

Lessons from feminist epistemology: toward an environmental jurisprudence

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I INTRODUCTION

The epistemological mode of inquiry is common in the feminist discipline. Broadly speaking, epistemology is the study of knowledge.¹ Feminist epistemological work looks more specifically at the influence of belief structure on our understandings and consequent approach to problems. Such work provides a good illustration of how a problem is deconstructed, to understand its real cause, and also of the construction and promotion of a replacement way of understanding.

The understandings gained from feminist epistemological inquiry have been applied to the law by feminist jurists. Recent feminist jurisprudence shows that epistemological understandings must be incorporated for legal analysis and response to be effective.²

This paper proposes that there are lessons to be learned from the feminist example.³ Environmental law is a burgeoning area of legal scholarship and it is therefore pertinent to consider whether the real issues are being addressed. Just as with issues of women's oppression, environmental problems can be expressed statistically and evidentially.⁴ Yet equally, if a deeper (epistemological) analysis of the problem is undertaken, substantially different legal solutions will evolve.

Part II briefly explains the epistemological analysis of women's oppression and considers how feminist jurists have addressed these understandings. Part III applies the feminist model to the environmental problem. The driving thesis of this paper is that unless the work of environmental lawyers acknowledges epistemological understandings, it will serve to perpetuate our current unsustainable path.

1 AR Lacey *A Dictionary of Philosophy* (2ed, Routledge & Kegan Paul, London, 1986) 63: "What can we know and how do we know it?"

2 A Bottomley and others "Dworkin; Which Dworkin? Taking Feminism Seriously" (1987) 14 *J of Law and Society* 47, 50.

3 It must be stressed that the importance of feminist work for this paper is not the feminist content, (that is, the *result* of the epistemological analysis), but the *way* feminists have gone about looking at a problem.

4 As an example, women's average hourly pay rates are approximately 80% of men's (Department of Statistics) and atmospheric carbon dioxide levels are higher now than they have been for the last 160,000 years. See JT Houghton and others (eds) *Climate Change: the IPCC Scientific Assessment: Report to IPCC from Working Group I* (Cambridge University Press, Cambridge, 1990).

II THE FEMINIST MODEL

A *Feminist Epistemological Inquiry*

A central tenet of feminist epistemological analysis is that knowledge is socially constructed. Assumptions made about what causes problems and how they can be dealt with, are indeed just that - assumptions. It is more accurate to realise that every way of organising society, making decisions and dealing with problems, is grounded in a particular world-view: human beings are "influenced by [a] particular belief system ... and this helps to circumscribe their view of the world".⁵

The importance of this is that one world-view often dominates, or at least is held by those with decision making power.⁶ Significant, too, is that dominant belief systems often appear as universal and therefore neutral.⁷

For feminism, this type of analysis has meant a recognition that not only are there major problems with the status quo, but that the current situation is just one man-made reality,⁸ the patriarchal system is only one system. The inquiry alerts women to the dangers of assuming as final and given the constraints of a patriarchal conception of society. It has prompted feminism to address the legitimation and perpetuation of patriarchal society by the knowledge and beliefs underpinning it. It has thereby allowed women to address the fundamentals of their oppression.

B *What Does This Mean For Law?*

A significant conclusion to result from epistemological analysis is that the legal system itself is not a free-floating entity. At both domestic and international levels, law has a political, economic, historical and cultural context.⁹ It is merely part of the current arrangement which epistemological analysis helps to deconstruct. For feminism, this means that law must be considered within its patriarchal context.¹⁰

Yet when attempts were first made to have women's concerns addressed by the law it was asked only that they be incorporated into the existing context; the patriarchal framework itself was not questioned. For example, anti-discrimination and maternity leave provisions were added to the existing framework of labour legislation. This has

5 D Spender "On Changing Thinking: Ask a Feminist" in *For the Record: the Making and Meaning of Feminist Knowledge* (The Women's Press Limited, London, 1985) 27.

6 J Resnik "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges" (1988) 61 S Cal LR 1877, 1906 cited by C Weisbrod "Practical Polyphony: Theories of the State and Feminist Jurisprudence" (1990) 24 Georgia LR 985, 1000-1001.

7 V Held "Feminism and Epistemology: Recent Work on the Connection Between Gender and Knowledge" (1985) 14 Philosophy & Public Affairs 296.

8 Weisbrod, above n 6, 985.

9 H Charlesworth and others "Feminist Approaches to International Law" (1991) 85 Am J of Int'l Law 613.

10 Above n 2, 50.

commonly become known as the "add-women-and-stir" approach.¹¹ Carol Smart¹² argues that this "compensatory scholarship" was an essential beginning. Yet, as she goes on to point out, it does not address patriarchy's explanations or assumptions. Most importantly, it prevents *re-definition* of the issues and the role law could play in addressing them:¹³

Much ... work, in accepting existing terrain, makes no attempt to construct new maps which might lead to greater insights Such boundary definitions close the broader question of the construction of gender relations by law and the legal system as a whole.

The epistemological analysis of feminism and law opens the way for such a process. It asks, "What does the law take for granted?" There are two relevant aspects:

- (1) the interpretation of feminist issues - "What is the problem?"; and
- (2) the knowledge of law - how it works and how it can help.

Anti-discrimination law can be used to illustrate the first. The issue is seen most generally to be equality for men and women. However, the equality it prescribes allows no challenge to greater and far more pervasive structural and political inequalities. It diverts attention from, and thereby sanctions, the more basic and important elements of oppression such as the public/private division¹⁴ and the undervaluation of women's work which actually *cause* the inequality problem. It is, then, equality in terms of a patriarchally-defined norm.¹⁵ In accepting the male norm as universal rather than descriptive, even anti-discrimination law legitimates patriarchy.¹⁶

An analysis of legal theory illustrates the second aspect of epistemological inquiry: questioning the role of law. Traditional legal theory plays a part in perpetuating the status quo because it legitimates the law.¹⁷ It offers little opportunity to question the *process* of defining issues,¹⁸ failing to ask *how* as well as what we know.¹⁹ In this

11 C Smart *Feminism and the Power of Law* (Routledge, London, 1989) 85; M Thornton "Feminist Jurisprudence: Illusion or Reality?" (1986) 3 Aust J of L and Society 5.

12 Smart, above n 11, 85.

13 Above n 2, 50.

14 The private world, where freedom and equality can be experienced, is the domain of men and women are confined to the private world of home and family where domination and inequality are the characterising features. See Thornton, above n 11, 5.

15 N Lacey "Legislation Against Sex Discrimination: Questions from a Feminist Perspective" (1987) 14 J of L and Society 411, 417.

16 HR Wishik "To Question Everything: the Inquiries of Feminist Jurisprudence" (1985) 1 Berkeley Women's LJ 64, 68.

17 Above n 16, 68.

18 MJ Mossman "Feminism and Legal Method: the Difference it Makes" (1987) 3 Wisconsin Women's LJ 147, 148.

19 Above n 16, 68.

way, legal theory prescribes our understanding of law. In accepting the legal process, it perpetuates its limitations.

The essential understanding for feminism is that the law and legal theory assume a *patriarchally* structured reality as universal and unquestionable and it is this reality which itself needs addressing.²⁰ If feminism does not address what the law takes for granted, it can only "incorporate feminism into law's own paradigm".²¹

Recent feminist jurisprudence argues that if women's concerns are to be effectively addressed the problem must be initially analysed from within the feminist critique, not the law: first feminism, then law".²² Beginning within the law will restrict how the problem can be viewed and therefore addressed. To start with the feminist analysis is to ensure that the real issues are addressed. This is the only way a "new topography", rather than mere "feminist grid references",²³ can be achieved.

By way of summary, the most basic point to be gleaned from the feminist epistemological analysis is that underlying assumptions and beliefs need to be addressed. In dealing with an issue which appears as empirical, such analysis allows any ideological aspects to be realised and therefore dealt with as the real cause. The application to law, as undertaken by feminist jurists, is important primarily for advocating the relevance of these understandings for a legal approach to be effective.

III APPLYING THE METHOD

Just as gender problems are more accurately explained by an analysis of underlying ideology and belief systems, the widespread nature of environmental problems suggests a similar analysis would be fruitful. The mode of analysis described in Part II entails a look beneath the environmental explanations embodied in political and legal discourse to reveal the ideology which drives them.

A *The Social Construction of Environmental Problems*

We are experiencing an environmental crisis, a crisis "whose dimensions are indicated by current rates of population expansion, runaway industrial growth, and environmental pollution, with their attendant threats of famine, war, and biological collapse".²⁴ It is arguable however, that there is essentially one crisis: that of perception.²⁵ The current conceptualisation of global society, economically, socially and

20 Above n 2, 55.

21 Smart, above n 11, 82.

22 C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, Mass, 1987) 94.

23 Above n 2, 59.

24 H Daly "UN Conferences on Environment and Development: Retrospect on Stockholm and Prospects for Rio" (1992) 5 *Ecological Economics* 9, 10-11.

25 F Capra *The Turning Point: Science, Society and the Rising Culture* (Simon & Schuster, New York, 1982) 2-3.

politically, assumes almost infinite environmental resilience - our perception of the environment allows us to destroy it. International negotiations²⁶ certainly reveal that the major political powers, and implicitly the majorities they represent, subscribe to a world-view in which the economic growth to be gained from environmental exploitation can be merely balanced against the environment - and win.

The following sections explore the conceptualisation of the environment which is implicit in the balance-and-win view. Consideration is then given to an alternative, ecological epistemology. The analysis is directly analogous to the feminist epistemological inquiry which involves revelation of the current patriarchal belief system and a move towards reconstructing different ways of knowing.²⁷ In the context of environmental issues it is the balance-and-win belief system which is revealed and ecological epistemology which is advocated as a better way of knowing.

1 *Balance-and-win epistemology: the dominant belief system*

We need nature to be fully alive: air, food, warmth, spiritual We live as if nature is only needed to provide extras: paper, recreation, speciality foods, a job to provide money.²⁸

The environment is currently regarded as an asset, a resource for human use.²⁹ When we want to preserve it as it is there is "often a frantic search for rational reasons for attaching aesthetic, recreational, scientific or cultural values to that part of nature so that the non-resource can be transformed into a resource".³⁰ The ways we ascribe value to nature have been described as the cathedral view, whereby natural areas are seen as opportunities for spiritual and aesthetic needs; the laboratory view, where wilderness is subject-matter for scientific inquiry; the silo view which sees unmodified areas as genetic stockpiles and, lastly, the gymnasium view which values the environment for

26 Negotiations for the 1992 Climate Change Convention provide an example. The Bush Administration refused to accept specific CO₂ reductions, arguing that these would impose undue stress on a US economy struggling to emerge from recession (*International Environment Reporter*, Washington, 11 March 1992, 123).

27 Above n 16, 68.

28 S Griffin *Women and Nature: the Roaring Inside Her* (Harper & Row, San Francisco, 1978), cited in B Devall and G Sessions *Deep Ecology: Living as if Nature Mattered* (Gibbs Smith, Utah, 1985) 1.

29 Above n 28, 43.

30 G Scott "An Ethic for Nature" in J Howell (ed) *Environmental Ethics - a New Zealand Contribution* (Centre for Resource Management, Lincoln College and University of Canterbury, 1986) 169 and 177 cited in P Taylor "International Law and the Greenhouse Effect: Danger or Opportunity?" Masters Thesis, VUW, 1991, 35. Taylor's paper is an attempt to base legal work on epistemological understandings of the environment. It includes a similar analysis to that which this paper explicitly aims to promote.

its recreational facilities.³¹ These clearly illustrate that our ways of addressing nature are pragmatic, the question: "Of what use is it to humans?" As the question indicates, the concern is for *human-centred* utility. We therefore have an anthropocentric environmental belief system.

Human beings view themselves as superior to nature and separate from the resources it represents. People are fundamentally different from all else and are the controllers of their destiny. This means that they can choose their goals and undertake whatever needs doing (to the Earth) to achieve them.³² Humanity's perceived relationship to nature is evidenced by talk of resource management and sustainable management, terms which suggest organisation and regulation, the taking charge of.³³

The Earth's "resources" are also considered to be vast, providing almost unlimited opportunities for humans. The common reluctance to make hard policy decisions regarding the environment is suggestive of such faith in the Earth's resilience and the survival of human civilisation. The history of humanity is one of "progress", so for every environmental problem there is assumed to be solutions and hence "progress" need never cease.³⁴

The origin of this belief system can be attributed to a number of sources.³⁵ The significance of such attribution is the relationship which can be seen between a view of the environment (the source) and the behaviour which it can justify. The mechanistic view of the Earth which arguably has dominated since late in the 16th century, can be used as an illustration. This view sees knowledge of the world as certain and consistent and matter as inert and passive. The natural world is rational, predictable and *therefore manipulable*.³⁶ To highlight the descriptive/normative connection, it is interesting to consider the pre-mechanistic view of the Earth which is as a nurturing mother:³⁷

One does not readily slay a mother, dig into her entrails for gold, or mutilate her body As long as the earth was considered to be alive and sensitive, it could be considered a breach of human ethical behaviour to carry out destructive acts against it.

31 See J Caldwell *An Ecological Approach to Environmental Law* (Legal Research Foundation Publication No. 29, New Zealand, 1988) 18. Another of the isolated examples of environmental legal work based on ecological understandings.

32 W Catton Jr and R Dunlop "New Ecological Paradigm for Post-Exuberant Sociology" (1980) 24 *American Behavioral Scientist* 15-48.

33 *The Concise Oxford Dictionary* (7ed, Oxford University Press, Oxford, 1982) 614.

34 Above n 32.

35 Feminist analysis sees its origins in patriarchal societies based on male-dominated hierarchies. Note that this is the type of conclusion a truly feminist critique yields, as opposed to this paper which merely applies the theory of knowledge and style of analysis. See for example ED Gray *Patriarchy as a Conceptual Trap* (Roundtable Press, Wellesley, 1982).

36 C Merchant *The Death of Nature: Women, Ecology and the Scientific Revolution* (Harper & Row, San Francisco, 1990) 227.

37 Above n 36, 3.

Today, the Earth as a separate, inferior and unlimited resource can very easily be traded off in favour of other factors which have gained almost sacrosanct status.

2 *Ecological epistemology: a new way of knowing*

In the broadest sense of the term, the Earth is an organism.³⁸ It is an organised whole, comprised of the dynamic, interactive relationships between its connected and interdependent parts - *it is a system*. The significance of this is that each part is "defined by and is dependent on the total context".³⁹ If everything is connected and interactive, each constituent part is affected by, and has an effect on, "the entire web of living and non-living environmental components".⁴⁰

Systemic⁴¹ understandings are in complete contrast to the views which see humans as superior, and nature at their disposal. Rather, humanity *is part of* the complex interrelationship making up the Earth's unified whole. As the World Commission on Environment and Development recognised, it is *humanity's* inability to fit *its* doings into natural patterns that is doing the damage. This is the "reality, from which there is no escape".⁴² The natural environment is comprised of ecosystems which have evolved over billions of years:⁴³

continuously using and recycling the same molecules of soil, water and air. The organizing principles of these ecosystems must be considered superior to those of human technologies based on recent inventions and, very often, on short-term linear projections.

So what are the implications of this worldview? The important aspect is that these understandings require a re-evaluation of the human-Earth relationship.⁴⁴ Humanity, and its social systems, exist within a physical reality and so to consider its part in isolation is to threaten the whole. Human beings need to change their role from "conqueror of the land community to plain member and citizen of it".⁴⁵

This means that within the social "reality" people need to account for the finite, interconnected environment. The traditional measure of national and social health is

38 D Rudhyar *Directives for New Life* (1971) 21, cited in CD Stone "Should Trees Have Legal Standing? - Toward Legal Rights for Natural Objects" (1971) 45 S Cal LR 450, 499.

39 Above n 36, 293.

40 Above n 36, 100.

41 Relating to the understanding of the Earth as a system.

42 World Commission on Environment and Development *Our Common Future* (Oxford University Press, Oxford, 1987) 1.

43 Above n 25, 390-391.

44 Taylor, above n 30, 2.

45 A Leopold "The Land Ethic" in D Scherer and T Attig (eds) *Ethics and the Environment* (Prentice-Hall Inc, New Jersey, 1983) 7.

growth,⁴⁶ production is equated with benefit and accounting systems do not consider environmental costs.⁴⁷ If a systemic ethic was adopted humanity would not separate the costs to the environment - the drain on finite resources, its limited capacity to deal with waste. Growth has been the linchpin for economics but now a new movement, aptly named ecological economics, is recognising that "we must replace the ideal of growth".⁴⁸ The system is finite, and all energy usage has an environmental price.⁴⁹

There is no such thing as a free lunch. In ecology, as in economics, the law is intended to warn that every gain is won at some cost. Because the global ecosystem is an interconnected whole, anything extracted from it by human effort must be replaced. Payment of this price cannot be avoided; it can only be delayed.

This is why human activities are having a global impact. There has been a denial of the interconnectedness and this has allowed a disproportionate impact on the environment. Systemic understandings make sense of the crises and systemic thinking is required to deal with them.⁵⁰ This does not mean however that everything should be halted. Rather "the world must learn to live in sophisticated modesty".⁵¹ People "will necessarily come to the conclusion that it is not lack of energy consumption that makes them unhappy".⁵²

B *What Does This Mean For Law?*

A brief re-cap of how feminism has applied epistemological understandings to law provides the framework for answering this question. The conclusions from the feminist analysis were:

- (1) the grounding of law in certain ideologies must be recognised;
- (2) for problems which result from ideology, conventional legal solutions cannot address and will actually perpetuate the situation; and
- (3) to be effective, solutions must address a redefined issue which encompasses epistemological understandings.

46 Above n 24, 11. In putting their national economy before the global ecosystem, the Bush Administration exemplified this attitude.

47 M Waring *Counting for Nothing* (Allen & Unwin, Wellington, 1988).

48 Above n 24, 12. It has been argued that economic growth will provide the necessary wealth to remedy the situation. However, as Daly notes, all indications are that environmental devastation is the consequence of an economy which has outgrown the capability of the earth's ecology to sustain it. To continue is to exacerbate.

49 B Compton *The Closing Circle: Nature, Man and Technology* (Bantam Books, London, 1972) cited in Caldwell, above n 31, 7.

50 K Bosselmann "New Mechanisms for Global Change" paper for Common Security Seminar, Victoria University of Wellington, 9 February 1990, 5.

51 M Strong quoted in P Brown and J Rocha "Rio Organiser Warns of Tragedy" *Guardian Weekly*, London, UK, 21 June 1992, 7.

52 S Bodian "Simple in Means, Rich in Ends: a Conversation with Arne Naess" Cited in Devall and Sessions, above n 28.

1 *Law is grounded in the balance-and-win worldview*

The feminist-style understanding of knowledge leads to a recognition that every social system is a value-imbued entity.⁵³ Although they appear neutral, systems such as law necessarily involve subjective assumptions as to how things should be and therefore how problems should be dealt with.

In respect of the environmental problem, law cannot be considered as distinct from the dominant paradigm⁵⁴ as outlined above. The bulk of contemporary legal solutions do not acknowledge the exploitative attitude which has led to the environmental crisis and which will ultimately be the issue which demands attention. These solutions do not recognise, let alone question, the assumptions they make about human dominance over the environment; environmental issues are treated as legal aberrations, not as pervasive, structural problems.⁵⁵ Law is not a free-floating entity but is grounded within the world-view which values development and economic growth as paramount concerns.⁵⁶

2 *Conventional legal analysis: perpetuating the problem*

In failing to explore whether its approach is appropriate for environmental problems, law - and those who work with it - fail also to deal with the fundamental questions. Legal work assumes a reality which itself needs addressing.⁵⁷

Much ... work, in accepting existing terrain, makes no attempt to construct new maps which might lead to greater insights Such boundary definitions close the broader question of the construction of gender relations [read environmental concerns] by law and the legal system as a whole.

The boundary definitions mean that legal work is still at the "compensatory scholarship"⁵⁸ stage and this prevents the issues, and the role of law, from being re-defined. The epistemological nature of the problem is obscured and so thereby are any alternative, truly sustainable, realities.⁵⁹

Indeed, in failing to deal with its conceptualisation of the environment, the law portrays the dominant view as neutral and thereby legitimates it.⁶⁰ What is in fact one school of thought based on one view of how the world can operate is presented, by default, as a universal.⁶¹ In accepting that planet Earth is here to fulfil human wants,

53 Weisbrod, above n 6, 998.

54 The term "paradigm" refers to the thoughts, perceptions and values that form a particular vision of reality. See above n 25, 30.

55 See above n 9, 632, in respect of women's issues.

56 See Smart, above n 11, 88 for a feminist analogy.

57 Above n 2, 50.

58 See above n 12 and accompanying text for this term applied to feminist scholarship.

59 V Held, above n 7, 296 emphasises the necessity to recognise epistemology.

60 See above n 16, 69 for a feminist analogy.

61 See above n 2, 55.

and that this is somehow natural rather than descriptive of how we operate, the law (as one of the major social systems) plays a part in perpetuating an unsustainable ethic.

3 *Toward an environmental jurisprudence*

It is clear that different strategies are needed if the same failures are not simply to be repeated.⁶²

In accepting that the environmental problem is the exploitative path of humanity, it is clear that environmental "grid references"⁶³ will not provide the solution. To achieve change, an epistemological understanding of the problem needs to be promoted. "Like all legal systems, international [environmental] law plays an important part in constructing reality"⁶⁴ and there is a place for legal minds to address that reality and the role of law within it. An ecological understanding must become the basis of environmental legal work if such work is to have any meaningful place in our future.⁶⁵

This stretches the bounds of what legal scholars conventionally concern themselves with. However, delusions about where the law truly begins and ends have no intrinsic merit, and certainly do not solve the problem. If the search for solutions starts *within* the constraints of law, the range is limited by the environmental philosophy it is grounded in;⁶⁶ there is a risk of legitimising the situation even in the attempt to change it.⁶⁷ Instead, there must be a conscious attempt to start with the epistemological analysis of the problem. Attitudes need to change, but to address them they must first be recognised as the issue.⁶⁸

For change to occur, active work is required. Inaction is not neutral behaviour, it perpetuates the status quo. Legal work which does not acknowledge, let alone address, the faulty environmental ethic can be seen to inhibit the process.⁶⁹ In contrast, that which encompasses a revised understanding of the environment can only facilitate change. It challenges the present framework as a given. At the more concrete level it widens the scope of considerable policy options. Perhaps the major contribution of jurisprudence based on an epistemological understanding, is to enable the dual effects of conventional legal work, the short-term benefits as well as the legitimisation of the real (attitude) problem, to become apparent. If this is done then conscious decisions can be made about which way to proceed.⁷⁰

62 Above n 11, 67 for a feminist analogy.

63 Above n 2, 59.

64 Above n 9, 644.

65 Just as feminist understandings of the patriarchal structure are a necessary basis for effective strategies for women. Above n 16, 71.

66 Above n 22: "First feminism, then law".

67 See above n 16, 68 for a feminist analogy.

68 See Smart, above n 11, 85 for a feminist analogy.

69 See above n 16, 71 for a feminist analogy.

70 Above n 16, 71.

IV CONCLUSION

In feminist jurisprudence there is much debate as to exactly *how* the redefined issues should be incorporated into action.⁷¹ This will no doubt be the case with environmental law. However if papers such as this can get the discussions to that stage, law may well be able to make a positive contribution. It will at least be evaluating the role it plays instead of constraining within an outdated paradigm. That there will be debates is not a concern. They must surely be healthy ones if they facilitate a revised environmental epistemology.

It is imperative that humanity recognise the imbalance it creates in the global system. Environmental problems are very obviously connected to human activity. To contain and prevent them, human behaviour will have to change. The increasingly apparent interconnectedness of global problems requires a revised interpretation of how things are done - what is considered possible and justifiable based on what is known. It demands an inquiry into what are, and what are not, truly realistic options.

71 In the debate about addressing sex discrimination, for example, see N Taub "Sexual Harassment of Working Women (A Review)" (1980) 80 Columbia LR 1686.

