological approach of understanding the world.

In pointing to the existence of considerable common ground between environmentalism and feminism, ecofeminists argue that a strong parallel exists between the oppression

131 D'Eaubonne, above n 104.

and subordination of women in families and society and the degradation of nature. Furthermore, by linking environmental questions to fundamental investigations into human psychology and wider social problems, ecofeminists address all forms of exploitation and oppression, including racism, classism, imperialism, hetero-sexism, ageism, anthropocentrism and speciesism. Ecofeminism therefore not only offers a deeper psychological insight into social, moral and political issues,¹³² but also pushes the boundaries of traditional Western political, social and ethical thought.¹³³ Ecofeminists take a principled stance on behalf of all those who have historically been oppressed by challenging the myth of the isolated individual that exists apart from the world and instead affirm the interconnectedness of all life. Although the heart of the debate is about changing perceptions of and attitudes towards women and the qualities and activities traditionally associated with them,¹³⁴ women are only the starting point to the ecofeminist debate, as ecofeminism fundamentally challenges the core of the patriarchal interpretation of humankind's role in the ecosystem¹³⁵ and the arbitrary hierarchy of values that flow from this:

With the identification of masculinity and reason, men become the protectors of and gatekeepers for this dominant vision of modernity... and set the terms on which others can be permitted to enter.¹³⁶

The ecofeminist critique of patriarchy ventures beyond traditional feminist theories, which largely concentrate on the causes and consequences of the oppression of women, in that it allows both men and women common ground for critical examination of the

132 McGuire and McGuire, above n 127.

133 Miles T Woolen, *Ecofeminism: Their Viewpoints and the Problem with the Western World* <<http://carbon.cudenver.edu/stc-link/wmnecol/html/ecowolen.htm>>.

134 Ariel Kay Salleh 'Epistemology and the Metaphors of Production: An Ecofeminist Reading of Critical Theory' (1988) 15 *Studies in the Humanities* 130, 130. As essentially feminists, ecofeminists argue that patriarchy is built on four interlocking pillars: sexism, racism, class exploitation and environmental destruction.

135 McGuire and McGuire, above n 127. The urge to subdue and control women and nature is created and perpetuated by patriarchal ideology, which arose roughly 5,000 years ago. Given that male-dominated history has occupied less than two per cent of the time that homo-sapiens have existed on earth, ecofeminists believe that it is time to embrace alternatives for reconstituting life on Earth in which humans live in harmony with other animals and nature.

136 Victor Seidler, *Unreasonable Men: Masculinity and Social Theory* (Routledge, 1994) 15.

relations between man and woman and man and nature.¹³⁷ In fact, a central tenet of contemporary ecofeminism is that the domination and exploitation of oppressed minorities such as women, poorly resourced people and nature extends to men, as men are also victims of capitalism, and by extension, globalisation. Moreover, ecofeminists do not seek equality with men, but recognition and acceptance of women as women - in their own right and on their own terms. Hence, the ecofeminist critique of patriarchy is not an attack on men, as men are not seen as the enemy, but an attack on a particular way of thinking, which is adopted and employed by both sexes. Indeed, for Mary Jo Frug, the feminist legal scholar who pushed for bringing the ideological out of the shadows, “gender-focused analysis is feminist only when its analyst is consciously oppositional [and] seeks to change the impact of gender categories either to improve the position of women or to liberate both sexes from gender constraints.”¹³⁸ Change therefore must be generated by both sexes, as both sexes have been socialised and educated in a system;¹³⁹ and ‘neither the alienation women feel, nor the social system they live in, is good for either sex, yet both [sexes] *are* the social system’.¹⁴⁰

In essence, the ecofeminist position is that because women and nature share a history of oppression under patriarchy, by understanding the oppression of women on social, cultural, political and economic levels, all other forms of oppression will be addressed by extension.¹⁴¹ Hence, while ecologists question why nature is treated as inferior to culture, ecofeminists question why women and nature share a common inferior position and why women are largely excluded from the sphere of culture.¹⁴² In turn, it is because of women’s shared history of oppression with nature that makes the untangling of the interconnections between women and nature feminist issues, and gender analysis is used as a starting point for questioning why subordinated groups exist at all.¹⁴³

137 Ibid. This position has also been articulated in literary works written by men, for example in 1977 novel *Der Butt* (The Flounder) by Guenther Grass, which is a superb example of history recreated by a man from a feminist perspective. This is further evidenced in the literature throughout this thesis.

138 Mary Joe Frug, ‘Re-Reading Contracts: A Feminist Analysis of Contracts Casebook’ <<http://www.wcl.american.edu/journal/lawrev/34/frug.pdf?rd=1>>. Frug was a Professor of Law and a leading feminist legal scholar who was instrumental in establishing one of the first courses on domestic violence in the USA. Frug was murdered in 1991 on her way home from her local grocery store.

139 Judith Plant, *Women and Nature* (2011) <<http://www.thegreenfuse.org/plant.htm>>.

140 Ibid.

141 Cuomo, above n 1, 151.

142 Maria Soledad Iriart, *In the Shadow of the Enlightenment: From Mother Earth to Fatherland* (2011) <<http://www.lancs.ac.uk/staff/twine/ecofem/enlightenpdf>>.

143 Warren, *Ecofeminist Philosophy*, above n 115, 2.

Feminist environmentalist studies into gender and environment embrace feminist political ecology and link to feminist cultural and geographical ecology. Ecofeminist trajectories may be influenced by many paradigms, including: Marxist, socialist, cultural, radical, post-colonial, post-modern, eco-womanist, goddess-worshipist, deep ecologist, social ecologist, black or Third World perspectives, or influenced from a variety of religious backgrounds, or perhaps none at all.¹⁴⁴ Hence, there are many differences, but also overlapping commonalities.¹⁴⁵ Ecofeminist ethics may also be grounded in caring and nurturing¹⁴⁶ with both sexes collaborating with nature,¹⁴⁷ and/or exploring historical, epistemological, material, cultural and/or conceptual perspectives, or providing singular understandings of the nature of and solution to pressing environmental problems.¹⁴⁸ For example, Rosemary Radford Ruether's conceptual approach argues that women and nature are connected culturally and symbolically and that this becomes evident in the way in which Western cultures present ideas about the world and organises it in a similar hierarchical and dualistic manner.¹⁴⁹ The epistemological link that follows may either argue that, because women are most adversely affected by environmental problems, they are in a position of epistemological privilege to create new practical and intellectual ecological paradigms, as upheld by Vandana Shiva, whose ecofeminism builds ecological, historical, political, epistemological, and spiritual connections,¹⁵⁰ or that this link should be further contested through deconstruction. Ecofeminist theorists who examine the historical

144 Lois Ann Lorentzen, *Ecofeminism: An Overview* (2011)

<http://cmapspublic.ihmc.us/rid=1174588237625_665601541_9501ecofeminism.pdf>.

145 Manion, above n 107. The difference between cultural and social ecofeminists is the designated relationship between women and the environment. Cultural ecofeminists naturalise women's role with nature, while spiritual ecofeminists take this one-step further, saying that women, as life givers are engendered to closer connections with the earth. Social and deep ecological feminists look at the historical socialisation and subjugation of women and nature, thus having perhaps a more open position to other forms of oppression.

146 The aspect of caring and nurturing has also been criticised as being part of socialisation and having both positive and negative effects. See for example: Sherilyn MacGregor, 'From Care to Citizenship: Calling Ecofeminism back to Politics' (2004) 9(1) *Ethics and Environment* 56.

147 Carolyn Merchant, *Radical Ecology* (Routledge, 1992) 183–209.

148 Warren, 'Feminism and Ecology', above n 112.

149 Rosemary Radford Ruether, *New Woman, New Earth: Sexist Ideologies and Human Liberation* (Seabury Press, 1975).

150 Maria Mies and Vandana Shiva, *Ecofeminism* (Zed Books, 1993); Carolyn Merchant, *Earthcare* (Routledge, 1996); Ariel Salleh, *Ecofeminism as Politics* (St Martins, 1997); Mary Mellor, *Feminism and Ecology* (Polity, 1997); Noël Sturgeon, *Ecofeminist Natures: Race, Gender, Feminist Theory and Political Action* (Routledge, 1997); Catriona Sandilands, *The Good Natured Feminist* (University of Minnesota Press, 1999); Plumwood, above n 102.

origins of patriarchy through the Western philosophical and theological traditions (in a similar vein to Lynn White's article) find patriarchal religion justifies the domination of both women and nature. For Gerda Lerner, Marija Gimbutas and Carol Christ, for example, goddess-centred cultures that valued women and nature predated the patriarchal and militaristic systems that overthrew them. Both women and nature were degraded and male domination and patriarchal hierarchy became both religious symbols and social norms.¹⁵¹

Ecofeminists who believe that humankind's separation from nature goes back to the shift from a hunter and gatherer culture to one of domestication argue that there was a time before written history, when cooperation, not competition, was valued.¹⁵² During this period, female deities were widely worshipped and societies were women-centred. However, when Earth worship turned to Sky worship, Goddesses were dethroned to become goodwives,¹⁵³ and with the discovery of paternity, factors such as inheritance and monogamy¹⁵⁴ served to reinforce the division of labour and created a hierarchy that infiltrated religious, social and political ideologies. Drawing from nature-based religions, paganism, goddess worship, Native American traditions, and the Wiccan tradition, spiritually-oriented ecofeminists view feminist spiritualities as being friendlier to nature and women than the patriarchal religious traditions. They argue that by reconnecting humans with nature, and modelling communities and self-actualisation on the patterns and webs of nature, existing hierarchies created around difference can be shattered and humans re-immersed in nature.¹⁵⁵ Cultural ecofeminists equally embrace goddess-oriented ecofeminism however Christian ecofeminist theologians such as Rosemary Radford Ruether, Anne Primavesi and Sallie McFague argue that even though the possible existence of pre-historic goddesses may serve as liberation from the

151 Valerie Kuletz, *Eco-feminist Philosophy Interview with Barbara Holland-Cunz* (2011) <<http://www.informaworld.com/index/909018673.pdf>>.

152 For example: spiritual or neo-pagan ecofeminists. Given the ecofeminist respect for non-linear, non-rational, emotional understanding, it's not surprising that spirituality is a core element with some ecofeminist trajectories. Most religions are patriarchal and often exemplify the way humankind aims to transcend nature through the realm of culture, just as God is portrayed as a transcendent being, beyond this world. Manion, above n 107.

153 Christine Battersby, *Gender and Genius* (Indiana University Press, 1989) 54.

154 Inheritance: only the mother is certain; hence traditionally, for husbands to be assured of their offspring, monogamy on the part of their wives was essential.

155 Kuletz, above n 151.

all-encompassing nature of the biblical or Christian image of the patriarchal god, a historically uncertain past will not liberate the present.¹⁵⁶

McFague and Merchant examine the connections between religion, culture, and scientific worldviews and claim that the mechanistic models of Western science led to a rupture between the material world and the sacred that has harmed both women and nature.¹⁵⁷ Merchant focuses on the ideological shift that occurred during 18th century European Enlightenment and on the emergence of a scientific, technological and capitalist ideology obsessed with progress.¹⁵⁸ She describes how the organic cosmology that had helped protect nature for centuries was overturned by the scientific and cultural revolutions of the Enlightenment era.¹⁵⁹ Judith Plant similarly describes how pre-industrial Western society used organic metaphors to explain self, society and nature and how they served as 'cultural constraints' because the Earth was understood as being alive.¹⁶⁰ She claims that when organic metaphors were replaced with mechanical ones during the scientific revolution of the Enlightenment period, the universe was no longer understood as a living organism, but as a machine, with nature being perceived purely as a resource for human use.¹⁶¹ Ynestra King argues that the domination of women by men is the original form of domination in human society from which all other hierarchies flow, such as rank, class, and political power and that the exploitation of nature is a manifestation and extension of the oppression of women by virtue of their association with nature.¹⁶²

By extension, Val Plumwood or Karen Warren understand the oppression of women to be one of many parallel forms of oppression that share and support a common ideological structure in which the dominant party, be it in the form of a male, an organisation or any of the numerous extensions thereof, uses a number of conceptual and rhetorical devices to privilege its interests over the other or subjugated party. This could be in the form of a female or nature, and when facilitated by a common structure,

156 Ibid.

157 Ibid; Carolyn Merchant, *The Death of Nature: Women, Ecology and the Scientific Revolution* (HarperCollins, 1980).

158 Ibid, 21.

159 Ibid.

160 Plant, above n 139.

161 Ibid.

162 Ynestra King, *Ecofeminism: The Reenchantment of Nature* (Beacon Press, 1991).

multiple and diverse forms of oppression are able to mutually reinforce each other.¹⁶³ Hence, both spiritual and non-spiritual schools of feminist thought come to a similar conclusion, namely that with a new engagement, interaction, and understanding of the natural world, and a self-proclaimed ability to reason, man exerted his superiority over humans and nonhumans, as an exhibition of power, or perhaps, as Iriart further argues ‘of a pitiful neurosis’.¹⁶⁴

The spiritually-oriented path of ecofeminist thought that sought to break the hierarchy by raising the holistic value of reality to a sacred realm (with some believing paganism to rise to the challenge of living in harmony with the Earth) was, however, heavily criticised as being anti-intellectual and overly intuitive, and many scholars subsequently distanced themselves from the title of ‘ecofeminist’.¹⁶⁵ Material ecofeminists, for example, argue that the spiritual ecofeminist position does not effectively address the other effects of capitalism, such as the perpetuation of sexism and environmental damage.¹⁶⁶ They are particularly critical of the tendency to endorse essentialism and the view that men and women are inherently different in character and nature.¹⁶⁷ In turn, they view the fundamental contradiction of capitalism to be not between capital and labour, but between production and reproduction.¹⁶⁸ Since the former is valued higher than the latter in capitalist societies, they view this inequity to be the source of the contradiction because women’s reproductive labour remains in nature (which is not valued) while men’s productive labour is removed from nature, and is valued.¹⁶⁹

While not all feminist theorists identify the underlying oppressive structure as ‘patriarchal’, the core feature that is almost uniformly referred to is the logic of domination, which, in turn, is an essential feature of male chauvinism and of patriarchy

163 Val Plumwood, ‘Feminism and Ecofeminism: Beyond the Dualistic Assumptions of Women, Men and Nature’ (1992) 22(1) *The Ecologist* 8, 10. For spiritual ecofeminism see Starhawk, *The Spiral Dance* (HarperCollins NY 1989).

164 Iriart, above n 142.

165 Noël Sturgeon, *Ecofeminist Natures: Race, Gender, Feminist Theory and Political Action* (Routledge, 1997) 3. Both cultural and spiritual ecofeminists have often been criticised for their radical and unacademic tenets, and other groups are not willing to be associated with them.

166 Jasmin Sydee and Sharon Beder, *Ecofeminisms and Globalisation: A Critical Appraisal*, <http://www.democracynature.org/vol7/beder_sydee_globalisation.htm>

167 Ibid.

168 Ibid.

169 Ibid.

by virtue of extension.¹⁷⁰ Therefore, the identifiable patterns of thinking and of conceptualising the world that flow from patriarchy or from male chauvinism are viewed to also nourish and sustain other forms of chauvinism, such as human-chauvinism or anthropocentrism, which in turn, is responsible for much of the exploitation and senseless destruction of nature.¹⁷¹ Moreover, as ecofeminism has an essentially politically activist agenda, in which political engagement is a requisite, over the past three decades ecofeminists have engaged in numerous protests, boycotts and campaigns to make the problems that flow from patriarchal ideologies more visible.¹⁷²

In the exploration of multiple theories, ecofeminists also incorporate aspects of other ethical theories, such as Leopoldian land ethics, deep ecology and social ecology into their overall theory, as well as point to flaws or shortcomings in these theories. For example, although ecofeminists generally share a concern for biocentrism and an appreciation for personal interaction with the nonhuman reality,¹⁷³ Warren regards intrinsic value as being a too limited criterion of moral considerability.¹⁷⁴ Also, in response to Bookchin's social ecology theory, the ecofeminist take on necessary human intervention embraces a much broader view, and through deconstruction of the term 'necessary' in the context of intervention with nature and nonhuman others, it can no longer be regarded as 'necessary'.¹⁷⁵ In examining Leopoldian land ethics, Warren, for example, explains that ecofeminism has developed a different position, which explores the important connections between the domination of women, people of colour, children, the poor, the Third World and indigenous peoples, and the domination of nonhuman nature.¹⁷⁶ Warren maintains that this position has failed to be explored in contemporary environmental ethics, both in theory and practice.¹⁷⁷

There are also schools of feminist thought that focus on the protection of animals in their analyses of the relationship between humans and the environment. Carol J. Adams and Marti Kheel, for example, argue that veganism is an important part of ecofeminist

170 Warren, *Ecofeminist Philosophy*, above n 115.

171 Ibid.

172 See 2.3.2.

173 Warren, *Ecofeminist Philosophy*, above n 115, 173.

174 Ibid, 76.

175 Warren, 'Feminism and Ecology', above n 112.

176 Warren, 'The Legacy', above n 78.

177 Ibid.

ethics, while Val Plumwood and Karen J. Warren argue for a contextual vegetarianism that ties animal ethics more to material and social contexts. The ‘justice care’ ethics debates began with Carol Gilligan’s *In a Different Voice* (1982),¹⁷⁸ and explores issues such as an animal care ethic, the granting of a comparable moral standing to animals and an analysis of the larger socio-political context in which current meat consumption and production takes place. The justice care ethics approaches will be explored in more detail in chapter five of this thesis, as they all work towards a common goal; namely to protect the voiceless. Because the shared history of oppression between women and nature includes nonhuman animals, ecofeminist voices are able to speak up on behalf of animals. According to Janis Birkeland, the ecofeminist challenge in animal advocacy is to be able to reassess our (human) relationship with animals and nature-cast speciesism and anthropocentrism, as they are symptoms of a deeper patriarchy in Western tradition that needs to be deconstructed before a successful animal ethic can be produced.¹⁷⁹

Ecofeminism is therefore open to listening to the diverse voices of nature and to understanding the repercussions of what happens when the voices of marginalised groups are ignored. As the ecofeminist exploration of the intersectionality between the oppression of others and the domination of nature is also an exploration of and reaction to social and political inequality, their vision is to create long-term solutions to restoring the quality of the natural environment rather than to address short-sighted, single ended production.¹⁸⁰ Ecofeminists regard the symbiotic relationship between women and nature, as a social construct, to have been largely ignored in environmental debates. Ecofeminists, such as Shiva believe that women in subsistence economies have a special connection to the environment through their daily interactions with the land, which is not recognised in the Western capitalism because of the focus on the creation of wealth:

178 Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982).

179 Janis Birkeland, *Ecofeminisms Contribution to Environmental Ethics* (2011)
<http://rhodes-enviroethics.wikidot.com/ecofeminism>.

180 Laura Hobgood-Oster, *Ecofeminism: Historic and International Evolution* (2011)
<http://www.clas.ufl.edu/users/bron/PDF-Christianity/Hobgood-Oster--Ecofeminism-International%20Evolution.pdf>.

Women in subsistence economies, producing and reproducing wealth in partnership with nature, have been experts in their own right of holistic and ecological knowledge of nature's processes. But these alternative modes of knowing, which are oriented to the social benefits and sustenance needs are not recognised by the capitalist reductionist paradigm, because it fails to perceive the interconnectedness of nature, or the connection of women's lives, work and knowledge with the creation of wealth.¹⁸¹

As the underlying common and unified position of ecofeminism is in the form of opposition of all forms of oppression, they all work towards the common goal of creating egalitarian, non-hierarchical structures, in which relationships between humans, nonhumans and the environment are just and sustainable.¹⁸² In their exploration of commonalities between gender oppression and environmental degradation, the different feminist positions and schools of thought in fact broaden the scope of cultural critique and mainstream social movements and offer diverse and alternative approaches that open up valuable ground for dialogue and lead to a greater diversity of possible courses of action.¹⁸³

Overall, ecofeminism is a dynamic force that is able to offer a unique 'oppositional political discourse'¹⁸⁴ and set of practices that challenge current debates, which still tend to be entrapped in their historical and political contexts. Furthermore, by addressing problems such as waste disposal and the injustices and cultural impoverishment that flow from global capitalism, contemporary ecofeminist activism and scholarship also focuses on finding practical ways of creating new and sustainable lifestyles.¹⁸⁵ Since ecofeminism is constantly evolving through lively and diverse theoretical debates while at the same time continuing to flow from the originating voices of the radical political feminist movements of the past, the ecofeminist vision and social and political critiques

181 Vandana Shiva, *Staying Alive: Women, Ecology and Development* (Zed Press, 1988), 24.

182 Susan Buckingham-Hatfield, 'Gendering Agenda 21: Women's Involvement in Setting the Environmental Agenda', (1999) 1 *Journal of Environmental Policy and Planning* 121, 122.

183 Kuletz, above n 151.

184 Sturgeon, above n 165.

185 Glynis Carr (ed), *New Essays in Ecofeminist Literary Criticism* (University of Delaware Press, 2000).

are as current and relevant today as they were in the past. Ecofeminism will no doubt continue to evolve in the twenty-first century, as its various strands continue to crosscheck and analyse each other.

2.3.3. The Political Agenda of Ecofeminism

As set out in principle 7 of the *Rio Declaration on Environment and Development*, all countries should promote sustainable consumption and production patterns and should benefit from the process.¹⁸⁶ Furthermore, as incorporated into chapter 24 of Agenda 21, women should be equally involved in environmental management and decision-making processes.¹⁸⁷ However, in spite of women's increasing presence in environmental management and decision-making processes, they are still denied equal access to and full participation and their contributions are often ignored.¹⁸⁸ At both national and international levels, governments are only willing to make decisions in environmental matters through the traditional lens, based on power and economics.¹⁸⁹ Since in effect nothing much has changed in terms of the human impact on the environment, arguably a change in perspective is what is needed most.

According to Martha Gimenez, given the changes in the world capitalist economy, the timeliness and relevance of Marxism might become self-evident again.¹⁹⁰ Hence greater awareness of the extent to which most working women's fate is tied to the contradictions of world capitalism is needed.¹⁹¹ Although both sexes are structured into the hierarchy of labour power for purposes of exploitation, women are still more disadvantaged than men, as not only are they unable to enjoy equal access to power or managerial control, but they are also denied the same opportunities for upward mobility as are men. Moreover, as Marxist ecofeminists argue that the fundamental contradiction of capitalism is not between capital and labour, but between production and reproduction,¹⁹² the production/reproduction dichotomy, in which production is valued

186 United Nations Division for Sustainable Development (2011).

187 Ibid.

188 Mere Pulea (ed), *Women's Participation in Environmental Management and Decision-Making* (2011) <<http://www.apwld.org/vol43-06.htm>>.

189 Ibid.

190 Martha E Gimenez, *What's Material about Material Feminism? A Marxist Feminist Critique* (2011) <<http://www.colorado.edu/Sociology/gimenez/work/rphil.html>>.

191 Ibid.

192 Sydee and Beder, above n 166.

above reproduction, results in the exclusion of women's reproductive labour from the formal economy because it is situated in nature, and as such women live in a different reality and are also viewed to have a different relationship with nature than men.¹⁹³

Ladelle McWhorter and Pip Jones take this argument one step further and refer to Foucault's statement in *Discipline and Punish*¹⁹⁴ that reproduction has become a form of production in modernity.¹⁹⁵ Foucault, for example, links the power of bio-medicine in modernity to the needs of its characteristic form of production, which is capitalism. Within this context, for industrial and commodity production to be effective, bodies need to be reliably placed in the production process.¹⁹⁶ In light of this, it can reasonably be argued that modern women, having willingly placed their bodies and their selves in the production process and by alienating themselves from nature's biological processes, have forfeited their exclusivity in the realm of reproduction. From the contraceptive pill to pregnancy, birth and post natal depression, modern women now depend upon almost entirely upon modern medicine and have as such joined in the battle against nature. As women's bodies and reproductive cycles now rest firmly in the hands of men, patriarchal capitalism has managed to exploit women on yet another level and the creation of a false reality serves to justify this intervention at the exclusion of women. For example, home births, which are overseen by midwives, are viewed with scepticism and breastfeeding has also been subject to trends while formula bottle feeding is consistently regarded as a most acceptable alternative, especially in public.

Moreover, the body centred society in which women live today is dedicated to the triumph of the physical, so from dieting to cosmetic surgery to giving birth by caesarean section, modern man in the alter ego form of modern medicine has taken control over women's bodies with the promise of minimising the negative impacts of their biology.¹⁹⁷ Modern medicine further dictates women's moral obligation to be healthy,

193 Ibid.

194 Michel Foucault, *Discipline and Punish: The birth of the Prison* (Editions Gallimard, 1975)

195 Ladelle McWhorter, 'My Body, My Self: Foucault and Ecofeminism' (2005) 1 *Philosophy Today: Academic Research Library* 100-115; Pip Jones *Introducing Social Theory* (Polity (2003), Macquarie University Department of Law Reading Materials for Legal Research Two (2008) 77.

196 Ibid, McWhorter.

197 Ibid. Moreover, since women's body-centred (or self-image) is a reflection of the era, in which they live, women in the Renaissance period, for example, considered a voluptuous body to be ideal, for both

fit and beautiful, which in turn, has significant implications for consumption and production. Marxists would view this as market manipulation by profit seeking companies, feminists would view this as the gendered nature of body centred consumption and Foucault views this as the inevitable outcome of the penetration and discursive regulation of body-centredness, traceable back to the rise of body centred medicine, which has itself its foundation in the needs of modernity.¹⁹⁸

Although for Foucault, modernity has displaced the classic Cartesian mind/body dualism by giving rise to a kind of physiological monoism, which he refers to as normalisation,¹⁹⁹ McWhorter is of the view that the reason/nature dichotomy continues to function within networks of normalising power and as such dualisms persist in the midst of a Foucaultian normalised society. McWhorter further suggests that Foucault's genealogies of normalisation can be applied to both evolutionary and environmental debates.²⁰⁰ Indeed, bio-medicine has equally been extended to the animal, plant and natural kingdom at large. It has thus taken control not only over reproduction in human societies (due to contraception, abortion, IVF, and so on), but also in the animal world in terms of livestock and farming practices. Intensive farming, genetic engineering of animals as well as crops, and indeed the farming industry at large, which includes the production and reproduction of animal produce for human consumption and use. For example, factory farmed cows are artificially inseminated to produce milk (as only lactating mammals are able to produce milk) and fixed to milking machines; hence the practice of milking cows today is far removed from nature.²⁰¹

aesthetic and childbirth purposes, as this was the view commonly held by men and medical practitioners at that time.

198 Jones, above n 195, Macquarie University Department of Law Reading Materials for Legal Research Two, 132.

199 McWhorter, above n 195. Normalisation theory operates on the premise that all aspects of life are temporal processes and in essence measurable rates of specified types of change rather than that of a Cartesian machine of extendedness and motion. For Foucault, however, to 'normalise' is not to make normal, as this would be to homogenise, but to understand and know individuals in their individuality as beings appropriately identified in relation to developmental norms. In turn, individual identity is simply the intersection of one's deviance from various norms; hence normalisation is based on the premise that development can be 'normed' and techniques for redirecting developmental forces can be devised. The clear implication of this is that normalisation has rendered the sovereign mind obsolete, as is evidenced in women's reliance on modern medicine.

200 Ibid.

201 This topic is dealt with in more detail in the first case study in chapter five.

The ecofeminist critique of patriarchal capitalism can thus be understood as a feminist commitment to resist and overcome the exploitation of women and nature under monetised capitalism.²⁰² Material ecofeminists question the validity of economic growth and claim that it is a question of redistribution, not generation of growth, which is at the heart of the environmental debate.²⁰³ Like Commoner and Bookchin, material ecofeminists point to capitalism and argue that the impacts of capitalism, and its extension globalisation, on the market economy flows from the enrolment of workers that are ensnared into subjugation through the propagation of the Protestant work ethic and the allure of consumerism.²⁰⁴ It is not just a matter of addressing equality within existing structures for material ecofeminists, but of changing the structures that affect this mode of thinking.²⁰⁵ This exposition of the rise of modern capitalism is not unique to a material ecofeminist interpretation, as identified above in 2.2., as it tends to appeal to the socialised mentality of modern, consumer driven societies, particularly where an alliance with modern capitalist theories and socio-economic perspectives can be made.²⁰⁶

Women's subordination is clearly visible in the social infrastructures that reflect income, employment, education, health, fertility and women's roles within the family, community and society.²⁰⁷ If social justice were to be measured in accordance with the status of women in any given society around the world, serious social justice issues exist in both women's public and private capacities. The statistics are damning in themselves. Women compose 53% of the world's population, perform an estimated 65% of the world's work for 10% of the world's pay, and own less than 1% of the world's property.²⁰⁸ Moreover, studies show that a direct link exists between the low status of women in society and violence against women in that society.²⁰⁹ The UN Declaration on the Elimination of Violence against Women 1993 acknowledges that

202 Cox, above n 4.

203 Susan Buckingham, 'Ecofeminism in the Twenty First Century' (2004) 170(2) *Geographical Journal* 146, 149.

204 Cox, above n 4; Gimenez, above n 190.

205 Buckingham, above n 203.

206 Sydee and Beder, above n 166.

207 Ibid; Cox, above n 4; Gimenez, above n 190.

208 Ariel Salleh, *Paper: Second Thoughts of Rethinking Ecofeminist Politics*, Australian National University, 1991 4; International Labour Organisation (ILO), *Women's Employment: The Indian Scenario* (2003) <http://www.southasiaoutreach.wisc.edu/powerpoint/Womens_Employment.ppt>.

209 World Health Organisation: Violence against Women
<<http://www.who.int/mediacentre/factsheets/fs239/en/>>

“violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men”.²¹⁰ The World Health Organisation (WHO) further reports that violence against women puts an undue burden on health care services, as women who have suffered violence are more likely to need health services, and at a higher cost, compared to women who have not suffered violence or abuse.²¹¹

Yet, women are historically the ones to first respond to crises at organisational levels that affect household management and the survival of their community at a grassroots level.²¹² They are also the first to suffer. In times of global economic crisis, women are the first to forgo essential provisions such as food, medicine and education,²¹³ and as primary household managers, they shoulder the burden and are the first to suffer the imbalance and lack of access to sustainable livelihoods.²¹⁴ In the rural areas of developing countries, for example, women manage resources such as clean water, fuel for cooking and heating and fodder for domestic animals, and also grow vegetables, fruits and grains for both consumption and sale. Given the variety of their daily interactions with the environment, women are directly affected by problems that flow from soil erosion, deforestation, desertification flooding, pollution and toxic waste disposal, which result in water shortage and crop failures, affect sustainable food development and reduce harvest yields because the soil is exhausted and the productivity of household gardens is consequently severely reduced.²¹⁵ In the case of water shortage, women traditionally seek safe, clean water and are held accountable

210 Declaration on the Elimination of Violence against Women,
<<http://www.coe.int/t/dghl/standardsetting/violence/Documents/Declaration%20on%20the%20Elimination%20of%20Violence%20against%20Women.pdf>>

211 World Health Organisation, above n 209.

212 Sydee and Beder, above n 166; United Nations Environmental Planning (UNEP), *Capacity Building for Sustainable Development: An overview of UNEP Environmental Capacity Development Initiatives* (2011) <http://www.unep.org/Pdf/Capacity_building.pdf>.

213 Manion, above n 107.

214 Ibid.

215 Ines Havet, Franka Brau and Birgit Gocht, *Gender Mainstreaming* (2011)

<<http://www.energyandenvironment.undp.org/undp/indexAction.cfm?module=Libraryandaction=GetFileandDocumentAttachmentID=2368>>. In Southeast Asia, women provide 90 per cent of the labour for rice cultivation, according to the United Nations Population Fund.

when food stores dry up and trees disappear, making the land untenable and the water unpotable.²¹⁶ In the case of deforestation, again it is women who spend four or five hours a day collecting wood for fuel, whereas before industrialisation, they would have completed this once every four to five days.²¹⁷ In urban settings, air and water pollution can be extreme and sanitation and waste treatment poor or non-existent, which poses a threat to women's health and to the health of their babies, as women have the highest levels of exposure and the toxic chemicals and pesticides can be passed on to infants through breastfeeding.²¹⁸

Ecofeminists view globalisation as an extended form of internationalised Western capitalism or neo-colonisation. According to Shiva, one of the noticeable impacts of globalisation is the changing role of the nation state.²¹⁹ Shiva describes how Southern nation states have been wholly subsumed by the superstate, run by trans-national corporations and Bretton Woods institutions (World Bank, International Monetary Fund and the General Agreement on Tariffs and Trade), under the guise of national interest.²²⁰ As a result, many traditionally subsistence-based communities have lost control over their land, and women's knowledge and traditional farming practices are lost to the capitalist economy and the Western worldview.²²¹ In a similar vein, Thomas-Slayter and Rocheleau detail how in Kenya the capitalist driven export economy has caused most of the agricultural productive land to be used for cash crops, leading to intensified pesticide use, resource depletion and marginalisation of subsistence farmers,

216 Ibid. This is an example from Gujarat, India. Further examples include a village in China's Gansu province where discharge from a state-run fertilizer factory has been linked to a higher number of stillbirths and miscarriages. Water pollution in three Russian rivers is a factor in doubling the bladder and kidney disorders in pregnant women, and in Sudan, a link has been established between exposure to pesticides and pre-natal mortality, with the risk higher among women farmers.

217 Ibid.

218 Ibid. In the Indian cities of Delhi and Agra, drinking water comes from rivers heavily polluted by DDT and other pesticides—they enter body tissues and breast milk, through which they are passed on to infants.

219 Shiva, above n 181. The nation state is itself an intrinsically patriarchal institution, created to control market and capital and the divide between production and reproduction.

220 Ibid; Sydee and Beder, above n 166. In the South, the State, as a mode of social organisation, has an even shorter history than in the North. Shiva explores the changing concepts of State in India as an example of the impacts of Statism, capitalism and globalisation on subsistence communities in the South. Shiva states that the concept of motherland—rooted in the soil as an image of sacred life and creation, the feminine—was the traditional organising metaphor in India. It was replaced by the term Mother India as a focus of resistance in the fight against colonisation by Britain in the 1940s. The subsequent drive for development replaced the image of mother or feminine strength with the state itself as a patriarchal leader.

221 Sydee and Beder, above n 166.

especially women, to the hillsides and less productive land.²²² Hence, the impact and pressures of globalisation have turned both women and nature into cheap and disposable resources and commodities.²²³

Greta Gaard and Lori Gruen explain neo-colonisation as a form of economic imperialism, in which industrialisation in Third World countries is pronounced to be the solution to the pressure of production in a global economy and to solving the problems of underdevelopment and debt.²²⁴ Therefore, not only are women denied the power and self-determination they once had under a subsistence economy but the environment is also being destroyed at an accelerating rate due to fast tracked development.²²⁵ For Gaard and Gruen, the oppression that connects women to nature becomes clearly visible in the case of cash crops, as sustenance farming and forests disrupt and reformulate food production to place both men and profit above women and the ecosystem.²²⁶ From this, they argue, it is impossible to break free without further environmental degradation, as natural resources are exchanged for capital. With women bearing the crushing weight of the 'debt-for-nature swap', the affluence of the North is thus founded on the natural resources and labour of the South.²²⁷ In turn, decision-making power, cash payments and status are conferred to men, marginalising women even more and making them more vulnerable to poverty and exploitation. The integration of culture and resources into the global marketplace are therefore inextricably linked and override all other social values, as economic value, being global value, does not respect the integrity of the webs of relationships between life and culture.²²⁸

It is because of this obvious and overt exploitation of women and nature that ecofeminists argue that a new system of values must be created, which directly challenges and confronts patriarchal capitalist structures and values. Importantly, as gender is the starting point, the attitudinal barriers that result from deeply-rooted,

222 Barbara Thomas-Slater and Diana Rocheleau, 'Gender and Development in Kenya: A Grassroots Perspective' in D Rochelau, B Thomas-Slayer and E Wangari (eds), *Feminist Political Ecology* (Routledge, 1995) 3.

223 Ibid.

224 Greta Gaard and Lori Gruen, 'Ecofeminism: Toward Global Justice and Planetary Health' in Andrew Light and Holmes Rolston III (eds), *Environmental Ethics* (Blackwell Publishing, 2008) 280.

225 Thomas-Slater and Rocheleau, above n 220.

226 Gaard and Gruen, above n 222.

227 Ibid.

228 Sydee and Beder, above n 166.

patriarchy-based socialisation and continue to disempower women systematically, must be removed. Since women continue to be assigned to roles that are considered to be of 'secondary' importance,²²⁹ this calls for a revaluation of the notion of what constitutes 'secondary' in terms of importance. 'Secondary' usually infers tasks that involve non-economic gain and does not appreciate other values that may be at least as important, if not more and hence not 'secondary' at all. Even if women do not have the same access as men to institutionalised power or to managerial control, and may not be regarded as 'head' of the family in the traditional sense and have control of the family's financial affairs, as primary household managers, women manage household resources.²³⁰ In turn, this 'secondary' or hidden power that women have enables them to initiate change and they are also more likely to be aware of the direction in which the change should take place. Particularly in the Western world, women as consumers, are on equal par to men, so when it comes to consumer choices, they are able to significantly impact on Western consumer philosophy, which will in turn impact on the environment and the economy on a global scale.

Women are also more likely to concentrate on improving health, education, infrastructure and poverty, if given the opportunity.²³¹ However, even if elected to local or national legislatures, women find the existing structures and processes to be formal, rigid, overwhelming and alienating,²³² and their contributions to environmental planning continue to have little impact on the decisions that are actually incorporated into policy.²³³ Hence, gender bias, or lack of gender consciousness, continues to create obstacles because policies fail to incorporate a gender-differentiated perspective on life experiences. Chinkin and Charlesworth claim that many of the issues that concern women suffer a double marginalisation in terms of traditional international law-making: they are seen as the soft issues of human rights and are developed through soft modalities of law-making that allow states to appear to accept such principles while minimising legal commitment. Hence, as a mechanism for distributing power resources in the international and national communities, 'the international legal system may have

229 Ibid.

230 Manion, above n 107.

231 Austrade, *Carla Zampatti Leads Womens Business Mission in India* (2008)

<http://austrade.gov.au/Carla_ZamapttiLeads-Women-s-Business-Mission-to-India/default.aspx>.

232 Buckingham, above n 203, 154.

233 Buckingham-Hatfield, 'Gendering Agenda 21, above n 182; Chinkin and Charlesworth, above n. 57.

broadened in scope, yet remains narrow in perspective',²³⁴ as it tends to be trapped between competing values and policy considerations. Moreover, the absence of women in positions of power/decision-making is poignantly evident, from organs of the state to international organisations, courts and tribunals. While it is within the power of states to change this, and they have in fact an international obligation to promote equality of participation,²³⁵ the injustices of women's situations around the world continue to be brushed aside.²³⁶ As the term 'development' per se denotes improvements in living standards over time,²³⁷ it is disturbing that decades of formalised development initiatives continue to apply traditional development models, which emphasise economic development 'as both the conduit to development and the final objective'.²³⁸ Therefore, to respond to these injustices, the boundaries of environmental law, both at national and international levels need to be destabilised and then redrawn.²³⁹ Until this eventuates, the gender bias that is at the core of all traditional worldviews and social formations will continue to remain.²⁴⁰

2.3.4. Ecofeminism as a Social and Political Movement

Ecofeminists have contributed to policy shifts in the fields of gender inequality and environmental sustainability and, in turn, their involvement in the development of environmental movements and action plans has lifted the profile of ecofeminism, nationally and internationally.²⁴¹ In their critique of patriarchal capitalism and its extension, globalisation, ecofeminists have provided useful insights and suggested workable alternative political and structural frameworks with the common goal of bringing humanity closer to nature - or nature back into humanity. The strength of argument that ecofeminists provide lies in their astute ability to highlight the impacts of capitalism and of globalisation on women and on biological diversity from a uniquely feminist perspective.²⁴² Conferences on issues that link gender oppression and environmental concerns therefore no longer ignore even the most radical tenets of the

234 Buckingham-Hatfield, above n 182; Chinkin and Charlesworth, above n 57.

235 Agenda 21, Chapter 24.

236 Chinkin and Charlesworth, above n 57.

237 Ibid.

238 Ibid.

239 Ibid.

240 Ibid.

241 Buckingham, above n 203, 150.

242 Sydee and Beder, above n 166.

ecofeminist position and indeed explore the links between development and women's issues in their investigations into the worsening global disparity between the rich and the poor, since women constitute the majority of the poor.²⁴³

The concept of Women and Development (WAD) was solidified as a theory at the United Nations conference on Women and Development held in Mexico 1975, which also marked the beginning of the United Nations Decade of Women.²⁴⁴ As ecofeminism deals with pressing and pragmatic concerns, it further served to motivate grassroots political movements around the world. For example, the environmental activist Wangari Maathi founded *The Green Belt Movement* in Africa to help restore denuded land in her country.²⁴⁵ Maathi enlisted African women to help plant millions of trees to stop soil erosion and improve soil quality, food, production, water quality and economic prosperity. In India, the environmental activist, Vandana Shiva, founded *Navdanya*, which is an organisation that works towards preserving the biodiversity of seed and food, as well as what Shiva calls the 'democracy' and 'sovereignty' of water.²⁴⁶ The Native American author and environmental activist Winona LaDuke, who is also the founder of the *Indigenous Women's Network*, *White Earth Land Recovery Project*, and cofounder (with The Indigo Girls) of *Honour the Earth*, fought to protect the environmental rights and land of Native American communities throughout North America.²⁴⁷ In Germany, Petra Kelly cofounded the *Green Party Movement*, which fought against the use and creation of weapons of mass destruction.²⁴⁸ These are but some examples, in which women successfully spearheaded various influential campaigns that were directed at change in government policies and traditional practices.²⁴⁹

As the 1980s ecofeminist perspective on women's roles in development shifted to a more socialist position, it was marked by several international conferences on issues

243 Manion, above n 107.

244 Sturgeon, above n 165. WAD was criticised for failing to uncover the underlying framework of oppression, and assumed that once equality was firmly imbedded in international structures, women's positions would improve.

245 Heidi Hutner, *Ecofeminism and Mothering* (2011) <<http://ecofeminism-mothering.blogspot.com/>>.

246 Ibid.

247 Ibid.

248 Ibid. Kelly further draws connections between sexism, war and environmental degradation.

249 Love Canal in Niagara Falls (1979), the Kenyan Green Belt Movement (1977) and the Chipko Movement (1970) are further examples.

that linked gender oppression with environmental concerns. Gender neutrality was no longer sought, due to an increasing awareness of inherent inequalities in institutional structures, which created a shift in focus from women as individually exploited entities to that of the inequity of gender relations as a whole.²⁵⁰ Both men and women were now welcome agents of change and environmental concerns focussed on the roles, needs and inputs of both sexes. Gender and Development (GAD) theory acknowledged women's productive and reproductive tasks and a new perspective was applied to development models to effect the changes needed. The correlation between the oppression of women and the oppression of the environment became the focus of ecofeminist debates, along with the notion of unequal relations between men and women due to 'uneven playing fields'.²⁵¹ Not only were dominant philosophies and social and linguistic theories extensively explored, but also language itself was subject to experimentation,²⁵² to draw awareness to the extent to which dominance or sub-ordination relations infiltrate each and every aspect of modern society. Ecofeminism too was moved into the realm of academic studies and the social constructive analysis, which drew from Marxist and social feminist literature, and the essentialist argument, based on women's biological connection with nature was subject to extensive analysis. The notion of oppression of all others to include nonhuman animals was further raised by ecofeminist writers as not only a logical but also a natural extension of the fight against oppression.²⁵³

In the 1990s, gender mainstreaming became the agenda and WEDO (Women's Environmental and Development Organisation) became one of the leading activist organisations. The UNCED presented an inimitable opportunity for the ecofeminist vision to be promoted and, in preparation for its final agreement, Agenda 21, Bella Abzug and Mim Kelber, the two founders of WEDO, launched the first Women's World Congress for a Healthy Planet in November 1991.²⁵⁴ This congress was attended

250 Sturgeon, above n 165.

251 Hobgood-Oster, above n 180.

252 Elfriede Jelinek, the Austrian writer and Nobel Prize winner, would stand at the forefront of bringing feminist views into language and experimenting with it in her stories to expose the sexist nature of language and its cultural heritage. See for example, Elfriede Jelinek, *Die Liebhaberinnen* (Rowohlt 1975)

253 Prominent ecofeminist writers of the 1980s and 1990s include Maria Mies, Vandana Shiva, Ariel Salleh, Greta Gaard, Val Plumwood, Starhawk, Carolyn Merchant, Charlene Spretnak, Noel Sturgeon, Carol Adams, Ynestra King, Irene Diamond, Gloria Orenstein, Judith Plant and Karen Warren.

254 Pulea, above n 188.

by 1500 women from 83 countries, and created *Women's Action Agenda 21*.²⁵⁵ At UNCED, women's involvement in environmental management was incorporated into chapter 24 of Agenda 21. Chapter 24 not only recognises the importance of women's contributions to sustainable development and conservation and protection of the environment, but also proposes actions to eliminate gender bias and instead strengthen women's equal participation in development activities, environmental management and decision-making.²⁵⁶ Consequently, governments around the world promised women equal access to and full participation in power structures and decision-making, and pledged to set specific targets as well as implement measures to ensure this.²⁵⁷

Hence, the concept of bringing gender issues into the mainstream of society was clearly established as a global strategy. Gender equality and the necessity to ensure that it remains a primary goal in all areas of societal development were again promoted in the Platform for Action adopted at the United Nations Fourth World Conference on Women, in Beijing in 1995. At the 2002 World Summit on Sustainable Development, the need to embed women's (or 'gendered') concerns was written more comprehensively into the Plan of Implementation. However, not much more has been done to advance women's equality concerning the environment, even though gender mainstreaming is, at least in theory, on the agenda.²⁵⁸ International law has only peripherally responded to non-traditional suggestions, and indeed the continuing lack of appreciation of any form of participation that is not measurable in economic terms suggests that there is much work to be done.

2.3.5. The Employment of Derrida's Deconstructive Technique in the Ecofeminist

Critique of Patriarchy

Deconstruction is a term that denotes a process by which texts and meanings appear to shift and become complex when read or understood in light of the assumptions and absences they reveal within themselves. The term was coined by Jacques Derrida in the 1960s, and draws mainly from Heidegger's notion of *Destruktion* and Husserl's method

255 Ibid.

256 Agenda 21, Chapter 24, above n 233.

257 Pulea, above n 188.

258 Buckingham, above n 203, 151.

of *Abbau* (dismantling or un-building).²⁵⁹ Since the common history of oppression for both women and nature is not only evident in the form of negative stereotypes, but also through their linguistic association, ecofeminists are able to use deconstruction as a means of pointing to the linguistic links between the oppression of women and of nature. They consider the negative implications that flow from the use of terms such as 'rape the land', 'tame nature', 'reap nature's bounty'. References to nature commonly imply nature as being a feminine entity, as is evident through use of the pronoun 'she' and through the more generic term that refers to nature as 'Mother Nature'. It further becomes clear that women and nature are not only deemed as passive and unproductive but also unpredictably 'wild' and 'untamed'. The polarised perception of women is evident in the biblical depiction of the two 'Marys'. Mary, the mother of God, gave birth to Jesus after an immaculate conception, and was therefore a passive recipient. Maria Magdalena was the wild and untamed temptress who was saved by Jesus, and who is held by some, such as the controversial Bishop Spong, to have in fact been Jesus' mistress or perhaps even wife.²⁶⁰ The famous Shakespearean play, *The Taming of the Shrew*, has further immortalised the Mary Magdalena female stereotype in classical Western literature; namely a woman who needs to be tamed or saved. In terms of the linguistic extension of the negative implications of associations between women, nature and animals, one of the most poignant and unembellished examples is evidenced in the reference to a serial killer or child rapist as an 'animal'. This connection places animals in general in the same category as the most violent and unacceptable display in human behaviour, and reinforces the need for both women and animals to be dominated, or at least contained, by an external social order. Furthermore, it exemplifies the need for the notion of 'other' to be removed from its negative (or violent and destructive) connotations.

In popular usage, deconstruction has come to mean a critical dismantling of tradition and traditional modes of thought. The conservative view regards deconstruction as a threat or an undermining of traditional ethical and cultural norms, but the more radical approach, as employed by ecofeminists, regards it as a revolt against the unjust

259 New World Encyclopaedia, *Deconstruction* (2011)
 <<http://www.newworldencyclopedia.org/entry/Deconstruction>>.

260 ABC Compass, *Interview with Bishop John Shelby Spong* (2001)
 <<http://www.abc.net.au/compass/intervs/spong2001.htm>>.

hegemony of the ‘logocentrism’ (as Derrida calls it) that is inherent in Western culture.²⁶¹ Deconstruction questions fundamental or traditional conceptual binary or hierarchical distinctions, which essentially involve a pair of terms in which one member of the pair is assumed fundamental and the other secondary or derivative. Examples of such binary or hierarchical distinctions include nature/culture, speech/writing, and mind/body, and to deconstruct an opposition is to explore the tensions and contradictions between the hierarchical ordering assumed in the text and its meaning, especially in light of its figurative or performative aspects. Ariel Salleh, for example, employs the man/woman binary to underscore the alignment between women and nature to emphasise the need for an embodied materialist analysis of global capitalism. In doing so, Salleh allows for the instrumentalist appropriation of both nature and woman-as-nature and by arguing that all ecological crises stem from an inherently sex-gendered ideological structure, Salleh reinforces the human/nature split. Salleh’s work thus brings feminist insights into the conversation as an embodied materialist understanding of nature, society, and capitalism.²⁶²

As deconstruction serves to displace the opposition by showing that neither term is primary (as the opposition is a product, or a construction of the text or meaning, not independent of it), it is a very useful methodological approach for social and political critique from any perspective, including from an ecofeminist perspective.²⁶³ For ecofeminists, the methodological approach used in deconstruction allows them to highlight and dismantle the plethora of misconceptions that lead to the oppression of women and nature. By demystifying and pointing to the fallacy of the foundations upon which such misconceptions are built, the systematic, albeit logically unsound justification of domination by a minority group over majority groups are exposed. This minority group, in turn, belongs to an artificially higher-ranking category while the majority groups, or all others, are ranked into equally artificial lower-ranking categories.

For Vandana Shiva, one of ecofeminism’s missions is to redefine the way in which patriarchal capitalist societies look at the productivity and activities of minority groups,

261 Richard Kearney (ed), *Dialogues with Contemporary Continental Thinkers: The Phenomenological Heritage* (Manchester University Press, 1984).

262 Gerry Canavan, Lisa Klarr, and Ryan Vu, *Embodied Materialism in Action: An Interview with Ariel Salleh* < <http://www.lancs.ac.uk/staff/twine/ecofem/SallehPolygraph.pdf>>

263 This topic is explored in more detail in chapter three of this thesis.

such as women and nature, as both groups have not only been historically oppressed but also ill-used.²⁶⁴ Shiva claims that this is because of the negative stereotype of passivity that is traditionally associated with women and nature (as per the Mary, Mother of God stereotype), according to which they are perceived to be unproductive, simply because they are categorised as such. According to the traditional view, for women and nature to have a higher value or status, they must somehow engage in or be engaged in the capitalist mode of production. One of the examples Shiva provides is that natural resource water, which is seen to passively exist until used for purposes such as the generation of hydropower. Another example Shiva provides is that of a forest which is seen as productive only when it can be used for commercial purposes, even though a forest is intrinsically valuable even in its most passive role, as it protects groundwater, creates oxygen, allows villagers to harvest fruit, fuel, and craft materials, and creates a habitat for animals.²⁶⁵

2.4. Conclusion

Despite conflicting positions concerning the gravity of human-induced climate change, the impacts of climate change on people and nature are not only far-reaching but also evident. The melting glaciers and icecaps, the floods, the hurricanes and the rise of sea levels²⁶⁶ are all telling us that nature has reached its natural limit and cannot withstand further abuse, and not only environmentalists but also governments and the public are concerned over the effects of climate change and the accelerating loss of biodiversity. Ecofeminists advocate that concrete changes must take place so that humans can reconnect with the natural world and address social injustices. On an ideological level, a cultural shift must also take place from old traditional belief systems to new systems of values. On a practical level, a change must take place in the way in which consumers view, use and allow materials goods to be produced. Since ecofeminism is fundamentally concerned with injustices that flow from traditional power relations, their standpoint is essentially political and is able to bring about the necessary change that

²⁶⁴ Shiva, above n 181, 24.

²⁶⁵ Ibid.

²⁶⁶ International Union for Conservation of Nature (IUCN), *About Climate Change* (2011) <<http://iucn.org/what/tpas/climate/about/>>; Australian Parliamentary Library, *Effects of Climate Change* (2010) <<http://aph.gov.au/library/pubs/climatechange/effects/effects.htm>>.

can further be reflected in the law by critically dismantling traditional modes of thought and bringing new perspectives into environmental conversations.

CHAPTER THREE: JACQUES DERRIDA AND THE ECOFEMINIST VISION OF LAW AND JUSTICE

3.1. Introduction

The purpose of this chapter is to demonstrate how concepts of justice, based on values of moral rightness and associated conceptual ideals, are able to be incorporated into the law from an ecofeminist perspective through the application of Derrida's methodology of deconstruction. The aim of this chapter is to provide the framework within which the case studies in chapters four and five and five are examined. These chapters focus on the endorsed destruction of the environment and of natural habitat, and the sanctioned violence against intensively farmed and feral animals.

One of the most celebrated debates on morality and law is the Hart-Fuller debate, published in 1958 in the *Harvard Law Review*.¹ This debate demonstrates the divide between positivist and natural law philosophy, in which Hart takes the positivist view, arguing that morality and law are separate, while Fuller argues that morality is the binding power of the law.² Fuller's naturalist position is more closely aligned with Derrida's, as Fuller holds the view that law must have an 'inner morality' to be binding. Fuller identifies eight criteria that lawmakers should take into account, such as: specifying how individuals ought to behave in the future rather than focusing on the prohibition of past behaviour; ensuring that laws are non-contradictory, in that one law

1 H.L. A. Hart (1958). 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71(4) 593–629

<<http://www.jstor.org/discover/10.2307/1338225?uid=3737536&uid=2&uid=4&sid=21101471674077>>; Lon L. Fuller (1958). 'Positivism and Fidelity to Law - A Reply to Professor Hart', *Harvard Law Review* 71(4) 630–672

<<http://www.jstor.org/discover/10.2307/1338226?uid=3737536&uid=2&uid=4&sid=21101471674077>>

2 Justice Markandey Katju, *The Hart/Fuller Debate* <http://www.ebc-india.com/lawyer/articles/496_1htm>. While legal positivism holds that for a law to be valid, the essential requirement is that it comes from a competent legislator and follows the prescribed process, natural law theory requires that for such law to be valid, it must also (or additionally) conform to an ideal principle (be it morality, reason, God, or some other source). An example in the Hart-Fuller debate is of a wife who reported her husband to the Gestapo for criticizing Hitler's conduct of the war. The husband was tried and sentenced to death, but his sentence was converted to serving as a soldier on the Russian front. The husband survived the war, and then instituted legal proceedings against his wife. The wife's defence was that her husband had committed an offence under a Nazi statute of 1934. The wife was held liable by the Court. Hart argued that the decision of the court was wrong, as the Nazi law of 1934 was a valid law (as it satisfied his 'rule of recognition'), whereas Fuller contended that the Nazi regime was so 'lawless' that nothing therein could qualify.

cannot prohibit what another law permits; and ensuring that laws are predictable rather than seeking the impossible.³ In essence, Fuller's views are markedly different and much more constrained to those held by Derrida, and it is because of such differences that Derrida's view on justice is more enabling for alternative perspectives to be considered. Derrida in fact embraces the unpredictable and the impossible by adopting the structure of a promise in the form of a future present, which is in turn able to move beyond constraints and allow the impossible to become possible; thus deconstructible.⁴

It is because of Derrida's unique approach that he has been specifically selected for the purposes of this thesis. Derrida's political ethic and interpretation of justice are akin to the positions held by ecofeminists, yet his methodological approach to deconstruction enriches the analytical approach that is typically employed by ecofeminists. Through the concept of *différance*, Derrida enables justice to be incorporated into the law.⁵ The combined approach of Derrida and ecofeminism has the potential to bring about change to both traditional perspectives and current legislation. This includes the symbolic use of *woman* for *différance*. The solid connection between the Derridean and ecofeminist views on justice is that in both cases it is based on the moral principles of goodness and decency, which in turn shape a moral conscience. Moreover, Derrida's employment of the structure of a promise in the form of a future present is crucial to the cases studies examined in chapters four and five, as legislative changes to both environmental and animal laws are dependent on allowing the impossible to become possible through the deconstruction of existing laws and the incorporation of *différance* in the form of an unpredictable, yet possible future present.

3 Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*

<<http://faculty.las.illinois.edu/colleenm/Research/Murphy-%20Fuller%20and%20the%20Rule%20of%20Law.pdf>>. The eight criteria: generality, publicity, non-retroactivity, clarity, non-contradiction, constancy, and congruity specify necessary conditions for the activities of lawmakers to count as *lawmaking*. According to Fuller, law is "the enterprise of subjecting human conduct to the governance of rules" When lawmakers respect the eight principles of the rule of law, their laws can influence the practical reasoning of citizens. Citizens can take legal requirements and prohibitions into consideration when deliberating about how to act. They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke. When the rule of law is realized, their expectations of congruence will not be disappointed. Taken together with the reasonable expectation that fellow citizens will also obey the law, these expectations justify the belief that the law gives citizens reasons to act or refrain from acting in certain ways.

So long as they avoid complete failure with respect to any one principle, lawmakers can meet the requirements of the rule of law to varying degrees and still succeed in making law.

4 Peter Goodrich et al (eds), *Derrida and Legal Philosophy* (Palgrave Macmillan, 2008) 257.

5 Ariel Salleh, *Ecofeminist Reviews* (2011)

<<http://www.arielsalleh.info/theory/book-reviews/warren-rev.pdf>>.

For Derrida, law and justice are diametrically opposed both in kind and purpose. Law is merely the general application of rules, which have been tenaciously constructed to regulate the way in which people, organisations and governments ought to behave,⁶ and to ensure that those who do not behave accordingly are punished by way of penalties or imprisonment. In Australian law, this can be traced back to the first law book ever published, namely the *New South Wales General Standing Orders*.⁷ This book consists of a compilation of government orders that were issued in the colony between 1791 and 1802 to standardise colonial regulations through means of ‘punishment of restless and turbulent characters’.⁸ The book thus demonstrates the traditional regulation of society in negative or violent terms, through limitations prohibitions, regulations, control and punishment. Moreover, since the law that governs a society also captures the historical, social, cultural and political of the society that it regulates, the violence in the law is a reflection of the violence that is accepted in the society that it regulates. Hence, the values and norms that govern both society and the law need to be reinvented, so that violence is not the avenue through which social order is maintained. Derrida’s critique of law and society thus aims to undermine the concepts of power and control by displacing oppositional and authoritarian structures of thought, which he maintains largely rest on the binary oppositions that exist in legal language and institutions.

Justice, on the other hand, is an abstract ideal concept that is eternal, and as such, has no boundaries because it transcends space and time. Moreover, since justice, as applied in this thesis, is based on principles of goodness and decency,⁹ it is in conflict with the law, in spite of the common assumption that it is the driver of the law. However, since law and justice have epistemic links, these two opposing forces are able to be reconciled and reconnected. So justice is seen as an opening of law to a discourse that includes the other and exists in a relation of alterity to law. For a decision to be just, it must be

6 Robin Banks, *Hot Topics; Legal Issues in Plain Language* (2011)

<http://www.legalanswers.sl.nsw.gov.au/hot_topics/pdf/aust_leg_syst_60.pdf>. For example, according to Hart, in law there is a necessary “distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned”, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 350.

7 David Collins, *New South Wales Governor-General Standing Orders* (1969)

<<http://acms.sl.nsw.gov.au/item/itemDetailPaged.aspx?itemID=449244>>.

8 Ibid. For Governor King, the aim of the book was to standardise colonial regulations through means of punishment of restless and turbulent characters.

9 See for example, ‘Crito’ in Plato’s *The Last Days of Socrates* (Penguin 1954) 79-92.

different each time, depending on the subject and surrounding circumstances. It therefore cannot be a mere application of a rule of law, but must continually reinvent itself. In that light, justice may operate in the name of the law, but at the same time be able to suspend the law because it is essentially subject to reinterpretation.¹⁰ To use Derrida's words: 'for a decision to be just and responsible, it must 'conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, re-justify it'; hence, justice is the experience of the impossible because it exists in a state of suspension or 'undecidability'.¹¹

Deconstruction is thus the event or moment, at which binary oppositions contradict themselves and undermine their authority. When the law is traced back to its original and violent foundations, a space is created, which has the potential to incorporate justice by means of *différance* or other perspectives. The outcome is undecidability.¹² The legitimacy of the law is therefore undecidable. A deconstructive interrogation, in turn, reveals absence at the base of its construction, and violence at the root of its institutional authority.¹³ In light of this, deconstruction may be viewed as "a strategy of resistance against the authority of meaning", and the deconstructive moment as the 'revolutionary' moment.¹⁴ Moreover, since 'natural' rights are not natural but constituted discursively through social contracts, the discourse of emancipation is also able to be structurally opened to new interpretations through deconstruction.¹⁵ In turn, the concept of natural, inalienable rights is further deconstructible,¹⁶ and in 'The Declaration of the Rights of Man', Derrida applies this deconstructive approach to all minority groups, including women, nature and animals.¹⁷ As feminist jurisprudence advocates focus on the

10 Saul Newman, Derrida's Deconstruction of Authority (2001), *Philosophy & Social Criticism* 27 (3) <<http://theanarchistlibrary.org/library/saul-newman-derrida-s-deconstruction-of-authority>>

11 Jacques Derrida, *Force de Loi* (Galilée, 1994) 23.

12 Adam Lodders 'Between Violence and the Law, Is There a Place for Justice?' (2008) 16 *Colloquy: Text Theory Critique*, 111, 116 <<http://www.colloquy.monash.edu.au/issue16/Lodders.pdf>>. This is a response to Walter Benjamin's Critique of Violence, in which Benjamin attempts to free violence from legal judgment by employing the means and ends distinction between positive and natural law.

13 Newman, above n 10.

14 Lodders, above n 12

15 Newman, above n 10. Once displaced from the social to the natural realm, the social is subordinated to the natural, just as writing is subordinated to speech...the idea of natural rights can be formulated only discursively through the contract. They can no longer remain inscribed within human essence and, therefore, can no longer be taken for granted. If they are without firm foundations, one cannot always assume that they will continue to exist. They must be fought for, and in the process will be reformulated in these struggles.

16 Ibid.

17 Derrida, above n 11, 28.

injustices perpetrated against others, Derrida's deconstructive methodology allows for the inclusion of justice for women and all subjugated 'others' in both society and the law by virtue of dismantling the ideological foundations, upon which oppression is built. Since the arbitrary construction of these foundations makes them inherently malleable, through the epistemic link between law and justice, the gap is able to be bridged through *différance* and incorporated into the law.

3.2. The Theoretical Foundation of Derrida's Deconstruction of the Law

Deconstruction denotes a process that pursues the meaning of a text to show that an interpretative reading is not possible as a discrete whole because of the essentially complex and incompatible foundations upon which they are built. As the paradigm in Western thought consists of a demarcation of boundaries (as things are organised into units, systems or categories, in which some are included and others excluded), binary oppositions result.¹⁸ A typical deconstructive reading would thus hold that the binary oppositions contained in a text make the text essentially irreconcilable.¹⁹ This dichotomous understanding of a text, in which one term is privileged over another holds the privileged term to be the one that is perceived to have the stronger association with the concept of *logos*.²⁰ *Logos*, in turn represents the dominant framework of ideas and beliefs through which the world is interpreted and according to which our interactions with the world are dictated.²¹ Thus, the privileged or dominant term, according to Derrida, represents presence, or the unified, the self-identical, while the subordinate other term represents absence, or the unformed, the transforming or the chaotic.²² Hence, the classical concept of logos has its roots firmly embedded in the conceptual logic of dualism, and as such, contains 'an ontological prejudice, in which the structure

18 Pam Papadelos, *Derridean Deconstruction and Feminism: Exploring Aporias in Feminist Theory and Practice* (2010) 32 <<http://digital.library.adelaide.edu.au/dspace/bitstream/2440/39506/2/01front.pdf>>.

19 Frederic Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act* (2011) <<http://courses.wcupa.edu/fletcher/special/jameson.htm>>.

20 Jack M Balkin, *Deconstructive Practice and Legal Theory* (1998)

<<http://yale.edu/lawweb/jbalkin/articles/decprac2.htm>>. Derrida believes that a privileging of speech over writing is a symptom of a more general bias in favour of presence as a foundational term in Western philosophical thought>.

21 Elizabeth Anderson, *Feminist Epistemology and Philosophy of Science* (2011)

<<http://plato.stanford.edu/entries/feminism-epistemology/>>.

22 Papadelos, above n 18, 32.

of the judgement (or proposition) refers to a divided [and essentially irreconcilable] reality.²³ In light of this, a logocentric *Weltanschauung* (or world view) is the primary target of deconstruction, as it is defined by a linguistic understanding of the world that excludes or absents other interpretations, and as such, the interpretation of a text cannot move beyond a certain point because the meaning shifts when read in light of other assumptions.²⁴ Deconstruction aims to move beyond this point.

In *Of Grammatology*,²⁵ Derrida argues that the binary oppositions are violent hierarchies that must be deconstructed because of their irreconcilable differences. He further argues that the deconstructions of such hierarchies are affected in two ways, which he refers to as double knowledge or *la Double Séance*.²⁶ This involves looking backwards into the past and forwards into the future and using repetition or 'iterability' (that is repetition and difference, alteration and singularity) to create new terms or series of terms called 'undecidables', which are outside the deconstructed system.²⁷ This process involves the existence of a non-presence that is always in operation to create *différance*. *Différance*, in turn, can be regarded as a means of grasping abstract ideas (such as justice for example) and challenging commonplace conceptions to allow for both the idea and its opposite come into play.

Since the history of ideas is the history of privileged conceptions, when an idea is considered or *différance* embraced, 'that strange repetition [] ties an irrefutable past to a future than cannot be anticipated'.²⁸ *Différance*, as the key theoretical basis of deconstruction, not only questions the basic operation of all philosophical thought which privileges presence over absence but also pervades all philosophical thought because it is constructed through language, and language is deconstructible.²⁹

23 Herbert Marcuse, *One Dimensional Thought* (2010)

<<http://www.marxists.org/reference/archive/marcuse/works/one-dimensional-man/ch05.htm>>.

24 Jameson, above n 19; Paul Patton and Terry Smith (eds), *Jacques Derrida: Deconstruction Engaged: The Sydney Seminars* (Power Publications, 2001) Introduction.

25 Jacques Derrida, *Of Grammatology* (The John Hopkins University Press, 1976) Chapter Two; originally published in France in 1967 under the title *De La Grammatologie*, by Les Editions de Minuit.

26 Ibid; Jameson, above n 19; Patton and Smith, above n 24.

27 Patrick Pinkerton, 'Remembering the Future: The Ethics of a New Beginning', (2010) 3(1) *Political Perspectives* 2.

28 Ibid.

29 Peter Goodrich et al (eds), *Derrida and Legal Philosophy* (Palgrave Macmillan, 2008).

Derrida's deconstruction theory thus provides the space to rethink the philosophical implications of questioning and presenting the resulting contingencies of traditional divisions that lead to irreconcilable differences and stem from the operation of an omnipresent non-presence (that is *différance*). It also serves to recompense for the historical power imbalances, of which the contradictory exigencies cannot simply be transcended throughout time, given the thousands of years of history behind them.³⁰ Since Derrida is predominantly interested in (re)-interpreting texts, his deconstruction analyses 'amount to a series of encounters with particular texts, contents and phenomena, [in which certain] characteristic features of experience, thought and 'writing' are displayed.'³¹

In the *Force of Law*,³² Derrida views the law as 'a system of rules that emerges in an original creative act of violence, in which sovereignty is asserted and maintained by force'.³³ As the law does not reflect justice by virtue of its construction, deconstruction bridges the gap by articulating itself between the two extremities of a law that 'claims to exercise itself in the name of justice' and a justice that 'demands for itself [to be] established in the name of a law that must be put to work'.³⁴ In turn, the oscillation between law and justice allows an *aporetic* structure to emerge in which justice can be reconceptualised through deconstruction as it 'exists in the interval between deconstruction and undeconstructibility'.³⁵ The process of deconstruction is not only complex but also takes time, so the frontier of justice is a future present.³⁶ Derrida thus adopts the structure of a promise, as a promise is not only a future present, but also escapes the traditional binaries of presence/absence, allowing the impossible to become

30 Patton and Smith, above n 24, 256. It is in particular the irreducible movement of repetition and difference, same and other, singularity and universality, and it is this double movement that includes *différance*.

31 Ibid.

32 Derrida, above n 25.

33 Goodrich et al, above n 29, Introduction.

34 Patton and Smith, above n 24, 257.

35 Ladders, above n 12, 117. In the *Force of Law*, Derrida presents three aporias that reveal the tension between law and justice to give space for justice. The first is situated in the interpretation of the law and the nature of the decision-making process that determines justice. The second is situated with the nature of justice for it to be viewed as something that cuts and divides, therefore allowing for the undecidable to appear. The third is situated with the condition that justice is to be enacted immediately, as it can only be realised when a decision results from a finite moment of urgency and precipitation rather than through reflection of theoretical or historical knowledge.

36 In this sense future present represents that which will come about but has not yet come about as it is still in the process of becoming what it needs to be for it to come about.

possible, hence deconstructible.³⁷ Derrida's method of deconstruction hence enables the experience of applying the law in a new and just manner to allow for the possibility of justice,³⁸ as the tension that emerges (that is *différance*) allows this to be possible.

Derrida's deconstructive techniques are further able to offer new interpretive strategies of critique, which undermine 'conventional interpretations through which doctrinal arguments are informed and serve to disguise ideological thinking'.³⁹ In that light, Derrida's deconstructive method is a powerful tool in legal scholarship, as it opens 'the possibility of emancipation from customary ways of thinking',⁴⁰ and critiques the existing ideologies that operate 'by privileging certain features while suppressing or deemphasising others'.⁴¹

Deconstructive analyses seek out the deemphasized, overlooked, or suppressed in a particular way of thinking or in a particular set of legal doctrines [and] explore how suppressed or marginalized principles return in new guises.⁴²

Even if justice may be outside or beyond law, the process of deconstruction bridges the gap between law and justice and allows justice to be brought into the law, as a deconstructive reading of a legal doctrine will inevitably point back to justice. Moreover, since justice demands a singular occurrence to respond to a new and uniquely tailored application of the law, the reversal of privileging allows for an opposite rule to emerge and an existing doctrine to become open to new interpretations.⁴³ As such, a deconstructive reading of the law is 'a leap from calculability towards incalculability'.⁴⁴

37 Goodrich et al, above n 29, 257. Because a promise is neither present nor absent, the notions of absence and impossibility can be made present and possible, hence deconstructible however indeterminate and intranscendental the ideal.

38 Ladders, above n 12, 118.

39 Balkin, above n 20.

40 Ibid.

41 Ibid.

42 Ibid.

43 Ibid. These aforementioned aspects of Derrida's deconstruction theory are particularly useful for bridging the gap between the intent of environmental and animal legislation and the laws themselves.

44 J B Maclean, *Towards a Progressive Theory of Law* (2008)

<<http://www.era.lib.ed.ac.uk/handle/1842/2666>>.

3.3. Deconstruction, Ecofeminism and the Law

Deconstruction engages many areas of scholarship and fosters a plethora of debates, as it enables the penetration of social constructions and undermines traditional interpretations. Deconstruction sheds light on the theories of ideological thinking and the way in which such ideologies are used, consciously or unconsciously. Since Derrida does not view deconstruction to be an enclosure in nothingness, but an attempt to discover the non-place or non-lieu of the other, it contains an ethical imperative to both question beliefs and understand the situations and views of others.⁴⁵ Derrida's deconstruction theory is thus a useful tool for feminist and ecofeminist scholars, as it not only presupposes an ethical relationship to others, in which recognition of others as others is required, but also offers avenues of resistance that embrace fluidity and are open to other perspectives.⁴⁶

Feminist jurisprudence advocates blame patriarchy for the oppression of women and focus on gender differentiation to expose that the injustices that are perpetrated against women in patriarchal society. Ecofeminists further argue that the oppression of nature and of women are inextricably linked, hence justice for women extends to justice for all life on Earth. In that light, the ecofeminist understanding of justice mirrors the Derridean concept of justice and political ethic, as both challenge existing ideologies and social and legal structures that sanction institutionalised violence and the many injustices that are inflicted upon humans and nonhuman others.⁴⁷

Due to the hierarchical dichotomies that result from the structural bias of Western philosophical thought, men are privileged over women as they have appropriated the faculty of reasonableness, while women (and every other being associated with women) are deemed with inferior qualities, such as irrationality and unreasonableness.⁴⁸ The classic example of binary oppositions is the presence-absence dichotomy, in which

45 Balkin, above n 20.

46 Ibid; Drucilla Cornell and Felicia Herrschaft, *The Interview* (2004) <<http://www.fehe.org/index.php?id=16>>.

47 Relevant to chapter five, which explores the law and treatment of animals in Australia and focuses on the sanctioned cruel practices that are used in intensive farming and in the culling practices of unwanted or feral animals.

48 Papadelos, above n 18, 36.

presence occupies a superior position over absence. When applied to the male-female dichotomy, male is viewed as dominant over female because male represents the presence of a phallus, whereas female represents the absence or loss of the phallus. When extended further to the law, the authority of the law is both questionable and illegitimate because the authority that supposedly grounds the law (that is presence or the phallus) is only legitimized when instituted. Accordingly, the authority upon which the law is established is essentially non-legal because it does not exist prior to the law; however the origins of law are undecidable, and are therefore neither legal nor illegal because they exist prior to the law.⁴⁹ Since the male-female binary constitutes the framework, through which the specificity of 'female' is recognised, Derrida's exposition of this dichotomy, and its extension to the law, is a useful tool for a feminist analysis of socio-political relations in particular. Because legal subjects are invariably produced through exclusionary socio-political practices that are concealed once a juridical structure is established,⁵⁰ the question of 'a subject before the law' is essential, and Mackinnon, for example, questions the exclusion of women from the construction of a subject that benefits only men.⁵¹ A feminist critique of the law further understands that the subject of 'feminism' fails to produce the outcome that it aims to achieve while it remains constrained by the very structures of power and control through which emancipation is ultimately being sought".⁵²

After many decades of arguing against the male construction of woman, as well as attempting to redefine woman, which was an exercise fraught with problems, as the epistemological difficulties inherent in the politics of identity or self-representation inevitably fosters divisions,⁵³ feminists tended to argue that a universal and satisfactory definition of woman was not possible, because women are all different.⁵⁴ In a sense, this argument is absurd, as the male construction of man and the associated qualities are also

49 Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority', *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell et al. (New York: Routledge, 1992), 3- 66, 14: "Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground."

50 Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, <http://selforganizedseminar.files.wordpress.com/2011/07/butler-gender_trouble.pdf>

51 Catherine MacKinnon, *Toward a Feminist Theory of State* (Harvard University Press, 1989) 98; Warren, 'Feminism and Ecology: Making Connections' (1987) 9 *Environmental Ethics* 4; Ynestra King, 'Feminism and the Revolt of Nature' (1981) 4 *Feminism and Ecology* 12.

52 Butler, above n 50.

53 Ibid, 39; Anderson, above n 21.

54 Papadelos, above n 18, 39.

restricted to a singular model and fail to incorporate differences among men, which clearly exist. This is, for example, evidenced in the use of the ‘reasonable man’ concept in English law, which, although understood to be a universal figure, conforms to the stereotype of an implicitly ‘white, Christian, heterosexual and male’.⁵⁵ While feminists appear to have no trouble accepting the singular model of the male construction of man (as they frequently use it as a basis upon which to model the opposite), they have trouble creating a singular and definitive model for woman because they acknowledge differences in women but apparently not in men.⁵⁶ Similarly, the fact that the Cartesian construction of the subject has been adopted as the dominant standard or norm from which feminism works,⁵⁷ and that Foucault is embraced by feminist scholars even though feminism is not mentioned in any of his works, shows that feminists have no problem employing and even adopting male models of thought as a basis of their critique of patriarchy. At the same time, they have significant trouble in producing alternative theories or models that are based on a female perspective and unite women.⁵⁸

Feminism is thus often viewed as inconsistent, if not contradictory, in its approach and also appears to have difficulties producing alternative, viable theories or models of thought that bring feminists together as a united front. There are however schools of feminist thought, such as for example that of ecofeminism, which allows both men and women common ground for critical examination of existing structures and ideologies. As discussed in chapter two, ecofeminism in fact encourages men to be involved in their critique of patriarchy and the relations between man and woman and man and nature, as their attack is not on men but on the institutionalised structures and modes of thought that have been adopted and are employed by both sexes.

For Derrida, Western metaphysical thinking, of which the knowing subject is a part, is structured on a ‘metaphysics of presence’ that is able to be deconstructed through *différance* because deconstruction aims to show that the notion of identity, which is basic or present, actually depends upon the notion of *différance*, as identity without

55 Ibid, 86. This position reflects that of Lynn White – see chapter 2, p. 28.

56 Ibid, 39. Cultural feminists argue that both differences among women, and from men, should be considered.

57 Papadelos, above n 18, 56. Particularly since, as Papadelos points out, the Cartesian subject is premised on an epistemology that supports and reinforces phallogocentric assumptions.

58 Ibid.

différance is dictated and learnt.⁵⁹ In light of this, *différance* allows for the space for ecofeminist perspectives and debates to take place.

As Derrida regards *woman* to act as a metaphor for *différance*, woman (the metaphor) can be used as a tool to deconstruct binary oppositions.⁶⁰ Derrida however points out that a reversal of binaries does not suffice for *différance* to effectively create change, but that it is the system upon which binaries are built that must be displaced and its binary logic transformed.⁶¹ In doing so, he argues, the area of a relationship to the other would be reached, in which ‘the code of sexual marks would no longer be discriminating’.⁶² After many decades of feminist activism, women are still disadvantaged. So rather than concentrating on the creation of a female identity or on women’s rights and struggles under the existing order of (patriarchal) binary oppositions, feminists who employ deconstructive techniques will break free from this order and generate a struggle that renders ‘more mobile, fluid and transformable means by which the female subject is produced and represented’.⁶³ In turn, by making use of the iterability and instability of socially constructed meanings, which makes them fluid and open to interpretive variance and play,⁶⁴ feminists using deconstructive arguments enlist a ‘play of forces that constitute the ever shifting and uncontrollable terrain of politics and identities’.⁶⁵

In *The Second Sex* Simone de Beauvoir points out that a class system is the result of the productive functions that stem from biological differences, so it is the inadequacies in the existing system that leads to the exclusion of women, not their biological differences.⁶⁶ Since deconstruction serves to undermine the gender divide that operates as a hierarchy in traditional political and social constructions, deconstructive arguments provide a broader critique and insight into social, political and cultural understanding of how subjects are constituted through institutional and discursive framework.⁶⁷ A

59 Ibid, 105.

60 Ibid, 48.

61 Ibid, 57.

62 Jacques Derrida and Christie McDonald, ‘Choreographies: Interview’ in N Holland (ed), *Feminist Interpretations of Jacques Derrida* (Pennsylvania State University Press, 1997) 23, 39.

63 Papadelos, above n 18, 2.

64 Balkin, above n 20.

65 Papadelos, above n 18, 2.

66 Simone de Beauvoir, *The Second Sex* (Penguin Books, 1972).

67 Balkin, above n 20.

deconstructive reading that challenges patriarchy's control over social and political constructions thus exposes the underlying injustices that result in the suppression and marginalisation of women and of all things associated with them.⁶⁸ Indeed, by confronting the established system of reality, which has to date shut out all other possibilities, new avenues that challenge traditional assumptions about past certainties also generate new ideas and in doing so, are able to bring about conceptual change,⁶⁹ as well as to create 'a future in which forces align in fundamentally different ways for past and present'.⁷⁰

In legal thought, deconstruction is used a critical tool to expose 'the gap or inadequation between the transcendent value of justice and its concrete instantiations in human culture'.⁷¹ Although Derrida regards violence as the constitutive element of the law, he also realises that justice must proceed through 'some field of significance', which is the law.⁷² Law and justice are therefore not separable in the sense that to do justice means that justice must be brought into the law. To facilitate this, the law must be reinterpreted in a way that justice is able to proceed on a level that interprets ideals within a legal system as well as being able to 'meet certain ideals to reinterpret what those ideals might mean'.⁷³ Derrida describes the deconstructive experience of questioning the authority of each law and tracing it back to its violent foundations as 'absolute alterity',⁷⁴ by which he means that the delivery of justice enables it to emerge from the *aporetic* structure, within which it is caught.⁷⁵ It is in this sense that Derrida regards deconstruction as justice, as it allows for the possibility of transcending established boundaries and creating a time and space for justice to emerge.⁷⁶

Like Derrida, feminists regard violence to be the constitutive element of the law, but as they blame patriarchy for the injustices resulting from this that lead to the oversight of women in the legal system, they argue that the foundations of patriarchy must be

68 Ibid.

69 Ibid.

70 Elizabeth Grosz, *Space, Time and Perversion: The Politics of Bodies* (Allen & Unwin, 1995) 193.

71 Balkin, above n 20.

72 Drucilla Cornell and Felicia Herrschaft, *The Interview*, above n 46.

73 Ibid.

74 Balkin, above n 20.

75 Ibid.

76 Ibid.

deconstructed for justice to be achieved. Thus, in their view, a logocentric *Weltanschauung* serves to privilege male desire and foster hierarchies of dominance/sub-ordinance relations, in which the marginalisation, if not exclusion of women are sanctioned. As bodies are ‘never simply and literally bodies but are always inscribed within a system of value differentiation’,⁷⁷ the privileged mark of sexual difference in patriarchal society (the phallus) not only extends to a phallogentric understanding of the body, but also to that of the relations between language and power and the construction and interpretations of the law.⁷⁸ Deconstructive justice therefore involves a reconstruction of the law on a metaphysical level to embrace new and other perspectives, including feminine and sexual differences. To date, equality discourses have not reconciled the differences between men and women, and Derrida, as well as many leading feminists argue that the only way that a woman can be a part of the existing order is to become a man.⁷⁹ However, when attempting to disturb the order, simply reversing the hierarchy is not effective either. It is necessary to move beyond the existing hierarchy into a direction that embraces ‘a new choreography of sexual difference’.⁸⁰ So, once the sexed body, which is one of difference, is deconstructed through *différance*, the body (in its metaphorical sense when referring to ‘the body of law’) is able to free itself from gendered embodiment and refigure itself in relation to violence and justice.⁸¹

Consequently, the change to the existing order in this direction will enable women, both literally and metaphorically, to operate as women outside the traditional bounds of gender. It is in this sense that Derrida considers that the law should occupy a neutral and non-gendered space,⁸² as it will then be able to undermine traditional thought that

77 Sara Ahmed, *Differences that Matter* (Cambridge University Press, 1998). They are gendered and racially marked; they have weight, height, age; they may be healthy or unhealthy; they may be able bodied or disabled.

78 Ibid, 29.

79 Papadelos, above n 18, 50.

80 Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (Routledge, 1991).

81 Ladders, above n 12, 123. Ladders argues that as *différance* also includes a way of ordering values that refer to political effects that are not at all neutral. Hence, when referring to the figure of blind justice on a courthouse and the grammatical gender of the law in French (*la loi*), which is Derrida’s native language, the law can also easily be regarded feminine and of a difference that can present a limit enabling it to refigure itself in a [specific] relation to violence and justice, based on sex.

82 Ibid.

privileges men over women.⁸³ In turn, Derrida's methodology is an effective way of moving beyond gender constraints and creating a more just society for all excluded or non-present others, human and nonhuman others, so that all living species can be viewed from a different and non-biased perspective. As argued in chapters four and five, the treatment of nature and of animals is not gender neutral in law or in social theory because they are connected to women, whether through biological or linguistic associations. Biological associations include reproduction and caring for the young, for example, and linguistic associations can be found in terms such as 'mother nature' or 'mother earth'. As feminist jurisprudence analyses traditional notions of exploitation, domination of all excluded others that govern the way in which society and legal theory, and practice relates to the environment and to animals,⁸⁴ Derrida's deconstructive methodology is able to create the space for this conversation to take place.

This does not infer that gender does not or should not exist, but rather that gender should not create a hierarchy, in which one gender is privileged above the other based on their sex. Derrida recognises the feminist struggle and the attempts of feminists to challenge patriarchy, but argues that many of the strategies used in the past work in opposition to deconstruction.⁸⁵ Therefore, by no means is Derrida suggesting that woman as a subject should be dispensed with, but rather that woman as a subject should be deconstructed, as he considers it important to be strategic about identity politics because the effects that flow from subjectivity are always inscribed in language.⁸⁶ In fact, Derrida regards women to be in an excellent position to challenge the metaphysics of presence because of their subordinate status. The term 'woman' reveals how the current symbolic order is maintained on the forced exclusion of women, however when acting as a metaphor for *différance*, it can serve to subvert traditional meanings and challenge the notions upon which meanings are built.⁸⁷

Moreover, since the concepts of 'woman' and 'feminine' are able to challenge the logic of non-contradiction by showing that the grounds for the associated metaphysical assumptions are undecidable or unstable, *différance* 'offers feminism a way that does

83 This view is articulated by both Ladders, above n 12, and Cornell, above notes 70 and 80.

84 Mackinnon, above n 51; Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 70.

85 Papadelos, above n 18, 77.

86 Derrida, cited in Papadelos, above n 18, 48.

87 Ladders, above n 12, 123.

not deny differences, but at the same time does not create false hierarchies'.⁸⁸ Therefore, when *différance* is applied to the metaphorical extension of 'women', deconstruction serves as an avenue of facilitating, if not effecting political change.⁸⁹ As Derrida maintains, by constantly reinventing the other, 'our response to the other will reinvent us'.⁹⁰ Derrida's criticism of the discourse of terror, his critique of apartheid in South Africa and vehement opposition to totalitarian regimes and his vociferous defence of animal rights reveal a deep concern with the liberation of subjugated others.⁹¹ For Derrida, animality represents 'the limit upon which all the great questions are formed and determined',⁹² along with the concepts that attempt to delimit what is 'proper' to man, which includes 'the essence and future of humanity and of ethics and politics, the law and human and nonhuman rights, crimes against humanity, genocide, and so on'.⁹³ So, both Derrida and ecofeminists have a similar vision of a democracy to come, and in that light, deconstruction and the inclusion of *différance* serves to 'challenge the constitutive structures of violence and sovereignty' and 'track the trace of a nonhuman life across all discourses and practices that are contained within contemporary politics'.⁹⁴

3.4. Deconstructing Exclusion through *Différance*

Deconstructive arguments mainly involve the identification and analysis of conceptual oppositions, followed by a temporary reversal. The goal is to locate the determining infrastructure, then reverse the hierarchy that keeps it in place, and finally to displace the binary through the introduction of a new or hinge term.⁹⁵ As hierarchical statements about any set of ideas privileges one above the other, they all lend themselves to deconstructive analyses.⁹⁶ Derrida's most cited example is the opposition between

88 Papadelos, above n 18, 79.

89 Ibid, 78–9.

90 Derrida, cited in Papadelos, above n 18, 80

91 Judith Butler, *On Jacques Derrida* (2004)

<<http://www.philosophypathways.com/newsletter/issue94.html>>.

92 Paul Livingstone, *Political Animals: Derrida on Sovereignty and Animality* (2010)

<<http://philpapers.org/rec/LIVPAD>>.

93 Ibid.

94 Ibid.

95 Papadelos, above n 18, 70. Hinge terms include difference, trace (presence and absence), supplement (excess and lack makes up for a deficiency in the logic of binaries), pharmakon (poison and cure), dissemination (fertilisation and fruitlessness), and arche-writing (speech and writing),

96 Balkin, above n 20.

speech and writing, in which speech is traditionally favoured over writing. The consequence of a reversal, or of privileging writing over speech, investigates the temporary substitution of a new priority, which can then further be reversed and substituted. Therefore, the process of deconstruction is to open the privileged term to new possibilities that may arise from any given arrangement without establishing new conceptual bedrocks.⁹⁷ As deconstruction is a never-ending process that has no boundaries, multiple and often conflicting meanings may be revealed, as meanings are the consequence of language and a change in meaning can bring about radically different visions of moral and legal obligation.⁹⁸ In that light, deconstruction is a means for ‘intellectual discovery that aims to derive at new insights when the privileging is turned on its head [to challenge] accustomed modes of thought [and] expose their biases.’⁹⁹

When applied to law and justice, Derrida’s position is very clear: deconstruction is justice. A mere reinterpretation of legal principles and their conceptual distinctions can radically shift meanings when placed in a new context of judgement, without having to destroy them.¹⁰⁰ Furthermore, as the law involves the privileging of particular conceptions of human nature, the deconstruction of legal principles can challenge the ideology of worldviews. Since meanings of words in law are dependent on the context of the linguistic understandings of human capacities that judge the importance of the context of meaning and draw analogies from other aspects of human rationality, a challenge to the theory of meaning itself arises. For Derrida, violence is also found in the construction of text, by examining the construction of legal texts, including legal principles, precedents and written statute law, the privileging of one gender or species over another becomes poignantly evident,¹⁰¹ as illustrated in chapters four and five of this thesis. Papadelos’ example of the ‘reasonable man’ in English law clearly illustrates

97 Ibid. One term may be privileged because it is considered the general, normal, central case, while the other is considered special, exceptional, peripheral or derivative. Something may also be privileged because it is considered more true, more valuable, more important, or more universal than its opposite.

98 Papadelos, above n 18, 67.

99 Balkin, above n 20.

100 Ibid. Deconstructive analysis attempts to explore the similarity or difference that is suppressed or overlooked by emphasising the importance of context in judgment and the many changes in meaning that accompany the changes in contexts of judgment through nested oppositions. A nested opposition, in turn, is an opposition in which the two terms bear a relationship of conceptual dependence or similarity as well as conceptual difference or distinction

101 Balkin, above n 20; Cornell and Herrschaft, above n 46.

the privileging of one human species (in terms of race or ethnicity) over another, hence it is not a figure of inclusion but one of exclusion in that the law, as it excludes certain groups, that is all men who are not ‘white, Christian and heterosexual’ from its normative structure.¹⁰² Cornell stresses the need to reconceptualise equality ‘beyond the likeness model’¹⁰³ so that differences can be incorporated into the law. In that light, *différance* is based on thoughts that are outside those which are sanctioned and disturbs the classical economy of legal doctrines by deconstructing their hierarchical binaries.¹⁰⁴ Since meanings of words in law are dependent on the context of the linguistic understandings of human capacities that judge the importance of the context of meaning and draw analogies from other aspects of human rationality, a challenge to the theory of meaning itself arises.

Given that the standards of the law have no canonical linguistic formulation or words to determine its content and standards, the law is unable to distinguish and explain the relations between the meanings of words and the ability to apply them in their true sense.¹⁰⁵ The law therefore lends itself to deconstructive analyses because legal principles necessitate privileging even if conceptual oppositions of meanings are disguised, or their justifications or boundaries are unclear or undermine themselves, and in that light alone, deconstructive analysis is very useful tool for ideological critique because it seeks out the deemphasized, overlooked, or suppressed.¹⁰⁶

For Cornell, Derrida’s reference to justice in *the Force of Law* is to be based on an implied relationship that stems from a common sense notion of being just and doing justice.¹⁰⁷ The law must therefore articulate a set of ideals that do the most justice within the legal system as possible. Cornell uses Justice Blackmun’s decision in *Roe v Wade* as an example of how to be just and to do justice through the law by venturing into an imaginary domain and exploring the possibilities in which the law can be reconceptualised. This case was decided primarily on the Ninth Amendment to the United States Constitution, a part of the Bill of Rights, and it was held that the abortion

102 Papadelos, above n 18, 86.

103 Cornell, cited in Papadelos, above n 18, 86.

104 Papadelos, above n 18, 72.

105 Timothy Endicott, *Law and Language* (2010) <<http://plato.stanford.edu/entries/law-language>>.

106 Balkin, above n 20.

107 Cornell and Herrschaft, above n 46.

law in Texas violated women's constitutional rights.¹⁰⁸ As Blackmun did not have the jurisprudential resources to proceed further through to the ideals of freedom and equality, his sets of ideals are as close to justice as possible, even if the law does not signify this.¹⁰⁹ Due to the jurisprudential – or epistemic – links between law and justice, by drawing on the essential ideals of justice and then interpreting these within the legal system, justice can be brought into the law. In that light, deconstruction is justice, and Derrida's notion of justice as an irreducible horizon that can be articulated through a set of ideals. This brings justice into a material existence, even if there are layers upon layers to unpeel to make a legal system work as closely to justice as possible, and even if the work is never completed or is itself never simply justice.¹¹⁰

According to Cornell, the most profound lesson of Derrida's deconstruction theory is that the law should not rest with an aesthetic idea because an aesthetic idea 'makes demands on you put by that other, because that other is something you can never imagine'.¹¹¹ Hence justice is able to be pursued through negotiating an ideal or an 'imaginary domain', which Cornell identifies as the moral and psychic space that operates to open up the public sphere in two senses, in which the first demands self-reflection and the second demands an actual space of debate.¹¹² As Derrida's politics are not only tied up with an economy of violence but also with friendship, hospitality and democracy, the potential exists for the imaginary domain to initiate change on other levels.¹¹³ For example, Derrida's response to the notion of 'committing the crime of hospitality' opens up an imaginary domain by asking questions, such as what it means to be hospitable to immigrants, who, without papers, are termed as illegal immigrants. By reworking the meaning of the word hospitality and displacing it from its original context and placing into the context of an ideal, that is what is the 'ideal' meaning of hospitality, Derrida was in fact putting the crime of hospitality into play, and questioning the responsibilities of the host country towards these persons.¹¹⁴ As the

108 *Roe v Wade* 410 U.S. 113 (1973).

109 Cornell, above n 80.

110 Ibid.

111 Ibid.

112 Ibid.

113 Papadelos, above n 18, 85. By violence, Derrida is referring to the materiality of language and its effects on others.

114 Cornell, above n 80; United Nations, *The Universal Declaration of Human Rights* (2011) <<http://www.un.org/en/documents/udhr/>>. This question thus also aptly applies to Australia's current

imaginary domain must also be able to operate at a level that does not recognise hierarchies, negotiations and reconciliation that oppose ignorance but are able to be universally materialised through the negotiation of different kinds of politics around complex relationships in an aesthetic place,¹¹⁵ the veil of ignorance cannot be worked through if negotiation is not risked because the ideology will freeze and no longer keep that space open to debate. A second example is Derrida's work on forgiveness towards the horrific crimes against humanity that were committed in South Africa and the granting of amnesty to the perpetrators.¹¹⁶ This, for Cornell, is an example of the demand for justice to do the impossible. To do the impossible is to forgive on both sides, including horrific acts for which there was no reparation and justice seemed impossible; however restoration cannot be brought out by revenge or any traditional notions of doing justice, so working through the impossible is finding a way to forgive, as in the end there is no reconciliation without justice.¹¹⁷

Derrida maintains that some decisions claim to recognise legislative and executive force while others claim to recognise 'objective science'.¹¹⁸ Since reason and law are not gender neutral but linked to 'phallogocentric' and 'logocentric' thought, Papadelos applies a feminist perspective to illustrate this point. Papadelos uses the use of an example of a piece of legislation in Australia that used to state that employers need not pay women the same rate as men for the same position because objective theories demonstrated that men worked more efficiently than women.¹¹⁹ Papadelos argues that it was not a case of discrimination against women per se but of a perspective based on an objective study

situation concerning refugees arriving by boat, to whom the Australian Government also refers to as illegal, although it is not illegal to enter another country without the appropriate paperwork if there is a fear for one's life or personal safety. For example: Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty; Article 3: Everyone has the right to life, liberty and security of person; Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

115 Cornell, above n 80.

116 Ibid.

117 Ibid. According to Cornell, what fascinated Derrida about South Africa is moving within this impossibility by asking people to do the impossible.

118 Papadelos, above n 18, 88.

119 Ibid.

that was nevertheless biased because a close review of the way in which women are constructed would have revealed that there is no natural status in the man/woman binary.¹²⁰ Since masculine identity perpetuates violence, *différance* is able to penetrate the shield that protects masculine identity and create a space to for a new and otherwise indiscernible conversation to take place.¹²¹ Derrida's methodological approach thus opens to interpretive strategies that deconstruct binary oppositions and allow for *woman* to act as a metaphor for *différance* that is able to be used as a tool.¹²² As ecofeminists focus on the injustices perpetrated against women, nature and nonhuman animals, Derrida's methodology of deconstruction provides the ideal space for ecofeminist debates to take place.

Feminist legal theorists, such as Drucilla Cornell and Catherine MacKinnon, consider that Derrida's methodological approach enables them to think in innovative ways in their radical efforts to re-imagine what it is to be a woman. As Derrida's deconstructive theory rests upon the premise that 'there is nothing outside of the text',¹²³ Cornell argues that it is impossible to merely reject the traditional construction of the womanhood and that feminists must rely on a feminine 'voice' and a feminine 'reality' that can be identified as such and correlated with the lives of actual women without resetting the trap of rigid gender identities.¹²⁴ Cornell further argues that if feminists are to challenge the situational sexism that women endure within the legal system, they must also challenge the current gender divide as it is implicated in the limits women have experienced on the possibilities of the legal reform and transformation.¹²⁵

Indeed, feminist legal scholars, such as Mary Joe Frug, have criticised the law for reflecting a masculine viewpoint which neglects a feminine perspective. For Frug, the use of an abstract, rule-orientated and apparently neutral style of analysis relies on characteristics associated with cultural stereotypes defined by men, and a more

120 Ibid.

121 Jacques Derrida, *Speech and Phenomena* (John Wild ed, David B Allison trans, Northwestern University Press, 1973) 91–2; Jacques Derrida, *Dissemination* (Barbara Johnson trans, The University of Chicago Press, 1981) 128–132.

122 Papadelos, above n 18, 48.

123 Jacques Derrida, *Of Grammatology*, above n 25, 158.

124 Cornell, *Beyond Accommodation*, above n 80, 3.

125 Ibid, 9.

contextualised approach would give voice to a ‘feminine’ viewpoint.¹²⁶ Frug refers to the case of *Allied Van Lines v Bratton* to highlight the implications of gender-related bias when ‘masculine’ autonomous, aggressive and self-reliant conduct is valued, and relief is denied in the case of a person who has conducted herself in a ‘feminine’ way.¹²⁷ Frug argues that the conduct that Mrs Bratton displayed was consistent with characteristics commonly associated with women, who are socialised to consider and value the feelings of others above their own. Hence the court’s refusal to evaluate the substantive content of the standardised contract is not a neutral judgment but a preference for male over female personality traits.¹²⁸ Frug concludes that the court’s approach to this might have been quite different had the court been sympathetic to gender issues and had ‘valued feminine as well as masculine personality traits’.¹²⁹

While for Frug, ‘[p]ostmodern feminists attempt to overcome the male/female opposition by accepting it and at the same time disrupting it’¹³⁰ and for Cornell, the feminine voice is a way of re-imagining the world, for MacKinnon, women must abandon their affiliation with the feminine because any association with the feminine is a reinstatement of oppression.¹³¹ In MacKinnon’s view: ‘difference is the velvet glove on the iron fist of domination. This is as true when differences are affirmed as when they are denied, when their substance is applauded or when it is disparaged, when

126 Mary Joe Frug, ‘Re-Reading Contracts: A Feminist Analysis of Contracts Casebook’ <<http://www.wcl.american.edu/journal/lawrev/34/frug.pdf?rd=1>>; Mary Joe Frug, ‘Rescuing Impossibility Doctrine: A Post-modern Feminist Analysis of Contract Law’ (1992) 140 *University of Pennsylvania Law Review* 1029. Such a viewpoint may be subjective and context-specific or emphasise the role of values such as reliance, co-operation, respect for the other and compromise.

127 *Allied Van Lines v Bratton* 351 So 2d 344 (Fla 1977). Mary Joe Frug, *Post-modern Legal Feminism* (Routledge 1992) 98-101 In this case, two women brought actions against a national moving company after their household goods were destroyed in transit. Both women argued that, although they had both signed the forms containing the alleged terms of the contract, they should not be bound by the provisions in the contract because they had not read the provisions. The court rejected Mrs Bratton’s argument on the ground that signature was sufficient to bind her to the agreement (in accordance with the finding in *L’Estrange v F Graucob Ltd* [1934] 2 KB 394) but accepted Mrs McNab’s argument because she had asked questions and had been given incorrect information. Frug argues that a self-reliant view of personhood was adopted by the court. Mrs Bratton was passive with respect to her own rights and did not read or ask questions about the document she signed but Mrs McNab was active in protecting her rights, alerting the agent to her desire for maximum insurance. According to Frug, the court’s approach was to ignore the power imbalance in the relationship between the agent and Mrs Bratton. The agent’s control was in the form of familiarity with the standard form contract and his status as a man. In turn, for Mrs Bratton to have made enquiries in regard to the contents of the document would have required her to challenge these forms of power.

128 Ibid, 100.

129 Ibid.

130 Frug, *Post-modern Feminist Analysis* (1992), above n 127, 164.

131 MacKinnon, above n 51, 150.

women are punished or when they are protected in its name'.¹³² MacKinnon argues that, as the standard of authority and control, men are in the right for being men and their domination over women fully manifests itself in sexual intercourse: 'women get fucked, men fuck'.¹³³ Feminist legal scholars, such as Elisabeth Sheehy, who are influenced by the works of Catherine MacKinnon, evaluate legal practices and policies to assess 'whether they operate to maintain women in a subordinate position'.¹³⁴ According to Sheehy, if the policies and practices are justified on the basis of differences between men and women, 'then the differences themselves must also be examined to ascertain whether they are consequences of social or economic oppression'.¹³⁵

In a similar tune to Derrida in the *Force of Law*, MacKinnon argues that the force of law underpins its legitimacy and in turn the legitimacy of the law conceals its force:

In male supremacist societies, the male standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all. Under its aegis, men dominate women and children [and nature].... Family and kinship rules and sexual mores guarantee reproductive ownership and sexual access and control to men as a group. Hierarchies among men are ordered on the basis of race and class, stratifying women as well. The state incorporates these facts of social power in and as law. Two things happen: law becomes legitimate, and dominance becomes invisible.¹³⁶

Feminist jurisprudence thus enables women to be given an authentic voice and by operating from a dialectical opposition it opens the imaginary space to allow speculation of how the law might function from an oppositional perspective. The traditional conceptual and legal frameworks that perpetrate violence are thus

¹³² Ibid, 124.

¹³³ Ibid. Hence by linguistic extension, the term 'get fucked' is a reference to power over women.

¹³⁴ Elisabeth Sheehy, 'Personal Autonomy and the Criminal Law: Emerging Issues for Women' in *The Hidden Gender of Law* (R. Graycar and J.Morgan, 2nd ed., Sydney: Federation Press, 2002), 42.

¹³⁵ Ibid.

¹³⁶ MacKinnon, above n 51, 236.

deconstructed and in doing so, the belief in the superiority of one group over another is exposed as being not only extremely dangerous but also unfounded.

3.5. Conclusion

As the law systematically regulates community life according to standards considered as binding by its members and institutions, if the standards change, so too will its institutions. Once women and children were regarded to be the property of men and rape, domestic violence and child abuse were merely frowned upon. Today, there are laws in place that prohibit rape, domestic violence and child abuse. So changing the status of women and children so that they are no longer held to be the property of men afforded them legal protection. This is what animal rights advocates hope to achieve in terms of abusive animal practices. That does not mean that abuse towards women and children no longer happens and that it would never happen again in the case of animals, but at least standards have changed and the laws are in place.

Once the aim of the law is to be just and do justice at all times, an actual space will be created to allow for the incorporation of a new moral space, or moral standards. In turn, the focus of the law would shift from penalising those who exceed sanctioned boundaries, such as pollution limits or harm to animals to not allowing these things to happen at all. That would be just and would serve justice. Since Derrida's deconstruction theory advances knowledge and unsettles old certainties about concepts, it leads to new potentialities for self-definition and cautions against a humanist politics of complicity.¹³⁷ If not, we will be continue to be 'hostage to the way things are now, to a human matrix constructed through gender identity [that] is belied as an illusion and fails to understand the full significance of the Derridean insight that reality is only there as a textual effect'.¹³⁸

Derrida's method of deconstruction and political ethic, coupled with the ecofeminist vision of creating justice for all life on Earth, is perhaps the best starting point to generating the real and much needed change, given that current means of dealing with

124 Papadelos, above n 18, 3.

125 Cornell, above n 80, 18.

the world, its people and the environment is ineffective, as evidenced in the escalating destruction of the environment and extinction of species. Moreover, Derrida's focus on a future present and his work on forgiveness illustrate the potential for justice to do the impossible by moving beyond the constraints of possibility. Furthermore, the employment of Derrida's methodology and politic ethic enables ecofeminist jurisprudence to engage in its consciousness raising tradition, and to steer legal theory and practice into new directions through the dismantlement of male-dominated ideologies and power structures that continue to oppress women, nature and nonhuman others.

CHAPTER FOUR: CLIMATE LAW IN AUSTRALIA

Case Study (1): The Carbon Tax—Australia’s Response to Climate Change in the Form of the Clean Energy Package

Case Study (2): The *Anvil Hill* Case—The Role, Purpose and Effectiveness of Public Participation in Environmental Decision-Making

4.1. Introduction

This chapter begins with a general overview of the problems associated with climate change, firstly with a global context, followed by the situation in Australia’s, both on an international and nation level. The views held by world leaders, Australian politicians, the Australian government and the Australian public are then considered in light of existing and proposed changes to environmental legislation. The purpose of the overview provided in this chapter is to draw attention to the devastation on both nature and its species that results from human interference with the natural world. This chapter thus draws on the material provided in chapter two, 2.2 and 2.2.1 in particular, and then places it within an Australian context. A further purpose of the overview is to provide the setting for the two case studies that are subsequently explored, and to identify the gaps between specific environmental legislation and the original legislative intent.

The two case studies at the focus of this chapter are the Australian Federal Government’s recently introduced carbon tax, and the New South Wales *Anvil Hill* case. These two case studies have been specifically selected because they epitomise the conflict between law and justice, as well as represent both topical and current issues in Australian environmental law and politics; namely the ongoing community opposition to the Coal Seam Gas (CSG) industry and the continuing debates in regard to the effectiveness of the carbon tax as a mechanism of reducing Australia’s carbon footprint.

The first case study examines the parliamentary speeches and public opinions surrounding the carbon tax debate. The carbon tax was introduced in July 2012, in response to Australia’s obligations under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (‘Kyoto Protocol’) to limit its greenhouse

gas emissions to eight per cent above its 1990 levels during its first commitment period (2008–2012).¹ In spite of vehement disapproval by the opposition party and divided opinions among the Australian public,² it was passed by the Senate on 8 November 2011 with a vote of 36:32, and by the House of Representatives on 22 November 2011 with a vote of 74:72. Although the government proposes the carbon tax to be part of a bigger picture in the form of a clean energy package with a renewable energy refund, the tax itself is aimed at big polluters, albeit as a deterrent for emissions of large quantities of greenhouse gases.³ As such, it fundamentally allows the production of ‘dirty’ energy to continue, as long as the big polluters pay.⁴

Opponents of the carbon tax thus challenged the view that a tax on carbon emissions was ‘the best way to stop businesses polluting and get them to invest in clean energy.’⁵ One of the main arguments was that the opportunity cost of directing resources into the development of cleaner technologies would be seriously comprised through the unnecessary investment in a carbon tax.⁶ A further view held by economists in particular was that the implementation of a carbon tax was economically unfeasible, driven by unsound arguments based on risk acceptance and risk aversion. The general public, on the other hand, viewed its imminent introduction as a major betrayal of an electoral mandate on the part of Prime Minister Gillard, who was initially adamant that

1 Australian Government Department of Climate Change and Energy Efficiency, *Tackling the Challenge of Climate Change* (2011) <<http://www.climatechange.gov.au/climate-change.aspx>>.

2 Mitch Fifield, *Clean Energy Bill: 2nd Reading Speech* (2011) <<http://www.mitchfifield.com/Media/Speeches/tabid/71/articleType/ArticleView/articleId/516/2nd-Reading-Speech--Clean-Energy-Bill-2011-and-related-Bills--2-November-2011.aspx>>. Compounding the fact that this government lied to the electorate at the last election, compounding the fact that they have not provided proper parliamentary scrutiny, what they are now doing is truncating the limited parliamentary scrutiny that is available. This is appalling. This bill should be opposed. This legislation should be opposed.

3 United Nations Environment Programme, *Rio Declaration on Environment and Development* (2011) <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>>. The Polluters pay principle is mentioned in Principle 16 of the Rio Declaration on Environment and Development, and this mechanism is employed by countries, such as Finland, Sweden and Great Britain. ‘Principle 16: National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment’.

4 Ted Norhaus, *The Flawed Logic of the Cap and Trade Debate* (2009) <<http://e360.yale.edu/content/feature.msp?id=2153>>. The answer lies not in making dirty energy more expensive but in making clean energy cheap.

5 Julia Gillard, *Australian Labor Party: Official Biography of Julia Gillard* (2011) <<http://www.alp.org.au/julia-gillard/>>.

6 Scott Ryan, *Second Reading Speech: Clean Energy Bill and related Bills* (2011) <<http://scottryancom.au/speech/second-reading-clean-energy-bill-and-related-bills-2011-2>>.

the carbon tax would not be introduced under her leadership. The conflicting views on the part of politicians, scientists and economists further served to heighten the negative sentiments towards the carbon tax, as they made ‘the public unsure of what to believe and politicians unsure of where the majority opinion lies’.⁷ The parliamentary speeches and public debates examined in this case study thus bring to light the conflicting views on notions of justice and its incorporation into the law. They further signal that the priorities held by both parliament and public opinion essentially stem from the dichotomy that flows from the Western rationale, namely social/environmental justice versus economics.

The *Anvil Hill* case study concerns public participation in environmental decision-making, as provided under Part 3A the New South Wales *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act). This section of the EPA Act has recently been repealed, after having undergone numerous amendments, following the case of *Gray v Minister for Planning* [2006],⁸ in which many flaws were successfully exposed. In effect, what has happened since this case is that the New South Wales government has moved further away from the recognition that local communities have relevant expertise and interests in planning outcomes, that decision makers do not always make the right decisions, and that the preservation of the environment ought to outweigh the importance of economic growth.⁹

Public participation in environmental decision-making and natural resources management is an essential feature of democratic good governance strategies and cross-sectoral coordination, as it provides an avenue through which the public is able to voice its opinion concerning proposals that are considered unjust, or are deemed to have potentially harmful effects on the environment and/or the local community. Public participation or involvement in matters of decision-making is principle 10 of the *Rio Declaration on Environment and Development*, and was one of the key features

7 Mike Hulme, *Why We Disagree about Climate Change* (2011) <<http://www.land-environment.unimelb.edu.au/deanslectures/>>; Åsa Wahlquist, *Communicating Complex Science in the Era of Masterchef* (2010) <<http://www.land-environment.unimelb.edu.au/deanslectures/asawahlquist-DLS2010.pdf>>; Cribb, above n 12.

8 *Gray v The Minister for Planning and Ors* [2006] NSWLEC 720.

9 Ian Ratcliff, Jessica Wood and Sue Higginson, *Technocratic Decision-Making and the Loss of Community Participation Rights: Part 3A of the Environmental Planning and Assessment Act 1979* (2012) <http://www.edo.org.au/edonsw/site/part3a_article.php>.

promoted at the United Nations World Summit on Sustainable Development (WSSD) held in Johannesburg.¹⁰ Also in the Brundtland Report of the World Commission on Environment and Development (WCED), it is a requirement that interested groups are well-informed and active participants.¹¹ Therefore, most planning and environmental statutes in Australia contain provisions for public participation in the decision-making process of development proposals.¹² However, as such proposals usually pertain to an economic objective and are customarily considered within the context of an overall national development plan, public participation does not always hold force. It is particularly when values conflict, that laws and policies are amended to protect economic interests.¹³ Developers have also become increasingly politically skilled and powerful project proponents. To obtain Ministerial approval, they employ approaches, such as to either claim that their project is too big and/or too important and hence requires enabling legislation, or to alternatively seek avoidance of assessment procedures by stating that their project is too small, which may essentially involve breaking the project up into smaller pieces.¹⁴

In the detailed discussion of the case studies in this chapter, the conflict between environmental justice and environmental legislation is brought to light. As enounced in chapter one and examined in chapter three, it will be established that the environmental legislation that is currently in place in Australia today is, in essence, aimed at managing destruction (or determining the extent to which it is permitted), rather than preservation. However, since the epistemic links to justice are still clearly evident in the fundamental

10 United Nations Environment Programme, (2011). Principle 10: Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. United Nations Environment Programme, *Capacity Building for Sustainable Development: An Overview of UNEP Environmental Capacity Development Initiatives* (2011) <http://www.unep.org/Pdf/Capacity_building.pdf>.

11 United Nations, *Report of the World Commission on Environment and Development: Our Common Future* (2011) <<http://www.un-documents.net/ocf-02.htm#I>>.

12 Section 123 of the Environmental Planning and Assessment Act 1979 (NSW) permits any person to approach the Court to seek to enforce any breach or apprehended breach of the law, and Section 475 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) extends this to non-government organisations (NGOs).

13 Mark Parnell, *Public Participation in Environmental Decision-Making* (2010) <<http://www.edo.org.au/edosa/research/aialpaper.htm>>.

14 Jeff Smith, *The changing Nature of Environmental Law: Recent Developments in Public Participation*, <<http://www.edo.org.au/edonsw/site/pdf/presentations/public.pdf>>

objective of environmental law, if indeed the law's substantive ends are to guide 'human conduct to consider consciously and to act to maintain the natural systems of the biosphere that sustains human life',¹⁵ legislation should reflect this goal. Environmental justice is about doing the right thing, not about managing the extent to which the wrong thing is permissible; so there is an inherent and fundamental clash between the ideal role and purpose of environmental law and the actual legislation. Furthermore, as per Principle 20 of the *Rio Declaration* (1992),¹⁶ Chapter 24 of *Agenda 21* (1992),¹⁷ the strategic objectives identified at the *Beijing Declaration and Platform for Action* (1995),¹⁸ paragraph 25(a) of the *Johannesburg Plan of Implementation* of the 2002 WSSD, and the 2015 targets set in the *Millennium Development Goals*,¹⁹ women are encouraged to participate in action plans in all areas of and at all levels of decision-making processes, including the drafting of or amendments made to legislation, policies and programmes. Studies reveal that women's input in decision-making is particularly valuable because men tend to focus on assets while women focus on welfare:

Study after study has taught us that there is no tool for development more effective than the empowerment of women. No other policy is as likely to raise economic productivity, or to reduce infant and maternal mortality. No other policy is as sure to improve nutrition and promote health -- including the prevention of HIV/AIDS. No other policy is as powerful in increasing the chances of education for the next generation. And I would also venture that no policy is more important in preventing conflict, or in achieving reconciliation after a conflict has ended. But whatever the very real benefits of investing in women, the most important fact remains:

15 Nicholas A Robinson, *Comparative Environmental Law: Evaluating How Legal Systems Address Sustainable Development* (1997)

<http://www2.hmc.edu/www_common/humsoc/paulweb/readings2.html>; United Nations Division for Sustainable Development, *Johannesburg Plan of Implementation: Protecting and Managing the Natural Resource Base of Economic and Social Development* (2011)

<http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter4.htm>.

16 United Nations Environment Programme, *Rio Declaration on Environment and Development* (2011)

17 Ibid; United Nations Division for Sustainable Development, *Johannesburg Plan of Implementation: Protecting and Managing the Natural Resource Base of Economic and Social Development* (2011)

<http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter4.htm>.

18 United Nations, *Beijing Declaration and Platform for Action* (1995)

<<http://www.un.org/womenwatch/daw/beijing/platform/>>.

19 United Nations, *Millennium Project* (2011) <<http://www.unmillenniumproject.org/>>.

women themselves have the right to live in dignity, in freedom from want and from fear.²⁰

Women's input in decision-making is also crucial for the purposes of this thesis, as is the metaphorical extension of 'woman' for *différance* in the deconstruction of existing policies and legislation and their reconstruction from an ecofeminist perspective.²¹ Particularly from a 'care ethic' perspective, the fact that women focus on welfare rather than on assets brings a social conscience to the fore, which upholds that there is no such thing as benevolent violence or destruction. Furthermore, the fundamental right for women to have the right to live in dignity, in freedom from want and from fear, as maintained by Kofi Annan, when applied metaphorically, extends to all excluded others. A deconstructive analysis of a legal system that sanctions violence and destruction will therefore create the space to enable *différance*, in the form of an ecofeminist voice, to speak on behalf of nature and its species. Moreover, as the law is also a reflection of the society that it regulates, the social conscience that is brought to the fore through the inclusion of *différance* is bound to have some influence public opinion.

The aim of this chapter is therefore to examine the selected case studies through ecofeminist lens to expose the injustices that are inherent in current environmental legislation with view to bridging the gap between law and justice, and bringing justice into the conversation, based on a social conscience, which is in turn, based on moral rightness.

4.2. Climate Change: A Global Overview

With humans, trouble is never far away. Salinity, greenhouse, chemical contamination of land, air and water; loss of species and new

20 Kofi Annan, *Breaking Barriers: Gender Perspectives and Empowerment of Women in Least Developed Countries* (2011)

<<http://www.unohrrls.org/UserFiles/File/Publications/Genderperspectives.pdf>>.

21 See chapter 3, 3.3.

pandemics have been among the milestones on our march into the future ‘.²²

Climate change is understood to be global problem that requires a global solution. It impacts on the biodiversity values that affect habitats and species around the world, as well as on ecological and biological processes that result in the artificial warming of the Earth’s atmosphere, the rise in sea levels, the melting of ice in the Antarctic, extreme weather conditions, changes to fire and water regimes, and food availability and nutrient cycles.²³ Climate change can further be attributed to human interference with the natural world and its cyclical processes, as Cribb maintains in the opening quotation. Hence, as enounced by the former Australian Prime Minister, Kevin Rudd, climate change is ‘the great moral issue of our generation’.²⁴ If world leaders truly commit to ‘avoid consigning future generations to an irreversible catastrophe’,²⁵ as President Barack Obama of the United States advocated in his Climate Change speech at the United Nations in September 2009, their primary objective, both politically and legislatively, should be to safeguard the Earth from ecologically destructive societies,²⁶ such as theirs. No doubt the intention to create a world that is ‘safer and cleaner for our children, than the one we have created’²⁷ implies a moral commitment to initiate change. This is however clearly not the main objective. In the same breath in which Obama pledged his commitment to respond to climate change ‘boldly, swiftly and together,’ he declared the revival of the economy to be ‘every nation’s most immediate priority’.²⁸

The promises made by world leaders, therefore, of their commitment to combat climate change through the implementation of effective measures (that is other than economic)

22 Julian Cribb, ‘The Coming Famine: The Risks to Global Food Security’ (Keynote address, Research, Productivity, Food Security, Sydney, 21 October 2009) <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0020/304427/Prof-Julian-Cribb--The-coming-famine---speaking-notes.pdf>.

23 Bastian Bomhard, *International Union for Conservation of Nature* (2011) <<http://whc.unesco.org/uploads/activities/documents/activity>>.

24 Official Website of the Australian Labor Party, <<http://www.alp.org.au/labortv/uKTHPU1yia>>; Sabra Lane, ‘Rudd Leads Dinner Talks amid G20 Protests’, *ABC News* (online), 25 September 2009 <<http://www.abc.net.au/news/2009-09-25/rudd-leads-dinner-talks-amid-g20-protests/1442980>>

25 President Barack Obama, *Climate Change Speech at the United Nations* (22 September 2009) <<http://www.truthout.org/092309D.iew>>

26 Murray Bookchin and Dave Foreman, *Defending the Earth: A Dialogue between Murray Bookchin and Dave Foreman* (South End Press, 1991) 17.

27 Obama, above n 25.

28 Ibid.

fail to hold persuasive power.²⁹ Environmental justice cannot be measured in cost-effective terms; hence once again the conflicting ends upon which the ideologies of justice and monetised capitalism are founded become poignantly evident. To be truly 'flexible and pragmatic', as Obama suggests,³⁰ unprecedented paradigm shifts in attitudes, values and beliefs must be brought about on an individual and a societal level, to ensure that past 'bad' practices, both social and institutional, cease to be practiced in the future.³¹ Only this will allow healthy, sustainable and egalitarian working relationships to be established with fellow humans and with nature and its cyclical processes.³²

The recurring economic and ongoing environmental crises also indicate that neither economic prosperity nor environmental longevity is secured within the capitalist vision. Capitalism, as a system, is more powerful than any individual nation, including the United States; thus the system itself must be changed to effectively change a nation. During the G20 Summit in March 2009 when leaders of the world's top twenty economies were deliberating over how the global economy can be transformed into a lower carbon world, anti-capitalist sentiments raged throughout the world because the prospect of a just agreement being at all possible within the parameters of modern capitalism was overwhelmingly unconvincing.³³ Tens of thousands of protestors rallied in London, Berlin, Barcelona, Frankfurt, Vienna and Paris to express a common distrust of the leaders' intentions to take the right actions in order to 'lay the foundation for a better world'.³⁴ In London, the protestors' slogan read: 'Capitalism isn't working...another world is possible',³⁵ and the Berlin demonstrators carried a black coffin to symbolise the death of capitalism.³⁶ The view that capitalism has misguided the world into a global economic and environmental disaster rather than into the

29 Ibid; Australian Government Department of Climate Change and Energy Efficiency, *Tackling the Challenge of Climate Change* (2011) <<http://www.climatechange.gov.au/>>.

30 Obama, above n 25.

31 World Watch, *Transforming Cultures* (2011) <<http://www.worldwatch.org/node/6096>>.

32 Miles T Woolen, *Ecofeminism: Their Viewpoints and the Problem with the Western World* (2011) <<http://carbon.cudenver.edu/stc-link/wmnecol/html/ecowolen.htm>>.

33 Lane above n 24; Carol Jordan, 'Hundreds Detained in Copenhagen Protests', *CNN International* (online), 14 December 2009 <<http://www.cnn.com/2009/WORLD/europe/12/12/copenhagenprotests/index.html>>. Protest such as at the recent 2009 G20 summit and the UN Climate Change Convention have a long history: Montreal (1995), Cologne and London (1999), Seattle (2000), Quebec (2001), Genoa (2001), Ottawa (2002).

34 Dean Carson, 'Thousands on March in Europe', *Sydney Morning Herald*, 30 March 2009, 7.

35 Paola Totaro, 'G20 Summit Springs a Damaging Leak', *Sydney Morning Herald*, 30 March 2009, 7.

36 Ibid.

fortuitous future it promised was clearly evident in these protests, and since no concrete policies or actions have yet been implemented that are ‘even remotely equal to the threat of climate change’,³⁷ their scepticism is not unfounded. It seems quite obvious to the protestors (and to other like-minded people) that is exactly because of the focus on economic prosperity that climate change and associated problems exist in the first place.

As a response to the impacts of climate change on people’s social, cultural and physical environments,³⁸ a growth of ecological or environmental citizenship is evident on a global scale.³⁹ This necessarily entails a growing concept of social responsibility towards one’s immediate surroundings,⁴⁰ as one cannot be addressed without the other because the environmental crisis and social injustices are inextricably linked.⁴¹ Good environmental governance involves ‘the effectiveness of strategies and initiatives implemented to achieve environmental goals, such as capacity building, increased access to environmental information, participation and justice’.⁴² All countries should assume ‘common but differentiated responsibilities ‘and be able to benefit from the process, as set out in principle 7 of the *Rio Declaration on Environment and Development*’.⁴³ The world’s wealthy nations must collectively take on a proactive role,

37 Andrew Simms, ‘82 Months and Counting’, *The Guardian* (online), 1 February 2010, <<http://www.guardian.co.uk/commentisfree/2010/feb/01/climate-change-banking-economics>>.

38 The Intergovernmental Panel on Climate Change (IPCC), *Examples in Progress: The Human Fingerprint on GHG* (2011) <http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch1s1-3.html>; Australian Parliamentary Library, *Climate Change* <<http://aph.gov.au/library/pubs/climatechange/effects/effects.htm>>; Cribb, above n 22; Pamela Matson, *Seeds of Sustainability: Transitions to Sustainability in Agricultural Systems* (2011) <<http://www.land-environment.unimelb.edu.au/deanslectures/pamelamatson-DLS2011.pdf>>.

39 Johannesburg Plan of Implementation, *Changing Unsustainable Patterns of Consumption and Production* <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm>.

40 Gunda Reire, *The Relationship between Humans and the Environment from the Latvian Perspective* (2008)

<http://www.nrf.is/Open%20Meetings/Anchorage/Position%20Papers/Reire_5thNRF_position_paper_session4.pdf>.

41 Alicia Ely Yamin, ‘Suffering and Powerlessness: The Significance of Promoting Participation in Rights-based Approaches to Health’ (2009) 11(1) *Health and Human Rights*

<<http://www.hhrjournal.org/index.php/hhr/article/view/127/200>>; Matson, above n 38; Ana Isla, *The Tragedy of the Enclosures: An Eco-feminist Perspective on Selling Oxygen and Prostitution in Costa Rica* (2009) <http://www.wrm.org.uy/countries/CostaRica/Eco_feminist_Perspective_Costa_Rica.pdf>; Peter Cossier and Jane McDonald, *Monitoring and Evaluating to Improve NRM Outcomes* (2011) <<http://www.wentworthgroup.org/uploads/NRM%20Monitoring%20Conference%20Speech%20Final.pdf>>.

42 Michael I Jefferey, ‘Environmental Governance: A Comparative Analysis of Public Participation and Access to Justice’ (2005) 9(2) *Journal of South Pacific Law*.

43 United Nations Division for Sustainable Development, *Johannesburg Plan of Implementation: Changing Unsustainable Patterns of Consumption and Production* (2011) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm>.

and governments, international organisations, the private sector, along with other major groups, should ‘play an active role in changing unsustainable consumption and production patterns’.⁴⁴ It has been shown in the not so distant past, that damage caused by humans is also able to be undone by humans, such as for example, reversing sulphate pollution in Greenland in the 1980s; controlling acid rain in North America and Europe and declining chlorofluorocarbon (CFC) abundances globally because of a phase-out undertaken to protect the ozone layer.⁴⁵ Although nature cannot defend itself against human acts of violence and destruction, such as deforestation, or toxic emissions released into the biosphere or onto the land, or into the oceans due to industrial ‘accidents’,⁴⁶ it articulates its frustration and pain in very evident ways. Since humans alone have the capacity to make informed decisions that affect other people and other species, they have a moral obligation to be just and to do justice for all life on Earth. Such decisions, in turn, should be based on principles of goodness and decency, not economics.

As discussed in chapter three, which focussed on Derrida and the ecofeminist vision on law and justice, law and justice are diametrically opposed both in kind and purpose. While law regulates society by way of limitations, prohibitions and punishment, justice is an ideal concept based on principles of goodness and decency. Since environmental legislation is also about regulating the use and practices involved in production by way of fines and penalties, it is also essentially about managing violence. To effectively incorporate justice into the law and thwart violence or abuse, the law must be stripped back to its original intention; namely preservation. Furthermore, it should be ensured that all parties involved in decision-making processes are able to exercise their rights,⁴⁷ and take on their responsibilities. As governments at all levels tend to resist change and respond slowly to the need for law reform, non-government organisations and particularly community groups, increasingly initiate actions to ensure that the call for

44 Ibid.

45 IPCC, above n 38.

46 See examples below: the Orica Plant in Newcastle, NSW, Australia and the stranded cargo tanker off New Zealand’s coastline: NSW Office of Environment and Heritage, *Orica Hexavalent Chromium Emission Incident, Kooragang Island* (2011) <<http://www.environment.nsw.gov.au/orica/>>; New South Wales Government WorkCover Authority, *Update on Orica Situation* (2011) <<http://www.workcover.nsw.gov.au/aboutus/newsroom/Pages/oricakoorangangislandinvestigationssite.aspx>>. In regard to the oil spill disaster, see *BBC UK World News*, ‘Oil Spill Disaster: New Zealand’s Worst’, 11 October 2011 <<http://www.bbc.co.uk/news/world-asia-pacific-15251319>>.

47 Jefferey, above n 42

law reform is brought to the fore. Public interest litigation therefore plays a key role in not only encouraging the need to protect the environment but also to enable citizens to have their say and their rights protected.⁴⁸ To date, internationally and in Australia, public interest litigation has focused on existing planning and judicial review mechanisms. However, due to industrial accidents and spills, such as for example the emissions released from the Orica Plant in Newcastle, New South Wales, Australia or the oil released into the ocean from the cargo tanker stranded off New Zealand's coastline,⁴⁹ tort actions are likely to follow suit.⁵⁰ Accountability for such acts is no doubt gathering momentum, and even unsuccessful litigation exposes weaknesses in the legal system and enables subsequent cases to build on the legal arguments and scientific evidence presented in these cases.⁵¹ In light of the above, from a Derridean/ecofeminist perspective, the authority of the law has been successfully questioned and its foundations destabilised. Moreover, since justice exists in a relation of alterity to law and its function is to open the discourse of the law to the other by way of reinterpretation and contestation, the space for justice to be part of the conversation has further been created.⁵²

4.3. Australia Within a Global Context

Australia is the world's fourth largest coal producer and largest coal exporter, accounting for almost 30 per cent of global coal exports.⁵³ Furthermore, over 75 per cent of Australia's electricity comes from burning coal,⁵⁴ and in the state of New South Wales alone, around 200,000 jobs rely on the coal industry. In turn, the NSW mining industry contributes \$1.5 billion in government royalty payments and state and federal

48 Kirsty Ruddock, *Climate Change at Local Level: Using the Law to Create Change* (2011) <http://www.edo.org.au/edonsw/site/pdf/papers/0801001cc_local_paper.pdf>.

49 See NSW Office of Environment and Heritage in regard to the chromium emission incident, <<http://www.environment.nsw.gov.au/orica/>>; NSW Government WorkCover Authority, above n 46; BBC UK World News, above n 46.

50 Ruddock, above n 48; NSW Office of Environment and Heritage, above n 49; NSW Government WorkCover Authority, above n 49; BBC UK World News, above n 46.

51 Ibid.

52 See Chapter 3, 3.1; Saul Newman, Derrida's Deconstruction of Authority (2001), *Philosophy & Social Criticism* 27 (3) <<http://theanarchistlibrary.org/library/saul-newman-derrida-s-deconstruction-of-authority>>

53 NSW Greens Parliamentary Website, *Coal Fact Sheet* (2010) <<http://lee.greens.org.au/index.php>>.

54 NSW Greens Parliamentary Website (2010).

taxes in a fiscal year.⁵⁵ The greenhouse pollution produced by these coal-fired power stations is equivalent to the annual emissions from about 40 million cars, which is four times Australia's actual car fleet.⁵⁶ Australia is thus a significant contributor to climate change and, according to the Organisation for Economic Cooperation and Development (OECD), has the highest emissions per capita in the developed world; in fact almost twice the world's average levels.⁵⁷ With one of the worst environmental records of any developed country,⁵⁸ Australia is ranked fourth last in actions undertaken by industrialised and emerging countries in the 2010 Index released at the UN conference in Copenhagen.⁵⁹ Even the world's largest emitters, China and the United States, are ranked higher than Australia, and by 2020, Australia's emissions are projected to reach 664 million tonnes.⁶⁰ Despite the dooming statistics and the fact that Australia can no longer pretend to be too small a nation to have an effect on climate change,⁶¹ economics take precedence over emission reduction because Australia's trade and domestic economies, as well as its domestic consumption, are heavily reliant on coal.⁶²

It is no doubt critical for Australia to commit to a clear and effective plan to reduce its greenhouse gas emissions. Acting on climate change is also important for Australia's national interests, because the consequences of non-action threaten Australia's national well-being, as well as its unique environment and lifestyle. In the Second Reading speech to the Senate on the *Carbon Pollution Reduction Scheme Bill* 2009, Senator Ursula Stephens warned that because of Australia's high exposure to the impacts of climate change, coastal communities and infrastructures all face unprecedented tests.⁶³ Failure to reduce global emissions could result in putting the health of the population and the security of water and energy supplies at risk.⁶⁴ Further risks include the loss of

55 Australian Government Department of Climate Change (2011).

56 Ibid.

57 Ibid.

58 Joseph Smith and David Shearman, *Climate Change Litigation: Analysing the Law, Scientific Evidence and Impacts on the Environment* (Presidian Legal Publications, 2006).

59 Australian Government Department of Climate Change (2011); Australian Government Treasury, *The 2010 Intergenerational Report* (2010) <<http://www.treasury.gov.au/igr/igr2010/>>.

60 Australian Government Department of Climate Change (2011).

61 Ursula Stephens, *2nd Reading Speech* (2009)

<http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-11-18/0152/hansard_frag.pdf?fileType%3Dapplication%2Fpdf>.

62 New South Wales Mineral Council Ltd., *Key Statistics* (2011) <<http://www.nswmincom.au/Media-Speeches-and-Info/Key-Statistics/Key-Statistics/default.aspx>>.

63 Ibid.

64 CSIRO, *Climate Change Impacts on Australia* (2010) <<http://www.csiro.au/files/files/p6fy.pdf>>.

irrigated agriculture in the Murray-Darling Basin and threats to Australia's World Heritage Properties, such as the Great Barrier Reef and Kakadu National Park.⁶⁵ It is predicted that by 2020, the average temperatures across Australia will rise by at least five degrees Celsius compared to 1990.⁶⁶ Under a worst-case scenario, irrigated agriculture in the Murray-Darling Basin will virtually disappear and bushfires will become more intense and with shortened intervals.⁶⁷ Australia's wildlife and biodiversity are equally at risk due to the effects of poor land and water management, including its life-support systems, such as its rivers, forests, oceans and landscapes.⁶⁸ While Australia's actions alone cannot avert the consequences of climate change on a global scale, Australia must do its part as part of a global effort on a national level.

Even though the Australian Government Climate Change website boasts of many initiatives and actions that have been undertaken to date,⁶⁹ the current legislation and public choice mechanisms merely fabricate patchwork reforms.⁷⁰ On an international level, for example, the ratification of the *Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol)* in December 2007 is a reinforced commitment to the United Nations climate change negotiations in 2009 to reduce emissions by 25 per cent below 2000 levels by 2020.⁷¹ However, according to the predictions of the Australian Department of Climate Change noted above, Australia's emissions are projected to reach 664 million tonnes by 2020, which is certainly not a reduction in emissions. Australia also partakes in various multilateral, bilateral and regional activities with international partners and Pacific island neighbours to ensure that climate change does not undermine the gains of sustainable development. Also, through the International Forest Carbon Initiative, Australia aims to reduce emissions from deforestation and forest degradation in developing countries, and furthermore, under the collaborative Forest Carbon Partnerships, works closely with

65 Ibid.

66 Ibid.

67 Ibid.

68 Australian Conservation Fund, *Big Polluters Continue Bad Practices* (2011)

<<http://www.acfonline.org.au/articles/news.asp?newsid=2571>>.

69 Australian Government Department of Climate Change and Energy Efficiency, above n 1.

70 The failed insulation scheme is but one example. Also see Cribb, above n 22; Mark Eric Williams, 'Theory-Driven Comparative Analysis: Dead on the Gurney or Lost in the Shuffle?' (2000) 35(3) *Studies in Comparative International Development* 112; Michael Shellenberger and Ted Nordhaus, *Breakthrough: From the Death of Environmentalism to the Politics of Possibility* (Houghton Mifflin Co., 2007).

71 Australian Conservation Fund, *Big Polluters Continue Bad Practices* (2011).

Indonesia and Papua New Guinea to build each country's capacity to reduce emissions from forests.⁷² These initiatives, in turn, are equally questionable, given that deforestation and emissions in these countries have increased,⁷³ and sustainable development is yet to be effectively implemented.⁷⁴

On a national level, in response to Australia's obligations under the *Kyoto Protocol*, the carbon tax is the main driver to reduce greenhouse gas emissions.⁷⁵ From July 2012, the cost of pollution is set at \$23 per tonne of carbon released into the atmosphere, and this will gradually increase until 2015, when Australia will shift to a trading scheme that will let the market set the cost.⁷⁶ This scheme uses a cap and trade mechanism and the cap or upper limit is to reduce the country's carbon pollution in future years to achieve the set target. Companies or other groups within Australia that emit carbon have to purchase, or be issued with permits that allow them to emit a specific amount of carbon pollution, and businesses can trade permits among themselves if they have more or less than they need.⁷⁷ Essentially, however, as the carbon tax allows big polluters to pollute, as long as they pay the penalties, the 'big picture' in regard to a future reduction in emissions is yet to be evidenced.

The central piece of Federal legislation is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), which provides a legal framework to the protection and management of nationally and internationally important flora, fauna, ecological communities and heritage places.⁷⁸ Under section 51(xxix) of the Australian Constitution, the Commonwealth has the power to intervene in matters that, for example, conflict with Australia's international obligations under the World Heritage Convention.⁷⁹ This is evidenced in the Tasmanian Dam Case,⁸⁰ which is not only the

72 Ibid.

73 UNEP Regional Office Asia-Pacific <<http://www.unep.org/roap/Activities/ClimateChange/UnitedNationsCollaborativeProgrammeUNREDD/tabid/6848/Default.aspx>>; Greenpeace Asia-Pacific <<http://www.greenpeace.org/australia/en/what-we-do/forests/>>

74 See UNESCO <<http://www.unesco.org/en/university-twinning-and-networking/access-by-region/asia-and-the-pacific/australia/unesco-chair-in-sustainable-urban-development-for-asia-and-the-pacific-817>>

75 Australian Conservation Fund, *Big Polluters Continue Bad Practices* (2011).

76 Ibid.

77 Ibid.

76 Australian Government Department of Sustainability, Environment, Water, Population and Communities, <<http://www.environment.gov.au/epbc/index.favour.html>>

77 Convention Concerning the Protection of the World Cultural and Natural Heritage <<http://whc.unesco.org/en/conventiontext/>>

most prominent environmental law case in Australian history, but also a landmark in Australian constitutional law. Under chapter four of the EPBC Act and under the Environmental Impact Assessment (EIA), Federal legislation is an adjunct to development approvals that concern the permitting of habitat and threatened species impacts, the grant of pollution licences, or as a prerequisite for allowing the exploitation of natural resources, where there is significant impact on designated matters of national environmental significance.⁸¹ However, because ministers are granted wide discretionary powers in decision-making,⁸² their decisions inopportunately favour economic considerations above social/environmental justice, effectively divorcing the moral component of the original legislative intent from decision-making.

At a State level, the situation is similar, and the absence of social justice becomes particularly evident in the amendments made to the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), following the landmark decision in *Gray v Minister for Planning* [2006].⁸³ This case is thus at the focus of the second case study, because it uncovered the failure of state (and federal legislation) to provide a responsible planning and accountability framework and exposed the weaknesses in the EIA process. Following this case, Part 3A of the Act, which allowed for transparency and accountability in environmental decision-making,⁸⁴ was repealed (after a series of prior amendments), and the approvals process regarding licences for exploration and production was brought to a standstill. The amendments made prior to its repeal included replacing the former category of state significant development with a new

78 *Commonwealth v Tasmania* (1983) 158 CLR 1. In this case the Commonwealth Government stopped a large hydro-electric dam that was proposed to be construction in South-Western Tasmania by the Tasmanian Hydro-Electric Commission - owned by the Tasmanian Government. The area in which the dam was proposed had been declared a World Heritage site in 1982 and the dam would have flooded a large section of the Franklin River. However, the listing of the area as a World heritage site would not by itself have prevented construction of the dam – but required incorporation of the protection of the area under international law into Australian domestic law. Tasmanian Dam case, <http://www.envlaw.com.au/tasmanian_dam.html>

79 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998); Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010), 104; Carolyn Abbot, 'Environmental Command Regulation' in Benjamin Richardson and Stephan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2006) 61–89.

82 Ibid, Godden and Peel, above n 79..

83 *Gray v Minister for Planning* [2006] NSWLEC 720.

84 Godden and Peel, above n 79, 175. The procedure at the time of the Anvil Hill case was that once a project had entered the federal EIA process, the public was notified for comment (section 74(3)) and their comments had to be considered (section 75(1A)); however once an application had been approved, there was no additional requirement for ongoing environmental management issues to be monitored.

category called Part 3A Major projects. Under this amendment, all major projects, including a sub-category of critical infrastructure projects, were to be assessed and approved under the new Part 3A provisions, rather than under Part 4 or Part 5 of the EPA Act.⁸⁵ In effect, the Planning Minister became the sole consent authority for all major projects and critical infrastructure.⁸⁶ Although under section 75F, the guidelines published in the Gazette with respect to EIA requirements had to accord with the findings in *Gray*,⁸⁷ the NSW government then moved further away from the intended objective of allowing the interests of local communities to be taken into account in planning outcomes, and ensuring that the preservation of the environment is not outweighed by economic growth.⁸⁸ The government further failed to take into account that a single decision maker does not always make the right decisions.⁸⁹ As the trend to Part 3A amendments and its subsequent repeal has been to increasingly move further away from social justice,⁹⁰ reverting back to the original intent of the EPA Act should be, as it should have always been, the starting point for any amendments made.

In light of the above, Australia's current technocratic methods and public choice mechanisms represent little more than token gestures, which merely fabricate patchwork reforms.⁹¹ On both Federal and State levels, the focus of environmental legislation is not on preservation of the environment, but on economic posterity. In turn, this blatantly anthropocentric perspective is a poignant reflection of the man over nature dichotomy, in which the other, that is nature, is able to be exploited at the exclusion of moral rightness. It is therefore intriguing to see if Australia's Clean Energy package is able to deliver what it originally promised; namely to lead the nation into a clean energy

85 If development is declared to be a project under Part 3A of the Act, any development consent under Part 4 of the Act or approval under Part 5 of the Act that applies to the project or land on which the project is to be carried out continues in force despite that declaration *Environmental Planning and Assessment Amendment (Miscellaneous) Regulation 2010* under the *Environmental Planning and Assessment Act 1979*.

86 EDO, *Fact Sheets: Part 3A Major Project Approvals* (2011) <http://www.edo.org.au/edonsw/site/facts/fs02_3_1.php>.

87 *Environmental Planning Legislation Amendment Bill 2006*.

88 Ratcliff, Wood and Higginson, above n 9.

89 Ibid.

90 EDO, above n 86.

91 The failed insulation scheme is but one example. Also see Cribb, above n 3; Mark Eric Williams, 'Theory-Driven Comparative Analysis: Dead on the Gurney or Lost in the Shuffle?' (2000) 35(3) *Studies in Comparative International Development* 112; Michael Shellenberger and Ted Nordhaus, *Breakthrough: From the Death of Environmentalism to the Politics of Possibility* (Houghton Mifflin Co., 2007).

future⁹² that incorporates ‘new ways of thinking’⁹³ New ways of thinking, in turn, must focus on social/environmental justice, as this is the original intent and purpose of environmental legislation.

4.4. Case Study 1: The Clean Energy Package: Australia’s Response to Climate Change

In 2009, the forerunner to the carbon tax, the *Carbon Pollution Reduction Scheme*, was unsuccessfully attempted to be introduced by Australia’s former Prime Minister, Kevin Rudd and the Minister for Climate Change and Water, Senator Penny Wong. It was rejected three times in the Senate in late 2009, and due to its overall unpopularity, ultimately led to Prime Minister Rudd’s replacement by Julia Gillard in June 2010. Criticisms of the *Carbon Pollution Reduction Scheme* included that the package was not only unconvincing but also failed to deliver the scale of greenhouse pollution cuts needed for Australia.⁹⁴ Although there were some positive initiatives, such as additional investment in solar power and energy efficiency, the overall package was held not to add up to an economy-wide and environmentally effective climate change policy.⁹⁵ The fundamental reason for its opposition was that the introduction of a carbon tax within the context of economic instability on a global scale was too risky. While Minister Wong correctly pointed out that there is no easy solution to climate change, she continued the sentence with: ‘if there were [an easy solution to climate change], it would have already been dealt with’, which is not entirely convincing.⁹⁶ Wong’s argument was essentially that, even if climate change were about both science and the economy, it cannot be tackled without changing the economy because the alternative would be letting the biggest polluters off scot-free.⁹⁷

92 Australian Government Department of Climate Change and Energy Efficiency, above n 1.

93 See Senator Christine Milne, *2nd Reading Speech on the Clean Energy Future Bills* (2011) <<http://christine-milne.greensmps.org.au/content/speech/senator-milnes-2nd-reading-speech-clean-energy-future-bills>>.

94 Ibid.

95 Australian Conservation Foundation, *Climate Change: Coalition Climate Change Package Fails Tests of Scale, Certainty and Fairness* (2010) <http://acfonline.org.au/articles/news.asp?news_id=2676>.

96 Penny Wong, *The Senate Water Amendment Bill 2008: 2nd Reading Speech* (2008) <http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2008-11-25/0101/hansard_frag.pdf>.

97 Penny Wong, *The Clever Green 2010 Conference* (2010). <<http://www.climatechange.gov.au/minister/previous/wong/2010/major-speeches/February/sp20100216.aspx>>.

You have to make polluters pay, and if you do not make polluters pay then you will not tackle climate change, because you will not change the very behaviour that has caused and continues to contribute to and cause this problem in the first place.⁹⁸

Since Wong's solution is driven by economic considerations, it is not surprising that the future for her does not look too bright:

We know that the world has already lost the opportunity to stop any climate change. That has already been squandered by past generations of political leaders but we do have an opportunity if we act soon to hold the risk, to hold temperature rise to levels that our children and our children's children can manage.⁹⁹

The revamped scheme that was then re-introduced two years later was in the form of an emissions trading scheme, with a fixed price for three years and then flexible trading. This was hailed by Julia Gillard to be 'an essential economic reform,' and is based on a similar argument as provided by Wong, namely that pricing carbon is 'the right thing to do' because 'the best way to stop businesses polluting and get them to invest in clean energy' is 'by charging them when they pollute'.¹⁰⁰ Moreover, in a similarly apocalyptic vein to Minister Wong, Senator Milne, the Tasmanian Deputy Leader of the Australian Greens, declared that while it may be too late to stop global warming, the challenge is now to limit its extent.¹⁰¹ Notably, though, even though both policies are primarily based on penalties, a social conscience, in the form of distributive justice, is evident in both schemes. Under both schemes, the money raised from taxing big polluters is to be directed at assisting lower income earning families with household bills, and enabling businesses to make the transition to a clean energy economy for the purposes of tackling

98 Penny Wong, *Carbon Pollution Reduction Scheme: 3rd Reading Speech* (2009) <<http://www.climatechange.gov.au/minister/wong/2009/transcripts/December/tr20091202b.aspx>>.

99 Wong, *The Clever Green 2010 Conference*, above n 97.

100 Gillard, above n 5.

101 Milne, above n 93.

climate change.¹⁰² While this may merely be a ploy to win over Australian voters at the lower end of the socio-economic scale, the notion of social justice has at least been acknowledged as an issue to be considered in policy making.

While the 2009 *Carbon Pollution Reduction Scheme* was also directed at creating the incentive for clean development, the 2011 package promised more.¹⁰³ In her Second Reading Speech on the Clean Energy Future Bills, Senator Milne, described the Clean Energy package as being a well-designed package of initiatives that is ‘head and shoulders above the Carbon Pollution Reduction Scheme’, as it ‘allows for upward mobility in terms of levels of ambition’.¹⁰⁴ The four pillars of the package include: an emissions trading scheme with an 80 per cent target by 2050; a renewable energy package with the ‘largest boost to renewable energy [Australia] has seen’, and a major driver of jobs and climate action into the future; an energy efficiency package to provide incentives to start reducing demand, as well as a directive to the Australian electricity market operators to start planning for 100 renewables, while at the same time an undertaking that the Commonwealth will lead the states in moving on national electricity market reform so that the demand-side is incorporated rather than just focussing on new supply; and a comprehensive land sector package for enhancing carbon in the landscape to protect the carbon stores, particularly to end the ability to make renewable energy certificates from using native forests.¹⁰⁵ As aforementioned, these four pillars are underpinned by a compensation package for households in recognition that the big polluters will pass on some of the costs associated with the buying of permits to ensure that lower income-earning families are not financially disadvantaged.¹⁰⁶

When considering the specifics of schemes, such as the carbon tax and emissions trading, they are essentially (capitalist) market-based mechanisms, which are subject to

102 Fran Kelly, *Carbon Pollution Reduction Scheme* (2009)

<<http://www.climatechange.gov.au/en/minister/previous/wong/2009/transcripts/December/tr20091202.aspx>>. Both Wong and Gillard claimed that the money raised from the big polluters would provide cash assistance to working families, whereby lower-income households would receive more assistance than higher-income households.

103 Milne, above n 93.

104 Ibid.

105 Ibid.

106 Ibid.

much criticism. This is because they indirectly impose a price by directly controlling the quantity of emissions; hence, one is controlled, but not the other.¹⁰⁷ An emission trading uses a property rights approach and the common property is the environment, more particularly the quality of the atmosphere.¹⁰⁸ Supporters of market mechanisms argue that they have the potential to increase the efficiency of environmental protection, as evinced in Wong's argument in 2009 and Prime Minister Gillard's argument in 2011.¹⁰⁹ On the other hand, sceptics argue that market mechanisms based on the traditional command and control model have the potential to exempt the highest polluting products and firms from paying taxes because they require complex government decisions about the stringency of regulation.¹¹⁰ Moreover, it is argued that the success of any such market scheme has not yet been fully explored and is likely to depend upon a background level of state-based regulation to set goals, provide incentives and lend credibility to compliance efforts.¹¹¹ Such schemes are further subject to industry and community pressure that may prevent or delay their introduction.¹¹² This indeed was a contributing fact to the rejection of the *Carbon Pollution Reduction Scheme* in 2009 and to the controversy surrounding the carbon tax proposal. Hence, in Driesen's view, market mechanisms 'do not offer a panacea for environmental problems', as many factors impact on the overall effectiveness of environmental regulation, 'in which command and control, along with other market mechanisms, bring about inter-jurisdictional tensions, resourcing and enforcement issues'.¹¹³

The Australian Greens Party had also initially criticised the carbon tax proposal for different reasons; namely because the target set was too low and too much compensation was to be provided to the coal and power industries.¹¹⁴ The Greens had

107 Keith Kendall, *Why a Carbon Tax Should be Australia's Answer to Climate Change* (2008) <<http://www.latrobe.edu.au/blogs/lawforum/index.php?/archives/2-Why-a-carbon-tax-should-be-Australias-answer-to-climate-change.html>>.

108 Australian Parliamentary Library (2011)

<<http://www.aph.gov.au/library/pubs/climatechange/responses/economic/emissions/emissionstrade.htm>>.

109 David Driesen, 'Economic Instruments for Sustainable Development' in Benjamin Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2006) 308.

110 Ibid, 294, 300.

111 Ibid.

112 Australian Government Department of Climate Change and Energy Efficiency (2011)

<<http://www.climatechange.gov.au/government/initiatives/cprs.aspx>>.

113 Driesen, above n 109, 190–1.

114 Milne, above n 93; Sid Maher and Dennis Shanahan, 'Labor to Impose Carbon Tax Next Year, ETS in 2015', *The Australian*, 12 February 2011.

always argued that trade-exposed industries should only be compensated to the extent that they may be disadvantaged relative to foreign competitors:¹¹⁵

Every Australian should bear in mind that Rio Tinto, which today announced a record \$14bn profit, stood to receive a breath-taking \$565m handout under the CPRS in the first year alone.¹¹⁶

According to Australian Conservation Fund, ‘taking advice from the Coal Association and the Minerals Council about the environmental effectiveness of the climate package is like getting the tobacco industry’s opinion on whether or not smoking is harmful’.¹¹⁷ As government modelling shows coal mining and gas extraction emissions will nearly double in the next decade and will be the biggest area of growth in Australia’s emissions, it is ‘no surprise that the mining industry is the loudest whinger about the price on carbon’.¹¹⁸ In both the original and the updated Garnaut Climate Change Reports, Professor Garnaut thus urged the government not to give in to business pleas for extensive compensation. In his 2010 updated report, Garnaut warned the government that the costs of climate change mitigation would be highest if the government gave in to lobbying, as ‘the costs would be highest of all if they were associated with opportunities for firms to obtain preferment through the application of pressure and influence on the policy process, and resulting in major diversion of corporate effort from productive enterprise’.¹¹⁹ At a meeting of the government’s business climate change roundtable in June 2011, business leaders told the government they wanted to be more involved in the preparation of the Clean Energy package in parallel with the negotiations with the Green Party,¹²⁰ as the Green Party was always

115 Australian Greens, *Climate Change and Energy Principles* (2011)

<<http://greens.org.au/policies/climate-change-and-energy/climate-change-and-energy>>.

116 Maher and Shanahan, above n 114.

117 Australian Conservation Fund, *Climate Change: Don’t Go to Big Polluters for Advice on Environmental Effectiveness* (2011) <http://acfonline.org.au/articles/news.asp?news_id=3479>.

118 Ibid.

119 Garnaut, *Climate Change Review Update* (2010) <<http://www.garnautreview.org.au/update-2011/garnaut-review-2011.html,2>>.

120 Maher and Shanahan, above n 114.

more interested in undertaking measures to boost investment in large-scale renewable energy projects in exchange for supporting the federal government's carbon tax.¹²¹

Even though the feasibility of a mechanism such as the emissions trading scheme was confirmed in a major study in 2010, conducted by the advocacy group, ClimateWorks,¹²² the manner in which the carbon tax was re-introduced by the Gillard government has however cast a shadow of uncertainty in regard to its efficacy as a policy instrument. A popular argument used against carbon pricing is that it will increase the price of petrol and electricity. This argument is also used by the opposition party, who claim that the introduction of this policy is 'the longest political suicide note in Australian history'.¹²³ According to the opposition leader Tony Abbott, the carbon tax is 'all economic pain for no environmental gain', as it is costly for the government and the public, ineffective in reducing greenhouse gas emissions and will not create the jobs as it promises.¹²⁴ Further concerns were expressed about 'the potential impact of a piece of legislation' which will not 'make the slightest bit of difference to the climate',¹²⁵ and 'what it will actually do to stop the waste',¹²⁶ due to a lack of required risk-management principles.¹²⁷

In 2010, a study by the Bureau of Meteorology and the Commonwealth Scientific and Industrial Research Organisation (CSIRO) found that, on average, the climate in Australia has warmed over the past 50 years, the average sea level has risen and the oceans have become warmer.¹²⁸ In the same year, a poll conducted by the Lowy Institute found that 72 per cent of Australians agree that Australia should take action to

121 Australian Greens, above n 115.

122 ClimateWorks Australia, *Low Carbon Growth Plan for Australia* (2010)

<http://www.climateworksaustralia.com/low_carbon_growth_plan.html>.

123 Tony Abbott, *2nd Reading Speech: Clean Energy Bills* (2011)

<<http://www.tonyabbott.com.au/LatestNews/Speeches/tabid/88/articleType/ArticleView/articleId/8315/Second-Reading-Speech-Clean-Energy-Bills-2011-House-of-Representatives.aspx>>.

124 Ibid.

125 Fiona Nash, *Second Reading Speech Carbon Tax Plebiscite Bill* (2011)

<<http://www.fionanash.com.au/IntheSenate/ParliamentarySpeeches/tabid/85/articleType/ArticleView/articleId/808/Second-Reading-Speech-Carbon-Tax-Plebiscite-Bill-2011.aspx>>.

126 Luke Simpkins, *Auditor-General Amendment Bill* (2011)

<<http://membership.wa.liberal.org.au/sites/default/files/mp-news/70/21%20March%20-%20Auditor-General%27s%20Management%20of%20Government.pdf>>.

127 Ibid.

128 Commonwealth Bureau of Meteorology and Commonwealth Industrial and Scientific Research Organisation, (2010); CSIRO, *Climate Change Impacts on Australia* (2010); Australian Government: The Treasury, (2010).

reduce its carbon emissions before a global agreement has been reached.¹²⁹ The same poll however found that one third of the Australian population is not prepared to pay extra on their electricity bill to help solve climate change problems.¹³⁰ It is further argued that the political pressure arising from higher electricity prices with the imposition of a carbon tax could swiftly lead to the reduction or removal of such a tax entirely.¹³¹ Even Senator Milne, who is in favour of the scheme, considered that setting too high a standard might not be politically sustainable.¹³² John Humphries of the Australian Libertarian Society, on the other hand, views the policy as being aimed at replacing cheap ‘dirty’ energy with expensive slightly less ‘dirty’ energy.¹³³ Humphries argues that the former is a business decision, while the latter is a policy decision.¹³⁴ Echoing the voice of economic reasoning, albeit with an underlying moral tone, Humphries articulates his anti-carbon tax sentiments as follows:

It’s great to have good intentions. We all want to do good. But poor people can’t eat good intentions, and good intentions will not cool down the globe. If we really do care about good public policy and making the world a better place, we must not introduce policies that fail a benefit-cost analysis. And the simple truth is that a carbon tax fails under any reasonable set of assumptions.¹³⁵

While Humphries acknowledges that global warming and carbon taxes are emotional issues, ‘with two entrenched sides often shouting past each other’, he rationally concludes: that ‘honest commentators know that carbon mitigation can only succeed with a strong, binding, global agreement [so] Australia acting on [its] own is useless’,¹³⁶

129 Lowy Institute for International Policy, *Lowy Institute Polling Shows almost Three Quarters of Australians Support Early Action to Reduce Australia’s Carbon Emissions*, media release, Sydney, 27 April 2010 <<http://www.aph.gov.au/library/pubs/bn/eco/EmisisionsControl.pdf>>.

130 Ibid.

131 Carbon Price Signals, *Australia’s Carbon Price Architecture Explained* (2011) <<http://climatedilemma.com/2011/02/25/australias-carbon-price-architecture-explained/>>.

132 Maher and Shanahan, above n 114.

133 John Humphries, *The Garnaut Report: Simply Brazen* (2011) <<http://catallaxyfiles.com/2011/06/16/garnaut-simply-brazen/>>.

134 John Humphries, *Carbon Tax and Evidence-based Policy* (2011) <<http://johnhumphreys.com.au/2011/06/06/carbon-tax-debate/>>.

135 Ibid.

136 Ibid.

and ‘for people interested in evidence-based policy the conclusion is clear: a carbon price is bad policy’.¹³⁷

It is indeed difficult to believe that combating climate change is one of the government’s highest priorities, as allowing big polluters to continue to emit greenhouse gases into the atmosphere as long as they pay the price is not being just towards the environment. The greater justice would rather be to close the door to the regulatory vacuum that enables Australia’s biggest corporate polluters to continue to pollute.¹³⁸ From an environmental ethicist’s point of view, as identified in chapter two, neither social nor environmental justice comes into play when decisions are based on economic considerations because they are typically at the expense of the environment. As Leopold would argue, if the purpose of the legislation were to protect the Earth, legislation would be directed at not polluting in the first place.¹³⁹ So new paradigms of thinking must be created in which justice towards the environment incorporates social inclusion and equity in way in which these objectives are not lost in the context of the law.¹⁴⁰

In her 2009 speech, the Parliamentary Secretary for Social Inclusion and the Voluntary Sector, Senator Ursula Stephens, focussed on the more inclusive notion of social/environmental justice when she said that the fundamental values of Australia as a nation must be ‘fairness, justice, generosity and compassion’.¹⁴¹ Similarly, in her Second Reading Speech, Senator Milne’s claims that the new legislation ‘is the beginning of a new way of thinking’ and of a necessary transformation ‘of social, technical, environmental and economic innovation that will touch every person, community, institution and nation on Earth’. Senator Milne continues that ‘the irony is that this transformation is still viewed as an economic cost when it is an enormous economic opportunity’, which ‘lays the foundation for a low-carbon economy and enables the scale of action required as opposed a result due to inaction’.¹⁴²

137 Ibid.

138 Australian Conservation Fund, above n 117.

139 See chapter two—Leopoldian Land Ethics.

140 Australian Parliamentary Library, *Climate Change* (2011)
<<http://aph.gov.au/library/pubs/climatechange/effects/effects.htm>>.

141 Stephens, above n 61.

142 Milne, above n 93.

The long-term, lasting structural reform that is needed to bring about change over decades to come, as Wong first argued,¹⁴³ needs to involve multiple bodies, including those who are independent and external, as Senator Fielding suggested,¹⁴⁴ because ultimately the environmental debate would then be able to move to a new level and in a new direction. In Senator Milne's Second Reading Speech, she identifies multiple bodies that are involved in the Clean Energy package, including an independent Climate Change Authority, the Australian Renewable Energy Agency and the Clean Energy Finance Corporation, the Australian electricity market operators and various other supporters, both in government and in private sectors.¹⁴⁵ From an ecofeminist perspective, if Warren's patchwork quilt metaphor were to be adopted here, and the multiple theories that are put forward by the various parties involved, including the specialists, the theorists, the politicians, the lawyers, community activists and the general public were to be considered, then the final design of the actual quilt would be able to emerge as a result of a diversity of perspectives on the part of the many different quilters who have contributed.¹⁴⁶ The imaginary space has therefore been opened for the notion of *différance* to be embraced, in which the meaning and intent of justice in its ideal sense can become the starting point for new conversations. When applying Derrida's example of hospitality in the case of illegal immigrants in France to the carbon tax as an analogy,¹⁴⁷ by displacing the corresponding meanings and then placing them into the context of an ideal, including associated moral responsibilities, the focus would shift to a new and unexplored perspective that may pave the way to a better and much more just long-term clean energy solution.

The first step would be to ensure that a benefit-cost analysis does not overshadow the 'benefit' aspect, as the 'benefit' aspect in its emblematic sense incorporates a sense of

143 Wong, *3rd Reading Speech*, above n 98.

144 Senator Fielding, *3rd Reading Speech*

<http://www.stevefielding.com.au/news/details/carbon_pollution_reduction_scheme_speech_-_3rd_reading/>.

145 Milne, above n 93.

146 Karen J Warren, *Ecofeminist Philosophy: A Western Perspective on What It Is and Why It Matters* (Rowman & Littlefield Publisher Inc, 2000) 66.

147 See chapter 3, 3.4: By reworking the meaning of the word hospitality and displacing it from its original context and placing into the context of an ideal, that is what is the 'ideal' meaning of hospitality, Derrida was in fact putting the crime of hospitality into play, and questioning the responsibilities of the host country towards these persons.

moral good; a good that also represents good for the other. Arguing in a similar vein to Commoner and Meadows and her team, as discussed in chapter two, the Australian Conservation Fund and Michael Shellenberger and Ted Nordhaus, two former political strategists, consider the more effective way of tackling the climate crisis is to invest in new ideas and technologies that will be able to meet the requirements of a changing society and a transforming global culture.¹⁴⁸ Although the Clean Energy package seems to have moved beyond the traditional and restrictive type of economic analysis by working towards a clean energy low-carbon economy future, Shellenberger and Nordhaus argue that policy fixes, such as the carbon tax, not only fail to meet set target but also places limitations on new possibilities. The Liberal Member for Bennelong, John Alexander, argues in a similar vein and refers to the finding of the Copenhagen Consensus Centre that a carbon tax is ‘the worst policy solution to achieve real results in fighting climate change’ and that ‘technical innovation was found to be the best policy response’.¹⁴⁹ While Alexander has faith in technical innovation occurring with relative speed,¹⁵⁰ Shellenberger and Nordhaus maintain that for this to eventuate, a new kind of environmentalism must be born that embraces a vision that is commensurate with magnitude of the ecological crisis.¹⁵¹ This vision, in turn, calls for a new space to be opened so that the signifiers that give meaning to this debate are able to be placed in an imaginary domain. Only then will the meanings be able to be reworked within the framework of an ideal aesthetic that is able to find a shared or common language.

Human interaction with the biosphere is typically predicated on the hegemony of man’s dominion over the Earth, with women and the biosphere treated by the law as man’s chattels. According to Sandilands, the enormous burden placed on reform measures to redress the inequalities and injustices that result from the dominant legal bureaucracy to open the space to negotiate terms for new possibilities begs the need to question, and ultimately reconfigure, traditional political categories and assumptions about who counts as a political subject and what counts as political action and speech.¹⁵² In a

148 Shellenberger and Nordhaus, above n 91.

149 John Alexander, *2nd Reading Speech, House of Representatives* (2011)

<http://www.johnalexander.net.au/sites/default/files/Carbon_Tax_Bills.pdf>.

150 Ibid.

151 Shellenberger and Nordhaus above n 91.

152 Catriona Sandilands, *The Good-Natured Feminist: Ecofeminism and the Quest for Democracy* (University of Minnesota Press, 1999). As previously discussed in chapter 3, 3.1, for feminist analysis, particularly of socio-political relations, the question of ‘a subject before the law’ is essential, as legal

similar vein to Derrida, Sandilands suggests that environmental politics should be a space where ecological subjectivities are formed, contested, destabilized, and re-formed.¹⁵³ Although the government claims to be open to new possibilities and long-term solutions, by following the carbon tax with yet another market mechanism in 2015, namely the Emission Trading Scheme, this approach precariously puts at risk the space that is now potentially open for negotiating new ways of investing in clean energy for years to come, as opposed to continuing to invest in dirty energy.

The second step would be to move away from the dead end debate of whether or not humans are responsible for the effects of climate change to that of working towards finding real and workable solutions, simply because climate change is real and threatens all life on Earth. Moreover, the scientific debate with its shortcomings by way of ground rules that deal in scientific data, and the way in which this data is collected, has already been sufficiently debated and should no longer be considered an intervening factor or deterrent.¹⁵⁴ Science holds many differing views or interpretations of the same data, making it difficult to reach a consensus, as Professor Brian Schmidt acknowledges,¹⁵⁵ which the public and politicians both find frustrating because they are looking for certitude.¹⁵⁶ However, the government has already looked beyond scientific certainty, as is clearly evident on the Climate Change website,¹⁵⁷ and section 391 of the EPBC Act refers to the precautionary principle that prevents environmental litigation from being hostage to scientific indeterminacy, as applied in *Leatch v National Parks and Wildlife Service* (1993) and in *Booth v Bosworth* (2001).¹⁵⁸ Moreover, scientific certainty does not need to be guaranteed, as most innovations, especially scientific and technological

subjects are invariably produced through exclusionary socio-political practices that are concealed once a juridical structure is established.

153 Ibid.

154 Godden and Peel, above n 79. Uncertainty is an inherent feature of science, while the law is more accepting of uncertainties in the available evidence in civil cases, such as environmental law, as its imperative is finality in decision-making. In scientific methodology, emphatic conclusions can only be drawn from empirical data that has been tested in accordance with experimental methodology, replicated, and then peer reviewed.

155 Suandra Creah (ed), *Climate Debate Diminished Standing of Science in Some Quarters: Nobel Prize Winner* (2011) <<http://theconversation.edu.au/climate-debate-diminished-standing-of-science-in-some-quarters-nobel-prize-winner-3709>>.

156 Cribb, above n 3.

157 Australian Government Department of Climate Change and Energy Efficiency, above n 1.

158 81 LGERA 270. Godden and Peel, above n 79. In these cases, the lack of full scientific certainty regarding a potential hazard was held as not be used as a reason for delaying regulatory action where the consequences for the environment and/or human health could be serious. In *Booth v Bosworth* (2001) 114 FCR 39 [at 97], the Court held that its standard of proof is on the balance of probabilities.

breakthroughs and achievements, have rarely been based on scientific certainties or truths, but on a hypothesis founded on the belief that a greater knowledge and a greater future for humankind is possible.¹⁵⁹ Combating climate change should, in that light, fundamentally focus on the implementation of government policies that work towards a reform that is able to bring about change in a new direction, in which public reason, motivation and activities contribute to judgements and are able to defend these judgements as better or worse within a related field of ideology.¹⁶⁰

Derrida argues that we must risk negotiations; otherwise, we risk freezing the ideology and closing the space that is open to an important debate.¹⁶¹ As the shift from a culture of mass consumption to a culture of sustainability is ‘one of the greatest cultural shifts imaginable’, which ‘no generation in history has previously experienced’,¹⁶² a shift in cultural orientation is as fundamental as the adoption of new technologies or government policies.¹⁶³ It involves redirecting the key culture-shaping institutions: education, business, government and the media, and a radical reshaping of long-standing traditions in regard to the way in which people view and interact with the natural world, so that ‘individual and societal choices will cause minimal ecological damage, or even better, restore the Earth’s ecological systems to health’.¹⁶⁴ Mallory suggests that it is here that an ecofeminist political philosophy is indispensable, as it has a long tradition of working through the ethical and political dilemmas of difference; namely by construing difference ‘not as justification for domination, but as difference to the political problem of recognising, hearing, taking account of and communicatively responding to non-traditional political actors’.¹⁶⁵ Mallory points to the fact that for women, the right to speak differently and not be spoken for is not ‘merely a question of claiming equal power in the privileged male domain of speech, but a way of discovering or creating a new voice to express experiences not apprehensible through dominant

159 Take, for example, landing on the moon or taking samples from other planets. These all began with hypotheticals, as did the argument of whether the Earth was flat or round. In fact, scientists were exiled in the past if they held beliefs other than those that were popular at the time, such as Galileo for example.

160 Reire, above n 40.

161 Felicia Herrschaft’s interview with Drucilla Cornell, *The Interview* (2004)

<<http://www.fehe.org/index.php?id=16>>.

162 Erik Assadourian, *Transforming Cultures* (2010) <<http://www.worldwatch.org/node/6096>>.

163 Ibid.

164 Ibid.

165 Chaane Mallory, ‘What is Ecofeminist Political Philosophy? Gender, Nature and the Political’ (2010) 32 *Environmental Ethics* 305.

constructs'.¹⁶⁶ This, in turn, requires a different kind of speech, and this process represents both the creation of a new series of codes through which to perceive and act in the world, and through which to challenge and change dominant and oppressive constructions.¹⁶⁷ Sandilands argues in a similar vein:

The subject of environmentalism [i.e. nature] is always contingent on its articulation with other subject positions in some chain of equivalences. None is a true representation but the ability of an environmental subject position to effectively challenge dominant discursive formations depends on its articulation with other democratic struggles.¹⁶⁸

This, in turn, reconfigures the political in a way that nature appears on its own accord and through its own voice, as it involves the creation of new codes and meanings and new modes of speech, and constructs alternative, liberatory ways of being in the world.¹⁶⁹ The process by which this takes place is in a public sphere, and in resonance of Derrida's notion of not resting with any aesthetic idea, an aesthetic idea 'makes demands on you put by that other, because that other is something that you can never imagine'.¹⁷⁰ For, as Senator Milne acknowledged in her Second Reading Speech:

We are in a race against time...if we are to have any hope of avoiding catastrophic climate change. [t]he question before us all is whether the nations of the world are capable of acting decisively in that timeframe. This is the biggest challenge of governance facing each nation and the United Nations simultaneously and to date the system has been found wanting....It is too late to stop global warming; the challenge now is to limit its extent.¹⁷¹

166 Ibid.

167 Ibid.

168 Sandilands, above n 153.

169 Ibid.

170 Cornell, *The Interview*, above n 161.

171 Milne, above n 93.

The greater justice would no doubt be put an end to the emission of dirty pollutants into the biosphere and to invest in clean energy solutions. It is yet to be seen how the practical application of the law is able to remain true to its ideological intention. If the *Anvil Hill* case study that follows is to be of any indication, the funding of dirty energy to meet economic demands may indeed seriously compromise the potential funding of clean energy solutions and the associated technological innovations. Unfortunately to date, the human ability to reason, which also translates into an ability to develop and implement solutions, has been less preoccupied with finding moral and ethical solutions than it has with finding ways of continuing destructive practices and predatory behaviour towards nature.¹⁷² Considering, however, that something needs to be done right now to reduce Australia's carbon footprint, perhaps *différance*, in its evolutionary form, is achievable with the Clean Energy package. If the Australian government truly commits to its promise of working towards long term clean energy solutions, research into clean energy sources that are potentially renewable, sustainable and not destructive to the environment would be its priority, and legislation would phase out dirty energy, rapidly rather than gradually. The progression from the carbon tax must therefore be closely monitored to ensure that the government remains on track in regard to its broader objective and is not diverted or dissuaded by economic or other similar considerations, which have little to do with social/environmental justice.

4.5. Case study II—The *Anvil Hill* Case

In the case of *Gray v Minister for Planning* [2006],¹⁷³ the environmental activist and member of the Rising Tide Newcastle climate change action group, Peter Gray, successfully challenged the NSW Minister for Planning's decision to approve an EIA for an open cut mine at Anvil Hill, near Newcastle, New South Wales. The mine, which was capable of producing up to 10.5 million tonnes over a lifespan of 21 years, was to be one of the largest coalmines in Australia. The coal was destined for use in coal-fired power stations in New South Wales and overseas, particularly Japan.¹⁷⁴ The mine site, situated on a valley floor, contained large remnant areas of wood and grasslands of high conservation value, including the habitat of an endangered orchid, *diuris tricolor* and a

172 James Connelly and Graham Smith, *Politics and the Environment* (Routledge, 2nd ed, 2003) 16

173 *Gray v Minister for Planning* [2006] NSWLEC 720

174 *Gray v Minister for Planning* [2006] at 4.

possibly critically endangered ecological community (EEC).¹⁷⁵ The project required environmental assessment under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act),¹⁷⁶ and the terms of reference for the EIA, as set by the Director-General of the Department of Planning, required a detailed greenhouse gas (GHG) assessment. However, Scope 3 (or indirect GHG emissions), which is an optional reporting category,¹⁷⁷ had been excluded in the original EIA assessment when the mine was approved. The indirect emissions test had already been established in the 2004 *Nathan Dam* case,¹⁷⁸ and had been adopted in *Australian Conservation Foundation & Ors v Minister for Planning* [2004], where the Victorian Civil and Administrative Tribunal (VCAT) decided that applications for permits or amendments to planning schemes must consider all relevant environmental impacts, direct and indirect.¹⁷⁹

The EIA prepared by Gray and his environmental consultants included the impact of Scope 3 emissions in their assessment in compliance with reporting standards.¹⁸⁰ It was argued that Scope 3 emissions from the combustion of the coal should have been included in the original EIA and that the ecologically sustainable development (ESD) principle of intergenerational equity and the precautionary principle should have also been considered.¹⁸¹ The precautionary principle aspect of ESD requires cumulative impacts to be assessed, which would have included the impacts of the combustion of the coal and the failure to consider cumulative impacts constituted a failure to take the

175 Ian Ratcliff, *The Anvil Hill Case* (2008)

<http://www.edo.org.au/edonsw/site/pdf/casesum/summary_anvil_epbc071023.pdf>.

176 *Gray v Minister for Planning* [2006] at 1.

177 *Gray v Minister for Planning* [2006] at 32.

178 *Minister for the Environment and Heritage v Queensland Conservation Council Inc.* [2004] FCAFC 190. In this case, approval was sought for a dam construction project in Central Queensland that would significantly affect river flow travelling into the Great Barrier Reef World Heritage Area and directly affect certain threatened species. This was found to be a controlled action, however the dam's indirect impacts on migratory species were deemed not be controlled actions under the direct effects test. This test was successfully challenged to include an assessment for the indirect impacts on the downstream Great Barrier Reef and Dawson floodplain. It was held that indirect affects must, however, be sufficiently close to the action to allow it to be said that they are, or would be, the consequences of the action on the protected matter (at 61)—hence not to lie in the realm of speculation (at 59).

179 *Australian Conservation Foundation and Ors v Minister for Planning* [2004] VCAT 2029, at 47.

180 *Gray v Minister for Planning* [2006] at 32. The EIA prepared was in accordance with the reporting standards of the World Business Council for Sustainable Development and World Resources Institute (WRI) GHG Protocol 2004 (the WBCSP GHG Protocol), which refers to the assessment of scopes 1, 2 and 3, at 19.

181 *Gray v Minister for Planning* [2006] at 45, 105, 109.

principle of intergenerational equity into account.¹⁸² These arguments were successful, and the Director-General's acceptance of the EIA for the Anvil Hill coal mine project was put aside on the grounds that there was a sufficiently proximate link between the burning of the coal and global warming for the impact of Scope 3 emissions to be included in the EIA. This inclusion would have allowed for a more informed decision concerning potential environmental consequences.¹⁸³ This landmark decision thus enshrined in case law; firstly the principle that the impact of downstream GHG emissions from coal mines must be included in the EIA of major projects of its kind;¹⁸⁴ and secondly, that ESD principles apply to all developments in New South Wales, expedited or not.¹⁸⁵

Although the first legal challenge in the NSW Land and Environment Court was successful, as a judicial review action, the reviewing court was limited to ruling on the legality of the procedures followed rather than dealing directly with the merits of the outcomes of the decision-making process itself.¹⁸⁶ The New South Wales government had also pre-emptively amended the EPA Act to prevent the delay of major projects through incomplete assessment processes. Under the amendments introduced by the Environmental Planning Legislation Amendment Bill 2006 (EPLAB),¹⁸⁷ the Minister was able to approve a development application under Part 3A whether or not the environmental assessment complies with the Environmental Assessment Report (EAR) of the Director-General. Since there is no legal test, under section 75X (5) the Director-General is able to exercise his broad discretion in accordance with the objects of the Act, which since challenged by *Gray* includes the encouragement of ESD principles for the environmental assessment to be valid.¹⁸⁸ Therefore, while Justice Payne fundamentally agreed with the arguments presented by Gray, her Honour also stressed

182 Ibid, 122, 126, 131, 134.

183 Ibid, 97.

184 Ibid, 150.

185 Ibid, 147; George Woods, *Latest Anvil Hill Case Fails but the Campaign Continues!* (2007) <<http://www.greenpeace.org.au/blog/?p=132>>.

186 Jacqueline Peel, *Anvil Hill Case* (2008)

<http://blogs.unimelb.edu.au/peel_climatechange/2008/12/16/anvil-hill-case-2006/>; Anna Rose, 'Gray v Minister for Planning: The Rising Tide, of Climate Change Litigation in Australia' (2007) 29 *Sydney Law Review* 725.

187 Environmental Planning Legislation Amendment Bill 2006.

188 Ibid.

that it was ultimately up to the Minister to decide how ESD principles are to be applied in their entirety.¹⁸⁹

After the mine at Anvil Hill was approved on 7 June 2007, the second legal challenge was heard before the Federal Court on 20 September 2007 in the case of *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter Pty Ltd* [2007].¹⁹⁰ This time the argument was primarily directed at Part 3 of the EPBC Act,¹⁹¹ which prohibits actions that have or are likely to have a significant impact on matters of national environmental significance including world heritage property, wetlands of international significance, threatened and migratory species and the marine environment.¹⁹² It was argued that the impact of the emissions from the combustion of the coal would contribute to the ‘loss of climatic habitat caused by anthropogenic emissions of GHG’, which is a key threatening process under section 183 of the EPBC Act.¹⁹³ More significantly, the issue was raised of whether a project that is likely to have a significant impact on matters protected under Part 3 of the EPBC Act; that is a controlled action within meaning of section 67 of the EPBC Act, was a jurisdictional fact.¹⁹⁴ If found to be a jurisdictional fact, GHG emissions would not only impact on endangered orchids and critically endangered ecological communities, due to the clearing of the site but also, by extension, on the Great Barrier Reef and the Blue Mountains World Heritage Areas.¹⁹⁵

189 *Gray v Minister for Planning* [2006] at 147–150; Environment Protection and Biodiversity Conservation Act 1999; Peel, above n 187.

190 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter Pty Ltd* [2007] FCA 1480.

191 Environment Protection and Biodiversity Conservation Act 1999 (Cth). Section 3A sets out principles of ecologically sustainable development that are relevant to decision makers under the Act. Those principles incorporate concern for long and short-term economic, environmental, social and equitable considerations. They direct attention to inter-generational equity, the conservation of biological diversity and ecological integrity as well as the need to balance levels of scientific certainty with the seriousness of an environmental threat. The section advocates the promotion of incentive mechanisms in the management of environmental issues. *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter Pty Ltd* [2007] FCA 1480.

192 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter Pty Ltd* [2007] FCA 1480 at 7.

193 *Ibid*, 45. Notably, the term impact was introduced into the Act on 19 February 2007, which is the date of the delegates decision made under section 75(1) and is now defined in section 527E.

194 *Ibid*, 1, 8 and 30; Ratcliff, above n 176; Rose, above n 186.

195 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter Pty Ltd* [2007] FCA 1480, at 29; Ratcliff, above n 169; Rose, above n 180.

As the test to determine the scope of a controlled action under the EPBC Act had earlier been established in the *Nathan Dam* case,¹⁹⁶ and in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v Minister for Environment and Heritage* [2006],¹⁹⁷ a GHG accounting baseline and a tighter nexus between emissions and their specific impact on the environment had already been in place.¹⁹⁸ In seeking to distinguish the *Anvil Hill* case from the Bowen Basin decision,¹⁹⁹ it was further argued that a ‘measurable or identifiable increase in the global atmospheric temperature or other GHG impacts’ required ‘a common sense approach’.²⁰⁰ This argument was however dismissed on the grounds that the two cases were not indistinguishable and it was further held that the relatively small contribution of the proposed emissions to total global emissions was not seen to have a significant impact on climate change.²⁰¹ After this case was dismissed, an appeal was filed on October 11, 2007, which was limited to grounds relating to jurisdictional fact and issues relating to endangered ecological communities found on the site that are listed as critically endangered pursuant to section 181 of the EPBC Act.²⁰² On 25 February 2008, this appeal was also dismissed, essentially on the ground that under section 75(1) of the EPBC Act, the NSW Minister for Planning had the discretionary power to approve the mine.²⁰³

196 *Minister for the Environment and Heritage v Queensland Conservation Council Inc.*, [2004] FCAFC 190 Ibid.

197 *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v Minister for Environment and Heritage* [2006] FCA 736; (2006) 232 ALR 510. In this case, it was argued that the proposed coal mine projects fell under the EPBC Acts controlled action provision because burning coal from these mines would produce significant amounts of GHGs that would contribute towards global warming. However, the EIA had already considered the possibility that GHGs may contribute to climate change and could adversely affect protected areas and such impacts were found to be too speculative. The Court rejected the interpretation that likely under section 75 of the EPBC Act amounted to possible and concluded that the Minister had met the Australian Conservation Foundations baseline of taking GHGs into account in the environmental assessment phase (at 44, 72). Having done so procedurally, substantively the burning of coal was not likely to have a significant impact on protected areas or species (at 47); Tracy Bach and Justin Brown, *Research for the Climate Legacy Initiative (CLI)* (2009) <http://www.vermontlaw.edu/cli/index.cfm?doc_id=1403>.

198 Bach and Brown, above n 197.

199 In the Bowen Basin case, it was argued that the threats posed by the emission of greenhouse gases are cumulative and that a detailed assessment should be undertaken by comparing those projects with the mines or other proposals that would lead to emissions. These arguments were rejected, Ibid, 55.

200 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter Pty Ltd* [2007] FCA 1480, 32–3; *Henville v Walker* [2011] HCA 52; [2001] 206 CLR 459 at 490.

201 Ibid, 42, 44.

202 Notice of Appeal, *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter Pty Ltd* [2007] FCA 1480 (2011); Ratcliff, above n 168; Ruddock, above n 46 (2011).

203 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3 at 25, 26 and 32; Woods, above n 185. The argument was based on the grounds that 10 percent

Not only did the EPA Act move further away from social and environmental justice but the decisions are also entirely dependent on the subjective discretion of the Minister for Planning. In turn, this shift to a ‘technocratic and discretionary regime’ is a backward step as when the EPA Act was first established in 1979. At this time, it was ‘one of the most progressive in the world’ because it recognised the value of genuine public participation, not only in terms of democracy and good governance but also in terms of the recognition that community consultation leads to better decision-making.²⁰⁴ The ongoing efforts on the part of public participants to challenge the law, which is historically hesitant to bring about social change, continues to pursue justice and, as such, to close the gap between law and justice, even if such changes are not easily brought about. Moreover, despite the fact that the mine was approved and that reforms to the EPA Act have eroded rather than enhanced its founding principles, the *Anvil Hill* case has had a notable impact on environmental legislation and jurisprudence. This is because it established a causal link between the coal mines industry and climate change and highlighted the flaws in the legislation, in particular in Part 3A of the EPA Act.

This case had thus staked out new territory that had previously been untouched by including ESD principles in the EIA process. This impacted on considerations in regard to the positive GHG impacts of renewable energy projects for intergenerational equity in reducing greenhouse emissions, as is evident in *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007].²⁰⁵ In *Xstrata Coal Queensland Pty Ltd. v Queensland Conservation Council* [2007], even though economic considerations were at the forefront,²⁰⁶ on appeal, it was held that the Court must re-evaluate the climate change science to determine if coal companies will not only have to assess their contribution to climate change, but initiate programs in order to

of the area to be cut open for coal was zoned for scenic protection—a local environmental zoning that wholly prohibits open cut coal mining.

204 Robert Ghanem, *Submission to the Legislative Council Inquiry into the NSW Planning Framework* (2009)

<<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/530183A60404CEC9CA25747500005550>>.

205 *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59, Rose, above n 186.

206 *Xstrata Coal Queensland Pty Ltd. v. Queensland Conservation Council* [2007] QLRT 33 at 23.

avoid, reduce, or offset GHG emissions.²⁰⁷ Moreover, in February 2007, the New South Wales government considered the *Anvil Hill* decision in its *State Environmental Planning Policy* (SEPP) so that consent authorities were required to consider GHG assessment, including downstream emissions, for future developments.²⁰⁸ Furthermore, new coal mines in the Hunter were subsequently requested to provide information on the environmental impacts of the burning the coal that they potentially produce.²⁰⁹

CSG mining is a relatively recent industry, so there is a pressing need for detailed research into its effects. There is however little doubt that research will be able to disprove that the effects of CSG mining and exploration on the environment are detrimental. To date, farmers have experienced only detrimental effects of CSG mining and exploration and a substantial section of the public agree. Thus, on a community or public participatory level, the *Anvil Hill* case continues to encourage ongoing opposition to the CSG mining industry. In his 2009 submission to inquiry into the impacts of CSG mining in the Murray Darling Basin to the Senate Standing Committee on Environment, Communications and the Arts, Bernie Caffery, an agriculturalist and crop consultant, raises grave concerns in regard the effects of CSG mining on water supplies and quality, and on environmental and agricultural productivity.²¹⁰ Caffery argues that never before in the history of mining in Australia has one type of mining grown so quickly or become so widespread. While the gas is to be extracted over the next forty years, productive farming land is required to sustain for the next 40,000 years. Hence, Caffrey emphasised that CSG extraction is utterly incompatible with irrigated agriculture and opines that, although “legislating against the mining of prime food producing land involves missing short term financial opportunities, such short term financial gains from mining will be far outweighed by the long term sustainability of our future food supply and exports for thousands of years”.²¹¹

207 Bach and Brown, above n 197.

208 Rose, above n 186.

209 Ibid.

210 Bernie Caffery, *Submission to inquiry into the impacts of CSG mining in the Murray Darling Basin to the Senate Standing Committee on Environment, Communications and the Arts*, <<https://senate.aph.gov.au/submissions/committees/viewdocument>>.

211 Ibid

In July 2011, the Stop CSG Illawarra community action group met with the Heathcote MP Lee Evans to ask him to support their calls to ban fracking and a moratorium on CSG mining until the outcome of a Royal Commission. Coalitions of farming communities such as Liverpool Plains (NSW) and Western Darling Downs (Queensland) also vigorously oppose the exploratory phases of CSG mining through official channels, such as writing submissions and responding to EIAs, parliamentary inquiries and public consultations.²¹² In September 2011, a similar submission to that put forward by Caffery was presented to the NSW Legislative Council by Rabobank Australia and New Zealand. In this submission it was also acknowledged that CSG exploration and extraction areas traverse many farmers' landholdings and if not properly managed, will negatively impact on agricultural production, which, in turn, reduces food production and consequently Australia's role in the global food and agribusiness sector.²¹³ The recommendations made by Rabobank were also similar to those proposed by Caffery;²¹⁴ namely that urgent changes to legislation must be made to ensure that a sustainable balance between farming, mining and energy production is able to be maintained. It was recommended that the precautionary principle be applied to CSG mining activities (as argued in *Gray*) and that licence assessment focus on environmental effects, not on economic gain.²¹⁵ It was further proposed that a strategic and comprehensive long-term plan be implemented at the Federal level, rather than at isolated State-based or regional management levels, to evaluate the effects of CSG mining and exploration activities.²¹⁶ Moreover it was proposed that Australia-wide knowledge, public participation and detailed monitoring be enabled, as well as a user-friendly appeals process for farmers to seek support and certainty in their dealings with the CSG industry.²¹⁷

Maintaining or conserving certain areas of the natural environment is valued for a variety of reasons and consequently, if threatened or tampered with, public participants

212 Tim Stewart, *Growing Opposition to Coal Seam Gas Mining* (2011)

<http://directactionorg.au/issue29/growing_opposition_to_coal_seam_gas_mining>.

213 Neil Dobbin, Group Executive, Rabobank Australia & New Zealand

<[http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/07bac1d80d86fa78ca25791b0011a9cb/\\$FILE/Submission%200455.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/07bac1d80d86fa78ca25791b0011a9cb/$FILE/Submission%200455.pdf)>

214 Caffery, above n 210.

215 Dobbin, above n 213.

216 Ibid

217 Ibid

are quick to defend such places. In general terms, concerns over public land management have a two-pronged effect: firstly they are voiced by the local public, and secondly they encourage the support of a broader public who may have otherwise been indifferent or ignorant of certain conservation issues.²¹⁸ According to the above submissions, CGS mining and exploration is not deemed as an effective long-term solution to energy production in Australia, and their views are largely supported by the media and the public. Consequently, public lawyering is successfully being used as a tool to meet the broader campaign objective of challenging ‘the historically unchallenged economic dependence on fossil fuels in New South Wales’.²¹⁹ Another available avenue of responding to environmental concerns is through use of the doctrine of the public trust. The concept of the public trust is based on the idea that certain resources are held in trust by the government for the benefit and use of the general public. Hence, as trustee, the government is under a fiduciary duty to deal with common natural resources in a manner that is in the interest of the general public, and the trust property cannot be alienated unless the public benefit that would result outweighs the loss of the public use or ‘social wealth’ derived from the land.²²⁰ Acceptance of the public trust doctrine means that any individual would have standing as a beneficiary to enforce the trust against the government as trustee, which would result in greater accountability of government action affecting the subject of the trust. It has been suggested that public trust law is perhaps the strongest contemporary expression of the idea that the legal rights of nature and of future generations are enforceable against contemporary users”.²²¹

While such avenues of responding to environmental concerns undisputedly have merit, the biggest problem however remains; namely that the utilitarian views expressed in legislation, land use planning and management policies continue to dominate traditional evaluation methods and EIAs in regard to consequences of human activity, which in

218 Joanne Vining, Melinda S. Merrick and Emily A. Price, ‘The Distinction between Humans and Nature: Human Perceptions of Connectedness to Nature and Elements of the Natural and Unnatural’ *Human Ecology Review*, Vol. 15, No. 1, 2008, 2.

219 Stewart, above n 212.

220 The Hon. Justice Brian J Preston, Chief Judge, Land and Environment Court of NSW (2008), ‘The Environment and its Influence on the Law’

<[http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf/\\$file/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf/$file/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf)>

221 Ibid. Preston is referring to W H Rodgers, ‘Bringing people back: Toward a comprehensive theory of taking in natural resource law’ (1982) 10 *Ecology L Q* 205 at 239-240.

turn, typically exclude ecological values.²²² In Australia, real property rights vest in the Crown, and certain components of the land that would at common law belong to the owner (as being attached to and part of the land), in fact belong to the government. Consequently, all jurisdictions since 1884, including New South Wales, have adopted a general severance policy that separates mineral rights from the rest of the land and provides that future land grants contain a reservation of all minerals.²²³ Even though the mining industry is to incur an additional profit-based tax since the introduction of a carbon tax, which, as mentioned in the case study on the carbon tax above, is to be invested by the government in the form of social benefits and infrastructures, mining is essentially a non-renewable source that causes extensive environmental damage. It is therefore important that decision-making in CSG projects allows for the configuration of a new economic and socio-political vision to ensure that sustainable development is incorporated into policies. The notion of sustainability, in turn, implies that a balance must be struck between environmental, economic, political, social and cultural processes under a systemic, multidimensional view of development that incorporates intergenerational solidarity, social equity and long-term considerations as essential elements.²²⁴

Sustainable solutions do not come from science, industries or governments, but are the product of a society-wide dialogue and the consensus it negotiates. Hence, viable alternative solutions to the traditional understanding of energy production are clearly needed. Within this context, the *Gray* case can be applauded for several reasons and on several different levels. Firstly, it enabled public interest to address the need for the ‘present generation to meet its obligation of intergenerational equity by ensuring the health, diversity and productivity of the environment is maintained and enhanced for the benefit of future generations’.²²⁵ Secondly, in reliance on ESD principles, it challenged traditional constraints in a clear attempt to bring the law back to its original intent and purpose; namely to be directed at social/environmental justice. Thirdly, it confirmed the belief that justice is possible if a space is created for ongoing discussions or *différance*

222 B Boer, ‘Social Ecology and Environmental Law’ (1984) 9(2) *Environmental and Planning Law Journal* 233.

223 Preston, above n 220.

224 María Nieves Rico, *Gender, the Environment and the Sustainability of Development* (1998) <<http://www.eclac.org/publicaciones/xml/6/4706/lcl1144i.pdf>>.

225 *Gray v Minister for Planning* [2006] at 116.

to take place with view to legislative change, even in the face of much opposition on the part of the Australian government.

By considering the omitted other, that is Scope 3 GHG emissions, the court ruled in favour of Gray. Regrettably, however, the resistance on the part of policy makers, who continue to adhere to traditional male perspectivetism, effectively reduced the full impact of the effect of *différance* by amending Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) prior to the court hearing to ensure that the Minister rather than the public has the final say. Although Part 3A of the EPA Act has since been repealed, the *Gray* case nevertheless continues to resonate in the ongoing protests against CSG mining, as a stark reminder of the power of public participation. In turn, social and environmental justices remain at the forefront, and since the gap between law and justice remains open, *différance* is still part of a conversation that focusses on bringing about legislative changes.

4.6. Conclusion

The case studies examined in this chapter - that is the carbon tax scheme and the Anvil Hill CSG mining case, show that change is possible by way of a promise in the form of a future present. In the case of the carbon tax, the promise is in the form a clean energy future for Australia, and in the CSG mining case, it is based on the principle of enabling public participation to ‘play an active role in changing unsustainable consumption and production patterns,’²²⁶ as set out in principle 7 of the *Rio Declaration on Environment and Development*.²²⁷

Given that the space for discussions to continue with view legislative change has already been opened in both cases, the potential for law and justice to be reconciled is reasonably foreseeable. Accordingly, once an imaginary domain has been opened, the possibility for alternative or oppositional discourses are endless. It is here that feminist epistemology is an effective means of incorporating justice into the legal framework

226 United Nations Division for Sustainable Development, *Johannesburg Plan of Implementation: Changing Unsustainable Patterns of Consumption and Production* (2011)

<http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm>.

227 Rio Declaration on Environment and Development, *United Nations Environment Programme*,

<<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>>

because it challenges the binaries that flow from normative privileging and disturbs logocentric thought. The ecofeminist contribution therefore brings a non-traditional understanding of human interactions with the world to the fore,²²⁸ which scrutinises man's dominion over the Earth and the way in which humans perceive and interact with the environment.

Since the law has already been sufficiently destabilised in both cases, the space has been created to enable other perspectives to be brought into the conversation, such as that of ecofeminists, who would ensure that precedence will not be afforded to monetary considerations. Policymakers would consider investing in clean energy source, assuring that the promise of creating a green energy future is followed through and strive towards making policy changes to the EPA Act, so that it becomes 'one of the most progressive in the world' once again.²²⁹

227 Catherine MacKinnon, *Toward a Feminist Theory of State* (Harvard University Press, 1989) 98.

229 Robert Ghanem, *Submission to the Legislative Council Inquiry into the NSW Planning Framework* (2009) <<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/530183A60404CEC9CA25747500005550>>.

CHAPTER FIVE: ANIMAL LAW IN AUSTRALIA

Case Study (1): Animals in Intensive Farming

Case Study (2): Animals deemed as Feral or Unwanted

5.1. Introduction

This chapter focuses on two case studies: animals used in intensive farming and feral or unwanted animals that are culled. These two categories of animals have been specifically targeted because they are afforded the least protection under the law and are subjected to the most torturous deaths at human hands. The first case study explores the treatment of intensively farmed animals while they alive and the slaughtering methods used on these animals for their ultimate purpose, namely for the purpose of human consumption and use. The second case study explores the culling practices of unwanted and feral animals, mainly through shooting by professional shooters, as this is considered to be the most cost-effective and efficient method. It is argued in both cases that these animals are subjected to unnecessary suffering and harm, and are also afforded little legal protection.

Animal law is ideally about the regulated relationships between animals and people; or more particularly, about human attitudes towards animals as fellow creatures and sentient beings.¹ However, the manner in which society interacts with other entities within their environment is with arrogant indifference to the needs of the other. The link between the mistreatment of animals and the historical exploitation of women under a male hegemony is therefore distressingly evident in animal law.

The current legal framework is constructed from a male perspective and is therefore based on only a partial account of the world. This chapter aims to bridge the gap between the treatment of animals and the incorporation of justice into the legal framework by examining both ethical and jurisprudential debates to encourage reform in animal law. The inclusion of ecofeminist jurisprudence serves to challenge the nature

¹ Deborah Cao with contributions by Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Thomson Reuters Australia Ltd, 2010) 3.

of legal theory itself, as it moves beyond arguments that are constrained by rational proof and truth-seeking. Prefaced on the ecofeminist understanding of normative dualisms, where higher value is attributed to one entity over another, the conceptual connections between the oppression of women and animals are exposed to encourage legal jurisprudence to think beyond the traditional legal framework and to embolden this to be reflected in legal practice.

5.2. An Overview of the Situation of Intensively Farmed and Unwanted Animals

Humans are able to culturally adapt to diverse environmental landscapes and climatic conditions, and have consequently colonised almost every type of ecosystem on Earth.² Humans' ability to survive and to reproduce under extreme conditions has led to a population growth that is unparalleled by any other species on Earth. Furthermore, their cultural practices and innovative technologies are able to aptly respond to resource scarcity.³ This in turn has resulted in the alteration of more than half of the Earth's terrestrial surface and in the extinction of many wildlife species.⁴ Humans have also been using animals in a variety of capacities since ancient times, from companion animals to sources of produce, such as milk, eggs and meat. Today, the revolutionary methods used in food production have led to an unprecedented use of animals that are raised for food and used for animal-based products.⁵ In Australia alone, more than half a billion farm animals, or livestock, are used annually for consumer products and in the manufacturing of animal-derived products.⁶ As producers compete on cost, scale and efficiency to meet growing demand in both domestic and international markets,

2 Mary A Orland, *The Roots of the Modern Environmental Dilemma: A Brief History of the Relationship between Humans and Wildlife* (2011) <<http://marinebio.org/oceans/conservation/moyle/ch1.asp>>.

3 Ibid. Other species survive and reproduce as the result of a history of natural selection and biological evolution, and a typical non-human species grows until it reaches the carrying capacity of its environment and then levels off or declines.

4 Ibid. Other species cannot survive outside their natural habitat, so the preservation of their natural habitats is essential to preserving biodiversity. Even slight alteration to natural habitat can harm the entire ecosystem, and migratory species are particularly vulnerable to habitat destruction because they inhabit more than one natural habitat, thus creating the need to preserve not only their habitats but also their migratory route. As the human population continues to grow so in addition to their demands on land use, and wildlife will have even smaller spaces to call home.

5 Katrina Sharman, *Voiceless* (2011)

<http://www.voiceless.org.au/The_Issues/Fact_Sheets/Factory_Farming.html>.

6 Ibid.

unorthodox practices are employed in intensively farming these animals, subjecting the animals caught up in this abusive cycle to immense harm, suffering and distress.⁷ As animals are valued in terms of profit and loss, both in life and after their slaughter, any reference to loss is directed at economic loss. This is disturbingly evident in the live export industry and further evidenced in the transport of meat as perishable goods.

Intensive farming also has detrimental environmental consequences, ranging from rapid erosion of fertile top soils, to the contamination of drinking water supplies through the chemicals used to enhance farmland productivity, as it takes up to three hundred years for one inch of agricultural topsoil to form; hence soil that is lost is essentially irreplaceable.⁸ Furthermore, according to a report conducted by the United Nations Food and Agriculture Organization (FAO), the livestock industry is responsible for eighteen percent of GHG worldwide, and is one of the foremost contributors to serious environmental problems at every scale from local to global.⁹ Animal agriculture produces gases such as carbon dioxide and the more harmful methane and nitrous oxide gases, which cause more GHG than all forms of transportation combined.¹⁰ The message is thus clear: intensive farming is bad for animals and for the environment - and because animals have no voice, we need to speak up on their behalf.

As society is becoming increasingly aware of the conditions under which farmed animals live, due to media exposure, sparked by the combined efforts of animal rights movements, animal welfare groups, the many contributions of researchers, scholars, authors in the fields of science, philosophy, ethics and the law, the duties of humans towards animals is increasingly under debate. The distinguishing feature between animal rights movements and animal welfare groups is that animal rights movements such as People for the Ethical Treatment of Animals (PETA) take a hard-line approach and outlaw all factory farming and animal use for food or clothing. They argue that all animals, as sentient beings, are on equal footing with humans regardless of whether they are cute, useful to humans, or endangered. Like vegetarian ecofeminists, or more

7 Ibid.

8 Nancy M Trautmann, Keith S Porte and Robert J Wagenet, *Modern Agriculture: Its Effects on the Environment* (2011) <<http://psep.cce.cornell.edu/facts-slides-self/facts/mod-ag-grw85.aspx>>.

9 United Nations Food and Agriculture Organization, *Livestock a Major Threat to Environment* (2006) <<http://www.fao.org/newsroom/en/news/2006/1000448/index.html>>.

10 Ibid.

specifically vegan ecofeminists, their aim is not to mitigate the pain that captive animals experience, but to abolish the use of animals for food, clothing, entertainment and experimentation.¹¹ Animal welfare groups, such as the Royal Society for the Protection of Animals (RSPCA) take a softer approach and work on incremental improvements in the lives of animals, such as for example bigger cages for farmed animals and ensuring that they treated more humanely.¹²

The legal protection of animals against acts of cruelty is a relatively recent development, as for the greater part of history animals were not entitled to protection or consideration of their well-being.¹³ Hence, as an academic discipline and legal practice, animal law has a short history compared to traditional branches of law, although the notions of animal rights and anti-cruelty legislation have been in existence for about two centuries.¹⁴ However, as animals are always considered in the context of human use, protecting their interests outside of human interests is problematic.¹⁵ In law, animals are regarded as human property and in economics, they are regarded as resources. This sets limitations to the welfarist model of protection, as certain categories of animals are protected from certain categories of acts. Moreover, because modern animal welfare law is based, broadly speaking, on utilitarian principles and is directed at protecting animals from cruelty and improving their quality of life,¹⁶ this makes it difficult to envisage any legislative change or moral force to protect their rights as intrinsically valuable beings and participants in the ecosystem.

According to Steven White, when considering animals and the law, a useful starting point is to acknowledge that companion animals, animals used in scientific research, animals performing for entertainment and animals farmed for their produce are the

11 People for the Ethical Treatment of Animals (PETA) <http://wncom/People_for_the_Ethical_Treatment_of_Animals>.

12 Royal Society for the Protection of Animals (RSPCA) <<http://www.rspca.org.au/>>; Australian Government: Department of Agriculture, Fisheries and Forestry (DAFF), *The Role of Animal Welfare Agencies in Improving Animal Welfare* (2011) <http://www.daff.gov.au/animal-plant-health/welfare/aaws/aaws_international_animal_welfare_conference/the_role_of_animal_welfare_agencies_in_improving_animal_welfare>.

13 Cao, above n 1, 4–5.

14 Ibid.

15 Ibid

16 Ibid.

property of humans.¹⁷ This suggests that humans may deal with animals however they please. They may act compassionately, sensitively and respectfully or alternatively, under a regime of absolute property, in a way that is gratuitously cruel, without legal ramifications.¹⁸ While anti-cruelty and other animal welfare statutes places limits on the rights of absolute property to prevent cruel practices, the question is whether such intervention sufficiently addresses the position of animals or 'whether the fundamental premise of property in animals as vested absolutely in humans needs to be overturned'.¹⁹ In Australia, the reform of animal welfare legislation is predominantly in the hands of its states and territories, and while these jurisdictions have progressively strengthened their legislation over the past few years, the focus has largely been on the protection of companion animals.²⁰ One of the important legislative developments has been to incorporate a duty of care toward animals, to clarify what constitutes cruelty and what is regarded as proper care. Most animal welfare legislation however, particularly in regard to farmed animals, reflects 'an unbalanced trade-off between human and animal interests'. This is particularly evidenced in the legislative language, which 'qualifies or limits the pain that can be imposed on animals to that which is not unjustifiable, unnecessary or unreasonable'.²¹

Ethical theorists inject the very necessary moral component into the environmental debate to illuminate the consequences of not only our choices to protect the environment but also to afford animals more legal protection. Feminists stress that the personal is political and that the choices we make on a daily basis have political ramifications. Ecofeminist theorists add a further dimension to the debate by pointing to the relevance of gender as a major contributor to the abuse of both nature and nonhuman animals. Warren identifies four key elements that constitute ecofeminist critiques of the means by which instruments of coercion, such as the law, oppress women and nature. Firstly, the connections between the oppression of women and the oppression of nature; secondly, the necessary understanding of the nature of these connections to adequately understand the oppression of women and nature; thirdly the

17 Steven White, 'Animals and the Law: A New Legal Frontier?' (2005) 9 *Melbourne University Law Review* 298-316 <<http://www.austlii.edu.au/au/journals/MULR/2005/9.html>>.

18 Ibid.

19 Ibid, 301.

20 Ibid.

21 Ibid

importance of including feminist theory and practice in the ecological perspective; and fourthly including a feminist perspective in the solutions to ecological problems.²² The underlying thesis of ecofeminism is that people operate from a socially constructed conceptual framework that shapes, reflects and explains self-perceptions and worldviews, and this conceptual framework, in turn, is centred on traditionally male-identified beliefs, values, attitudes and assumptions.²³ This understanding adds a vital element to the construction of a domination that is reinforced through legal mechanisms.

5.3. Philosophical Approaches to Human/Nonhuman Relationships

Although ecofeminists may distance themselves from certain aspects of Peter Singer's utilitarianism and from Tom Regan's deontological rights approach, they share their underlying passion to subject human attitudes about and interactions with animals to moral scrutiny.²⁴ Singer's book, *Animal Liberation*, is generally regarded as having revived the modern debate about the status of animals.²⁵ Singer's basic idea is based on the utilitarian doctrine of the English philosopher Jeremy Bentham (1748-1832),²⁶ and Singer holds the view that the interests of animals should be given equal weight to the interests of humans because 'an interest is an interest, whoever's interest it may be'.²⁷ Consequently, by not extending equal consideration to the interests of animals on the basis of their lack of capacity to act rationally, autonomously and morally as compared to the average human, unequal consideration must then also be afforded to humans who display a lack of capacity to the average human.²⁸ This, in turn, essentially contradicts the proposition that all humans are equal.²⁹

22 Karen Warren, 'Feminism and Ecology: Making Connections' (1987) 9 *Environmental Ethics* 4.

23 Ibid.

24 Grace Kao, 'Consistency in Ecofeminist Ethics' (2006) 3(11) *The International Journal of the Humanities* 11.

25 Peter Singer, *Animal Liberation* (HarperCollins Publishers, 2002).

26 For Bentham, what ultimately matters is pleasure and pain, in which the value of pleasure is greater than the value of pain. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in B J H Burns and H L A Hart (eds) (Clarendon Press Oxford, 1996).

27 Peter Singer, *Practical Ethics* (Cambridge University Press, 1993) 21.

28 Singer, *Animal Liberation*, above n 25, 16.

29 Ibid.

Moreover, if it is wrong to inflict pain and suffering on people who lack this capacity, such as for example infants and the intellectually disabled, the infliction of pain and suffering on animals with comparable intellectual capacities is equally wrong.³⁰ Singer's principle of equal consideration however does not require equal treatment of all sentient beings, as equality is a moral idea and not an assertion of fact.³¹ Hence, animals are not to be treated like humans, simply because they are not humans; however their right to equal consideration of interest exists on the basis that they are sentient beings who experience pain and suffering, as do humans, and as such have an interest in avoiding such pain and suffering.³² In drawing parallels between racism, sexism and speciesism,³³ Singer concludes that speciesism is 'an equally ethically indefensible form of discrimination against beings on the basis of their membership of a species other than ours'.³⁴ For Singer, most humans are speciesists because their most direct contact with members of other species is at mealtime.³⁵ For Singer it is however not merely the act of killing that reflect speciesism, but the suffering inflicted on the animals while they are alive, which is 'perhaps an even clearer indication of speciesism than the fact that we are prepared to kill them'.³⁶

While Singer focusses on sentience as the basis for equal consideration of one's interests, Regan argues that animals should be granted the same moral status as humans, based on rights as right holders; that is both moral and legal rights.³⁷ For Regan:

The fundamental wrong is the system that allows us to view animals as *our resources*, here for *us*—to be eaten, or surgically manipulated, or exploited for sport or money. Once we accept this

30 Ibid.

31 Peter Singer, *All Animals are Equal* (2011) <<http://www.animal-rights-library.com/texts-m/singer02.htm>>.

32 Ibid.

33 A term coined by in 1970 by Richard Ryder. See chapter one of this thesis. Richard Ryder, *Animal Revolution: Charging Attitudes towards Speciesism* (Basil Blackwell, 1989).

34 Peter Singer, 'Ethics, Animals and Nature' in H-L Ki and A Yeung (eds), *New Essays in Applied Ethics, Animal Rights, Personhood and the Ethics of Killing* (Palgrave MacMillan, 2007) 29.

35 Singer, *All Animals are Equal*, above n 31.

36 Ibid.

37 Tom Regan, *The Case for Animal Rights* (2003) <<http://www.animal-rights-library.com/texts-m/regan03.pdf>>.

view of animals—as our resources—the rest is as predictable as it is regrettable.³⁸

Regan's basic principle is equality of consideration, although equal consideration for different beings amounts to different treatment and different rights.³⁹ Regan argues that it is not the differences but the similarities between humans and animals that matter most, and the fundamental similarity between humans and animals is that they both experience 'a subject of a life'.⁴⁰ Both feel fear, pain, frustration enjoyment and satisfaction, and the basic moral right to respectful treatment is to be able to enjoy a quality of life and not be treated as a mere resource.⁴¹

In a similar vein to Singer, Regan argues that if animals are denied rights based on lack of cognitive abilities, then it naturally follows that human with a similar level of cognitive abilities should also be denied moral and legal rights.⁴² Therefore, either a higher standard for moral and legal rights should be set, in which case some humans and all animals would be denied rights, or a lower standard should be set, such as that of sentience, in which case all humans and all other sentient beings would be granted equal rights.⁴³ Regan further argues that humans have direct duties to animals to protect the interests of animals and ensure that they are given moral consideration. For Regan, animals, as any other living beings that experience a 'subject of a life' warrant respect and this respect must ultimately stem from an act of justice because, alternatively, it would amount to prejudice and injustice.⁴⁴ Regan further considers the Animal Welfarist approach to be too lenient, as in the end, even if animals are confined in bigger cages, they are ultimately treated as resources and denied of rights.⁴⁵

38 Ibid.

39 Ibid.

40 Tom Regan, *Defending Animal Rights* (University of Illinois Press, 2006) 43.

41 Ibid.

42 Ibid.

43 Regan, *The Case for Animal Rights*, above n 37.

44 Ibid.

45 Ibid.

Ecofeminists, such as Josephine Donovan and Carol Adams argue that empathy and care constitute equally morally significant factors that contribute to ethical thought.⁴⁶ For Donovan, an ethic based on sympathy is a complex intellectual and emotional exercise that is able to further animal liberation through compassion for the animal and its well-being in exploitative circumstances.⁴⁷ Although feminists disagree about whether male and female qualities are innate to the sexes or common human traits,⁴⁸ many believe that qualities such as caring and nurturing are gender neutral and socially imposed.⁴⁹ Adams, for example, puts forward the view that men are as relational as women, and that it is the invisibility of their dependence on women's caring activities that allows them the illusionary façade of being autonomous, rational individuals.⁵⁰ In *Of Mice and Men*, MacKinnon also discusses the 'caring' and 'protecting' aspect towards other beings, human or nonhuman but further argues that this can be viewed as degrading to the subject because the subject is unable to fend for itself.⁵¹ MacKinnon's notion of *différance* is from the perspective that gender is not a question of difference but one of dominance propagated by a system of law that 'sees and treats women the way men see and treat women'.⁵² Acknowledging the correlation between the social hierarchy that governs relationships between men and women and humans and animals, MacKinnon argues that the current primary model of animal rights makes animals the objects of rights in accordance with traditional liberal moral standards from a human perspective. This in turn fails to consider animals on their own terms in the same way in which women have traditionally not been considered on their own terms.⁵³

46 Josephine Donovan and Carol Adams (eds), *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals* (Columbia University Press 2007). Also for Jean Kazez, etymologically speaking, kindness, kind, and kin all share a common origin (through the old English word *cynd*), which indicates that we (humankind) give kindness to our own kind and kin, including animals. This involves intuitive concepts, such as respect, care, concern, and compassion. Jean Kazez, *Animalkind* (Wiley-Blackwell 2010) 30, 113.

47 Ibid, Donovan and Adams, 149.

48 H K Manion, Ecofeminism within Gender and Development (2002)

<<http://www.lancs.ac.uk/staff/twine/ecofem/manion.pdf>>. Cultural and radical feminists believe that women are in essence more nurturing, peaceful, co-operative and closer to nature than men, while social or deep ecology ecofeminists resist the urge to overestimate social constructs.

49 Judith Plant, *Women and Nature* (2011) <<http://www.thegreenfuse.org/plant.htm>>.

50 Donovan and Adams, above n 46, 172.

51 Catharine MacKinnon, 'Of Mice and Men', in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and new Directions* (Oxford University Press, 2004).

52 Catherine MacKinnon, 'Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence' (1983) 8(4) *Signs* 635.

53 MacKinnon, above n 51.

MacKinnon's theory of the dominance of the nonhuman world by the human world thus identifies another facet of substantive inequality to animals.

In focusing on the idea of the 'argument from marginal cases',⁵⁴ Elisabeth Anderson argues that a 'rational attitude theory of value'⁵⁵ is the better approach, as different animals require recognition of different rights.⁵⁶ Furthermore, according to Anderson, there is room within policy considerations to be open to animal welfare (sympathy for animals), animal rights (respect for animals), and environmentalism (wonder of nature).⁵⁷ Nussbaum, on the other hand, proposes the 'capabilities' approach to animal rights and compares central human capabilities, such as reason and emotion, with a broad list of basic entitlements for animals.⁵⁸ Nussbaum argues that these principles provide a system that is able to work through the inherent conflicts between the well-being of humans and the well-being of animals.⁵⁹ Animal ethicists thus attempt to redefine the rights and identity of all living species and to afford them rights, regardless of their similarities or dissimilarities with humans.⁶⁰ The debates surrounding the ecofeminist 'justice care' ethic, which began in 1982 with Carol Gilligan's book *In a Different Voice*,⁶¹ focus on 'caring' as an attempt to undermine the private/public dichotomy that fails to consider the emotional aspect of traditional animal rights advocates. Gilligan's thesis is that because male and female legal and ethical styles have developed in different ways, the different ethical orientations between men and women reflect important differences in moral reasoning.⁶² Rather than constructing rational arguments in animals' defence, care ethicists draw upon ordinary attitudes about, and concrete experiences with animals to remind us that we already care about them. Importantly, the feminist care ethic calls for an end to the exploitation and consumption

54 Elisabeth Anderson, 'Animal Rights and the Values of Nonhuman Life' in Cass R Sunstein and Martha C Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 279.

55 Ibid.

56 Anderson, above n 54, 290.

57 Ibid, 293.

58 Martha C Nussbaum, 'Beyond Compassion and Humanity Justice for Nonhuman Animals' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 299.

59 Ibid.

60 Donovan and Adams, above n 46, 63.

61 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

62 Karen J Warren, 'Feminism and Ecology: Making Connections' (1987) 9(1) *Environmental Ethics* 3.

of animals because humans ought to care more about the natural world and its nonhuman inhabitants.

In *Neither Man nor Beast: Feminism and the Defense of Animals*,⁶³ Adams refers to the depiction of the suffering that animals endure as consumable commodities, and again draws on the epistemologies of Regan and Singer, which she argues are filtered through a male experience. Adams recognises that these epistemologies come from embodied experiences that are subjective and gender-based, but then poses the essential feminist question; namely in which way would animal ethics be different if seen from a woman's embodied experience?⁶⁴

For Adams, the connection between male dominance and meat eating is explored in her book, *the Sexual Politics of Meat*.⁶⁵ Adams objects to the popular Western ontologization of animals as meat, since it obscures the subjectivity of the 'absent referents' that lie behind every non-vegetarian meal: there is neither beef without a cow nor pork without a pig and in each case an animal has been slaughtered, prepared and even bred for human consumption.⁶⁶ As billions of animals are slaughtered for human consumption, the disrespect towards animals has become so culturally ingrained that it is not even seen as domination.⁶⁷ Adams claims that the elimination of meat eating would displace male control due to the overt association between meat eating and male virility.⁶⁸ For Adams, the close examination of meat eating is not only an essential aspect of animal rights theory, 'as meat eating leads to the most extensive destruction of animals' but also of feminist theory, as the oppression of animals and the oppression of women are linked.⁶⁹ The vegetarian ecofeminists' rejection of meat can thus be seen as a protest against a greater chain of environmental and social evils, for 'by speaking of

63 Carol J Adams, *Neither Man nor Beast: Feminism and the Defence of Animals* (The Continuum Publishing Company, 1995).

64 Ibid.

65 Carol J Adams, *The Sexual Politics of Meat* (Polity Press, 1990).

66 Ibid.

67 Lee Hall, *Some Thoughts on Catharine MacKinnon's Essay of Mice and Men* (2011) <<http://www.lancs.ac.uk/staff/twine/ecofem/hallonmackinnonpdf>>.

68 Adams, above n 65. Adams nevertheless recognises that not eating meat does not always or necessarily result in the creation of a better person. She provides several examples of distorted vegetarians, including Adolf Hitler (152). From the perspective of virtue ethics, vegetarianism would be seen as having a virtue such as compassion for animals, for example, but would not make you a virtuous person based on this virtue alone.

69 Ibid, 14.

the text of meat, we situate the meaning of the production of meat within a political-cultural context'.⁷⁰ Ultimately, for Adams, Western meat-eaters are 'blocked vegetarians', which is demonstrated in a common defensiveness and anger about vegetarianism because it betrays suppressed guilt or shame about their dietary habits.⁷¹

In turn, deconstruction of the cultural symbolic association between women and animals is an important step towards the creation of social and environmental justice. This involves a journey into the psychology that leads to oppression and opens the space for a radical change in perspective to take place that can successfully challenge such deeply-rooted exploitation.⁷² Similar to humans, animals feel pain, mourn for the dead and have intricate social networks. In that regard, and for purposes of the law, animal ethical theories offer valuable insights and contributions towards a legal philosophical understanding of animals as being an essentially moral issue that has largely been ignored.⁷³ Their goal is to work towards generating change, so that all living species are afforded both moral and legal rights. Only then will nonhuman animals be able to live their lives without being subjected to pain and suffering at human hands, as the alternative would clearly be undesirable of any moral person or community.

5.4. The Legal Status of Animals

The legal status of animals is an important consideration for the animal liberation movement, as it reflects the protection afforded to animals in the hierarchy of beings. Despite the fact that animals are now recognised as sentient beings, they are still classified as property under the law. This is a legacy of ancient Roman law, which divided persons, things and actions into distinct categories. Whatever could be assessed in terms of money, with a cash value placed on it, was classified as a thing and the object of rights of a person, including property rights. In turn, the characterisation of animals as property is fundamental to not only their legal definition but also the protection of their interests. Interestingly, the legal definition of animals has remained unchanged for the past two thousand years but the way in which animals are protected

⁷⁰ Ibid. Vegans take on the same argument but also include all animal-derived produce.

⁷¹ Ibid, 15.

⁷² Hall, above n 67.

⁷³ Peter Singer, 'Do Animals Feel Pain?' in *Animal Liberation* (Avon Books, 2nd ed, 1990) 10–15.

has seen an evolutionary change over the past two hundred years.⁷⁴ So although the notion of property suggests that there are no constraints on the ways in which humans may deal with animals, parliamentary intervention, in the form of anti-cruelty and other animal welfare statutes, places limits on the rights of absolute property that humans may exercise in relation to animals.⁷⁵

In Australia, at common law, domestic animals belong to someone and are therefore the subject of absolute property, whether they are companion animals, animals used in scientific research, animals performing for entertainment, or farmed animals.⁷⁶ As part of the absolute property rights, the owner of domestic animals can maintain a claim for their detention or conversion or for trespass to goods, and retains property in the animals if they are stray or lost. The property in the young of domestic animals is in the owner of the mother of the young.⁷⁷ Wild animals are regarded as either not being property (*res nullius*), and therefore not goods or chattels as they are not owned by anyone, or as qualified property when living and as absolute property when dead.⁷⁸ In the case of a wild animal as qualified property, humans are only able to obtain qualified property rights in such animals through taming, confinement, or other means of control. The qualified right in living wild animals is conferred *ratio impotentiae et loci* or *ratione privilegii*, is in substance an exclusive right to reduce the wild animals into human possession.⁷⁹ Such qualified property is defeasible, for if the animal resumes its wildness and is not under pursuit, another person may take it.⁸⁰ *Ratione impotentiae et loci* also means that the owner of land has a qualified property in the young of wild animals born on the land until they can fly or run away.⁸¹ If acquired *per industriam*, the

⁷⁴ Cao, above n 1 63–5.

⁷⁵ White, above n 17.

⁷⁶ Cao, above n 1, 73.

⁷⁷ Ibid 73; *Official Assignee of Bailey v Union Bank of Australia Ltd* [1916] 35 NZLR 9 at 18; [1916] 78; *Graf v Lingerell* (1914) 16 DLR 417; 6 WWR 566.

⁷⁸ Cao, above n 1; *Case of Swans* (1592) 7 Co Rep 15b at 17b.

⁷⁹ Cao, above n 1, 73. Game animals were excluded from the category of wild animals, as game was seen to be of particular value as a source of food and sport. The nobility wished to exclude others from expropriating to themselves game animals. According to Blackstone, to avoid disturbances and quarrels amongst individuals contending about the acquisition of this species of property by first occupancy, ownership of game was vested in the sovereign of the state or its authorised representatives, usually lords of manors. The Hon. Justice Brian J Preston, Chief Judge, Land and Environment Court of NSW (2008), ‘The Environment and its Influence on the Law’

<[http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf/\\$file/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf/$file/Paper_Sept07_PrestonCJ_Environment_and_its_influence.pdf)>

⁸⁰ Cao, above n 1, 73.

⁸¹ Ibid, 74.

qualified right of property is an exclusive right to the possession of the wild animal to any person who takes, tames or reclaims them until they regain their natural liberty.⁸² *Ratione soli* and *ratione privilegii* allow the owner of land who has retained the exclusive right to hunt, take and kill wild animals.⁸³ As it is transient property in animals (usually referred to as game), the owner has qualified *ratione soli* in them while they are on his land. If the owner grants the right to hunt, take or kill wild animals on his property to another person, the grantee has qualified property *ratione privilegii*.⁸⁴ When a wild animal is killed or dies, there is an absolute property in the dead animal, which vests in the person by whom it was taken or killed, provided the animal was lawfully killed/executed. Rights and liabilities are regulated by relevant criminal laws.⁸⁵

A central issue to the debate about animal rights is whether the intervention of welfare legislation adequately addresses the position of animals, or whether the fundamental premise of property in animals as vested in humans, either absolutely or qualified, needs to be overturned. One proposition is to grant animals legal rights of which there are many definitions and interpretations. Francione calls for the status of animals to be reconceptualised based on a 'right' for animals not to be treated as property.⁸⁶ He argues that because animal welfare legislation is essentially based on an understanding of animals as commodities, the property status of animals renders meaningless the animal welfare laws that prohibit the infliction of 'unnecessary' suffering or require the 'humane' treatment of animals.⁸⁷ Francione embraces the principle of equal consideration of the interests of animals and rejects that the painless killing of animals is acceptable on the basis that it perpetuates the paradigm of human exploitation of animals.⁸⁸ Francione regards the problem with anti-cruelty statutes to be that they are designed to protect agriculture, research, entertainment and hunting and on belief that the majority of the suffering inflicted on animals is necessary.⁸⁹ He explains that a

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid, 75.

⁸⁵ Ibid, 76.

⁸⁶ Gary L Francione, *Animals, Property and the Law* (Temple University Press, 1995) 124–5.

⁸⁷ Ibid.

⁸⁸ Ibid, 132–4; White, above n. 17.

⁸⁹ Francione, above n 86, 108, 124; Nussbaum, above n 58. David J Wolfson and Mariann Sullivan also discuss the limitations of state anticruelty statutes due to the exemptions of common or normal husbandry practices. This means that those who use animals for agricultural purposes ultimately determine what is or is not cruel. The authors then compare and contrast laws in the United States to those in Europe, where

balancing of interests includes the status of a ‘legal person’, which does not mean they are ‘human persons’, and there may be times when human interests take precedence over animal interests.⁹⁰ Joel Feinberg equally makes a case for animal rights. According to Feinberg, ‘to have a right is to have a claim to something and against someone, the recognition of which is called for by legal (or institutional) rules, or in the case of moral rights, by the principles of an enlightened conscience’.⁹¹ Feinberg points out that children and the intellectually disabled who cannot represent themselves have their interests protected; hence since animals also have interests, recognition of their interests is critical to their entitlement to rights.⁹² Feinberg concludes that most people morally believe that animals have rights, but conceptual confusion underpins the reluctance to afford them such rights.⁹³

Sunstein identifies three limitations of state anti-cruelty statutes and their enforcement. Firstly, that it is within state prosecutors’ discretion whether or not to enforce criminal statutes whereas private prosecution would allow for more prosecutions; secondly, problems arise because our duties and obligations to animals only exist through relationships that are entered into by people, and state laws do not protect most animals from cruelty; and thirdly because federal protections for animals and their enforcement are inadequate.⁹⁴ To create a system that protects animals and is better enforced, Sunstein argues that new statutes need to be created or existing statutes expanded.⁹⁵ White similarly argues that most animal welfare legislation is problematic in that it inevitably reflects an unbalanced trade-off between human and animal interests.⁹⁶ This is evidenced in the legislative language that qualifies or limits the pain that can be

significantly more progress has been made in animal rights. They conclude that the farming community should not set the standards for humane treatment of animals, industries should not be allowed to regulate themselves, and we should not tolerate a legal system that simply does not in any way protect most of the animals in the United States from cruelty.

90 Francione, above n 86, 110.

91 Joel Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, 1980) 159 (cited in Cao, above n 1, 90).

92 Cao, above n 1, 91.

93 Ibid, 92.

94 Cass R Sunstein, ‘Can Animals Sue?’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 253–5. While there are a number of environmental and animal welfare statutes on the federal level protecting migratory birds, horses, endangered species, and marine mammals—the list is quite comprehensive—but the tapestry of laws, and unequal enforcement, leaves out a number of animals.

95 Ibid 255.

96 White, above n 17.

imposed on animals to that which is not unjustifiable, unnecessary or unreasonable.⁹⁷ Although a positive duty of care towards animals is also incorporated, such as to provide them with adequate food and accommodation, modern animal welfare laws fall short of protecting animals from cruelty and improving their quality of life.⁹⁸ As animal welfare law is based on utilitarian principles, White concludes that Singer would also argue that for legislation to be effective, it would need to consider the interests of animals and humans equally.⁹⁹

David Favre proposes a new animal property paradigm by adding the category of 'living' property based on the self-ownership of living objects.¹⁰⁰ In this model, the relationship between owner and an animal is similar to a custodial relationship between a parent and child.¹⁰¹ The legal and equitable components of the law are thus divided in that humans would hold legal title to an animal and the animal would hold equitable title, or equitable self-ownership.¹⁰² Once the animal has equitable title, the legal title owner has the obligation to consider its interests.¹⁰³ Steven Wise however argues that 'unless a nonhuman animal attains legal personhood, she will not count'.¹⁰⁴ Wise thus makes a direct connection between animals and women through use of the pronoun 'she' and his argument, based on legal personhood, equally resonates the strong historical connection between women and animals. Wise argues that as the property status of animals means that they are objects of ownership and not legal persons, and as legal personhood is per se an artificial construct,¹⁰⁵ the recognition of basic liberty rights for animals is possible, based on the probability of animals having 'practical autonomy'.¹⁰⁶ In a similar vein to Singer and Regan, Wise considers the notions of sentience and consciousness in animals and argues that an animal's intention to fulfil that desire may imply legal personhood, at least in the case of animals with

97 Ibid.

98 Ibid.

99 Ibid; also see 5.2 of this chapter.

100 David Favre, 'A New Property Status for Animals: Equitable Self-Ownership' in C R Sunstein and Martha C Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 245–50.

101 Ibid.

102 Ibid.

103 Ibid.

104 Steven M Wise, 'Animal Rights: One Step at a Time' in C R Sunstein and Martha C Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 25.

105 For example, a corporation is an artificial legal person.

106 Ibid 32.

higher practical autonomy, such as chimpanzees, while for other animals with lower practical autonomy, legal rights would be appropriately minimised.¹⁰⁷ In cases in which it is simply impossible to determine the extent of the autonomy, Wise suggests that the ‘precautionary principle’ be applied and adjusted in accordance with new empirical evidence.¹⁰⁸ Biological determinism should thus be used to persuade judges to take the first and most crucial step of overcoming the status of animals as property, and to invest them with legal personhood so that they are bearers of rights.¹⁰⁹ Hall, in turn, refers to the finding of Supreme Court Justice Louis Brandeis that the right to be free is rooted in something more deeply than a study of property rights could reach. According to Justice Brandeis, ‘the right to be let alone’ is ‘the most comprehensive of rights and the right most valued by civilized men’.¹¹⁰ On this premise, Hall continues that at the core of nonhuman rights is the right to an inviolate personality, which includes the right to life and liberty of movement, and this is in essence the right to be left alone. For animals, Hall continues, this is surely ‘the most comprehensive of rights’.¹¹¹

The classification of animals as property is without a doubt a feminist issue on multiple levels. The legal status of women as property dates back to Roman law under the reign of Romulus (753-716 BC),¹¹² but has since changed thanks to the concerted efforts on the part of feminist movements of the past. The classification of animals as property also dates back to ancient Roman law, but their status is still evident in the law that applies to animals today.¹¹³ In ‘*Of Mice and Men*’, MacKinnon states that just as ‘[p]eople dominate animals, men dominate women’, however ‘animals do not exist for humans any more that women exist for men’.¹¹⁴ Mackinnon draws parallels between the treatment of women and animals that has resulted in their property status to the common identification of women and animals with irrationality as opposed to reason, which

107 Ibid.

108 Ibid.

109 Ibid.

110 Hall, above n 67.

111 Ibid.

112 ‘Women, even though full of age, because of their levity of mind, shall be under guardianship’, R Fester, *Weib und Macht. Fuenf Millionen Jahre Urgeschichte der Frau* (Fischer, 1979) 45.

113 Cao above n 1, 64–5. In Roman law, all beings that were considered to lack free will were classified as things and capable of being owned. Hence there is a clear stipulation concerning both women and animals as property and the classification of animals as property continues to mould the laws in Australia today. See Cao, chapter three; and 5.3.2 of this chapter.

114 Catherine MacKinnon, *Toward a Feminist Theory of State* (Harvard University Press, 1989) 264.

leads to their subjection based on their need to be controlled.¹¹⁵ As discussed in chapter two, women also had no civil or legal rights, due to their perceived ‘levity of mind’, a term which dates back to the Roman law that deemed women not to possess the cognitive abilities to be able to exercise free will.¹¹⁶ Given that women and other minority groups are now granted legal rights, it is not unreasonable to suggest that animals should also be granted rights, on that basis that they are fellow sentient beings with recognised cognitive abilities.¹¹⁷ As MacKinnon points out, the value measure of a moral society is reflected in the way it treats other members of society; namely on their own, individual terms.¹¹⁸ Indeed, the struggle to establish basic rights for animals is evidenced in many of the propositions discussed above, however Wise confronts this issue most directly by succinctly arguing that ‘unless a nonhuman animal attains legal personhood, she will not count’.¹¹⁹

On another level, the social and cultural repercussions of the status of women as property or chattels similarly subjected them into eternal guardianship of first their fathers and then their husbands. In the legal doctrine, the Coverture, which was enshrined in the common law of England throughout most of the 19th century, a woman’s legal rights were subsumed by those of her husband upon marriage.¹²⁰ The definition of a wife as a *feme covert* emphasised her subordination to her husband because in marriage husband and wife became one.¹²¹ Not only was a wife’s legal identity surrendered to her husband but also any personal property that she may have acquired, unless it was specified that it was to be for her own personal use.¹²² Aware of their daughters’ unfortunate situation, fathers often provided their daughters with dowries or constructed a prenuptial agreement, so that the estate which their daughters

115 Ibid; Fester, above n 112.

116 Christine Battersby, *Gender and Genius* (Indiana University Press, 1989); Cao, above n 1 65.

117 Cao, above n 1, 65.

118 MacKinnon, above n 114, 264.

119 Wise, above n 104.

120 Sir William Blackstone, *Commentaries on the laws of England: Of Husband and Wife*, Book 1 Chapter 15 < <http://www.lonang.com/exlibris/blackstone/bla-115.htm>>

121 Ibid. Women who were never married or who were widowed maintained control over their property and inheritance, owned land and controlled property disposal, since by law any unmarried or widowed adult female was considered to be a *feme sole*.

122 Ibid. Married women were also unable to draft wills or dispose of any property without the husband’s consent.

were to possess was to be for their sole and separate use and not subject to the control of their husbands.¹²³

The state of affairs that applied to women in the 19th Century strongly correlates with that governing animals today. This is evidenced in the arguments in support of animal rights, as outlined above, which address familiar obstacles that need to be overcome to protect animals from harm as long as they are regarded as human property and have no legal rights of their own. Feinberg, for example, argues for the protection of the interests of animals with reference to the protection afforded to children and the intellectually disabled (hence associating the notion of 'levity of mind'), and Favre's model is similarly based on a custodial relationship between owner and animal (hence guardianship). Sunstein and White, on the other hand, point out that even though owners owe a positive duty of care towards their animals, the law as it stands still fails to protect animals from cruelty and thus has little impact on improving their quality of life. They propose that the only way to really protect animals is to create new laws and to upgrade existing laws, and then ensure that these laws are actually enforced. This argument resonates strongly with the position of women, both before and after they were granted legal rights.

For Hall, the core of nonhuman rights is the right to an inviolate personality, which includes the right to life and liberty of movement, or in essence, the right to be left alone. The 1836 Caroline Norton case, in which the injustice of gender-based discrimination in English property law was brought to light, reinforces the core of Hall's idea of the right to life and liberty of movement as being 'the most comprehensive of rights'.¹²⁴ In 1836, Caroline Norton left her abusive husband, taking her three sons with her. For the short time that Caroline's sons were living with her, they relied on Caroline's earnings as an author. During the nine day trial, Caroline's husband, who was a barrister, successfully argued that Caroline's earnings were legally his because under English law, any property or earnings of a wife automatically belong to her husband.¹²⁵ Caroline's three sons were also taken from her, as under English law

123 Anne Laurence, *Women in England: 1500-1760: A Social History* (New York: St.Martin's 1994) 54.

124 Hall, above n 67 – refers to notes 110 and 111, in which Hall refers to Justice Brandeis' finding.

125 Bridget Hill, *Women, Work and Sexual Politics in Eighteenth-century England*, (London: Blackwell 1989) 196.

at that time, children were regarded as the property of their father.¹²⁶ This notion is evident in Australian animal law today (discussed in detail in 5.4 of this chapter), as *ratione impotentiae et loci* allows the owner of land to have qualified property in the young of wild animals born on his land until they are in a position to fly or run away. Similarly, Caroline's children, who were also Norton's children, belonged to Norton as he was the rightful owner, not only of the person who had given birth to the children (that is Caroline) but also the legal owner of the land upon which the children were born and were meant to be raised. Caroline, in turn, by fleeing Norton to whom she was legally bound through marriage and by having taken the children from their legal owner and his property (as well as having possibly had an extra-marital affair), no doubt places her in the category of a wild or untamed animal, and as such outside the law. Although Norton was unable to prove in court that Caroline was indeed having an extra-marital affair, he was nevertheless successful in blocking the divorce, and thus in blocking Caroline's freedom or 'liberty of movement'.¹²⁷ Had Norton's claim of adultery been successful, this would have been considered as an added offence on Caroline's part against his property, as adultery at that time was defined in terms of sexual intercourse with another man's wife; hence a violation of his property.¹²⁸

In spite of her soiled reputation, Caroline Norton's case generated sufficient support for women's status as property to be rethought. After many years of political lobbying, married women's legal identities and property rights were introduced in the *Women's Property Act 1882*.¹²⁹ In the year before (1891), the traditional right of a husband to inflict corporal punishment on his wife to keep her 'within the bounds of duty' had also been removed from the law.¹³⁰ Not long after these laws were enacted in England, Australia followed suit and the *Married Women's Property Act 1883* allowed married women to acquire, hold and dispose of property and also provided legal avenues for

126 Jane Perkins, *The Life of the Honourable Mrs Norton* (H. Holt New York 1909) <<http://ia600400.us.archive.org/11/items/lifeofhonourable00perkrich/lifeofhonourable00perkrich.pdf>>; Hiam Brinjikji, *Property Rights of Women in Nineteenth-Century England*, <<http://www.umd.umich.edu/casl/hum/eng/classes/434/geweb/PROPERTY.htm>>

127 Ibid.

128 William L. Countryman, *Dirt, Greed and Sex: Sexual Ethics in the New Testament and their Implications for Today* (Fortress Press 2007) 144.

129 *Women's Property Act 1882*, Chapter 75: an Act to consolidate and amend the Acts relating to the Property of Married Women, <<http://www.legislation.gov.uk/ukpga/Vict/45-46/75/enacted>>

130 Brinjikji, above n 126.

them to sue (and be sued) on their own behalf.¹³¹ Although in 1892, the Supreme Court of South Australia had ruled against a wife seeking a maintenance order against her husband, even if she had left to escape domestic violence, in 1896 the government introduced the *Married Women's Protection Act*, which enabled magistrates to make orders for the protection, custody and maintenance of married women and their children.¹³²

It is therefore ironic, if not inconceivable, that women even in so-called progressive Western societies continue to uphold outdated and oppressive marriage rituals as part of their wedding ceremony. Given that by the end of the 19th century, the notion of women as property of either their fathers or their husbands was no longer accepted by law in most English speaking countries, as illuminated in chapter two of this thesis, current marriage rituals in Australia still signify that women are either the property of their fathers or of their future husbands. By allowing the father of the bride to hand over his daughter, or chattel, to her future husband or her next owner, women in even the most progressive countries have still not moved beyond patriarchal constraints. As such, women continue to consider themselves, and to allow themselves to be considered by others, as tradable goods or commodities, even if only symbolically. Even more unfortunately, the subordination of women is not always only symbolically enacted, as in many societies around the world women are still viewed as the property of the males in their family, who see it as their right to decide on their fate. Hence, irrespective of class, ethnicity or religion, the concept of ownership of women still exists, turning women into commodities that are able to be exchanged, bought and sold, and treated as deemed fit. This is evidenced in the many forms of violence and violations perpetrated against women, including domestic violence, rape, sex trafficking, bestiality and treating women as objects of sexual gratification, forced or arranged marriages and

131 *Government of South Australia State Library*, <<http://www.nationalarchives.gov.uk/records/research-guides/divorce-before-1858.htm>>

132 Ibid. Prior to 1883, in 1857 the South Australian Parliament passed the *Matrimonial Causes Act*, which came into force on January 1, 1858 and allowed women to petition for divorce. However the Act was largely in favour of men and the social norms of the day equally failed to protect wives and their children. After the social costs of desertion and domestic violence placed pressure on governments to legislate for reform, the *Savings Bank Act* of 1875 enabled married women to operate bank accounts in their own name, however it did not stop husbands from claiming the capital and any interest earned. In 1892 the Supreme Court ruled that maintenance orders could only be enforced when the husband deserted his wife.

honour killings.¹³³ This extreme form of oppression and violence against women indeed mirrors the paradigm of the human exploitation of animals and the violence perpetrated against them. In turn, just as many societies do not recognise violence, especially domestic violence against women, to be a crime because of the misconception that violence against a female family member is a family and not a judicial matter,¹³⁴ the infliction of pain and suffering upon animals is equally not recognised as being a crime, certainly not on the part of the owner/perpetrator and unfortunately also not adequately enough by the law. So, just as the penal codes in the case of violence against women must be brought up to international standards in all countries around the world,¹³⁵ so too must the laws governing animals be brought up to standard, at both national and international levels, so that animals are afforded protection against cruelty and offenders are penalised accordingly.

The fact that women are still being mistreated in many parts of the world today clearly suggests that it is fallacy to believe that women have achieved equality on every level and in every society, and it would be equally fallacious to believe that a sweeping and radical change in the legal status of animals and of people's attitudes towards them can take place overnight. Indeed, in the 1998 case of *Garcia v National Australia Bank Ltd* (1998), it was found that even though the role of women in Australian society has changed in the last six decades, there is 'still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power relationships between the parties.'¹³⁶ By no means however does this signify that the battle for and on behalf of animals should be

133 Hillary Mayell, 'Thousands of Women Killed for Family Honor', *National Geographic News* (online), 12 February 2002

<http://news.nationalgeographic.com/news/2002/02/0212_020212_honorkilling_2html>. Honour killings are perpetrated for a wide range of offenses: marital infidelity, pre-marital sex, flirting, or even failing to serve a meal on time can all be perceived as impugning the family honour. In societies in which most marriages are arranged by fathers and money is frequently exchanged, a woman's desire to choose her own husband, or to seek a divorce, can be viewed as a major act of defiance that damages the honour of the man who negotiated the deal. Even victims of rape are vulnerable to honour killings. For example, in March of 1999, a sixteen year-old mentally retarded girl who was raped in the Northwest Frontier province of Pakistan was turned over to her tribe's judicial council. Even though the crime was reported to the police and the perpetrator was arrested, the Pathan tribesmen decided that she had brought shame to her tribe and she was killed in front of a tribal gathering.

134 Ibid. Also unfortunately, as mentioned in chapter two, complicity by other women in the families and communities of many of these female victims reinforce the concept of women as property or objects.

135 Ibid. In a similar vein to the 1891 change in the law so that a husband no longer had the right to inflict corporal punishment on his wife, as mentioned in 5.4 of this chapter.

136 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403-404

relinquished, as it not defeated, just as the battle for women's rights and equality is not defeated.

Given the strong correlation between the treatment of women and animals in law and society, including the health issues that result from violence, the animal rights movement has much to learn from the feminist critique of women's historical oppression under patriarchy, as women are in a prime position to argue for the cause of animal rights and to critically evaluate and contextualise the oppression and exploitation they experience. However, as MacKinnon points out, the causes for women and animals are different. Just as women's solution is particular to women, so too should the animal solution be particular to animals. To date, what is called animal law has been human law or laws about the relations of humans to animals. Perhaps it is time to ask the animals.¹³⁷ This is not as impossible as it sounds, as animals are highly expressive beings, with demonstrable emotions and certainly possess the ability to communicate. Indeed, the fact that animals are still regarded as property renders 'their position the most demeaned of any thinking, feeling beings in our midst',¹³⁸ and women's ongoing struggle to gain equality only illuminates the struggle that lies ahead to gain rights for animals. If any correlation can be made between the two causes, then just as in the case for women having rights on their own behalf and on their own terms is more effective than having rights under any other form of custodial protection or guardianship, as they are not then exposed to a position of vulnerability and dependence upon the benevolence of their guardian/custodian.

5.5. An Overview of Animal Law in Australia

As a former British colony, Australia has inherited the common law system from England; thus, Australian law has a strong historical and ongoing connection to English law. In English law, animal welfare legislation is believed to date back to 1635 when a law was passed in Ireland that prohibited working horses by their tails and pulling rather than shearing wool from sheep.¹³⁹ The earliest piece of legislation for the legal protection of animals dates back to June 22, 1822, when the *Bill to Prevent the Cruel*

137 MacKinnon, above n 114.

138 Hall, above n 67.

139 Cao, above n 1, 52.

and Improper Treatment of Cattle was enacted in England, sponsored by Richard Martin. Martin was an English parliamentarian and a human rights and animals rights activist.¹⁴⁰ He was not only the pioneer of the first animal welfare legislation that outlaws cruelty to animals but also the founder of a society that was later known as the RSPCA.¹⁴¹ Martin's Act or the *Cruel Treatment of Cattle Act 1822* was amended several times, and later replaced by laws such as *The Cruelty to Animals Act 1849*, amended in 1876, which sets limits on animal experimentation and introduced a licensing system.¹⁴² The *Protection of Animals Act 1911* marks the beginning of contemporary legal attitudes towards animals and the current law in England is the *Animal Welfare Act (2006 (UK))* which supersedes previous statutes.¹⁴³ When Australia was first established as a British colony, it also adopted its laws from England and ever since, English law has had a significant impact on the development of Australian law. Although the *Prevention of Cruelty to Animals Act 1979* (NSW) is generally regarded to be the first direct statutory protection of animals, the first Australian anti-cruelty legislation was in fact adopted in Van Dieman's Land in 1837 and New South Wales made an anti-cruelty law in 1850, followed by the *Animal Protection Act 1901* (Qld) in Queensland.¹⁴⁴ Animal law however consists of statutory and case law and is both interdisciplinary and multi-disciplinary, as it touches on many different other areas of law, including property law, torts, administrative law, criminal law, environmental law, consumer law, constitutional law, and legal theory.¹⁴⁵

Animal law can be divided into two broad categories; firstly, laws that relate to animal products and animal control; and secondly laws that relate to animal welfare and protection. While the definition of animal has some similarities, each Australian state and territory has adopted a different definition of which creatures are to be defined as animals for the purposes of the anti-cruelty statutes.¹⁴⁶ Most statutes define an animal as a live member of a vertebrate species including any amphibian, reptile, bird, fish and

¹⁴⁰ Ibid.

¹⁴¹ Ibid, 54–7.

¹⁴² Ibid, 57.

¹⁴³ Ibid, 57–9.

¹⁴⁴ Ibid, 99.

¹⁴⁵ Ibid, 35, 97.

¹⁴⁶ Katrina Sharman, *Animal Law in Australia* (2004)

<<http://www.animallaw.info/nonus/articles/ovaaustrailia.htm>>.

(nonhuman) mammal.¹⁴⁷ The basic philosophy that underlies the animal welfare laws in Australia is that animals are sentient beings that must not to be subjected to deliberate harm of suffering, unless a permissible benefit is gained from doing so. The focus and legislative intent of animal welfare laws are thus on the prevention of ‘unnecessary’ cruelty to animals and the duty of care of that is owed to animals by the people who are in charge of them. Where a state law conflicts with a Federal law, section 109 of the Constitution provides that Federal law prevails to the extent of the inconsistency.¹⁴⁸ Under section 51(xxv) of the Constitution, the Commonwealth has certain powers to regulate fisheries in Australasian waters; however, a cooperative approach to jurisdiction and supervision has also been adopted with states and territories.¹⁴⁹ Although the Constitution does not specifically mention animals, apart from fish, the Commonwealth has been able to enact and enforce valid legislation relating to other animals based on sections of the Constitution. For example, section 51 provides that the ‘Parliament shall... have power to make laws for peace, order and good government of the Commonwealth with respect to subject matters, known as ‘heads of power’’.¹⁵⁰ Subject to some limitations, a law that is characterised as belonging to a head of power will be valid even though it may regulate another matter that is not specifically allocated to the Commonwealth, such as for example animal welfare.¹⁵¹

The two parts of the section 51 heads of power that are significant to animal law are the external affairs power and the corporation’s power. The external affairs power is embodied in section 51(xxix) of the Constitution. Although subject to some limitations, it enables the Commonwealth to make laws relating to persons, events and things outside Australia and to implement the terms of an international treaty as part of

147 For example, the *Animal Welfare Act 1992* (ACT) 2; the *Prevention of Cruelty to Animals Act 1979* (NSW) 4; the *Prevention of Cruelty to Animals Act 1986* (VIC) 3; the *Animal Care and Protection Act 2001* (QLD) 11; and the *Animal Welfare Act 1999* (NT) 4 also include crustaceans in defined circumstances. The Australian Capital Territory (ACT) and Queensland (QLD) further include cephalopods, that is octopuses and squid, in certain circumstances, and sections 11(1) (b) and (3) of the Queensland Act further includes live pre-natal or pre-hatched creatures, if they are in the last half of gestation or development, but do not include the eggs, spat or spawn of fish. South Australia and Western Australia do not include fish in their definition of animal.

148 *Commonwealth of Australia Constitution Act 1901* (Cth)

149 Sharman, *Animal Law*, above n 146.

150 Ibid. *Commonwealth of Australia Constitution Act 1901* (Cth); the Commonwealth is permitted to enact any law, if the law is characterised as being under at least one of the heads of power. Other sections include section 92, which provides for freedom of intrastate trade and section 51(i), which provides for the power to make laws with respect to trade and commerce with other countries and among the States.

151 Ibid.

domestic law.¹⁵² Although there is no constitutional limitation on the subject matter of a treaty, in *R v Burgess: Ex Parte Henry* (1936), the courts have cautioned that the Commonwealth must become a party to a treaty in good faith and not ‘*merely [as] a device to procure for the Commonwealth an additional domestic jurisdiction*’.¹⁵³ Section 51(xx) permits the Commonwealth to make laws in respect to foreign corporations, trading and financial corporations,¹⁵⁴ and the corporation’s power, in turn, provides a platform for the Commonwealth to enact constitutionally valid laws relating to animals. In regard to animal law, the High Court has held that a corporation is a trading corporation if it conducts ‘*substantial or significant trading activities*’,¹⁵⁵ and once identified as a foreign, trading or financial corporation, the Commonwealth has the power to make laws with respect to trading or foreign corporations that affect animals in all Australian states and territories.¹⁵⁶ Furthermore, section 51(xxxvii) enables a power to be referred to States so that they can refer certain powers back to the Commonwealth. This includes animal welfare matters, although the popular approach has been for the states to expressly or impliedly incorporate national model standards of animal welfare into their own legislation.¹⁵⁷

Under section 122, the Commonwealth is empowered to make laws in areas beyond the limited heads of power in section 51 with respect to territories. The Commonwealth could therefore potentially pass constitutionally valid animal welfare laws relating to the Australian Capital Territory and the Northern Territory if it chose to do so. Despite the presence of section 122, the Australian Capital Territory and the Northern Territory tend to enjoy self-government, including the enactment and enforcement of animal welfare

152 As evidenced in the Tasmanian Dam case (also referred to in 4.3 above): *Commonwealth v Tasmania* (1983) 158 CLR 1. The seven judges of the High Court split 4:3 in deciding (amongst other matters) that the Commonwealth had power under section 51(xxix) of the Australian Constitution to stop the dam based on Australia’s international obligations under the World Heritage Convention.

153 *R v Burgess: Ex Parte Henry* (1936) 55 CLR 608 at 687, per Evatt and McTiernan. Examples of treaties concerning animals, to which Australia is a party, include the Convention on Biological Diversity (Biodiversity Convention) (Rio de Janeiro 1992), the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), the Convention on the Conservation of Migratory Species and Wild Animals 1979 (the Bonn Convention), and the Convention on the Conservation of Nature in the South Pacific (the Apia Convention).

154 *Commonwealth of Australia Constitution Act 1901* (Cth)

155 *R v Judges of the Federal Court of Australia, Ex Parte Western Australian National Football League* (Adamson’s case) 1979 143 CLR 190; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282

156 Sharman, *Animal Law*, above n 146.

157 Ibid.

laws.¹⁵⁸ Section 52 of the Constitution provides the Commonwealth with the exclusive power to legislate in Commonwealth places, which are places, or areas that belong to the Commonwealth government for public purposes and includes airports or certain land and marine areas; hence, if an animal lives in a Commonwealth place it is subject to Commonwealth legislation. Although the Commonwealth government has passed legislation to allow state laws to apply to Commonwealth places, statutory interpretation determines which law prevails in the event of inconsistency, as they are both Commonwealth laws.¹⁵⁹

The Commonwealth, through the Department Of Agriculture, Fisheries and Forestry Australia (AFFA), mainly administer the import and export of live animals. AFFA and its agencies administer laws such as the *Quarantine Act 1981* (Cth), the *Imported Food Control Act 1992* (Cth), the *Export Control Act 1982* (Cth) and the *Australian Meat and Livestock Industry Act 1997* (Cth). The main group concerned with the import and export of live animals is however the Australian Quarantine Inspection Service (AQIS). AFFA and AQIS also administer the import and export of horses, cats, dogs, including disability assistance dogs, issuing licenses and certifications for the live export of cattle, sheep and goats, implementing government policy in relation to live exports and investigating the deaths of animals during shipment.¹⁶⁰ The Commonwealth's power to legislate in these areas is likely to be derived from sections of the Constitution including but not limited to section 51(xxix), the external affairs power and section 51(ix), the quarantine power.¹⁶¹ State laws govern the transport of animals between States and Territories prior to export, and despite the role of AFFA, the live export of cattle, sheep and goats from Australia is largely self-regulated. The industry body responsible for accrediting exporters is the Australian Livestock Export Corporation Ltd (LiveCorp) and the accreditation scheme is the Livestock Export Accreditation Programme (LEAP). Licenses are granted by AFFA to accredited exporters under the *Australian Meat and Livestock Industry Act 1997* (Cth) and *Australian Meat and Livestock Industry (Export Licensing) Regulations 1998* (Cth). The regulatory framework for the export of live animals has been subject of considerable scrutiny due to the high incidence of sheep

158 Ibid. For example, Commonwealth Places (Application of Laws) Act 1970 (Cth) and Commonwealth Places (Mirror Taxes) Act 1998 (Cth).

159 Sharman, *Animal Law*, above n 146.

160 Ibid.

161 Ibid.

mortalities during voyages to the Middle East, and the more recent incidence that exposed the mistreatment of cattle in Indonesian slaughterhouses, which is discussed later in this chapter. Moreover, as livestock industries are governed by a series of national codes which are overseen by state departments of agriculture or primary industries, due to the inherent conflict of interest between welfare and production, it is difficult for the legal system to pursue cases of alleged neglect or cruelty.¹⁶²

The prevention of cruelty to animals has broadly the same objectives in each state and territory, even if the structure and provisions of the legislations vary.¹⁶³ All States and Territories prohibit the infliction of ‘unnecessary pain’ on an animal or the failure to take steps to alleviate pain experienced by an animal.¹⁶⁴ New South Wales, Western Australia, Queensland, Tasmania and Victoria use words such as ‘beating, mutilating, kicking, wounding, terrifying, torturing, abusing and overworking an animal’ in their definitions of cruelty, and New South Wales, Victoria and Tasmania have additional offences such as aggravated cruelty, which is defined as ‘acts resulting in the death, deformity or serious disablement of an animal’.¹⁶⁵ Some anti-cruelty statutes have created offences, such as confinement of an animal or failure to provide adequate or appropriate exercise, exposing an animal to excessive heat or excessive cold, failing to provide adequate veterinary treatment, neglecting an animal so as to cause it pain, tethering an animal for an unreasonable length of time, and failing to provide an animal with proper food, drink, or shelter.¹⁶⁶ The Queensland and Tasmanian statutes have also proactively imposed a positive duty of care on persons in charge of the animal.¹⁶⁷

162 Sean Murphy, ‘Law of the Land’, *ABC News* (online), 16 September 2011 <<http://www.abc.net.au/landline/content/2010/s3304060.htm>>.

163 These include the *Animal Welfare Act 1992* (ACT), the *Animal Welfare Act 1999* (NT), the *Prevention of Cruelty to Animals Act 1979* (NSW), the *Animal Care and Protection Act 2001* (QLD), the *Prevention of Cruelty to Animals Act 1985* (SA), the *Animal Welfare Act 1993* (TAS), the *Prevention of Cruelty to Animals Act 1986* (VIC), and the *Animal Welfare Act 2002* (WA).

164 The New South Wales, Victoria, Tasmanian and Northern Territory Acts expressly state that one of the objectives is to prevent cruelty to animals while the South Australian Act does not expressly state that this is an objective but it may be implied from its title. A number of States also list additional management or education aims in their objectives.

165 *Prevention of Cruelty to Animals Act 1979* (NSW) 4(2); *Animal Welfare Act 2002* (WA) 19; *Animal Care and Protection Act 2001* (QLD) 18; *Animal Welfare Act 1993* (TAS) 8; *Prevention of Cruelty to Animals Act 1986* (VIC) 9.

166 *Prevention of Cruelty to Animals Act 1979* (NSW) 6; *Prevention of Cruelty to Animals Act 1986* (VIC) 10; *Animal Welfare Act 1993* (TAS) 9; *Prevention of Cruelty to Animals Act 1979* (NSW) Sections 4–5; *Animal Care and Protection Act 2001* (Qld) Sect 18; *Animal Welfare Act* (NT) Sections 6–8.

167 *Animal Care and Protection Act 2001* (QLD) 17; *Animal Welfare Act 1993* (TAS) 6.

Despite the seemingly complex legal regime that regulates the treatment of animals, many loopholes are still evident and some laws afford little if any legal protection for animals against many acts of cruelty that are still practiced today. Anti-cruelty statutes are also unable to protect animals where mitigation is available through sanctioned exceptions, such as for example actions that may be deemed reasonable or in accordance with accepted killing methods.¹⁶⁸ The power to enforce the anti-cruelty statutes is granted to officers of state government departments, such as the police force and officers of the RSPCA, however the bulk of prosecutions are instituted by the RSPCA, which, as a charitable organisation, is significantly limited by budgetary constraints.¹⁶⁹ To address the lack of uniformity in Australia's anti-cruelty legislation, attempts have been made to achieve model standards through model 'codes of conduct', or 'codes of practice' which each state and territory is encouraged to incorporate into their anti-cruelty statutes. These codes were developed by the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ) and are now subsumed by the Primary Industries Ministerial Council (PIMC). Their legal status and effectiveness however varies between States, depending on the degree to which they have been incorporated into legislation.¹⁷⁰

In May 2004, the Council of Australian Governments' (CoAG) PIMC endorsed the Federal government's Australian Animal Welfare Strategy (AAWS) for the purpose of bringing a national approach to animal welfare standards, and ensuring that these are reflected in the law.¹⁷¹ In 2005, the government funded the AAWS for four years and gave them the task of reviewing all aspects of animal welfare for the purpose of identifying gaps, areas of duplication and ways of building community support, awareness and understanding. Six sectorial working groups were established to ensure that the strategy covers all sentient animals; namely animals used for work, sport,

168 Sharman, *Animal Law*, above n 146.

169 Ibid.

170 They cover the welfare of pigs, sheep, goats, livestock, the farming of deer, the intensive husbandry of rabbits, the keeping of poultry at slaughtering establishments, the keeping of animals in sale yards, the sea and transport of livestock and the care and use of animals for scientific purposes.

171 The origins of the Australian Welfare Strategy (Department of Agriculture, Fisheries and Forestry, 2011). Animal welfare started as a radical ideal in the 1970s, but has grown into a regular feature in the media and consumer campaigns. Significant milestones include the development of the Model Codes of Practice for the Welfare of Animals by the national Sub Committee on Animal Welfare in 1980, known today as the Animal Welfare Working Group, and the 1983 establishment of a Select Committee on Animal Welfare by the Australian senate to enable structured debates and new ideas for the sector.

recreation or display; animals in the wild; companion animals; livestock/production animals; aquatic animals; and animals used in research and teaching.¹⁷² Additional working groups review national education and training, investigate ways of incorporating animal welfare priorities into existing research and development programs, and guide the development and implementation of a communication strategy. Animal welfare groups, veterinarians, researchers, government agencies and the general community are further involved in the development and implementation of the strategy to work towards the common goal of improving animal welfare outcomes.¹⁷³

Animal welfare laws and strategies thus appear to reflect that animal cruelty is unacceptable. Breaches can result in fines of up to \$100,000 in Queensland and imprisonment for terms of up to five years in Western Australia. The legislation in most States also allows ‘banning’ orders, which prohibit people who are convicted of cruelty from owning or handling animals. This could reasonably be compared to sanctions for violent offenders and child predators; however quite often the sentences and fines that could be imposed are not strictly applied by the courts.¹⁷⁴ Indeed, if the stated commitment of the AAWS were truly reflected in the law, there would be a sound base for further improvement in animal welfare legislation.¹⁷⁵ Upon closer examination, the animal welfare standards and existing legislation reveals that entire categories of animals have little or any legislative protection from cruel practices. These animals are usually based on the type of human use the animal is deemed to have rather than on its ability to suffer.¹⁷⁶ Furthermore, although state and territory jurisdictions have strengthened their legislation over the past few years, Australia still lacks a unified and national approach, and due to the many gaps in the existing legislation, not only is cruelty to large numbers of animals permitted but it is also entrenched in law. There appears to be a distinct unwillingness on the part of both federal and state legislators to meaningfully engage with the issue of animal cruelty, particularly in regards to the practices that occur in Australia’s agricultural and intensive animal farming industries

172 Ibid.

173 Ibid.

174 Glenys Oogies, *Problems with Current Animal Protection: Sentient Animals Slipping through the Net* (2011) <http://www.daff.gov.au/animal-plant-health/welfare/aaws/aaws_international_animal_welfare_conference/problems_with_current_animal_protection_sentient_animals_slipping_through_the_net#19>.

175 Ibid.

176 Ibid.

towards pigs, cattle, sheep and poultry.¹⁷⁷ For example, the *Prevention of Cruelty to Animals Act 1986* (Vic) s 6(1) exempts farming from cruelty offences. Although most jurisdictions have adopted codes of conduct for the treatment of farmed animals, they are not always compulsory and not subject to wide public scrutiny, as is evident in the *Animal Welfare Act 2002* (WA) s 20(1) and the *Animal Welfare Act 1999* (NT) s 79(1)(a).¹⁷⁸ Furthermore, the fate of feral and other ‘forgotten’ classes of animals is also largely hidden from public scrutiny. For example, in the 2007 case *Animal Liberation Ltd v Department of Environment and Conservation*,¹⁷⁹ the New South Wales Supreme Court refused to grant an injunction sought by Animal Liberation Ltd to restrain the aerial shooting of goats and pigs on New South Wales nature reserves. This was based on a lack of necessary ‘special interest’ under the general principles of standing and that the evidence did not show a sufficient likelihood of the infliction of cruelty upon animals.¹⁸⁰ Deliberate infliction of harm is not the only circumstance in which it could be argued that humans affect animals’ rights.

5.5.1. Intensive Farming in Australia

Most people agree that all animals feel pain and experience fear and that they should be treated humanely.¹⁸¹ It is reasonable for people to believe that animals are protected from acts of cruelty by legislation. As the aim of animal law is also to protect animals from ‘unnecessary’ pain and suffering, it is a legal requirement to render animals unconscious at slaughter to spare them from an otherwise ‘unnecessarily’ painful and terrifying death.¹⁸² In reality, however, the animal agriculture industry very clearly demonstrates that these sentient creatures represent little more the mere production of flesh and animal products. Many animals are either not stunned or not successfully stunned before slaughter and studies have been conducted to determine the degree and duration of sensibility, consciousness, pain and suffering that are involved with failed

¹⁷⁷ Ibid.

¹⁷⁸ White, above n 17.

¹⁷⁹ *Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221.

¹⁸⁰ Cao, above n 1, 80.

¹⁸¹ See for example, the research study undertaken by Grahame Coleman of the Animal Welfare Science Centre, School of Psychology, Psychiatry and Physiological Medicine, <http://www.daff.gov.au/animal-plant-health/welfare/aaws/aaws_international_animal_welfare_conference/public_perceptions_of_animal_welfare_an_international_perspective#Livestock>.

¹⁸² Animals Australia, *Ritual Slaughter in Australia* (2011) <http://www.animalsaustralia.org/features/ritual_slaughter.php>; FAO, *Slaughter of Livestock* (2011) <<http://www.fao.org/DOCREP/003/X6909E/x6909e09.htm>>.

and unstunned slaughter. The time observed for the interval from the throat cut to unconsciousness for sheep varies from two to twenty seconds and for cattle consciousness up to two minutes.¹⁸³ The delay to unconsciousness can be considerably longer if the blood vessels are not successfully cut, or if occlusion occurs, that is the vessels close before bleeding out is complete.¹⁸⁴ Hence, for slaughter to be even considered remotely humane, it is imperative that animals are stunned unconscious first. Approximately 32 million sheep and 8 million cattle are killed in Australian abattoirs each year for domestic and export human consumption.¹⁸⁵ The slaughter standard in Australian commercial abattoirs are dictated by the Australian Standard for the Hygienic Production of Meat and Meat Products for Human Consumption (AS 4696 — 2007),¹⁸⁶ which requires that:

AS4696 - Slaughter:

7.09: *Animals are slaughtered in a way that prevents unnecessary injury, pain and suffering to them and causes them the least practicable disturbance.*

7.10: *Before sticking commences animals are stunned in a way that ensures that the animals are unconscious and insensible to pain before sticking occurs and do not regain consciousness or sensibility before dying.*

AS4696 - Ritual Slaughter:

7.12:

(1) This provision only applies to animals killed under an approved arrangement that provides for ritual slaughter involving sticking without prior *stunning;*

(2) An animal that is stuck without first being stunned and is not rendered unconscious as part of its ritual slaughter is stunned without delay after it is stuck to ensure that it is rendered unconscious.

183 Ibid.

184 Ibid.

185 Ibid.

186 CSIRO, *Australian Standard for the Hygienic Production of Meat and Meat Products for Human Consumption* (2011) <<http://www.publish.csiro.au/Books/download.cfm?ID=5553>>.

These slaughter practices are enforced by licensing bodies, such as the state Meat Authorities under the relevant state Meat Industry Acts, and the AQIS for the Commonwealth. The Export Control Act and Regulations also require compliance with the standards for all exported meat products, which is managed by the AQIS officers stationed in each export abattoir. In addition, the Australian Meat Industry Council (AMIC), which represents abattoir owners, developed and implemented the Industry Animal Welfare Standards for Livestock Processing Establishments in 2005, which integrate the national Codes of Practice, the relevant State and Commonwealth legislation and other commercial requirements.¹⁸⁷ These Standards similarly require that livestock are effectively stunned with appropriate equipment for the species and class of livestock (Standard 6, principle 2).¹⁸⁸ Australia's trade in chilled and frozen 'halal accredited' meat to the Middle East and other markets is significantly increasing each year, and most of this meat comes from animals that were stunned before slaughter. Islamic and Jewish leaders in Australia largely accept the stunning of animals because Halal and Kosher slaughter also requires that the animal not be injured at the time of slaughter.¹⁸⁹ Hence, electrical stunning in the case of sheep and percussion stunning in the case of cattle, neither of which is deemed to injure the animal, is part of acceptable ritual slaughter in Australia for both domestic consumption and export.¹⁹⁰

In the slaughter process for sheep, they are electrically pre-stunned in accordance with the relevant Australian Standard, and in line with state legislation for domestic consumption and federal legislation for export. In most abattoirs sheep come along a narrow race to the slaughter area, electric tongs are placed on either side of the sheep's

¹⁸⁷ Australian Meat Industry Council, *Industry Animal Welfare Standards* (2011) <<http://www.amic.org.au/SiteMedia/w3svc116/Uploads/Documents/Industry%20Animal%20Welfare%20Standards.pdf>>; Animals Australia, above n 173.

¹⁸⁸ Ibid.

¹⁸⁹ Frozen and chilled mutton and lamb exports to the Middle East grew to over 80,000 tons in 2010. Key requirements of halal killing, according to the Koran and Islamic leaders, include: not killing animals in the presence of other animals; the animals are not to be bound; the slaughterman makes a dedication of the animal to Allah; the animal being slaughtered must face Mecca; the animal should be killed with a single cut to the throat with a long sharp blade; and the animal must not suffer prior to slaughter. Investigations since 2003 in key Middle East countries which import Australian animals have found that the above halal requirements are routinely ignored in each of Egypt, Oman, Bahrain, Kuwait and Qatar. Animals Australia, *Halal Meat Exports—A Viable Alternative* (2011) <<http://www.liveexport-indefensible.com/facts/halal.php>>.

¹⁹⁰ Ibid; FAO, above n 182; Australian Meat Industry Council, above n 187.

head, and held there for around two seconds.¹⁹¹ The sheep is rendered unconscious and the stun will last for around 45 seconds.¹⁹² Industry standards state that the sheep's throat must be cut directly after the stun to ensure bleed out; that is insufficient blood/oxygen to maintain life, and prior to sheep regaining consciousness.¹⁹³ Once bled out, the sheep's body will be hoisted onto a processing line to be skinned, gutted, and cut up.¹⁹⁴ Similarly, the cattle killed in Australian abattoirs are walked along a raceway, then into a walled box area, restrained upright, a head neck restraint is applied and the animals is stunned, usually with a captive bolt or percussion gun and then the unconscious animal is released onto a platform where slaughter begins.¹⁹⁵ Some cattle that are slaughtered for the Jewish community (that is, kosher slaughter) are stunned immediately after the throat cut,¹⁹⁶ however, a number of slaughterhouses exist in Victoria and South Australia that have exemptions to practice ritual slaughter of sheep while they are fully conscious.¹⁹⁷ As the political spotlight focuses more on the live export trade, these slaughterhouses are able to continue to utilize an existing and legally disputed loophole, and this meat is sold in Australia without being labelled as such. To address this loophole, on the 23 September 2011, Australia's Primary Industries Standing Committee (PISC) met to make a recommendation to the government on the future of non-stunned ritual slaughter in Australia.¹⁹⁸ Moreover, specific exemptions from the cruelty provisions of state and territory animal protection laws subject up to 500 million animals to cruel husbandry practices without pain relief or to close confinement, creating severe behavioural restrictions for much of their productive lives.¹⁹⁹

On the Department of Agriculture, Fisheries and Forestry website the Australian government acknowledges that it supports 'a vibrant and growing livestock industry',

191 Animals Australia, above n 182; FAO, above n 182; Industry Animal Welfare Standards, *Livestock Processing: Preparing Meat for Human Consumption* <<http://www.amic.org.au/SiteMedia/w3svc116/Uploads/Documents/Industry%20Animal%20Welfare%20Standards.pdf>>.

192 Animals Australia, above n 182; FAO, above n 182; Industry Animal Welfare Standards, above n 191.

193 Animals Australia, above n 182; Industry Animal Welfare Standards, above n 191.

194 Animals Australia, above n 182; Industry Animal Welfare Standards, above n 191.

195 Animals Australia, above n 182; FAO, above n 182; Industry Animal Welfare Standards, above n 191.

196 Animals Australia, above n 182.

197 Ibid.

198 Oogies, above n 174.

199 Ibid.

as the export sector is an important part of the Australian economy.²⁰⁰ It also claims to recognise that the livestock export sector faces challenges and responsibilities that are different from other export industries, and that the government and those involved in the live export trade are continuing to work on improvements throughout the supply chain. As a member of the World Organisation for Animal Health and the OIE Regional Commission for Asia, the Far East and Oceania, through the OIE Commission and Australian agriculture counsellors, the Australian government claims to be continuing to raise awareness of animal welfare issues in Asian countries, and to provide the required information and technical cooperation to help improve animal health and welfare in these regions in line with international standards.²⁰¹ However, despite industry assurances that its training programs are effective, this is far from the truth. On 30 May 2011 the Four Corners television program in Australia revealed that many thousands of animals in fact die slow and hideous deaths in Indonesia.²⁰² The program showed video footage taken by its own team and separately by animal welfare activists across a range of slaughterhouses, which revealed that the training of the slaughtermen was grossly inadequate. The footage showed that animals smash their heads repeatedly on concrete as they struggle against ropes and take minutes to die in agony after repeated often clumsy cuts to the throat. In some cases there is abject and disturbing cruelty, such as kicking, hitting, eye-gouging and tail-breaking, as workers try to force the cattle to go into the slaughter boxes installed by the Australian industry, with support from the Australian government.²⁰³

The tacit acceptance of practices that occur in the live export trade allows it to continue, largely unabated, in spite of its history of deaths and suffering to the animals involved and media attention over the past few years. This can be attributed to several reasons, including the inconsistency of legislation across the board; the failure to sufficiently regulate current practices; the different court reactions to the protection afforded to certain categories of animals; and the gaps or loopholes that still exist between

200 Department of Agriculture, Fisheries and Forestry, *Animal Welfare Issues* (2011) <http://www.daff.gov.au/animal-plant-health/welfare/animal_welfare_issues>.

201 Ibid.

202 Sarah Ferguson, 'A Bloody Business', *Four Corners*, 30 May 2011 <<http://www.abc.net.au/4corners/content/2011/s3228880.htm>>.

203 Ibid.

legislation and its implantation.²⁰⁴ Moreover, the ineffectiveness of legislation is most evident in the protection of animals involved in the live export trade industry, as current practices include practices that, although horrific, are at the same time justifiable, reasonable and necessary on economic grounds.²⁰⁵ Such grounds are however not good enough, as Magistrate Musk brought to attention in *Dawson*: ‘if you put your pet dog on a truck and shipped [it] to the Middle East, some people would say that would be just very unkind and a cruel thing to do. But with sheep, it’s all acceptable, isn’t it?’ Although the animal farm industry realised three decades ago that it was under threat from increasing public scrutiny in regard to certain practices that could be regarded as cruel, its response was to persuade governments to enshrine what they claimed to be ‘normal’ husbandry practices’ into their animal welfare codes.²⁰⁶ Hence many of the codes of practice that exist today that cover a range of species and approved activities would not otherwise have been considered as lawful.²⁰⁷ Moreover, as the codes of practice in most states and territories are voluntary, compliance can also be used as a defence. The current codes of practice can thus also be interpreted as a public relations strategy that allows animal industries to claim compliance with agreed codes of practices, which reflect good animal welfare.²⁰⁸

Under state acts, farmed animals are afforded very little protection. Section 9 of the New South Wales *Prevention of Cruelty to Animals Act 1979* (POCTAA), for example, allows for the confinement of an animal without the provision of adequate exercise for persons in charge of that animal if it is a stock animal other than a horse, or of a species that is usually kept in captivity by means of a cage.²⁰⁹ Moreover, many of the defences in section 24 allow various practices to be performed on stock animals; for example section 24(1)(a)(ii) allows pigs under the age of two months or cattle, sheep or goats under six months of age to be castrated without anaesthetic. Section 24(1)(c) provides a defence against prosecution for a cruelty offence where the relevant act or omission was

204 Geoff Bloom, *Regulating Welfare to Promote and Protect Animal Welfare Outcomes under the Australian Welfare Strategy* (2011) <http://www.daff.gov.au/animal-plant-health/welfare/reports/regulating_animal_welfare>.

205 Ibid; Cao, above n 1, 206. This includes the high mortality of sheep transported to the Middle East.

206 Oogies, above n 174.

207 For the majority of the livestock codes see the CSIRO website, <<http://www.publish.csiro.au/sid/11.htm>>.

208 Geoff Neumann and Associates (2003) *Review of the Australian Model Codes of Practice for the Welfare of Animals* (commissioned by the federal Department of Agriculture, Forestry and Fisheries) at 3.

209 *Prevention of Cruelty to Animals Act* (1979) (NSW)

done in the course of destroying an animal in accordance with the precepts of the Jewish religion or any other religion prescribed by the regulations. As a result, many sanctioned practices are not subject to prosecution for acts of animal cruelty, such as the overcrowding of farm animals and their long-term confinement that prevents them from moving, let alone exercising. This applies to boiler chickens, battery farmed hens and sows that are kept in cages or stalls too small for them to turn or move around.²¹⁰

It is not only the consumption of meat that causes unnecessary pain and suffering to animals, but also that of associated products, such as milk and cheese.²¹¹ In *Of Mice and Men*, MacKinnon argues that society has done a disservice to both women and animals on several levels, including the common biological connection of both women and female animals.²¹² Just as women's reproductive capacities once determined their fate, as they were pressured to reproduce for the purposes of producing a male heir and restocking the country's military force, in the intensive farming industry dairy cows are forced to give birth to a calf at least once a year so that they can produce milk.²¹³ Again, the same as for women, a cow's gestation period is nine months; hence giving birth every twelve months is physically very demanding. The cows are forced to give milk during seven months of their nine month pregnancy. In a healthy environment, cows may live in excess of 25 years, but on modern dairies, they are slaughtered after three or four years and then used for ground beef.²¹⁴ Moreover, with genetic manipulation and intensive production technologies, dairy cows produce ten times more than they would in nature resulting in health problems, such as mastitis or 'milk fever', an ailment is caused by calcium deficiency, which occurs when milk secretion uses calcium faster than it can be replenished in the blood.²¹⁵

210 Oogies, above n 174.

211 Sharman, *Animal Law*, above n 146.

212 MacKinnon, above n 51.

213 Animal Liberation Front, *Factory Farming: Mechanized Madness* (2011) <http://www.animalliberationfront.com/Practical/FactoryFarm/factory_farming.htm>.

214 Ibid.

215 John Popp Farm Production Extension, *Down Cows: Winter Tetany, Milk Fever, Pregnancy Toxaemia* (2011) <<http://www.thedairysite.com/articles/907/down-cows-winter-tetany-milk-fever-pregnancy-toxaemia>>; Ibid. This is such a common and costly ailment that a dairy industry group, the National Mastitis Council, was formed specifically to combat the disease. Other diseases, such as Bovine Leukaemia Virus, Bovine Immunodeficiency Virus, and Johnes disease (whose human counterpart is Crohns disease), are also rampant on modern dairies, but they are difficult to detect or have a long incubation period and commonly go unnoticed.

Cows are also force fed an unnaturally rich diet of high energy feeds, which causes metabolic disorders such as ketosis, which can be fatal, and laminitis, which causes lameness, as a normal grass diet would not enable the cow to produce milk at the abnormal levels expected of them.²¹⁶ Also associated with intensive milk production is the injection of the Bovine Growth Hormone (BGH), which is a synthetic hormone with adverse side effects, such birth defects in their calves.²¹⁷ Of the calves that are born, the females are used to replace older cows in the milking herd and the males are used for beef or veal. Within moments of birth, male calves are taken away from their mothers and loaded onto trucks. Many are sold through auction rings and the fragile animals are often shocked, kicked, or dragged by their legs or ears when they can no longer walk.²¹⁸ The calves are also confined in tiny crates and chained by the neck, restricting all movement and making it is impossible for them to turn around, stretch, or lie down.²¹⁹ The severe confinement from which calves experience leg and joint disorders and an impaired ability to walk is to inhibit muscle development so that their meat is tender.²²⁰ Apart from restricting the animals' movement, they are fed an all-liquid milk-substitute, purposely deficient in iron and fibre, and intended to produce borderline anaemia and the pale coloured flesh.²²¹ At approximately sixteen weeks of age, the animals are slaughtered and marketed as white veal, however for 'bob' veal, calves may be slaughtered at just a few hours or days old and many die before reaching the slaughterhouse.²²²

Such and other practices, such as teeth cutting in piglets without pain relief, which causes both acute and long-term suffering to the animals,²²³ and the mulesing of lambs are further examples of the unquestioned acceptance of codes of practice that have

²¹⁶ Ibid.

²¹⁷ Animal Liberation Front, above n 213.

²¹⁸ Ibid; ABC Lateline, *Victorian abattoir accused of cruel treatment to unwanted calves* (1 January 2013) <<http://www.abc.net.au/lateline/content/2013/s3681709.htm>>

²¹⁹ Ibid; RSPCA, *What happens to Bobby Calves* (2011) <http://kb.rspca.org.au/What-happens-to-bobby-calves_87.html>.

²²⁰ Animal Liberation Front, above n 213; RSPCA (2011). Calves confined in crates experience chronic stress and require five times more medication than calves living in conditions that are more spacious. It is not surprising then, that veal is among the most likely meat to contain illegal drug residues which pose a threat to human health. Researchers have also reported that calves confined in crates exhibit abnormal coping behaviours associated with frustration. These include head tossing, head shaking, kicking, scratching, and stereotypical chewing behaviour.

²²¹ Ibid

²²² Ibid; RSPCA, above n 219.

²²³ Oogies, above n 174.

continued for almost three decades and would be considered outrageous if performed on human children.²²⁴ Many of these practices are being or have been phased out, due to international exposure, community concerns and wool buyer and retailer boycotts.²²⁵ Indeed, many of the inconsistencies and contradictions in Australian animal welfare laws that remain largely unnoticed by both the public and the wider legal community are yet to be challenged. According to Professor of Law and former President of the Australian Law Reform Commission David Weisbrot, such change is inevitable in light of a bigger picture that incorporates the notion of social justice:²²⁶

On their face [the Codes] look pretty good, (but) they are riddled with exemptions and out clauses and problems of enforcement.... It's the next great social justice movement that we'll have to encounter over the next some years. I think the way we now look back 40 years ago in Australia where we had the referendum finally beginning to recognise the rights of Aboriginal people, I think in 40 years hence we'll look back at this time and wonder why we we're only beginning to become aware of issues about animal rights.²²⁷

5.5.2. Unwanted, Feral, Pest or Abundant Wild Animals

Since European settlement, Australia's native animals have had to compete with a range of introduced animals for habitat, food and shelter, native animals, as well as face many new predators. The Rabbit-eared Bandicoot or Bilby, for example, which feeds on carbohydrate-rich seeds and roots, has to compete for vegetation that also provides other introduced animals with food and shelter, and feral cats and foxes hunt native birds, mammals, reptiles and insects, which threatens the survival and many species now

224 Ibid.

225 Ibid.

226 AAP, 'Animal Rights: Next Great Social Debate', *The Age* (online), 4 March 2008, <<http://news.theage.com.au/national/animal-rights-next-great-social-debate-20080304-1wr1.html>>.

227 ABC TV Landline, *Livestock Producers Face Animal Welfare Challenges*, 1 July 2007, <<http://www.abc.net.au/landline/content/2006/s1965877.htm>>.

considered as threatened or endangered.²²⁸ The focus of wildlife legislation is therefore on the environment, framed in terms of ‘nature’, ‘biodiversity’ and/or ‘ecosystems’ and animals are conceptualised either as a constituent part of nature or as invaders or ‘pests’.²²⁹ Under section 18 of the *EPBC Act*, many animals are recognised as feral animals, and as such, threats to native animals and plants; the impacts of which are listed as key threatening for which a threat abatement plan either has been or may be developed.²³⁰ Threat abatement plans establish a national framework to guide and coordinate Australia’s response to key threatening processes registered under the EPBC Act and ensure for the ‘humane’ treatment and disposal of animals in accordance with the animal welfare requirements of each state or territory.²³¹ The plans identify research, management and other actions that are aimed to ensure the long-term survival of protected native species and ecological communities and accompanying background documents provide information on the biology, distribution, impacts and current management practices relevant to the respective threat.²³² Under subsection 279(2) of the EPBC Act, the Australian government environment Minister is required to review threat abatement plans at least every five years.²³³

Under the Australian Pest Animal Strategy, other animals, such as feral camels, are the subject of national plans for management as an Existing Pest Animal of National Significance.²³⁴ The definition of feral or pest animals is contained in some animal welfare legislation, usually in the context of exemptions from or defences to animal cruelty offences. For example, in section 11 of the *Animal Welfare and Protection Act 2001* (Qld), a feral animal is ‘an animal living in a wild state that is a member of a class of animals that usually live in a domestic state’. Codes of Practice address the welfare of a variety of animals, including wild animals, but are mainly concerned with intensive husbandry and some jurisdictions have adopted codes of practices for zoos and

228 Australian Government: Department of Sustainability, Environment, Water, Population and Communities, *Feral Animals in Australia* (2011)

<<http://www.environment.gov.au/biodiversity/invasive/ferals/index.html>>.

229 Cao above n 1, 234.

230 *Environment Protection and Biodiversity Conservation Act 1999*.

231 Australian Government Department of Sustainability, Environment, Water, Population and Communities, above n 228.

232 Ibid.

233 Ibid.

234 Ibid.

circuses.²³⁵ However, the regulation and treatment of wild animals is ‘disparate, lacks coherency, devoid of accountability and poorly resourced’, as found in the 2006 Review of the existing welfare arrangements, in which significant regulatory gaps were identified.²³⁶ Codes are not considered regulatory documents in several jurisdictions but can be used a defence in proceedings in most States and Territories, so unless they are subject to a review process, they may perpetuate management practices that are no longer acceptable to the public.²³⁷ A review is currently taking place but a draft model from 2009 is available on the Australian government: Department of Sustainability, Environment, Water, Population and Communities website.²³⁸

Nature conservation and land management legislation refers to wild animals in common terms such as ‘native animals’, ‘wildlife’, ‘game animals’ and ‘feral animals’.²³⁹ Native wild animals, particularly when plentiful in number, may be declared as pest animals, thus having a comparable status to unwanted or feral animals.²⁴⁰ These animals are treated differently under different animal protection laws. However, as per for example under section 42 of the *Animal Care and Protection Act 2001* (Qld), there is an exemption from cruelty provisions for acts done to control feral or pest animals where the act is done in a way ‘that causes the animal as little pain as is reasonable’. This statement, which is similar in other States, means that many exceptionally cruel practices are permitted, mainly because such methods have been used in the past and are deemed ‘reasonable’ and hence accepted as normal.²⁴¹ In accordance with the codes of practices that relate to the population control or the killing of unwanted or feral wild animals, the conventional methods of control include fencing, trapping, baiting and shooting. However, other methods such as the use of unmodified, serrated-edged, steel jaw traps, strychnine baiting for fox and dog control, chloropicrin fumigation of warrens for rabbit control, warfarin baiting for pig control; and yellow phosphorous (CSSP)

235 Ibid.

236 Cao above n 1 230; *Codes of Practice Independent Review* (2001) <<http://codeofpracticereview.com.au/LinkClick.aspx?fileticket=P03oX6bnriw%3D&tabid=55>>.

237 Neumann, above n 208.

238 Australian Government Department of Sustainability, Environment, Water, Population and Communities, above n 228.

239 For example, section 528 of *Environmental Protection and Biodiversity Conservation Act 1999*.

240 Oogies, above n 174.

241 Ibid.

baiting for pig control are all practiced although they are deemed as unacceptable and no longer legal.²⁴²

Fences designed to exclude feral animals are seen as impractical and almost impossible to exclude feral animals from large tracts of land.²⁴³ The variety of traps that are used for feral animal control include conventional cage traps, soft-catch traps and yards that may be created around watering holes to catch animals as they come in to drink. Yard traps are commonly used for catching feral goats for live transport to markets in Australia and overseas, however, some feral animals are reluctant to enter traps even when baited with food. The baiting of feral animals such as foxes, pigs and rabbits is usually done using the poison known as 1080, which would be illegal if used against domestic animals. A landholder must apply for a permit to use 1080 poison and provide the Resource Management and Conservation Division (RMC) of the Department of Primary Industries and Water with documented evidence that all requirements are met. Permit holders are also responsible for notifying neighbours of their intention to lay 1080 poison. As 1080 poison occurs naturally in native pea bushes in Western Australia, many native herbivores, such as kangaroos, brush-tailed possums and small native ground-dwelling mammals in Western Australia have developed a much higher tolerance to 1080 than feral animals. This in turn allows 1080 baiting programs to be carried out more extensively than in other Australian State and territories. Where there is the problem of non-target species eating the baits, the common practice is to bury baits designed for foxes and feral pigs, or to dye baits green or black when using them for rabbits. Foxes and feral pigs are more likely to dig up baits than native carnivores, as they often dig for food. The green dye reduces the likelihood of birds picking up baits, as many birds use colour to determine the tastiness of food.²⁴⁴ Any female wallaby or possum carcasses that are recovered must be examined for pouch young and if one is present it must be humanely destroyed. Suitable techniques include decapitation with a sharp knife or a heavy blow to the head, such as recommended in the *Animal Welfare Standard for the Hunting of Wallabies in Tasmania*. The use of 1080 poison is seen as a method of last resort. However, other illegal baiting methods are also still being used, as

242 Ibid.

243 Australian Government Department of Sustainability, Environment, Water, Population and Communities, above n 228.

244 Ibid.

they have been used for decades, despite the terrible suffering they inflict on the animals; for example, warfarin poisoning may take up to 14 days after ingestion to kill an animal and inflicts severe pain as the yellow phosphorus burns the animal's stomach.²⁴⁵

Hunting is regulated at state and territory level and the applicant or shooter is required to have a licence or permit to shoot, usually with the aid of a vehicle and spotlight. Shooting is the preferred method of killing where non-lethal methods are not viable and this method is used to control both native and introduced wild animals, such as feral horses, pigs and goats. Where the control program takes place in rugged terrain or in vast remote areas, helicopters are used. This method of killing is considered the most 'humane way of reducing the number of feral animals' in these areas, as it is quick and the animals are not 'subject to the stresses of mustering, yarding, and transportation'.²⁴⁶ However, without a doubt, this control method involves considerable stress to the animals as well as immense pain, as many animals are wounded in the process and left to die a slow death, and young marsupials are left to starve to death when their mothers are killed. As the objective for managing the majority of established feral animals is to reduce the damage caused by pest species in the most 'cost-effective manner', another method of control is biological control, or the control of pests by natural predators, parasites, disease-carrying bacteria or viruses. An example is the release of myxomatosis in 1950, where the myxoma virus, which is usually transmitted by mosquitoes or fleas, is believed to have killed more than 90 per cent of feral rabbits in the six months following the release of the virus.

This holistic approach to conservation which focuses on the environment, in terms of 'nature', 'biodiversity' and/or 'ecosystems', thus allows the interests of individual animals to be sacrificed to maintain the integrity of species or ecosystems in accordance with either an anthropocentric or eco-centric understanding of the significance of wildlife. The anthropocentric approach is in terms of the benefits wildlife provides to humans and the eco-centric approach is in terms of their value independent of the value to humans. Both approaches focus on the plight of endangered species and legislation

²⁴⁵ Oogies, above n 174.

²⁴⁶ Ibid.

addresses threats to biodiversity, predominantly land clearance, climate change and pest, feral or invasive plants and animals. The threats to conservation of wild animals are however largely due to the actions of humans, including habitat destruction, climate change and the deliberate introduction of non-native wild animals and non-native domestic animals that have gone wild. Moreover, the holistic environmental ethic that applies to nature conservation overlooks the central distinction between plants and animals, namely sentience.²⁴⁷

The desire to control nature is therefore poignantly evident in the case of feral and unwanted animals. Man's desire to control nature begins in his own yard by pruning trees and pulling out weeds. According to Simone de Beauvoir, men are able to transcend the realm of biological necessity through risk and violence, such as hunting, fishing, and war; hence, 'it is not in giving life but in risking life that man is raised above the animal; and that is why superiority has been accorded in humanity not to the sex that brings forth, but to that which kills'.²⁴⁸ Through the taking of life, men symbolically sever their emotional ties with the female (animal) world and given the social conditioning that denies men any connection to others, it is not surprising to find significant gender differences in attitudes. The way in which feral animals are culled reflects their position within the hierarchy. Feral animals are the animal representatives of weeds, and if they were human, it would be genocide, which is not only condemned but is also illegal. However, with animals this is not the case and, in the case of feral animals, not even sentience is taken into account, even if it has been formally recognised in animal law. As mortally wounded or poisoned animals are left to die an agonising death, animal welfare groups are opposed to culling practices, such as helicopter shootings, because this a cruel and inhumane method of control.²⁴⁹ Dr Hugh Wirth, President of the RSPCA stated that 'there is no position in in Australian environmental systems for feral animals', which, 'as sentient creatures, deserve to be eradicated by more human methods'²⁵⁰

247 Cao, above n 1, 236.

248 Simone de Beauvoir, *The Second Sex* (H M Parshley trans, Penguin Books, 1972) 72.

249 Australian Government Report, *Culling of Large Feral Animals in the Northern Territory* (2011) <http://www.aplh.gov.au/senate/committee/history/animalwelfare_ctte/culling_feral_animals_nt/04ch4.pdf>.

250 Ibid.

According to David Alexander, Coordinator land Management Central Land Council, Aborigines, as owners of large areas of the Northern Territory, should be involved in the decision-making processes regarding the culling of feral animals and they, in turn, perceive feral animals as valuable resources that rather need to be ‘managed, domesticated and looked after’ than eradicated.²⁵¹ For the Aborigines, feral animals are part of the country; hence, many are reluctant to give their consent to the culling of these animals.²⁵² The Australian government’s position is however that the number of introduced wild species, including feral horses, need to be reduced periodically to levels that compatible with the conservation of the environment and the welfare and long-term survival of animals who share their habitat. However, some animals such as brumbies, buffalo camels, donkeys and cattle have been proposed to be recognised as part of the 20th century Australian environment, and that brumbies, in particular, are part of Australia’s heritage as the wild descendants of the horses used in the First World War.²⁵³

Hence, with the intervention of animal welfare groups and Australia’ indigenous people, perhaps change is on the way, and given the strong theme of animal rights in contemporary jurisprudence, the space has been opened for change to eventuate.

5.6. Conclusion

The protection of the vulnerable is a key tenet of functioning communities in human societies, and the value measure of a functioning civilisation is the degree to which it is able to protect the rights and welfare of those in need of protection through its laws and other community structures, whether they are children, the disabled, impoverished or oppressed people or animals.²⁵⁴ More specifically, one of the basic tenets of animal rights should be that animals should be free from human use and abuse, based on ‘a

²⁵¹ Ibid.

²⁵² Ibid. In indigenous societies, separation from nature is obviously not part of a boy’s ritual passage into manhood.

²⁵³ Ibid.

²⁵⁴ Oogies, above n 174.

rejection of speciesism and the knowledge that animals are sentient beings'.²⁵⁵ Simply put, and as discussed in this chapter, animals should not be considered as property under the law because they are not inanimate objects, but sentient beings with their own lives and interests. Neither the guardianship nor the welfarist model can achieve this goal. In fact, according to Francione, rather than making the treatment of animals more human, welfarist regulation, for the most part, makes animal exploitation more efficient.²⁵⁶ In light of this, abolishing the absolute property status of animals would be a leap forward in animal rights, because it would make it extremely difficult, if not impossible for animals to be exploited and used for human purposes.²⁵⁷ This would be justice for animals in the true meaning of the word, namely based on principles of goodness and decency, or moral rightness. Again, Derrida's example of illegal immigrants in France makes a direct connection between hospitality and democracy. In this example, by reworking the meaning of the word hospitality and displacing it from its original context and placing into the context of an ideal; namely the 'ideal' meaning of hospitality, Derrida questions the responsibilities of the host country towards these persons.²⁵⁸ In turn, this can be applied to animal rights, as the imaginary domain must be able to operate at a level that does not recognise hierarchies or negotiations, which oppose ignorance but are able to be universally materialised through the negotiation of relationships in an aesthetic place.²⁵⁹ A second example is Derrida's notion of forgiveness towards the horrific crimes against humanity committed in South Africa, which can be viewed as a demand for justice to do the impossible.²⁶⁰ In the case of animal law, therefore, working through the impossible would be to change the anthropocentric view of the law and open the space for justice.

To an extent, Australian courts and legislatures recognise that animals are not like other types of property and anti-cruelty laws focus on the protection of certain animals from certain forms of cruelty, abuse or neglect. Domestic animals are afforded the most protection, while intensively farmed and feral animals are afforded the least protection,

255 Doris Lin, *Animals as Property* <<http://animalrights.about.com/od/animallaw/f/AnimalsProperty.htm>>

256 Gary L. Francione, *Reflections on Animals, Property and the Law and Rain without Thunder* <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1407&context=lcp>>

257 Lin, above n 255.

258 Felicia Herrschaft's interview with Drucilla Cornell, *The Interview* (2004) <<http://www.fehe.org/index.php?id=16>>.

259 Ibid.

260 Ibid.

as evinced in this chapter. Thus, overall, current animal cruelty laws in Australia fail to protect all animals and furthermore, fail to protect animals, which are legally protected to the extent that they should be protected under the law. Moreover, legislation allows for animals to be owned, possessed, controlled and be sold and the absolute rights to do these things are afforded to humans. In the case of intensively farmed animals, therefore, veal calves are able to be kept in wooden crates and chained by the neck before being sent to slaughter and wild animals are able to be legally culled by a licenced hunter. Changing the property status of animals, in turn, would prevent such things from happening. Moreover, a feminist care ethic will redefine rights in regard to animals and species identity to afford nonhuman animals rights to themselves, regardless of how identical or different they are from humans.²⁶¹ Rather than taking an objective, non-relational approach to the moral unacceptability of exploiting animals, and engaging in abstract debates, such as a right to life or consideration of interests, an ethic of care essentially undermines the private/public dichotomy in which emotion and sympathy for animals is disregarded. Instead, a feminist ethic of care recognises the role that relationships between humans and nonhuman others play, and creates a space for values such as friendship and trust, to be embraced.²⁶²

As the level of knowledge within the community grows, so too does greater scrutiny of the practices of the ways in which animals are being both used and killed. Inevitably, cruel practices that are shunned by informed consumers, affects the way on which the animal protection net is perceived and tightened by politicians.²⁶³ Following the 2012 Melbourne Cup, the Coalition for the Protection of Racehorses, for example, posted a video on the internet, which contained graphic footage of racehorses being hoarded into cages not much bigger than the size of their own bodies, and then shot in the head. The public was urged to sign a petition to put an end to this gruesome practice, in which 18,000 horses are killed each year because they are deemed as ‘unprofitable’, and hence as ‘wastage’ by their owners.²⁶⁴

261 Josephine Donovan and Carol J. Adams (eds), *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals* (Columbia University Press 2007) 83.

262 Ibid, 61.

263 Oogies, above n 174.

264 *Australian Racing Industry: racehorses aren't pet food -- create an owners levy to fund a horse welfare plan*. <http://www.change.org/petitions/australian-racing-industry-racehorses-aren-t-pet-food-create-an-owners-levy-to-fund-a-horse-welfare-plan?utm_campaign=share_button_action_box&utm

Organisations such as the RSPCA, Greenpeace, Whisper, Voiceless, PETA and the World Wildlife Fund (WWF) are well known for drawing attention to the cruelty inflicted upon animals and to the moral and ethical responsibility humans have to respect the lives of all living things. In turn, public response is evident on many levels, including that of the former High Court Judge, the Honourable Michael Kirby, who has been at the forefront of social and legal movements of the past half-century, not only in Australia but also abroad. In 2011 Kirby became an official patron of Voiceless and also a vegetarian. Kirby acknowledges that there is nothing as powerful as an idea whose time has come, and animal protection is just such an idea.²⁶⁵ Indeed, most progressive movements that have changed the law in the past have a similar trajectory; namely by starting on the margins of social acceptability and then moving to mainstream consensus.²⁶⁶ According to Kirby, legal progress is made by pushing forward the boundaries of legal protection. The result of this has been in Australia that women are able to vote, the White Australia policy, like apartheid, has been consigned to history, Aboriginal Australians have access to land rights, homosexuals are no longer subject to criminalisation, and disabled humans are now able to assert their rights.²⁶⁷ Kirby thus confirms that a new frontier beckons in the protection of animals, not only through animal welfare but also by affording animals legal rights.²⁶⁸

In spite of their differences, the animal rights and animal welfarist positions are unified in their call for the elimination of practices, in which the human benefit is minimal compared to the degree of suffering of the animal. Investigations of cruelty towards animals are almost entirely conducted by non-government organisations. In turn, evidence of extensive routine cruel practices, such as for example, in industrial farming practices and the live export trade, have led to public outcry with the result that governments have been forced to respond.²⁶⁹ For example, the revealing footage of conditions in intensive piggeries in the mid-1990s led to a ban on tethering of pregnant pigs, and exposure of the unacceptable handling and slaughter of Australian cattle and

_medium= facebook&utm_source=share_petition&utm_term=16970017>. The footage was short during the week of the Melbourne Cup in November 2012.

265 Lynne Dwyer, 'A late-life epiphany for Michael Kirby', *The Sydney Morning Herald*, 12 December 2011 <<http://www.smh.com.au/environment/animals/a-latelife-epiphany-for-michael-kirby-20111217-1ozrs.html#ixzz1p403eZ8O>>

266 Ibid

267 Ibid

268 Ibid

269 Oogies, above n 174.

sheep in Egypt in 2006 and 2007 resulted in the Commonwealth government being forced to suspend the export of cattle and sheep to Egypt.²⁷⁰

More recently, the exposure of the fate of cattle in Indonesian slaughterhouses by Animals Australia resulted in a temporary ban of exporting cattle to Indonesia. When the Government resumed trade, it did so under strict new guidelines, stating exporters must now guarantee the welfare of all livestock that leave Australia. However, it is evident that this must be more strictly monitored, as less than a year after the ban was lifted Animals Australia again captured footage of severe mistreatment of cattle in Indonesian slaughterhouses.²⁷¹ The footage that was aired on ABC's Television Programme *Lateline* on 29 February 2012 was taken in January 2012 in two abattoirs in Jakarta. The footage showed workers slitting the throats of cattle without stunning them first and cutting animals up while still alive. In response, the Federal Department of Agriculture declined from revealing the names of approved abattoirs 'for commercial reasons'.²⁷² According to Lyn White of Animals Australia, the Government's response proves that the new system is not working and that there is in fact no guarantee of transparency.²⁷³ Lee Rhiannon, the Greens spokeswoman on animal welfare, agrees that the Australian government has not done enough and suggests that the live export industry to Indonesia should be shut down if the animals are confirmed to be Australian.²⁷⁴ However until Australian government politicians actively take this problem on board and farm animal industries become more proactive, animal welfare reforms will remain largely the concern of non-government organisations.

Consumers are in general concerned about animal welfare, but are confused in regard to the real state of farm animal welfare. The problematic relationship between the stated and actual treatment of animals is described by Francione as a 'moral schizophrenia'.²⁷⁵ There has also been a rise in the numbers of lawyers groups that are committed to

270 Ibid.

262 ABC News *Fresh Footage shows Indonesian Abattoir Cruelty* (29 February 2012) <<http://www.abc.net.au/news/2012-02-28/new-footage-shows-cruelty-at-indonesian-abattoir/3858230?WT.svl=news0>>

263 Ibid

264 Ibid

265 Ibid. Rhiannon claims that monitoring and auditing is needed, and that while the Greens will continue to call for an end to live exports, they also recognises that there is an immediate need for the Government to deal with the situation and apply the full force of sanctions in the first instance.

275 Francione, G, 'Animals – Property or Persons?', in G. Francione (ed) *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press, 2008) 25, 26.

animal welfare, as well as an increased academic involvement in the legal protection of animals in Australia.²⁷⁶ So, just as the environmental movement was seen ‘as the province of hippies and greenies’ a few decades ago, but thanks to environmental advocacy, it has now become part of mainstream politics, the animal rights cause could equally follow its lead. Indeed, a community that is better educated about the actual state of affairs in regard to the treatment of animals is likely to be more receptive to ethical concepts, and the moral obligation not to sanction cruelty against animals will also become more clear. In turn, animal husbandry practices and ‘species cleansing’ will be seen from a different light, and ultimately, and perhaps even confidently, the laws will change and animals will no longer be regarded as inanimate objects, but as sentient beings, with the right not to be mistreated.

The above case studies involving intensively farmed animals and the culling practices of unwanted or feral animals most clearly reflect the disturbing consequences of social and economic oppression, as well as the biological and emotional similarities between the subjugation of animals and women. Like unwanted or feral animals, hundreds of thousands of women are violated: they are burnt at the stake, drowned or executed as witches or adulteresses, not only in the past, but also in parts of the world today.²⁷⁷ And like the fate of calves discussed above, Australia’s stolen generations tells a similar tale. Not only were indigenous children forcefully taken to be raised by white, Christian families but also new born babies were forcefully taken from white, unmarried mothers to be adopted by married couples, as it was deemed shameful for a woman to have a child out of wedlock.²⁷⁸ On a global scale and in a similar vein, female infanticide is still practiced in countries, such as India, Pakistan and China, for example.²⁷⁹ The emotional connection to animals in the form of a feminist care ethic, as advocated by Carol J. Adams, is therefore not unfounded, and arguments based on emotion rather than reason can indeed be just as powerful. For Adams, killing animals without strong

²⁷⁶ Oogies, above n 174.

²⁷⁷ Mary Schons, ‘Witch Trials in the 21st Century’, *National Geographic Education*, 24 July 2010 <http://education.nationalgeographic.com/education/news/witch-trials-21st-century/?ar_a=4&ar_r=1>.

²⁷⁸ Australian Government, *Sorry Day and the Stolen Generations* <http://australia.gov.au/about-australia/australian-story/sorry-day-stolen-generations>;

²⁷⁹ Ansley J Cole and Judith Banister, *Five Decades of Missing Females in China* <<http://www.jstor.org/pss/2061752>>. Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/comm_contrib_former_forced_adoption/report/index.htm>

justification is wrong and this belief is based on a meta-rational intuition rather than on a depersonalised, rational and neutral principle of ethics.²⁸⁰ Moreover, the biological connections of women to female animals and their use as sexual objects - or as objects based on their sex, as advanced by MacKinnon, are further exemplified in the common exploitation of women and animals. Just as women are viewed as sexual others and their bodies used as vehicles to produce male heirs and army recruits, animals are used in a similar way. Particularly intensively farmed female animals are used for the products derived from their reproductive capacities and exploited for the benefits of humans.

The case of animal rights is however complex and its division into two distinctive groups allow each group to serve a different, but nonetheless important function. As explained above, animal rights advocates denounce the use of animals and animal-related produce for human use and consumption, while animal welfare groups seek to regulate the treatment of animals that are being used by humans to protect these animals from unnecessary harm. Animal rights advocates believe that animals have an intrinsic value separate from human values, and are worthy of moral considerations, such as enjoyment of the right to be free of oppression, confinement and human abuse. They further argue that, as sentient beings, activities that cause them pain and suffering is morally unacceptable or speciesist, because the same pain and suffering inflicted on human sentient beings is condemned, or morally unacceptable.²⁸¹ While animal rights advocates argue the human consumption of meat and the use of animal-based products is wrong, animal welfarists argue that the humane slaughtering of an animal for the purpose of human consumption is morally acceptable. Nevertheless, unless the same argument can be applied to humans, the slaughter and consumption of animals is fundamentally based on speciesism.²⁸² In turn, the argument against experimentation on animals follows a similar logic: namely that because animals are incapable of providing

280 Chaone Mallory, *Toward an Ecofeminist Environmental Jurisprudence: Nature, Law and Gender*, <http://digital.library.unt.edu/ark:/67531/metadc2219/m1/1/high_res_d/Thesis.pdf> .

281 Doris Lin, *Basic Tenets of Animals Rights*

<<http://animalrights.about.com/od/animalrights101/a/BasicTenets.htm>>. A typical speciesist argument is the cognitive ability is not a morally relevant argument. If it were, the smartest humans would have more moral and legal rights than other humans who were deemed intellectually inferior. Even if this difference were morally relevant, this trait does not apply to all humans. A person who is profoundly mentally retarded does not have the reasoning capabilities of an adult dog, so cognitive ability cannot be used as a defence. A similar argument was advanced in 5.3 of this chapter.

282 Ibid.

voluntary consent, and involuntary human experimentation is universally condemned regardless of its scientific value, animal experimentation should also be condemned.²⁸³

Although changing human perceptions about animals to the extent that people stop eating meat and abusing animals in other ways would be the ideal solution, realistically this will not happen in the short term, if at all, at least on a global scale. The idea of animal rights is foreign to many people throughout the world, and animals are abused and killed for a wide variety of socially acceptable purposes. Thus, what is considered as socially unacceptable varies across cultures and indicates that the moral justification for using and killing animals is not based on a constant moral position.²⁸⁴ Therefore, working towards securing the welfare of animals, both while they are alive and in their execution is a crucial step forward, while the fight for their rights as fellow beings (either based on sentience or purely on moral rightness) must continue.

283 Ibid. Non-animal medical research is available, although there is quite a bit of debate over the scientific value of animal research versus non-animal research. Some argue that results from animal experimentation are not applicable to humans, and we should conduct research on human cell and tissue cultures, as well as human subjects who provide voluntary, informed consent. Others argue that a cell or tissue culture cannot simulate a whole animal, and animals are the best available scientific models. All would probably agree that there are certain experiments that cannot be done on humans, regardless of informed consent.

284 Ibid.

CHAPTER 6: CONCLUSION: THE WAY FORWARD

6.1. Introduction

This thesis has focused on specific elements of current legislation in Australia governing the protection of the environment, with specific focus on carbon pollution and coal seam gas (CSG) mining and excavation, and certain categories of animals, namely intensively farmed animals and feral and unwanted animals. As the argument presented in this thesis is from an ecofeminist perspective, a comprehensive understanding of gender-based discrimination has been provided to explain the feminist position and to reinforce the ecofeminist stance that the oppression of women represents the oppression of all excluded others, including nature and animals. It was argued that because women, nature and nonhuman others share a history of oppression, women's interconnectedness with both nature and animals allows gender to be used as starting point to challenge anthropocentric thought, or the assumed superiority of humans over nature and its species. It was further argued that by challenging traditional thought and pointing to the underlying ideologies that foster discrimination and lead to all sorts of injustices, ecofeminism is able to bridge the gap between law and justice through deconstruction from this unique perspective. To contextualise the argument presented in this thesis, the views held by prominent philosophers, ethicists and legal theorists of both feminist and non-feminist persuasions were explored to firstly provide a connection to the many commonalities that they share with ecofeminist concerns and secondly, to identify the shortcomings in current legal theory and practice. Alternative frameworks were then proposed, based on the ideal notion of justice; namely a justice based on principles of goodness and decency.

This final chapter recaptures the main points raised in the thesis with view to a way forward. The chapter begins by providing an overview of the progress that has been made in the areas of environmental and animal legislation and the way in which the law has been effective, or alternatively compromised or 'watered down'. Derrida's notion of a promise is then presented as an effective means of incorporating *différance* into the law. Next, the ecofeminist vision of embracing the other is presented as a way forward, with emphasis placed on the importance of women's participation in decision making (including symbolically). The effectiveness of an ecofeminist deconstruction of existing

laws is then considered in light of the elimination of hierarchies based on the dichotomy of inclusion/exclusion. Implications that may be drawn from the study are included in each relevant section.

6.2. Progress in Environmental Law and in Animal Law

6.2.1 Progress in Environmental Law

The most progressive leap forward in environmental legislation on an international level was the *United Nations Conference on the Human Environment* (UNCHE) held in 1972. This was the first and most promising international response to the effects of industrialisation on the environment, as an agreement was made on the part of all participating nations to combat global warming, protect biodiversity and prohibit the use of dangerous poisons. Good environmental practices across the globe were further promoted by the United Nations Environment Program (UNEP).¹ However, as discussed in chapter 2 (2.2), twenty years later, at the United Nations Conference on Environment and Development (UNCED), the 27 principles that were established at UNCHE were watered down, which in turn evidenced a deterioration of international commitments.² Moreover, in response to principle 7 of the *Rio Declaration on Environment and Development*, which states that all countries should assume ‘common but differentiated responsibilities’, and ‘play an active role in changing unsustainable consumption and production patterns’, so that all countries are able to benefit from the process,³ Bush declared that ‘the American way of life is not negotiable’ and then reduced the aid package to developing countries.⁴ Other progressive issues were however raised at UNCED, such as for example, Agenda 21, in which *Women’s Action Agenda 21* was incorporated into Chapter 24 of the Agenda. The 2012 Rio + 20 Earth Summit was an even greater disappointment than UNCED. In response to the United Nations’ request to endorse a ‘green economy roadmap’, the outcome 49-page

1 United Nations Conference, *Conference on the Human Environment* (2011)

<http://climatelab.org/United_Nations_Conference_on_the_Human_Environment>

2 Peter Cossier and Jane McDonald, *Monitoring and Evaluating to Improve NRM Outcomes* (2011)

<<http://www.wentworthgroup.org/uploads/NRM%20Monitoring%20Conference%20Speech%20Final.pdf>>.

3 Rio Declaration on Environment and Development, *United Nations Environment Programme*,

<<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>>

4 John Vidal, ‘Rio + 20: Earth Summit dawns with stormier clouds than in 1992’, *The Guardian* 19 June 2012 <<http://www.guardian.co.uk/environment/2012/jun/19/rio-20-earth-summit-1992-2012>>.

document, ‘The Future We Want’, contained mostly loosely defined steps. The document was thus derided by environmentalists and anti-poverty campaigners for the lack of detail and ambition required in addressing the challenges posed by a deteriorating environment, heightening inequality and a global population expected to rise to 9 billion by 2050.⁵ Moreover, the 2012 United States negotiators, who were supported by the EU and the G20, blatantly told developing countries that they need to accept the ‘new global reality’.⁶ The International Executive Director of Greenpeace, Kumi Naidoo, called the summit ‘a failure of epic proportions’ because “the leaders of the most powerful countries supported business as usual, shamefully putting private profit before people and the planet.”⁷

In Australia, a similar trend of not keeping promises is evident in environmental legislation. On a national level, for example, an unkept promise is evident in the Commonwealth government’s failure to establish the institutional frameworks that track the health of its environmental assets. This is in spite of Australia’s commitment to maintain environmental accounts in relation to decision-making following the 1992 Rio Earth Summit.⁸ Similarly, under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (‘Kyoto Protocol’), Australia has failed meet the promised 2012 target of greenhouse gas (GHG) emission reduction to eight per cent above 1990 levels.⁹ In fact, quite the opposite is evident, as Australia continues to have the highest GHG emissions per capita in the developed world and its emissions are projected to reach an unimpressive 664 million tonnes by 2020.¹⁰ Moreover, rather than confronting this problematic situation head on by prohibiting large quantities of GHG emissions, the Australian government has introduced the carbon tax instead, which, under the polluter pays policy, based on the principle established in UNCED in 1992,

5 Jonathan Watts and Liz Ford, ‘Rio + 20 Earth Summit: campaigners decry final document’, *The Guardian* 23 June 2012 <<http://www.guardian.co.uk/environment/2012/jun/23/rio-20-earth-summit-document>>. Issues that were endorsed to promote a green economy included global sustainable development goals, and measures to strengthen environmental management, protection of the oceans and food security.

6 Vidal, above n 4.

7 Ibid.

8 Cossier and McDonald, above n 2.

9 Australian Government Department of Climate Change and Energy Efficiency, *Tackling the Challenge of Climate Change* (2011) <<http://www.climatechange.gov.au/climate-change.aspx>>; Parliament of Australia: Parliamentary Library, *The Kyoto Protocol* (2011) <<http://www.aph.gov.au/library/pubs/climatechange/governance/international/theKyoto.htm>>..

10 Australian Government Department of Climate Change (2011); Australian Government Treasury, *The 2010 Intergenerational Report* (2010) <<http://www.treasury.gov.au/igr/igr2010/>>.

essentially allows big polluters to continue to pollute as long as they pay for the emissions. As discussed in chapter four, this band-aid solution (if it can at all be considered to be that) is to be the first step towards GHG reductions as part of a comprehensive action plan in the form of the Climate Change package, which promises to tackle the GHS emissions problem on a larger scale, with more effective measures. Whether or not Australia keeps its promise is however yet to be seen. As stated in chapter five, this would entail adopting a completely new vision, as well as ensuring that funding/investments are primarily channelled into the research and development of clean energy sources. On a State level, the repeal of Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), as discussed in chapter four, is another lamentable step backwards for Australia. When first introduced, this Act was one of most progressive in the world because it recognised, and incorporated the value of genuine public participation and principles of good governance.¹¹

For true progress to continue, lawmakers should not deviate from the original intent and purpose of the law, because when the laws were initially proposed, they were much more closely aligned with justice principles. Moreover, since such proposals are usually in the form of a promise that is based on ideals, there is also an ideal outcome in mind. However, when later considered in light of intervening factors, such as economic considerations or trade relations, the real meaning and intent of the initial proposal or actions plan is easily lost or watered down to meet objectives that have much less to do with justice.¹² The way forward would be to find clean energy solutions and to reintroduce Part 3A of the EPA Act in accordance with the original intention. The means by which this is able to be achieved is by considering the promises made by the government as a form a future present, which, as a future present, are able to escape the traditional constraints that are habitually determined by economics. Once these constraints are lifted and the law is destabilised, new laws will be able to be applied that

11 Robert Ghanem, *Submission to the Legislative Council Inquiry into the NSW Planning Framework* (2009)

<<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/530183A60404CEC9CA25747500005550>>.

12 Examples include: the 2012 Rio + 20 Earth Summit document, which was overshadowed by the global economic crises and thus failed to meet the promises that were implied alone in the document's title; and secondly, the trade relations between Australia and Japan, which has resulted in the reluctance of Australia to intervene in ongoing slaughter of whales in the Antarctic.

are based on social/environmental justice because the tension that emerges (that is *différance*) would allow for justice to be possible.¹³

6.2.2 Progress in Animal Law

In chapter five, it was suggested that the biggest leap into progress that animal law could make is to remove the property status of animals. As argued in chapters two and five, removing the property status from women, children and conquered indigenous peoples, for example, has historically been the most effective means of affording them legal rights. Since women, children and conquered indigenous peoples historically belong to the same 'subordinate' group to which animals belong, treating nonhuman animals differently is essentially discriminatory or speciesist.¹⁴ This speciesist form of discrimination against animals is further exemplified by the inherent contradiction in the law: on the one hand animals are regarded as property of their human owners, and on the other, they are recognised as sentient beings. Hence, by virtue of definition, the notion of sentience per se excludes animals from the category of chattels, which essentially refers to inanimate objects, and thus fundamentally contradicts the accepted understanding of animals as sentient beings under the law.¹⁵

The biggest leap forward that animal legislation has made to date is in regard to a duty of care that is owed to animals under animal welfare legislation. Under this provision, owners who breach their duty of care by neglecting, mistreating or abusing animals can be penalised and the animals are able to be removed from their care. But also here, major drawbacks are evident. Firstly, the legislative protection is mostly afforded to domestic pets, and even then, mistreated, neglected or abused pets are usually only removed from their owners in repeated or extreme cases.¹⁶ As this situation is not unfamiliar for women who are abused by their husbands or partners, or for children who are abused by their parents or guardians, a big leap forward into progress would be to apply the UN declaration for human rights in cases of prosecution involving acts of

14 Adam Lodders 'Between Violence and the Law, Is There a Place for Justice?' (2008) 16 *Colloquy: Text Theory Critique* 118 <<http://www.colloquy.monash.edu.au/issue16/Lodders.pdf>>.

14 Doris Lin, *Animals as Property* <<http://animalrights.about.com/od/animallaw/a/AnimalsProperty.htm>>

15 Ibid.

16 Ibid. The situation is thus not unfamiliar for women who are abused by their husbands or partners, or for children who are abused by their parents or guardians.

violence against all victims of oppression - which would include cruelty towards animals.¹⁷ As in the case with humans, legal action with appropriate consequences could then be pursued, particularly if animals are also afforded legal rights or personhood. Secondly, many notable or commendable steps forward are continuously being taken by countless non-government organisations, the media and on the part of various celebrities to raise public awareness in regard to animal cruelty that would have otherwise been hidden from the public. Only recently, footage of the slaughter of sheep in Pakistan was aired on the ABC's *Four Corners* program, which reignited calls to ban live exports and resulted in the voluntary suspension the export of live sheep to Bahrain and Pakistan by the industry.¹⁸ The welfarist position again comes to the fore in the case of intensively farmed animals on the part of celebrities, such as for example Jamie Oliver, who promotes organic meat and free range chickens and eggs. This, at the very least, leads to more informed consumer choices and raises awareness of what potentially happens to an animal before it is on the menu or in a wardrobe. While the ideal goal would be for animals not to be used for human consumption and use at all and to not be regarded as property, welfarist initiatives should thus by no means be trivialised.

As pointed out by Sunstein, the duties and obligations of humans towards animals exist only through relationships (or contracts) that are entered into by people.¹⁹ White argues in a similar vein, claiming that animal welfare legislation is a reflection of an unbalanced trade-off between human and animal interests.²⁰ Francione further extends this argument by pointing to the fact that animal welfare legislation essentially

17 Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty; Article 3: Everyone has the right to life, liberty and security of person; Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

18 ABC Rural Reporters (6 November 2012) <<http://www.abc.net.au/rural/news/content/201211/s3626462.htm>>

19 Cass R Sunstein, 'Can Animals Sue?' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 253–5.

20 Steven White, 'Animals and the Law: A New Legal Frontier?' (2005) 9 *Melbourne University Law Review* 298–316 <<http://www.austlii.edu.au/au/journals/MULR/2005/9.html>> i.e. while a duty of care towards animals is incorporated in animal welfare legislation, the laws fall short of protecting them from cruelty and improving their quality of life.

understands animals as commodities; hence the property status of animals renders meaningless the animal welfare laws that prohibit the infliction of ‘unnecessary’ suffering or require the ‘humane’ treatment of animals.²¹ It is Wise, however, who directly confronts the problem of the property status of animals, as he maintains that this is an artificial construct, which enables the aspect of legal personhood to be easily addressed.²² Wise thus creates the space to bring *différance* into the conversation, and his use of the metaphorical extension of ‘woman’, when enriched by the ecofeminist position, would become a combined force that works towards putting an end to the property status of animals and the effects that flow from this.

6.3. The Ecofeminist Vision

6.3.1. Embracing the Other

Throughout patriarchal history, the predominant views on nature and nonhuman others have been that because they are other than human, they are things to be conquered, subdued and controlled.²³ Hence to date, the dominant philosophical and political discourses exclude men from being a part of nature and from being animals themselves.²⁴ In order to challenge the power imbalance, the excluded other (that is women, nature and animals), must be given a voice so that the underlying ideologies that have led to their exclusion are able to be dismantled and reconstructed. Embracing the other is an effective means of moving past traditional constraints by means of *différance*. As women iconically and metaphorically represent the excluded other, enabling women to redefine themselves opens the path for alternative discourses to take place that are able to be extended to all excluded others.

Feminist theorists, such as Luce Irigaray, postulate that patriarchal institutions have been constructed in diametric opposition to the feminine ‘other’. Irigaray thus fittingly

21 Gary L Francione, *Animals, Property and the Law* (Temple University Press, 1995) 124–5.

22 Steven M Wise, ‘Animal Rights: One Step at a Time’ in C R Sunstein and Martha C Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 25.

23 The conquering of nature and of nonhuman animals is clearly evident in sporting activities such as for example hunting, bullfighting, abseiling, skydiving and wild water rafting. The subduing of nature and of nonhumans animals can be evidenced in the breaking in of wild horses or the taming of animals for circuses, for example, and the controlling of nature becomes evident in the creation of dams, gardens and wildlife parks, even if for the purpose of preservation.

24 Marti Kheel, ‘From Heroic to Holistic Ethics: The Ecofeminist Challenge’, in Greta Gaard (Ed.), *Ecofeminism: Women, Animals, Nature*. (Philadelphia: Temple University Press, 1993) 243-271.

argues that “sexual *difference* is one of the major philosophical issues of our age” which could also be “our salvation.”²⁵ What Irigaray is basically saying is that once women are accepted on their own terms and not viewed as the polarised and inferior ‘other’, an egalitarian society can be brought about in which all life on Earth is appreciated on its own terms. This in turn implies that once the subordinate status of women has been successfully challenged, the subordination of nature and nonhuman animals can also be successfully challenged. To reinforce this standpoint and adopt Mallory’s expression, “the *thesis of ontological separatism*, which holds that humans are essentially separate from one another and from the nonhuman world [and] especially from the more-than-human-world”²⁶ is able to be contested by way of an equally viable but ‘oppositional’ political discourse,²⁷ which is able to overcome, or at the very least recognise, the contrived discord that persists in traditional ideological thought and practice.²⁸

By extension, traditional law and legal theory are also gender-biased and the application of formal justice principles within the law equally reinforces discrimination and substantive inequality.²⁹ This is clearly evidenced in the case studies conducted in chapters four and five of this thesis. As further evidenced in these chapters, feminist jurisprudence responds to this inherent injustice in the law by untangling the interconnections between women, nature and nonhuman others, as they regard the entrapment of nature and nonhuman others to be an essentially feminist issue. Moreover, by using *woman* to act as a metaphor for *différance*, woman (the metaphor) is able to be used as a tool to deconstruct binary oppositions.³⁰ In doing so, the area of a relationship to the other would be reached, in which ‘the code of sexual marks would no longer be discriminating’.³¹ The ecofeminist approach thus makes demands on the law to transcend formal legal principles by examining the reality of power relations, which is indeed an important contribution to generating change.

25 Luce Irigaray, *An Ethics of Sexual Difference*, Carolyn Burke & Gillian C. Gill trans. (Cornell University Press 1984) 5.

26 Chaone Mallory, *Toward an Ecofeminist Environmental Jurisprudence: Nature, Law and Gender*, <http://digital.library.unt.edu/ark:/67531/metadc2219/m1/1/high_res_d/Thesis.pdf>

27 Noël Sturgeon, *Ecofeminist Natures: Race, Gender, Feminist Theory and Political Action* (Routledge, 1997)

28 Catherine Mackinnon, *Feminism Unmodified: Discourses in Life and Law* (Harvard 1987) 98.

29 Ibid.

32 Pam Papadelos, *Derridean Deconstruction and Feminism: Exploring Aporias in Feminist Theory and Practice* (2010) 48 <<http://digital.library.adelaide.edu.au/dspace/bitstream/2440/39506/2/01front.pdf>>

33 Jacques Derrida and Christie McDonald, ‘Choreographies: Interview’ in N Holland (ed), *Feminist Interpretations of Jacques Derrida* (Pennsylvania State University Press, 1997) 23, 39.

According to Catherine MacKinnon, as epistemology and politics are two mutually enforcing sides of the same unequal coin, because feminist epistemology views the mind and world as interpenetrated,³² a feminist perspective on the law is able to expose “a relation between one means through which sex inequality is produced in the world and the world it produces”.³³ Premised on the belief that a continuation of humankind’s relationship with ecological systems is likely to increase scarcity and competition for resources, and thus exacerbate existing inequalities, the relation between *objectification*: the hierarchy between self as being and other as thing, and *objectivity*: the hierarchy between the knowing subject and the known object, are able to be successfully challenged.³⁴ This will in turn open the space for new conversations to take place in regard to the way in which humankind interacts with the environment and the nonhuman world and hence facilitate the incorporation of equality into the legal framework. Thus, by radically re-envisioning the role and function of the law, ecofeminism is able to offer a new direction.

As discussed in chapter two, ecofeminism views the interconnection between the domination of women, nature and animals to be on two levels: ideological-cultural and socioeconomic.³⁵ On both levels, women and associated others are devalued. Ecofeminist jurisprudence can be regarded as a way forward in regard to future developments in environmental law and animal law, as it reveals heightened concern for all things that are situated differently and directly confronts the legitimised oppression and exploitation of others under a male hegemony. In offering a more broadened and inclusive way of thinking, ecofeminism creates a platform for oppositional discourses to take place, which in turn, opens the imaginary space that is necessary to bridge the gap between justice and the law. Since social, political and legal reform can only be just once traditional perspectives have been rethought, and if necessary overturned, ecofeminism encourages that a radical change to the rules by which society operates are

34 Mackinnon, above 28, 98.

35 Ibid, xi.

36 Ibid, xi

37 Chaone Mallory, *What Is Ecofeminist Political Philosophy? Gender, Nature, and the Political* <<http://www38.homepage.villanova.edu/chaone.mallory/publications/EnvEthF10.pdf>>

brought about.³⁶ An example is in the care ethic understanding or the consumption of meat as not being gender-neutral, as evidenced in the linguistic association of women and passivity with vegetarianism: watching television will turn you into a vegetable. A feminist care ethic further reveals the connection between the body and the self, in which the bodily self develops a tolerance for violence by inflicting violence, or allowing violence to be inflicted, on animals for the purpose of eating meat.³⁷ Hence, a feminist care ethic considers both animal exploitation and animal liberation and emphasises the value of caring and nurturing in the relationship between humans and nonhuman others.

While on the one hand, feminist approaches differ in regard to how change may be brought about, when woven together, their theories offer a valuable framework, which not only debunks but also transcends the abstract principles and universal rules upon which traditional thought is based. Through deconstruction, ecofeminists expose that institutionalised rational thought is in keeping with hierarchies of domination and subordination. Since for ecofeminists, social and environmental justice cannot take place until the hierarchical relationships between humans, nonhumans and the environment cease to exist,³⁸ they work towards the creation of a new form of society, based on egalitarian, non-hierarchical structures, which ensure that life on Earth is just and sustainable for all living beings.³⁹ The additional use of images and metaphors serve to identify the vitiating factors that sanction the violence perpetrated against subordinated others to liberate them from their subordinate status. In the case of animals, this would include looking at them from an animal perspective. In mythology, fairy tales and legends, humans and deities often assume the bodies of animals to experience their energy.⁴⁰ At the heart of the animal rights movement are the two basic

36 Val Westbury, 'Ecofeminising Australia', *The Bulletin*, Sydney: Australian Consolidated Press (02/07/1991)

37 Josephine Donovan and Carol J. Adams (eds), *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals* (Columbia University Press 2007) 72.

38 Jasmin Sydee and Sharon Beder, *Ecofeminism and Globalisation: A Critical Approach* <http://www.democracynature.org/vol7/beder_sydee_globalisation.htm>.

39 Susan Buckingham, 'Ecofeminism in the Twenty First Century' (2004) 170(2) *Geographical Journal* 248.

40 Skye Alexander, *Shapeshifting* <<http://www.netplaces.com/wicca-witchcraft/the-animal-kingdom/shapeshifting.htm>>. Zeus, for instance, changed himself into a swan in order to seduce Leda. Merlin instructed the young King Arthur in the art of shapeshifting, teaching him to take on the forms of a badger, hawk, and bird. Shamans often shapeshift to acquire the powers of an animal; witches might choose to shapeshift in order to explore, gain knowledge, or see things from a different perspective, or for healing purposes, or to conceal their true identity.

principles of firstly, the rejection of speciesism, and secondly, the knowledge that animals are sentient beings. Since humans have so much more to learn about and from animals, assuming an animal perspective can lead to a better understanding and a heightened awareness of the animal world.

6.3.2 Enabling *différance* through Inclusion

Traditional male perspectives continue to regulate human interactions with the environment, which in turn, are reflected in the policies of local and international bureaucratic organisations. This includes the exclusion of the contribution of women in decision-making, which is a legal requirement at both national and international levels.⁴¹ The traditional (male) lens, in turn, is based on notions of power and economic prosperity,⁴² which merely reinforces the popular misconception that it is men who manage the Earth.⁴³ As the structures and processes that are in place are rigid and resistant to change, they need to become more malleable.⁴⁴ It needs to be ensured that women's voices are heard and that their contributions are not only respected but also incorporated into policy. As Kofi Annan maintains, "there is no tool for development more effective than the empowerment of women".⁴⁵ The case studies conducted by Havet, Brau and Gocht and Sydee and Beder confirm Annan's claim, as they reveal that women not only consider themselves as an integral part of the ecosystem but are also the first to respond to crises at organisational and grassroots levels.⁴⁶ Women's contributions to policy and decision-making are therefore highly undervalued.

41 See for example Agenda 21, *Chapter 24: Global Action For Women Towards Sustainable And Equitable Development Changing Consumption Patterns* (2011) <<http://habitat.igc.org/agenda21/a21-04.htm>>; Principle 20, United Nations Environment Programme, *Rio Declaration on Environment and Development* (2011) <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>>; United Nations, *Beijing Declaration and Platform for Action* (1995) <<http://www.un.org/womenwatch/daw/beijing/platform>> and United Nations, *Millennium Project* (2011) <<http://www.unmillenniumproject.org/>>.

42 Mere Pulea (ed), *Women's Participation in Environmental Management and Decision-Making* (2011) <<http://www.apwld.org/vol43-06.htm>>. As pointed out in chapter two, even if women are elected to local or national legislatures and their role in environmental management may be appreciated on a local level, women continue to have little impact on policy decisions, and their contributions are also not meaningfully reflected in policy.

43 V Brown and M Switzer, *Paper: Where Have All The Women Gone? The Role of Gender in Sustainable Development*, Centre for Resource and Environmental Studies 1991, 2.

44 Buckingham, above n 39, 152.

45 Kofi Annan, *Breaking Barriers: Gender Perspectives and Empowerment of Women in Least Developed Countries* (2011) <<http://www.unohrrls.org/UserFiles/File/Publications/Genderperspectives.pdf>>.

46 Ines Havet, Franka Brau and Birgit Gocht, *Gender Mainstreaming* (2011) <http://www.energyandenvironment.undp.org/undp/indexAction.cfm?module=Libraryandaction=GetFileandDocumentAttachmentID=2368>; Sydee and Beder, above n 40.

Moreover, women would also be more likely to target social justice issues, such as health, education, infrastructure and global poverty.⁴⁷

Given that traditional mechanisms have failed to reduce the human impact on the environment, a change in direction, as proposed by ecofeminists, could be considered as a way forward. This would involve changing the institutionalised structures that reinforce a hierarchical mode of thinking.⁴⁸ Among the changes that would be proposed would be to eliminate the socio-political relations, which pits men against women, privileged whites against people of colour, elites against masses, employers against employees, the First World against the Third World, and ultimately an industrial capitalist economic system against the natural world, including its nonhuman inhabitants.⁴⁹ In turn, a new economic and socio-political vision will ensure that a balance is able to be struck between environmental, economic, political, social and cultural processes in accordance with a multidimensional view that incorporates intergenerational solidarity, social equity and long-term considerations as essential elements.⁵⁰

The non-traditional perspectives of ecofeminists would be a valuable starting point, as the focus would be to ensure that discrimination against others does not remain at the core of worldviews and social formations. Particularly from a 'care ethic' perspective, the focus would be on welfare rather than assets, bringing a social conscience to the fore. This in turn, will uphold the view that there is no such thing as benevolent violence or destruction. Furthermore, the fundamental right for women to have the right to live in dignity, in freedom from want and from fear, as maintained by Annan, when applied in the metaphorical sense, extends to all excluded others. A deconstructive analysis of a legal system that fosters violence and destruction would therefore create the necessary space for non-traditional views to enable *différance*, in the metaphorical form of a *woman*, to speak on behalf of nature and its species. As the law is a reflection

47 Austrade, *Carla Zampatti Leads Womens Business Mission in India* (2008)

<[http://austrade.gov.au/Carla ZamapttiLeads-Women-s-Business-Mission-to-India/default.aspx](http://austrade.gov.au/Carla_ZamapttiLeads-Women-s-Business-Mission-to-India/default.aspx)>.

48 Buckingham, above n 39, 146, 149.

49 Murray Bookchin and Dave Foreman, *Defending the Earth: A Dialogue between Murray Bookchin and Dave Foreman* (South End Press, 1991) 30.

50 María Nieves Rico, *Gender, the Environment and the Sustainability of Development* (1998)

<<http://www.eclac.org/publicaciones/xml/6/4706/lcl1144i.pdf>>.

of the society that it regulates, the social conscience that is brought to the fore is bound to be incorporated into the law.

6.4. Conclusion

The quasi ‘soft’ law aspect of both environmental and animal legislation not only implies a reluctance to commit, but is further substantiated in the discrimination that is evident in the laws themselves. This has led to the difficulty of both environmental law and animal law to establish legitimacy in their own right and based on their own merits, and to the reluctance of the legal profession to incorporate legal theory critique that is advanced from non-traditional perspectives. Indeed, the metaphorical representation of ‘woman’ as the other that is recognised by ecofeminists (and feminists in general) to apply to nature and nonhuman animals is also recognised by non-feminist ethicists and scholars, as well as legal practitioners. As pointed out by Warren, the remarkable legacy of Leopold’s land ethic is his association of land as property with slave-girls, which has led to the development of an ecological ethic based on the gendering of human and nonhuman relationships.⁵¹ In the same vein, Steven Wise makes a direct association between animals and women by declaring that ‘unless a nonhuman animal attains legal personhood, she will not count’.⁵² Hence, the use of the pronoun ‘she’ in reference to legal personhood resonates the same historical connection between women and animals as Leopold recognised between women and the land.

The ecological ethic based on the gendering of human and nonhuman relationships allows for similarities to be drawn between environmental and animal legislation in that they are both aimed at protecting the other from a welfarist point of view. Environmental legislation is aimed at protecting the environment from potential abuse by humans as legitimized owners and controllers of the land, and the welfarist model protects animals from potential neglect or abuse from their legitimized human owners. As argued throughout this thesis, in both cases, certain areas of the environment and certain categories of animals are afforded less protection than others because the protection afforded to them reflects their low standing within an arbitrarily constructed

51 Karen J Warren, *The Legacy of Leopold’s “The Land Ethic”* (1998) 3 *Reflections*.

52 Steven M Wise, ‘Animal Rights: One Step at a Time’ in C R Sunstein and Martha C Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 25.

hierarchy of value and worth that is based on human perceptions and needs. In turn, these perceptions and needs are fundamentally based on economic worth with the result that certain areas of the environment are exploitable because it is economically viable to do so, and certain categories of animals are subjected to harm and suffering because it is deemed necessary for human consumption or other economically-based purposes. A clear example is evidenced in the fate of ‘unprofitable’ racehorses or of unwanted bobby calves, which are born purely for the production of milk, as mentioned in chapter five. Such cases further reveal the shortcomings of the laws that are seemingly aimed at protecting the environment and animals; namely that unacceptable is endorsed by the law because moral considerations are not at all taken into account.

The parallels drawn between gender differentiation and the sexual objectification women and the mistreatment of nature and nonhuman animals are thus not at all far-fetched, and since women iconically represent the other, they are in a position to speak up for both animals and nature. Indeed, the perpetual failure to pay attention to the impacts of human interactions with nature, and to ignore the messages that nature is conveying to us through the melting of glaciers and icecaps, the floods, the hurricanes and other man-made disasters, are all forms of communication that we should learn to heed, as they are telling us that nature has reached its limit and cannot be further abused. As all life on Earth is intricately entwined, being able to listen and feel the world around us is essential to understanding the larger context within which decisions and choices are made. Reality is not able to be discerned through reason alone as instinct and intuition play an invaluable role, as do all sensory perceptions, such as seeing, listening and feeling. Just as the traits that were once believed to be unique to humans have now been observed in nonhuman animals, the traits that were considered to be inferior to rational thought, such as intuition and sensory perceptions, should be redefined and openly embraced. It was once believed that only humans could make tools, but other primates have since been observed at also be able to make and use tools. Similarly, it was once believed that human alone could use language, but it is now recognised that other species are also able to communicate verbally in their own language and are even able to communicate in human-taught languages.⁵³

53 Lin, above n 14.

It is therefore essential to recognise that the survival of all species is directly linked to human survival. It is here that the ecofeminist approach is extremely useful for allowing for a “narratised and contextual” approach that is inclusive of others, and furthermore, not based on universalistic, abstract principles.⁵⁴ Indeed, Cornell argues that the most profound lesson of Derrida’s deconstruction theory is that the law should not rest with an aesthetic idea because an aesthetic idea ‘makes demands on you put by that other, because that other is something you can never imagine’.⁵⁵ Through deconstruction, new conversations are able to take place that move beyond the constraints of traditional thought and through the inclusion of this form of *différance*, social and legal institutions will be able to create justice for all. This is indeed an essential step forward, both in perspectives and the law.

On a final note, because the destruction of the natural world is currently proceeding at breakneck speed and society is becoming increasingly aware of the violence and injustices perpetrated against nature and animals, it has become more evident than before that a paradigm shift in perspectives is vital. It is also evident that no single ‘saviour’ theory is able to heroically save the environment and its nonhuman inhabitants, and given that no implemented mechanism has to date proven to be effective, the ecofeminist vision of creating a society that embraces reciprocity, mutuality and diversity is no doubt a good way forward. As MacKinnon points out, “a feminist theory of the state has barely been imagined, and systematically, it has never been tried,”⁵⁶ so, as advanced by Mallory, “it is [indeed] time to rectify this”.⁵⁷

54 Mallory, above n 26.

55 Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (Routledge, 1991) 45, 151.

56 MacKinnon, above n 38, 249

57 Mallory, above n 26.

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