

## Wild law: sustainable development and beyond?

This issue of *ELM* is concerned largely with the work of Cormac Cullinan, author of *Wild Law*,<sup>1</sup> and contributor of an important new article published below fleshing out the practical application of this increasingly influential legal theory.<sup>2</sup> Cullinan's writing is of interest to readers of this journal because of the unique extent to which it seeks to articulate a novel concept of law that is based on five decades of development in the fields of environmental sciences. The science underlying Cullinan's work is not the main talking point. Most readers will be familiar with the notion of the physical interdependence of all living organisms, as first popularised by Rachel Carson in *Silent Spring*,<sup>3</sup> and recently reasserted with a non-specialist readership in mind by scientists such as James Lovelock.<sup>4</sup> Cullinan, himself a lawyer, aims to work into this holistic scientific vision an environmental jurisprudence which intriguingly, in his latest article, appears to be seeking to move beyond the 'sustainable development' agenda. Given that sustainable development is the central organising concept of environmental law around the globe today, no one could question Cullinan's intellectual ambition. What is Cullinan getting at, and how seriously should one take criticism of the emerging sustainable development 'orthodoxy' at a time when it is just beginning to bear fruit in practical legal terms?<sup>5</sup>

### Wild law as an application of Earth jurisprudence

Central to Cullinan's legal theory is 'Earth jurisprudence'. This was the name coined by Cullinan in *Wild Law* to describe what he considered a radical paradigm shift away from prevailing theories of law.<sup>6</sup> Earth jurisprudence rejects prevailing theories on the basis that they are grounded in what he considers a deluded vision of the human world as separate from the universe.<sup>7</sup> In one of what is a number of thought provoking analogies involving mental health – a theme that has great but undervalued potential when it comes to understanding environmental problems – Cullinan writes:

We have lived so long within this contrived 'homosphere' breathing its myths of human supremacy, that it is now more real to us than the Earth ... we have become ... 'autistic' in relation to the earth.<sup>8</sup>

Earth jurisprudence situates human needs – in the broadest sense as including physical, mental and cultural well being – within a wider ecological whole. In another passage which suggests a concern much deeper than simply the physical or material well being of humans which often dominates debate in this arena, Cullinan writes:

Earth gives substance and form to our bodies, our imaginations are inspired by the wonders of the natural world and our sense of awe and beauty arises from experiencing the universe. We are 'earthlings' through and through ... the idea that we are separate from, or superior to, Earth is a dangerous delusion that may yet prove fatal.<sup>9</sup>

Earth jurisprudence supplies the general norms out of which practical laws can be extrapolated. Such law is called 'wild law'. Wild laws are not strictly speaking natural laws (which are typically inspired by divinity), for Cullinan's vision is secular. Wild law is firmly grounded in the work of men and women of their time, and it does not rely on any contestable higher authority, or spirit, of law.

### The content of wild law

Elaborating on the content of wild law is a principal theme of this issue of *ELM*.<sup>10</sup> In broad terms, wild law sets out the rights and responsibilities of humans both in relation to one another, and in relation to other organisms

- 1 C Cullinan *Wild Law: A Manifesto for Earth Justice* (Green Books Totnes Devon 2003) ISBN 1-9039998-35-2.
- 2 C Cullinan, 'Sowing wild law' p 71. This article is based on a paper given to the 2nd Wild Law Conference (see p 69 for details and for other papers delivered at this conference).
- 3 R Carson, *Silent Spring* (Penguin London 2000). First published in America by Houghton Mifflin 1962, and in Britain by Hamish Hamilton 1963. See Pontin Editorial *ELM* 18 (2006) 3 99.
- 4 J Lovelock, *The Ages of Gaia: A Biography of our Living Earth* (OUP Oxford 2000); *The Revenge of Gaia* (Allen Lane 2006).
- 5 See on an international plane the New Delhi Declaration of Legal Principles of Sustainable Development (2002). In Britain, many environmental regulatory authorities now have a statutory duty to pursue sustainable development (eg Environment Act 1995 s 4; Local Government Act 2000).
- 6 Cullinan (n 1) p 50.
- 7 *ibid* p 34.
- 8 *ibid* p 35–6. See also p 82.
- 9 Cullinan below p 72.
- 10 See p 69.

(or, in Cullinan's words, 'other members of the community of beings that constitutes earth'<sup>11</sup>). Cullinan's analysis of rights draws bravely upon Christopher Stone's still controversial and oft dismissed argument in 'Should Trees Have Standing?',<sup>12</sup> that the natural world ought to have legal rights enforceable on behalf of nature by humans. This thinking is developed by Ian Mason in an article which also appears below.<sup>13</sup> Mason examines a trailblazing Pennsylvania Borough's experimentation with a law conferring on ecosystems rights enforceable by individuals acting on behalf of nature.<sup>14</sup> For Mason, the actions in Tamaqua show that plant rights, or insect rights, or indeed any other ecological rights, have 'real meaning and purpose...deriv[ing] from a different perspective on the origin of rights and obligations which comes into sharp relief when the traditional human-centred approach is displaced by the wild law approach'.<sup>15</sup>

Wild law thus contemplates a considerable broadening in our conception of rights, so that they extend to non-human subjects within the natural order. Yet Cullinan is equally concerned with ensuring that the scope of certain existing rights are reigned in. A particular object of criticism in *Wild Law* is the treatment of land as property.<sup>16</sup> Cullinan is concerned with the anthropocentric manner in which land is reduced to the ownership of an individual, who has the rights to exploit it regardless of wider ecological interests. He advocates laws which reward physical proximity to the land and its fertility. Current laws fall short in two major respects: first, (as above) by reducing land to an object of ownership; and secondly, by vesting ownership in fictional individuals, ie in corporations.

The breakdown in the relationships between humans and Earth has been exacerbated by the fact that many landowners are incorporated persons that exist by virtue of legal fictions and are wholly incapable of forming an intimate relationship with the land. This lack of capacity means that they cannot connect with the Community [of human and non-human organisms] and so are incapable of functioning as part of it.<sup>17</sup>

Mason's analysis of *Bradford Corporation v Pickles* (1895)<sup>18</sup> introduces a note of caution.<sup>19</sup> It reveals how real people can behave in ecologically perverse ways with the blessing of the courts when it comes to the pursuit of petty short term material interests arising from land. The problem, of course, is that the common law allows landowners to be as environmentally attuned or switched off as they wish to be.<sup>20</sup>

There is considerable scope for elaborating on the huge issue of the content of wild law's responsibilities. The idea of regulatory law appears to be endorsed in Cullinan's account, subject to its obligations being strengthened so as to respect the interest of the communities of the future. In *Wild Law*, Cullinan laments, with much support if he were in need of it, that regulatory laws are too apt to focus on short-term human utility.<sup>21</sup> A practical suggestion he makes is to redefine the ubiquitous concept of 'public interest' to refer to the interest of the whole earth community over the long term.<sup>22</sup> The interaction between Christopher Stone, the Sierra Club and the courts which Cullinan alludes to in *Wild Law*, as noted above,<sup>23</sup> represents a good pointer of the potential of this in America; in Britain, pertinent examples lie in the quite dramatic liberalisation of standing rules in relation to constitutional and administrative law in the field of the environment, as illustrated recently in Greenpeace's challenge to the consultation on the UK Energy Review.<sup>24</sup> By contrast, the fact that European environmental rights jurisprudence is grounded in *human* rights might be an area where some change is needed if wild law is to be delivered. Even here however, these rights have their basis in the right to a home, which accords in broad terms at least with the concern of Earth jurisprudence to bring individuals closer to – and to become more at home in – nature.

#### Wild law and climate change

It is impossible today to ignore climate change in any discussion of environmental rights and responsibilities. Climate change has been described by another commentator with close associations with Gaia theory – James Lovelock – as Gaia's revenge.<sup>25</sup> Cullinan does touch on climate change in the article below,

11 Cullinan below p 72.

12 (1972) 45 *Southern California Law Review* 450.

13 I Mason, 'Earth, Rights and Insects: an Holistic Approach to Environmental Law' see below p 87.

14 *Tamaqua Borough Waste and Local Control Ordinance, May 2007*, see also Boyle and Filgueira, Cullinan, Baker.

15 *ibid*.

16 Note 1 Ch 12, 13.

17 *ibid* p 179.

18 (1895) AC 197.

19 Mason below p 88.

20 Mr Pickles obviously had what wild lawyers might describe as a more shallow relationship with his land than William Whitacre Tipping, claimant in nuisance law's greatest triumph of the nineteenth century: see B Pontin, S Bowen, J Hickman, A Lloyd, C Lopes and J Wilkes, 'Tipping v St Helens Smelting Ltd: "Anti-Development" or "Sustainable Development"?' (2007) 19 ELM 17.

21 Note 1 p 176.

22 *ibid* p 208.

23 *ibid* p 103ff.

24 *R (on the application of Greenpeace Limited) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), see Lowther (2006) 19 ELM 1 37.

25 Note 4. See also eg environment.guardian.co.uk/climatechange/story/0,,2034245,00.html - 45k ; www.firstscience.com/home/articles/earth/interview-james-lovelock-on-climate-change\_9814.html - 33k.

yet not in depth.<sup>26</sup> We can speculate, fairly safely perhaps, that wild law would endorse renewable energy and energy efficiency. It is possible that it would support carbon capture and storage. But where does it stand on the vexed issue of nuclear energy? Tom Burke's article in this issue is an uncompromising rejection of nuclear technology as a solution to climate change, based on a range of arguments, cost and time in particular.<sup>27</sup> However, Lovelock would take issue.<sup>28</sup> What would a wild lawyer make of this debate?

It is not possible to appreciate wild law's significance for the climate change debate without addressing a series of prior issues surrounding how much energy an earth system guided by Earth jurisprudence would in practice demand. This is principally a question of Cullinan's stance on 'development'. Lovelock's controversial argument in support of nuclear energy is based on the assumption, which many environmental lawyers would consider realistic, that we will continue to seek high levels of economic growth, and that we will be living, in his beguiling phrase, in an 'electric world' with energy demands to match.<sup>29</sup> Is Cullinan in agreement? Tom Berry's preface to *Wild Law*, in which economic issues are addressed, gives little away. Berry writes damningly of modern reliance on technology, and the economics which so often drives it. And yet his principal concern in this context appears to be the *spiritual* decline which has accompanied this state of affairs. Certainly, there is nothing in Berry's critique which suggests that wild law must necessarily renounce technological innovation and GDP. Indeed, in his article below Cullinan appears less concerned with rejecting the model of development through economic growth as much as with situating it in a wider context of other non-economic values. For him, the development of society ought to be pursued at numerous levels; economically, of course, but also with reference to other values – physical, mental, cultural, and spiritual.<sup>30</sup> However, this raises more questions than it answers in terms of the key questions today of how much energy is needed, and how it ought to be supplied.

#### Sustainable development and wild law

If Cullinan is broadly supportive of development, what is the relationship between what Cullinan has to offer here, and the sustainable development concept which environmental lawyers have battled to see integrated within the law with increasing success of late? That is probably the principal question which arises from the articles published here. *Wild Law* did not engage explicitly with sustainable development, but in speculating about what Cullinan would say were he to have addressed this issue, I was surely not alone in thinking that he would view his project and that of sustainable development as complementary. However, this is not how Cullinan sees it in the article below, which is highly dismissive of sustainable development as a framework for action.

Some of the criticisms leveled by Cullinan in this setting are clearly wide of the mark. This applies to the suggestion that sustainable development embodies a negative vision, scaring individuals into stopping doing something (eg polluting the environment, depleting natural resources). Whilst this might at times apply to climate change, this is an isolated (if important – see below Satish Kumar p 83) exception. Generally, sustainable development is portrayed as a fundamentally positive concept which, in Britain, is about aspiring to *A Better Quality of Life*.<sup>31</sup> Cullinan cannot then claim that wild law and associated concepts are novel in this respect, for they are part of a prevailing orthodoxy.

On firmer ground is Cullinan's criticism that the concept of sustainable development has become enveloped in a 'morass of confusion and disagreement'. This is correct up to a point, yet it is an obvious criticism, and it does not follow that we need a different concept. Clarifying the present concept, through the experience of applying it, would be a more obvious prescription to many. After all, so much has been invested in this concept, particularly when one considers it in the context of historical research in a pre-industrial age.<sup>32</sup>

Cullinan does have one strong criticism which is capable of transforming the agenda in this field. It is that sustainable development *as it is currently conceived* is not in fact a big enough idea. It is a meager idea, in that it is too often skewed toward present and future material needs – principally economic

26 In *Wild Law*, loss of biodiversity overshadows climate change, which does not appear to have been anticipated as a major issue.

27 T Burke 'Is nuclear inevitable?' below p 63.

28 'Our Nuclear Lifeline', *Readers Digest*, March 2005, 4. See also eg (19 June 2007) <http://comment.independent.co.uk/commentators/article61727.ece>. For Lovelock, nuclear energy is the only source of energy that comes close to reconciling environment and economy, if members of society continue to pursue energy intensive lifestyles.

29 *ibid* at 9.

30 'We have been conned into believing that economic prosperity (usually defined by GDP) is an acceptable proxy for what we really want – and it is not. I think that what people really want is to be able to live healthy and fulfilled lives within a community in which they feel they belong...' (n 2 p 76).

31 UK Government Sustainable Development Unit 'A better quality of life—strategy for sustainable development for the United Kingdom—1999; <http://www.sustainable-development.gov.uk/publications/uk-strategy99/index.htm>.

32 S Coyle, K Morrow *Philosophical Foundations of Environmental Law* (Hart Oxford 2003).

prosperity – at the expense of wider non-material needs which are what ordinary people are interested in.<sup>33</sup> A bigger idea, according to Cullinan, is one that would speak to people in deeper ways than the dismal economics which is used increasingly to justify environmental action (epitomised in the Stern Review<sup>34</sup>). The biggest idea of all, Cullinan appears to be suggesting, is one which would tap into people's often forgotten, now dormant, emotional and aesthetic affinity with the natural world, dismissed wrongly by many today as soft, naïve, or romantic.

Cullinan's argument here is not new, but it is timely. He will be aware that the success of Rachel Carson's *Silent Spring* was that it contained a down-to-earth poetry which inspired millions of ordinary readers to action, with barely a single reference to money and economic prosperity. Sustainable development could be like this, if it were conceived along Earth jurisprudence lines. That is to say, Cullinan's most important contribution is to expose an unnecessary shortcoming of sustainable development, that with its misplaced emphasis on economic prosperity, it really only mobilises economists such as Sir Nicolas Stern, who in turn inspire high level politicians, NGOs and large companies, without ever capturing the imaginations of a confused public. Cullinan must not compete with sustainable development, for he will alienate a powerful audience on whom law reform depends, and ultimately lose. His task, rather, is to show how sustainable development law and policy can mean more to more people.

*Ben Pontin*

<sup>33</sup> This makes it 'boring' ('[S]ustainable development' is too abstract (and overused and therefore boring) a concept to mobilise people and societies around') (p 74).

<sup>34</sup> N Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press 2007) [http://www.hm-treasury.gov.uk/independent\\_reviews/stern\\_review\\_economics\\_climate\\_change/stern\\_review\\_report.cfm](http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm).

## Wild Law 2006–7

The Wild Law Conference 2006 *Changing environmental law to meet global challenges* based on the book *Wild Law* by Cormac Cullinan, was organised by the United Kingdom Environmental Law Association and the Environmental Law Foundation in association with the University of Brighton in November 2006.

The articles that follow have been based upon the papers or the ideas presented at the Conference.

Cormac Cullinan	Sowing wild law
Norman Baker MP	Rebalancing the system: an agenda for change
Satish Kumar	Economics and ecology – which comes first?
Elizabeth Rivers	Creative regulation: how wild law can rehabilitate governance and regulation
Ian Mason	Earth, rights and insects: a holistic approach to environmental law

### Foreword

**Simon Boyle** *Argyll Environmental Ltd, UKELA Council*  
**Begonia Filgueira** *Director, Gaia Law Ltd*

In November 2005 the first UKELA Wild Law Conference was held at the University of Brighton.<sup>2</sup> The event was something of an experiment in being the first of its type, but thanks to an excellent line up of speakers<sup>3</sup> and a large professional and student attendance, there was a strong call for a follow up conference in 2006.<sup>4</sup>

In the first conference Michael Meacher MP set a series of questions (see Introduction to the Conference papers) which were largely about turning the ideas in Cullinan's book *Wild Law* into practice. The speakers for the second conference were approached by UKELA on the basis that that they would attempt to address such difficult questions. Whereas the speakers at the first Conference were largely from the legal profession, for the second conference a more eclectic mix was required, including speakers who could approach *Wild Law*'s premises from a less legalistic perspective.

In that regard it is hard to think of anyone better qualified than Satish Kumar, editor of *Resurgence*. In the early 1960s, at the height of the cold war, Satish spent two and a half years walking without money and few possessions from Delhi to Washington via Moscow, Paris and London in order to give 'peace tea' to the leaders of the nuclear powers. His ideas, largely inspired by the Buddha, may appear to western lawyers to be radical or even impractical, but it must be remembered that these ideas founded a world religion. Satish's ideas were powerful and inspiring.

Norman Baker MP, formerly the Liberal Democrat Environment Spokesperson, offered an alternative route

towards the same destiny. Like Satish, he had profound misgivings about measuring wealth purely in terms of GDP, but unlike Satish believed in working with and changing existing economic institutions (such as the IMF) so that they could work for rather than against the interests of the environment.

Cormac Cullinan's presence at the second conference was vital in order to move the agenda on. In the 1990s Cullinan worked as a corporate lawyer in London and set up his own specialist environmental consultancy before moving to South Africa. However, it is perhaps Cullinan's personal history as an activist in South Africa in the struggle against apartheid which has led to the groundbreaking agenda of *Wild Law*. As a student Cullinan could not accept the moral position held by the white supremacists in his homeland. In the same way he finds it unacceptable to stand by in the knowledge that the current extinction rate on earth averages 100 species a day, which is estimated as up to 1000 times the natural level shown in fossil records. Scientists are therefore calling this current phase the 'sixth period of mass extinction'. The moral premise of *Wild Law* is that the other species of the earth should have the benefit of legal protection providing them with a 'right' to coexist.

We have already seen the very beginnings of the legal changes that may bring the ideas behind *Wild Law* into reality. In September 2006 the Borough Council of Tamaqua, Pennsylvania adopted a Sewage Sludge Ordinance 2006 (see pp 78, 87). This local legislation prohibits the rights of any corporation to apply sewage sludge to any land in the borough and it recognises ecosystems as legal persons who have civil rights under the legislation.

Following the April 2007 US Supreme Court's ruling in *Massachusetts v EPA*<sup>5</sup> the government will be on notice to protect the interests of the environment and not only those of industry. In this case the Supreme Court found that the Environment Protection Agency had violated the Clean Air

1 United Kingdom Environmental Law Association [www.ukela.org](http://www.ukela.org).

2 Conference 'The Principles of Earth Jurisprudence based on the book *Wild Law: A Manifesto for Earth Justice* by Cormac Cullinan'.

3 Rt. Hon. Michael Meacher MP, Chairman, Professor Robert Lee, Professor Lynda Warren, Jacqueline McGlade and Begonia Filgueira. The papers were published, together with an article by Cormac Cullinan in ELM 18 (2006) 1–32.

4 Held at the University of Brighton, November 2006.

5 *Massachusetts v EPA*, 415 F. 3d 50 (D.C. Cir), reh'g en banc denied, 433 F. 3d 66 (2005), cert. granted, 126 S. Ct. 2960 (June 26, 2006), 167 L. Ed. 2d 248 (U.S. Apr. 3, 2007).

Act when it refused a legal request seeking regulation of global warming pollution emissions. Existing environmental laws will need to be interpreted in the light of real threats to the environment which are backed by scientific evidence. Increasingly science is finding that species are interdependent and the continued rate of mass extinctions will start bearing more directly on the welfare of mankind. These developments should increase public support for laws like the Sewage Sludge Ordinance where rights of other species are expressly recognised.

In conjunction with the Environmental Law Foundation<sup>6</sup> and the Gaia Foundation,<sup>7</sup> UKELA will be holding the third Wild Law event in September 2007. Here the main objective will be to build up a legal foundation that can support Wild Law concepts and be offered to the politicians and public as an approach that should be endorsed if we are serious about ending the sixth period of mass extinction.

6 [www.elflaw.org](http://www.elflaw.org).

7 [www.gaiafoundation.org](http://www.gaiafoundation.org).

## Introduction

John Elkington *SustainAbility*<sup>1</sup>

The first thing to say is that I am not a lawyer, wild or otherwise. That said, SustainAbility's London offices are in Bedford Row, the epicentre of matters legal. Which is rather ironic, since I appear to have developed powerful antibodies to lawyers – more or less every time I have encountered them, it seems, I have been in trouble of some sort. In 1989, for example, we ran head-long into McDonalds. We had produced a book called *The Green Consumer Guide* and, in the process, we had cut across a number of major corporates, McDonalds among them. They came after us with an army of lawyers, but in the end we fought them to a standstill.

More recently, SustainAbility has invested a good deal of effort in investigating the longer term implications of the growing role that lawyers are playing in shaping the international landscape of legal, financial and moral liability. Our report *The Changing Landscape of Liability* makes the case that the landscape of liability – and therefore the risks for both companies and shareholder value – is changing rapidly. It explores the evidence, maps the changes and aims to help business navigate new and uncharted territory. The case studies examine and draw conclusions in relation to climate change, human rights, obesity and legacy issues.<sup>2</sup>

Before turning to the emerging field of 'wild law', let me give a few words of context. We see the environmental and sustainability movements as having evolved thanks to a series of major societal pressure waves. The 1960s and 1970s saw the first wave, characterised by the rise of a growing number of environmental NGOs and the emergence of an embryonic 'green' movement seeking to change government approaches to the agenda. During this period, governments tended to lead the charge, introducing new regulations and forcing business onto the defensive and into compliance mode. The second wave peaked late in the late 1980s and early 1990s. This period saw the end of the Cold War, coupled with a series of environmental and social catastrophes that put markets, big business and their brands firmly in the NGO and media spotlight. The third wave saw an intense era of globalisation – and the rise of movements that

were opposed to the process. That was sharply halted by the 9/11 attacks and their aftermath, but now we see either the recovery of that third wave or the building of a fourth.

The focus today is on responsible globalisation, to be sure, but also now on creativity, innovation and measureable entrepreneurial solutions to the world's problems.<sup>3</sup> At the same time, Paul Hawken speaks of our various civil society initiatives as now representing the largest movement on earth – a movement with no name, no headquarters and no leader.<sup>4</sup> The wild law movement is one that I'm still learning about, and Cormac Cullinan's book, *Wild Law: A Manifesto for Earth Justice*<sup>5</sup> looks set to be a key text of this emerging global movement.

One of the things that emerges strongly from Cormac's book is the argument that we need to change not just individual laws but also the underlying architecture of jurisprudence and of the legal system. He himself asks the question: is this ambition delusional or practical? Well, most people looking at everyday reality today would be tempted to conclude it is delusional. How can we even hope to change such an ancient and deeply-entrenched legal system, particularly with so many legal interests vested in the status quo – and no doubt prepared to pull out every stop to defend those interests. But the problems facing us, among them poverty and the risks associated with pandemics and climate change, mean that we have to act as if change is inevitable. The current system appears to be set in concrete, but history shows that seismic shocks are inevitable in the economic, social, environmental and political realms, which suggested that opportunities to drive fundamental change could be upon us sooner than we might imagine. The practical challenge, then, is to work out what we want to happen in such circumstances.

The organisers of this conference are to be congratulated; there is far too little of this sort of joint working in our multiple movements. In what follows, it is worth bearing in mind the key question that Cormac poses: 'How do we embark on a radical re-envisioning and restructuring of our international and national legal systems and government systems?'. With experience of advising clients in over 20 countries, he is well placed to help guide us in finding the answers we will need as the twenty-first century gets into its stride.

3 [http://www.sustainability.com/insight/skoll\\_article.asp?id=937](http://www.sustainability.com/insight/skoll_article.asp?id=937).

4 P Hawken *Blessed Unrest: How the largest movement in the world came into being and why no one saw it coming* (Viking Publishers May 2007).

5 Green Books, Dartington UK 2002, ISBN 1 903998 35 2, 240pp, pb £9.95 [www.greenbooks.co.uk](http://www.greenbooks.co.uk).

1 Founder and Chief Entrepreneur, SustainAbility [www.sustainability.com](http://www.sustainability.com); Advisory Council Member Environmental Law Foundation [www.elflaw.org](http://www.elflaw.org).

2 <http://www.sustainability.com/insight/liability.asp>.

Wild Law 2006-7

## Sowing wild law

Cormac Cullinan *Enact International*

### Introduction<sup>1</sup>

This article explains briefly what is meant by the terms 'Earth jurisprudence' and 'wild law' and addresses two questions which were posed by the Honourable Michael Meacher MP in his capacity as chairperson of the first UKELA Wild Law Conference held in 2005. The first question is 'How are forces to be mobilised to get the ideas (contained in *Wild Law*)<sup>2</sup> onto the worldwide public agenda?' The second question is 'How are the principles in *Wild Law* compatible with the almost universal aspiration across the world for economic prosperity?' My presumption is that by posing these questions, Michael Meacher was encouraging participants to discuss how Earth jurisprudence could be spread globally in order that it might become the basis for reforming human governance systems and, in particular, how one would deal with potential obstacles such as the apparently incompatible desire for economic prosperity.

### Contextualising law within the evolving Earth story

Understanding Earth jurisprudence and wild law requires re-conceptualising human governance systems from the perspective that humans are a component of a larger natural system of order that governs how Earth as a whole (and ultimately the universe itself) functions. This is in stark contrast to the legal and political system of most societies today which are premised on the understanding that human beings are separate from, and superior to, the rest of the community of beings that constitute Earth.

Today many people regard the ancient idea that the mountains, forest and wild animals are our kith and kin as a quaint, pre-scientific superstition. However, even from the perspective of modern physics and cosmology, it is literally, and not just figuratively, true. We all share the same source and the relationships between us have shaped the evolution of each of us.

Scientists tell us that our common origin lies way back in deep time when a massive explosion occurred, giving birth to time and energy which surged forth into the darkness of the void. Initially there was not even matter, but as the universe cooled, subatomic particles bonded

in relationships that formed the early elements of hydrogen and helium. Massive density waves swept through the debris created by the Big Bang and gradually, moved by some mysterious force, the universe began to organise itself. Myriads of stars and planets were born and our galaxy and solar system, among many others, was spun out of the chaos.

One of the planets in our solar system was particularly distinctive. Earth, by virtue of its size and distance from the sun, could maintain the presence of solids, liquids and gases simultaneously. It formed oceans and continents and then simple organisms. These gradually began to cooperate and to establish symbiotic relationships that gave rise to more and more complex life forms, and eventually to the incredible diversity of life forms which we see around us today.

One of the species to emerge during the last few million years was the human. For most of its existence our species has lived in small tribal communities, very close to nature. It was very clear to these tribal peoples that Earth was primary and they were secondary. They recognised their complete dependence on Earth and the other creatures with which they had evolved, and consequently made great efforts to respect Earth and to live by what they perceived to be her universal and immutable laws.

Comparatively recently, particularly as a consequence of the 'Scientific Revolution' during the sixteenth and seventeenth centuries, the idea that humans are separate from Earth began to take hold. The work of philosophers and scientists such as Descartes, Bacon and Newton popularised the belief that there is a very rigid division between humans and the natural world, and between mind and matter. The natural world to them was a vast mechanism – a grand clock that could be taken apart to discover the mathematical principles that governed how it worked. The advent of that mechanistic, materialistic understanding of the world largely (but not completely) destroyed any sense of the sacred dimension of Earth.

Hand-in-hand with the idea of separation came the myth of superiority. People came to believe that they are at the centre of the universe and are superior to the rest of creation. Earth was transformed in the minds of humans from a sacred presence to an inexhaustible larder of resources which exists exclusively for their benefit. This is the thinking that is now enshrined in our legal systems. For example, in the eyes of the law, only humans and corporate entities are subjects capable of having rights. From a legal perspective, Earth and all other life forms are 'property' which can be bought, sold and exploited – as slaves, women, and many indigenous peoples once were.

1 This is a revised and edited version of the paper entitled 'Spreading Earth Jurisprudence' which Cormac Cullinan presented in November 2006 at the UKELA Wild Law Conference held at the University of Brighton.

2 C Cullinan *Wild Law: A Manifesto for Earth Justice* (Green Books Totnes Devon 2003) ISBN 1-9039998-35-2.

Science has revised its understanding of the universe since the seventeenth century but the law has not. As a result of the insights of quantum physics, 'systems thinking', and complexity, chaos and Gaia theories, among others, we now know that a mechanistic and reductionist understanding of Earth does not accord with reality. Scientists have discovered that the universe is not really like a gigantic clock at all. It is more like a vast, whirling, celebratory, cosmic dance. It seems that we cannot understand the cosmos by analysing each component part separately. The universe is formed by the relationships between the different components and it is the system as a whole that determines how each component behaves, rather than vice versa. Just as a dance is neither the dancer, nor the music, nor the dance step, but is created by the relationship between all of them, so the universe is composed of an intricate relationship between all of its different aspects. As Thomas Berry says, 'the Universe is not a collection of objects but a communion of subjects'.<sup>3</sup>

From this perspective, human beings cannot be understood except as a part or aspect of the Earth system. Earth gives substance and form to our bodies, our imaginations are inspired by the wonders of the natural world and our sense of awe and beauty arises from experiencing the universe. We are 'Earthlings' through and through. We are an absolutely integral and inseparable part of the Earth system and can only be human in relationship to the cosmos within which we have come into being. The idea that we are separate from, or superior to, Earth is a dangerous delusion that may yet prove fatal.

### Earth jurisprudence and wild law

'Earth jurisprudence' is a philosophy of law and human governance based on the idea that humans are only one part of a wider community of beings and that the welfare of each member of that community is dependent on the welfare of Earth as a whole. It is premised on the belief that human societies will only be viable and flourish if they regulate themselves as part of this wider Earth community and do so in a way that is consistent with the fundamental laws or principles that govern how the universe functions (which I have termed the 'Great Jurisprudence').

The term 'wild law', on the other hand, refers to human laws that are consistent with Earth jurisprudence. A wild law is a law made by people to regulate human behaviour which prioritises maintaining the integrity and functioning of the whole Earth community in the long term, over the interests of any species (including humans) at a particular time. Wild laws are designed to regulate human participation within this wider community. They seek to balance the rights and responsibilities of humans against those of other members of the community of beings that constitutes Earth (eg plants, animals, rivers and ecosystems) in order to safeguard the rights of all the members of the Earth community.

<sup>3</sup> T Berry 'The Origin, Differentiation and Role of Rights' (2001) quoted in *Wild Law* (n 2) p115.

### A time of transition

We are part of an astonishingly creative and continuing story which so far has seen Earth create life and self-reflective consciousness (for example the human mind) from matter. Now all the indications are that the Earth community is in the early stages of a massive transition. This transition is significant not only in historical but in geological timescales. Indeed, climate change scientists drily describe us as being in a 'non-analogue' situation, by which I understand them to mean that the situation in which we now find ourselves is unprecedented.

We are now well outside the range within which greenhouse gas concentrations have fluctuated over the last 400,000 or so years and it now appears that there is absolutely nothing that we can do to reduce the average temperature of the biosphere to within this range in the near future. Shockingly, some leading scientists believe that the fate of the Arctic ice has already been determined – it will slowly but inexorably disappear. Eventually Earth is likely to stabilise around a higher average temperature range. The urgency of taking action on climate change now revolves around the fact that according to some leading scientists we only have a short time (some say about seven years) to take action that will have a substantial impact on minimising the eventual equilibrium range in hundreds of years' time.

At the same time, the beginnings of the sixth period of mass extinction is bringing to an end the Cenozoic age, and there is a very real prospect that the so-called 'peak oil' effect may relatively soon deliver a lethal blow to what Thomas Berry refers to as 'the petroleum interval'.

These circumstances change everything. First, the rules of the game are changing, which means that we must be cautious about relying too heavily on precedent as a guide to action. Secondly, whatever doubts and disagreements there may be about the way forward, one thing is clear. Continuing to act and to regulate ourselves as we have been doing is not a viable option. In other words, adopting a new strategy that has only a 25 per cent chance of working is substantially less risky than continuing to pursue strategies that have been tried and tested and shown not to work. Thirdly, it appears that we are at a point in evolution where a quantum leap is required – a radical and novel creative jump made without going through a slow progression of intermediate stages. What we now need is the cultural equivalent of the biological evolution from forelegs to wings.

### Desire and emotion

If the ideas in *Wild Law* are to be spread and implemented, then it is up to people to do it. This means that to explore how Earth Jurisprudence can be spread, we must first ask what would induce a person or a group of people to spread it? What might motivate each of us to accept these ideas and want to spread them and what shared cultural values might assist or hinder us? In other words, we must look not only at the external world, but also at the internal worlds of each individual and each society.



Our motivations are typically coloured and enhanced by emotions. Most environmentalists will at some time or another have been motivated by many different emotions. Sometimes the dominant emotion may be fear, for example that our children will inhabit a ravaged and inhospitable world. At other times we might feel hope, passion and excitement at the prospect of healing the damaged relationships between people and planet, or even love and gratitude at being both part of, and containing, the creative spirit which animates the universe. Whatever it is, action is usually fuelled by deep desires and emotions.

If we want to mobilise people we need to pay attention to both desires and emotions. The contemporary legal world worships reason and distrusts emotion to such an extent that animating change is difficult. It is a world in which detachment (or disassociation) is prized and empathetic engagement is seen as a weakness. A world so firmly based on material realism that it not only denies the existence of the realms of soul and spirit, but even discounts material realities if they cannot be proven, is one that needs to change, but in advocating change we must take care not to perpetuate the divisions between mind and matter, heart and intellect, nature and consciousness which have so bedevilled our thinking in the past. It is far more productive and helpful to recognise that most approaches or points of view to which humans have adhered for any length of time contain at least partial truths which were useful to them at the stage at which they were developed.

Typically a particular theory or approach will appear quite satisfactory for a while, but eventually the anomalies and paradoxes start piling up and dissatisfaction grows until a new theory is developed which can resolve or explain the contradictions. A new approach may be premised on an outright rejection of its predecessor, but if one looks back at history it is often clear that each thesis and its subsequent antithesis is part of the dynamic of progress. Each theory is a partial truth and the evolution of understanding is often achieved through the successive incorporation of the partial truths or insights of earlier explanations into more comprehensive world-views that transcend the previous understandings.

### Holons and holarchies

A useful analogy is the way in which the biosphere has arranged itself into self-organising 'holons' which themselves form part of larger wholes, so collectively forming a 'holarchy' (like ecosystems nested within larger ecosystems). These terms were coined by Arthur Koestler and refer to the fact that each 'holon' is simultaneously a whole and a part of a larger whole, like a molecule within a cell and a cell within an organism. A holon strives both to maintain its distinctness and integrity and to fit in with and contribute to the whole of which it is a part. The way in which holons relate to each other creates a holarchy of increasing wholeness. However, if a holon attempts to dominate the whole it can create a destructive hierarchy based on domination (like a cancer or a dictator) and if this is not resolved by reintegrating the holon so that it

assumes its proper place, then the process will begin to reverse and the whole will start to unravel.

So if we apply this analogy to ideas, the challenge would be to see if we can recognise and keep those aspects of our current philosophies which are valuable and have served us well while incorporating them in successively more comprehensive world views, which deepen our understanding by reconciling, or at least explaining, the relationship between the partial truths of previous philosophies. As I mentioned in my response to papers delivered at the previous Wild Law conference, I am not interested in encouraging a move from mind to heart or from rationality to emotion in dealing with legal matters, but rather a move towards a synthesis along the lines of the 'heartmind' concept of the Buddhists.<sup>4</sup> In other words, by applying both heart and mind to our understanding rather than choosing one over the other, we are likely to achieve a fuller and more useful understanding.

### The necessity of depth

Ken Wilber, the prominent American thinker, argues that many environmentalists are unknowingly operating within a post-industrial mindset which only accepts material reality and denies the existence or relevance both of our individual subjective experiences and of the inter-subjective experiences of our culture.<sup>5</sup> This means that we look at the objective behavioural aspects of the individual and ignore the internal dimensions (including the holons of body, mind, soul and spirit). It also means that we focus on how society functions (ie its external manifestations such as laws) and ignore the collective internal culture which informs that society. Wilber argues that our society's insistence on scientific materialism and hence on focusing exclusively on what can be observed has led us to ignore the depth of understanding which can only be achieved by recognising that the external behaviour of an individual correlates with the internal subjective world of that individual, as the social world corresponds with internal cultural values and understanding. This, he argues, has resulted in deeper ideas of 'Nature' being replaced with a belief that 'nature' in its material form is the ultimate and only reality. Thus he argues that 'nature' is a product of industrialisation

4 According to John Welwood: 'In Buddhism, the words "heart" and "mind" are part of the same reality ("citta" in Sanskrit). In fact, when Buddhists refer to mind, they point not to the head, but to the chest. The mind that the Eastern traditions are most interested in is not the thinking capacity, but rather what the Zen master Suzuki Roshi called "big mind": a fundamental openness and clarity which resonates directly with the world around us. The big mind is not created or possessed by anyone's ego; rather, it is a universal wakefulness that any human being can tap into. The rational thinking apparatus we know so well in the west is, in this perspective, a "small mind". The mind that is one with the heart is a much larger kind of awareness that surrounds the normally narrow focus of our attention.' J Welwood (ed) *Awakening the Heart. East/West Approaches to Psychotherapy and the Healing Relationship* (Shambhala Boston and London 1985) Introduction p viii.

5 For example K Wilber *A Brief History of Everything* (2nd edn Gateway Dublin 2001).

and that many environmentalists have unwittingly accepted this superficial understanding (or as Wilber calls it, the 'flatland' perspective).<sup>6</sup>

Wilber argues that many environmentalists are now what he calls 'eco-romantics' and worship nature as the supreme reality, thereby ignoring consciousness and culture. He believes that the eco-romantics pit themselves against what he calls the 'ego-camp'. The latter also regard nature as the ultimate reality, but are motivated by a desire to control and subdue the world of nature and to free themselves from its constraints. To Wilber, both camps are trapped in a post-modern 'flatland' because of their inability to recognise the depth of experience that can only be discovered in the internal realms. Those in the ego-camp attempt to repress and deny any sort of spiritual reality while those in the eco-camp, alarmed at the growing rift between mind and nature, emphasise that we humans are but a strand in the web of life that constitutes nature. As he points out, because the eco-romantics' view is also based on a soulless, valueless concept of nature as a material reality (ie 'nature' rather than 'Nature'), they face conceptual difficulties in arguing on the one hand that human culture is creating the problem and on the other that our cultures are part of an all-encompassing, material natural world.

Perhaps Wilber's most telling point for our purposes is that very few people or societies are going to be concerned about issues such as global warming unless their consciousness or culture has evolved to a certain point.<sup>7</sup> This means that if we focus on nature as a material reality and ignore and devalue the interior world, we will miss the path that people and societies must take to arrive at the global understanding that is necessary to motivate them to protect the global environment. In other words, we will never succeed in getting people to stop destroying the external physical biosphere without facilitating the interior evolution of individual consciousness and cultural values. This means that no amount of explaining the Gaia theory (or at least the 'weak' version of it) is likely to induce people to stop destroying the natural communities that constitute Gaia.

Accordingly, any strategy to spread Earth jurisprudence ideas must aim both to disseminate those ideas in the external world and to inspire those involved to engage in personal and collective practices that will engage their inner world. For example, in our highly urbanised world, I think that it is very important for people to make an effort to connect in a personal way with nature as often as possible. In my experience, the beauty of a

dawn or the calm solitude of a forest are much more powerful means of overcoming our autistic separation from the rest of the Earth community than discussing Cartesian dualism. This also means that questions of ethics and social and religious values have an important part to play. In this regard, the increasing willingness of organised faith communities (churches, mosques etc) to take up issues such as climate change as moral issues is particularly encouraging.

### Focusing on a positive vision

Earth jurisprudence and wild laws cannot come into being without social change. Earth jurisprudence is the jurisprudence of a different kind of society from the one that surrounds us. Unfortunately, we are not yet clear about the nature of that society. One of the things that holds us back is that we focus most of our energy on what we do not want – pollution, climate change, the rampant destruction of beautiful places, the extinction of species and the continuing erosion of community. We need to spend more effort envisioning and creating what we do want. At the moment, I suspect that if environmentally conscious people were asked what our societies should be aiming at, the most common answer would probably be 'sustainable development'. Indeed, most public policy initiatives throughout the world are said to be motivated by a desire to achieve sustainable development. However, even mentioning the term almost invariably leads swiftly to the next question 'What is sustainable development?', and we plunge into a morass of confusion and disagreement.

I am not sure that many of us would be able to recognise sustainable development let alone be able to visualise it. Policy-makers everywhere seem to go to great lengths to avoid defining clearly what the key attributes of a sustainable society would be. This may be because we are so far from achieving it that it is scary, and there are no votes to be won by pointing this out. Furthermore, unlike sustainable development which is a process in which political decisions play a large role, what is or is not sustainable is determined primarily by the Great Jurisprudence, and is beyond human control. For example, humans have to accept that, although we may have a significant impact on atmospheric levels of greenhouse gases, we cannot change the fact that if our emissions exceed a certain level then the equilibrium of the current climate system cannot be maintained.

In any event, I suspect that 'sustainable development' is too abstract (and over-used and therefore boring) a concept to mobilise people and societies around.<sup>8</sup> What

6 *ibid* pp 235, 299–300, 307.

7 *ibid* p 285. Wilber argues that: 'Gaia's main problems are not industrialisation, ozone depletion, over population, or resource depletion. Gaia's main problem is *the lack of mutual understanding and mutual agreement in the Noosphere* about how to proceed with these problems. We cannot reign in industry if we cannot reach mutual understanding and mutual agreement based on a worldcentric moral perspective concerning the global commons. And we reach that *worldcentric moral perspective through a difficult and laborious process of interior growth and transcendence*. In short, global problems demand global consciousness, and global consciousness is the product of five or six major interior stages of development'.

8 Sustainable development is defined by its proponents as balancing the fulfilment of human needs with the protection of the natural environment so that these needs can be met not only in the present, but in the indefinite future. The term was used by the Brundtland Commission (United Nations 1987 'Report of the World Commission on Environment and Development'. General Assembly Resolution 42/187, 11 December 1987) which coined what has become the most

we need is big, challenging and exciting ideas, capable of sparking a new renaissance of creative energy that will transform the world. We need to take up what Thomas Berry refers to as 'the Great Work' of our times – fashioning a viable mode of existence for people as part of the community of this planet.<sup>9</sup> Sustaining development does not cut it. Although we may understand it intellectually and agree that it is a good thing, it is difficult to form a picture of this process in our minds, and even more difficult to get passionate about it. I also find it difficult to imagine most people getting fired up about a worthy notion that has been explained to them mainly in terms of what they will have to give up.

If we want to make the leap to what Thomas Berry calls the 'Ecozoic age', we must be able to conceive of social structures and ways of being that we believe can come about and that we desire deeply. We need a vision that we can see in our mind's eye and that will get our creative juices flowing, and experiences that convince us that it is achievable and is something that we really, really want. We need a beautiful dream that we can almost smell and touch and feel, and that stirs us to the core. If we can do that, then issues such as climate change will be dealt with as a by-product of our creating the future we want.

This might sound like a tall order, but if we think of holons and holarchies it is not so difficult. If you sit back and think about how to change your life in a way that reflects an intention to live as a good citizen of an Earth community, the ideas soon come. Perhaps it might involve leaving aside a section of your garden to provide a wild space for other creatures, protecting public open spaces in your community, sharing an organic meal or devising personal rituals to remind you of your interrelationship with Earth and all its inhabitants. In fact, millions of people are already walking this road, whether or not they are conscious of their actions being motivated by a desire to bring about the greater change. Many of us have already quietly defected to another world-view.

Once we have consciously defected to the Earth community, we can start to influence the human communities to which we belong. Again, the trick is to begin to think about how they might look if they consciously tried to function as part of the Earth community. What obstacles need to be removed and what needs to be put in place to facilitate the building of communities that are integrated into local ecosystems? Perhaps building standards and laws could be changed? Perhaps a group of people could be granted specific responsibilities to protect a common, or a by-law passed that prohibits the growing of genetically modified foods in the area?

These ideas may seem strange at first, but they can be implemented. For example, on 19 September 2006

the borough council of a community of about 7000 people in Pennsylvania in the USA adopted the Tamaqua Borough Sewage Sludge Ordinance 2006.<sup>10</sup> At first sight this does not seem to be exceptional, except for two things. First, the ordinance strips corporations which engage in the land application of sludge of legal personality and civil rights. Secondly, it recognises natural communities and ecosystems within the borough as legal persons for the purposes of enforcing civil rights.

One of the effects of enacting this ordinance is that the borough or any of its residents may institute an action to recover compensatory and punitive damages for any interference with the existence and flourishing of natural communities and ecosystems caused by the land application of sewage sludge. Damages may be recovered not only from the responsible corporation, but also from a shareholder, director, officer or manager of that corporation. Any damages recovered as a result of an action to enforce civil rights must be paid to the borough to be used to restore natural communities and ecosystems. According to Thomas Linzey, the lawyer from the Community Environmental Legal Defense Fund who assisted Tamaqua Borough, this is the first time in the history of municipalities in the USA that this has happened. In doing so, the citizens of Tamaqua reasserted their inalienable right to regulate themselves in way that protects the health of their community. They also made a conscious attempt to join their rights with a larger reservoir of natural rights so that they may better resist corporate assaults on the rights of local communities to govern themselves.

Lawyers need to lift their professional vision. Thomas Berry has said that 'The legal profession needs to cease its subservience to the industrial organisations to fulfil its larger responsibilities for the survival of Earth in the fullness of its grandeur'. What would this entail? Would the ethical and professional rules of the Law Societies have to be changed? Positive actions might take the form of building on the Animal Welfare Bill and campaigning for the legal emancipation of animals, or building support for a European Union constitution based on Earth jurisprudence principles and the recognition that both our separate identities as ethnic groups and nation states, and our collective identity as a European Community or Union, flow from our relationship with Earth. Why not define what the essential characteristics of a flourishing Earth-oriented society would be (eg no disposal of waste to landfills), and then change environmental impact assessment and strategic environmental impact assessment procedures so that they result in reports that show decision-makers whether or not a project, policy or programme would take us closer to that society?

Once we commit to reintegrating ourselves into the Earth community (ie set a clear purpose) the possibilities are endless. The key is to commit to do something definite that is consistent with that purpose and will make us feel happier and more fulfilled. In this way, as Gandhi said, we can become the change we wish to see.

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often-quoted definition of sustainable development as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.

9 T Berry *The Great Work: Our way into the Future* (Bell Tower New York 1999).

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10 See p 87.

### The mechanisms of mobilisation

Having touched on what might motivate and fuel the dissemination of Earth jurisprudence, I would now like to return to the question of how we could spread Earth jurisprudence worldwide and how we could mobilise the forces to do so. In other words, what mechanisms could we use to propagate these wild law seeds?

There is probably an infinite number of mechanisms available, but I think that it is particularly helpful to consider the conscious use of networks. Recent advances in the understanding of how networks operate, and the existence of the internet and other fast and relatively inexpensive means of communication mean that ideas can be spread much faster and more effectively than ever before. Researchers have found that there appears to be an inherent organising tendency in networks (whether they be natural networks such as river systems or human-made systems such as electricity grids or the internet) to organise themselves in a way that permits information to be transferred between any two points in the net via a surprisingly small number of interconnections. The expression 'six degrees of separation' refers to the surprising discovery that virtually any two people on the planet can be connected through no more than six acquaintances.

The key to spreading an idea is to have 'nodes of inspiration' where the idea is constantly developed and refined by groups of committed persons who inspire 'carriers', who in turn communicate the idea to other groups. With complex ideas there is always the risk that the original idea will mutate, be diluted and lose its potency unless there is two-way traffic between the different nodes or groups. This is needed to re-inspire people and to enable the evolution of the idea. So one way of spreading an idea worldwide is to establish strong nodes of inspiration and then deliberately to encourage the ideas to be carried into other existing networks within which they can spread rapidly.

Of course, simply introducing new ideas into a network is no guarantee that they will be spread effectively or rapidly. Ideas can get blocked along the way and confined to a few isolated pockets, or mutate beyond recognition and eventually die. However, one of the ways in which I believe one can create the energy necessary to drive the dissemination of these ideas is to show that they provide a more useful way of understanding and dealing with contemporary challenges, such as climate change, than existing philosophies.

### Conclusions

In conclusion, I think that the way to deal with what Michael Meacher described as 'the almost universal

aspiration across the world for economic prosperity' is to focus on what people want more than economic prosperity. We have been conned into believing that economic prosperity (usually defined by GDP) is an acceptable proxy for what we really want – and it is not. I think that what most people really want is to be able to live healthy and fulfilled lives within a community in which they feel they belong, have something to offer, are valued and are connected with other beings and the place. In short, they want to have their basic needs met and an opportunity to evolve as an integral part of the Earth community.

As we experience more extreme weather events and other backlashes against our abuse of Earth, the inadequacies of our existing laws and political systems are likely to become apparent to more and more people. This will provide fertile ground to sow ideas of Earth jurisprudence and motivate others to contribute their imagination and energy to the process. In essence, to get these ideas on to the worldwide public agenda requires only that each person who is inspired by them does two things.

First, 'defect' to the Earth community and begin learning to act as a responsible member of it. Students can study from this perspective. Those in government can develop policy from this perspective. Activists can organise communities and cooperate around these unifying ideas.

Secondly, consciously use the networks of which you are part – whether they be on-line communities, political structures, professional associations, institutions, schools, universities, workplaces, or friends – to inspire others to do the same.

If we all do this, then I believe it is quite possible that within a few years the basic elements of this new perspective will reach the 'tipping point' and develop an internal momentum of their own that will enable them to spread very rapidly without any conscious effort on our part. This will help to establish the new understandings or myths that we need for our times and, before we know it, the idea that humans are the masters of Earth and can flourish on the back of the ruinous exploitation of natural systems will seem as absurd and demonstrably false as the belief that the sun revolves around Earth.

In fact this is already happening. The seeds of wild law are already growing and spreading, like a vine sending out tendrils. Similar ideas and practices are cropping up in places like Tamaqua and we are only just beginning to connect the dots. As we do, the picture of what is possible will become clearer and will inspire others. However, the most important task facing us right now is to ensure that these ideas take root firmly in our internal worlds and that we all do what we can to nourish and support the tender imaginative shoots that we see emerging.

Wild Law 2006–7

## Rebalancing the system: an agenda for change

Norman Baker MP *Chair of All-Party Environmental Group*

### Introduction<sup>1</sup>

There is no question that the world is facing a very difficult situation in environmental terms. I don't think there is any need at the moment to produce convincing arguments about the challenge of climate change. The statistics are all there: the melting of the polar ice caps; the disappearance of whole ecosystems; the fact that the polar bear, for example, has maybe 50 years left to survive if we carry on as we are; the destruction of our rain forests; the increased level of flooding and increasingly extreme weather patterns; the loss of species for ever (we are told that a species becomes extinct roughly every 45 minutes). And, of course, we are using finite resources, whether it is the fish in the sea or the oil under the ground, as if there is no tomorrow, which indeed there might not be if we carry on as we are. So, we *cannot* carry on as we are. The present system isn't working; the present system needs to change; and the present system needs a *fundamental* change in order to rebalance – to use that New Labour word – how we live on this planet. That's why I'm very pleased to welcome the work that Cormac Cullinan has done, which is a very significant contribution to that thinking.<sup>2</sup>

How can we take it forward? We don't have very long. In terms of climate change we have perhaps a tipping point of maybe 10 to 15 years away, beyond which we may reach the point of no return. For example if we start releasing the methane from under the permafrost, then there is positive feedback – I prefer to call it negative feedback – which then means we are in a cycle which is ever-worsening. A key point to emphasise is that, although we don't have much time and the tipping point may not be very far away, this is not a reason to do nothing or to put our heads in the sand. And the latest argument of the climate change sceptics is that it is all too late. The climate change sceptics were saying only about six months ago or a year ago 'oh, there's no problem, climate change isn't happening, or if it is, it's very beneficial, we can grow grapes in Yorkshire, don't worry about it'. Suddenly, from being told that it isn't happening, we are now being told that it's too late to do anything about it. So the sceptics are unhelpful and we must ignore them and try to find out how we can in fact move forward in a productive way.

The idea that we give rights to the earth or rights to all species is one that I personally find very attractive as a concept. We are all linked to everything else on this planet. There is a very famous photograph from a spacecraft looking back at planet earth and in the middle of nothing there is this little ball of activity and we realise how precious this planet is and how we really can't afford to destroy it – as I fear we are doing. The planet works because there is an interrelationship between different life forms. Everything is linked to everything else, as Lenin said – and he was right in that sense – and once we start messing about with one part of the life cycle then, of course, the consequences are unpredictable, will almost certainly be negative, and can be severe.

It may be slightly controversial to say that one of the reasons we find ourselves in the present position is the traditional Christian viewpoint that man has pre-eminence or stewardship over the planet, and that God has given us the planet to exploit. That may have worked all right in biblical times when humans couldn't really do much damage, but that philosophy does not work now when we can do enormous damage. We can wipe out, for example, entire fish stocks in a year or two; we can, of course, cause nuclear war; we can completely deforest every year areas the size of Wales or Belgium. And this is not only happening in developing countries, as people like to think. In Tasmania there is appalling destruction of the forests, which is contributing enormously to climate change, not simply from the loss of the forests, but from wood being burnt in an indiscriminate way. So all of us across the world, whether in developing or developed countries, have a great deal to learn.

### Capitalism and traditional economics

There is also, of course, a problem with the capitalist system, and why we have got to where we are. We need to consider first of all what the capitalist system has delivered for us? We are told that it has delivered progress. Interesting word, progress. What is progress? Progress in traditional economic terms could be, for example, concreting over a field. It could be producing a factory, which then produces emissions. It could be, in perhaps the worst example, Manchester immediately after the Industrial Revolution, where the life expectancy was reduced to 17. A strange definition of progress, but we are told it is progress. The newsreader on television used to tell us the *good* news that more cars had been produced

1 This is a transcript of the paper delivered at the Wild Law Conference 2006.

2 Cormac Cullinan *Wild Law: A Manifesto for Earth Justice* (Green Books, Dartington UK 2002) [www.greenbooks.co.uk](http://www.greenbooks.co.uk).

this month than last month. Even then alarm bells rang. But we are told that more is better. In fact, more isn't always better. More can sometimes be a lot worse.

Traditional economists assume that the world is infinite, that its resources are infinite, that oil, coal, gas, wood, whatever it happens to be, will go on for ever and we needn't worry about it. In so far as they take cognisance of the resources, they simply adjust the supply of resources by price, so the price goes up as the resources become more difficult to achieve or obtain. That is, in the traditional sense, the capitalist mechanism for dealing with variable resources and it means that eventually there is a situation where something is very rare indeed and the price is grossly inflated. Such a mechanism may reduce demand at that point, but eventually there will be no resource left. This cannot be a sensible or sustainable use of our resources.

Traditional economists also assume that the capacity of the earth to absorb is limitless. It's free, the environment is free, the 'externality', as they say in the Treasury, is free. We can throw whatever we want up the chimney or into the seas and nature will deal with it. And nature *has* dealt with much of it and will continue to deal with very much of it, but sometimes the stresses are too great and we can't always assume, as economists have traditionally assumed, that nature *will* deal with it.

We are told that we have to look at our energy sources, but when we look at the economics put forward by the Department of Trade and Industry (DTI), we actually see that the way different sources of energy are costed, so much per kilowatt, is based on an assumption that there is no impact on the environment, simply the pure cost of producing that energy at that point. Which is why, for example, the DTI says 'oh, wind power and all the renewables are very expensive, whereas coal power and gas are much cheaper to produce'. It doesn't take into account in any way the use of the resources, nor the pollution and the cost of dealing with the pollution, nor the consequences of advancing climate change. That is why, when nuclear power started in the 1950s, it was going to be 'too cheap to meter'. And as a result we have just signed off a bill in Parliament for £72 billion to clear up the mess and we will still have radioactive waste for thousands of years. Not very sustainable.

### A way forward

So, we have to find a different way of looking at economics. We have to question the use of GDP. GDP is a traditional narrow-focused measurement which doesn't take account of sustainability or environmental impact in any way. However, there have been moves to change this. The Index for Sustainable Economic Welfare moves in the right direction by subtracting from GDP corrections for harmful basis or consequences of economic activity. In 2002, the RSPB, Oxfam and the Ergonomics Foundation proposed a set of headline indicators to measure global developments for sustainability. These included, for example, indices such as global emissions of carbon dioxide, area of land and sea area protected under national

or international law, area of forest in the world, economic losses from unnatural disasters, fossil fuel, and the global economy. So some people are now reaching towards the idea of costing in the environment.

I appreciate that this is not necessarily the thesis of Cormac Cullinan's work and that his ideas have a greater concern with the change to a new legal basis. However, given what we know, we have got to use all the instruments available to us, wherever and whatever they are, to try and move towards the ideal position, the nirvana where we do have a sustainable world, where the world is respected for itself and all its living organisms. Achieving this is perhaps the most difficult part of what we have to do.

Let us consider for a moment how we might look at the impact of this concept of Wild Law. I was fascinated to read about the Tamaqua Borough Sewage Sludge Ordinance 2006.<sup>3</sup> I never thought I would get excited about sewage sludge but it is actually an exciting matter. It encompasses the arresting idea of refusing to recognise the rights of a corporation to apply sewage sludge to land and instead recognising the rights of natural communities and ecosystems within the borough as 'legal persons' for the purpose of enforcing civil rights. This could be a very exciting development and one with considerable potential to promote a state in which ultimately our environment does have legal protection in a way which doesn't exist at the moment. Before discussing how we might achieve that I want to reflect on the difficulty of squaring the environmental imperative, which has to take precedence. After all, if we don't have a planet to live on, all the rights of the world count for nothing. We have to preserve the planet, but we also have to try and do so in a way which minimises the impact on what might be called traditional and civil rights or human rights. And there *are* going to be conflicts here. The right to protect the Borough of Tamaqua from sewage sludge also means that someone else's traditional right to deal with the sewage sludge has been restricted. Now that may be the correct decision, and I'm sure it is in this particular case. Nevertheless, one person's loss even when viewed against the good of the planet as a whole still represents a temporary loss at least for that person. This is not to say that people should have the right to pollute and that this right should take precedence, far from it. The concept that we need to live in a way that is sustainable for the world is paramount, but that concept needs a legal framework in order to become a practical reality and we need to ensure that we don't compromise existing civil rights where it is not necessary to do so.

Take flying as an example. Many people are realising that, in environmental terms, it is hugely damaging to fly round the world, *hugely* damaging. The carbon emissions from the aviation industry are enormous. They are growing, taking off, every year in a way that nobody seems to be

<sup>3</sup> Tamaqua Borough Waste and Local Control Ordinance, September 2006 and Ordinance of 1 May 2007, Tamaqua, Pennsylvania, USA see also p 87.

able to stop. While we are clamping down now at last on emissions from industry, emissions from transport, and aviation in particular, are rising enormously and there is no easy technological solution to the particular problem of aviation. So, what should we do about aviation? Under a Wild Law it would be agreed that aviation is going to be damaging so it should be curtailed. But not all flying can be curtailed. Some can be allowed – but how much? Who flies and who decides what price is paid and who decides what can be done and what can't be done? Is flying going to be rationed by an overall personal allowance? Is it going to be rationed by price? Is it going to be rationed by some sort of ballot? There are all sorts of ways theoretically of controlling emissions from aircraft. Take flying to Antarctica. One of my constituents has been there, Angela Wigglesworth, a *Guardian* journalist, and she told me that if someone stands on a piece of moss in Antarctica it takes 100 years to grow back. The damage that one person causes, inadvertently no doubt and without any knowledge of that damage, can be significant. So, do we then stop people flying to and visiting Antarctica or do we say that a handful of visits, such as that of the *Guardian* journalist, has actually educated people like me and others as to what the consequences of damaging Antarctica are?

There are some very difficult issues as to who should decide what. I think we have to find the system that sets an overall maximum level of environmental pollution that the scientists think that the world and nature can sensibly absorb. That should be an absolute legal maximum. Then within that maximum level, we should try to find ways of dividing up the total amount in an equitable way. I'm very attracted, for example, on an international basis, to the idea of contraction and convergence. We do need to have a climate change agreement internationally and to develop contraction and convergence, which means reducing carbon emissions until we end up with per capita equalisation across the planet. This could be a system which could have a buy-in from the world as a whole.

Other systems which have been put forward simply won't be bought by different countries and it is vital that we work in a pragmatic way. The USA, for example, which has been the great climate change emitter, may buy into a climate change agreement when other countries who were initially excluded from Kyoto become part of the deal. The developing world, which is reluctant to make the effort to control emissions when the West is churning out CO<sub>2</sub>, may also buy into it because of the legalisation involved in the process. So that is one example of how an international treaty – a *law* – can bring about an obligation on governments to behave in a particular way by setting an overall ceiling for a country which can then be subdivided within that country. And I would subdivide within the countries by using the idea of personal carbon allowances. Personal carbon allowances permit each person to emit a certain amount of carbon. If we undershoot that through living sustainably, and not flying to Antarctica, then in theory our carbon allowance can be sold on to someone else. Or it can be used for a particular purpose in the knowledge that it won't be needed for another purpose. This will mean costing out

our various activities which will educate us about carbon emissions and will help change behaviour generally as well. And I stress that all this is within a ceiling of sustainability. We are not talking about endless amounts of emissions. We are talking about setting the amount of emissions that can be sustained and then dividing up that amount in a way that still allows some choice and freedom within the limit.

We already have a putative system in the European Union with the emissions trading scheme, which is now up and running, and although not working perfectly by any means, establishes a cap for emissions from a particular industrial sector within which the individual industries can trade their emissions. If a particular business concern undershoots due to good pollution control, it can sell its excess permits. If it hasn't put in the investment, it can buy emissions allowances from another participant. The idea is that each year the cap will reduce, so driving down overall the total amount of carbon emissions from the whole industrial sector. This seems to me, given the world we are in, a way of using market mechanisms within the vital framework of sustainability and of achieving some progress.

Cormac Cullinan has said that the only living models of truly sustainable human governance available to us are those few remaining indigenous communities which live in harmony with nature but with very limited technology. That of course means that the vast majority of us are not living in a sustainable way at all, and particularly those living in the West where lights are on and windows blocked up when there is daylight outside. In practice, however, I think that the way forward lies in looking for real, tangible improvements that we can make, particularly in terms of what we can do to make urban living as sustainable as we possibly can. After all, the world's urban population is enormous and is expected to increase by 2.1 billion over the next 24 years. Estimated projections are that by 2020, at least 23 of the world's cities will have passed the 10 million mark and nearly 600 cities will have 1 million or more inhabitants. And cities occupy just 2 per cent of the land space on the planet but consume 75 per cent of the world's resources. How to maintain this consumption sustainably is the challenge ahead and it is not possible – or desirable – simply to revert to a pre-industrial society where our impact in carbon terms is limited by the absence of technology or the absence of knowledge, which were the limitations in previous eons. We have to start from where we are now.

### Change for an urban society

So we need to embrace the goal that Cormac Cullinan sets, the goal of Wild Law. We should introduce new laws and international laws in particular, as soon as possible, but before looking at this we also need to look at other possibilities, because time is short and there is not only one answer. Cormac is right to say that we shouldn't simply look for security in technology. Some technology of course can be useful but it is important to accept that technology is no panacea. It is not going to cure everything and we

can't just carry on living unsustainably and hope that new inventions will solve the problem. That's a very dangerous and irresponsible attitude. Equally, it is unrealistic to say that if the advance of technology in the first place to some degree created global warming, then technology is not acceptable. Technology will be part of the answer, not the whole answer.

Technology of course is amoral. Technology is only as good as the people who are operating it and introducing it. But technology can do a great deal, for example to change our method of energy generation and increase the use of renewable energy and overall energy efficiency.

The real challenge is to change the lifestyles and consumptions of those in our cities, and to decide how best to do this. One of several ways is to apply market mechanisms and the use of the market. This may sound strange given where we are in the market today, but as Cullinan says, in my opinion quite rightly, 'Our human government systems must incorporate methods of guiding human behaviour'. There are a great many people who aren't aware of what climate change is and there are some who are too busy trying to survive from one day to the next to worry about our climate changes. There are also some who deny it. There are others, particularly older people, who think it is not their responsibility. There are some who are unconvinced as to the causes of climate change and who think the answers put forward to deal with climate change are actually wrong. People are only slowly beginning to associate flying with climate change, and even if they do, are reluctant to give up a life style which depends upon air travel. So there are huge challenges in terms of educating people, providing information to them and guiding them to make choices which are beneficial to us all. I would like to see all airline tickets labelled, for example, to say that such and such an airline trip is going to emit so much carbon equivalent to 23 rail journeys, or whatever it happens to be, over the same distance.

Thus education is important, and so, also, is price. We have to make it more expensive to do the wrong thing and cheaper to do the right thing. We have got to make it more expensive, for example, to fly. It is absurd that people can fly to Portugal and back for £5. And yet, to fly to Wick or the Shetland Islands, which is likely to be a necessary journey with few other travel alternatives – the cost is £600. The trips which aren't necessary are the ones which are cheap. Petrol is cheapest in London where the public transport system is probably the best in the country; it is most expensive in the Scottish Highlands where there are fewest alternatives to the car. Since 1974, the cost of going by train has gone up 73 per cent in real terms above inflation; the cost of going by bus has gone up 68 per cent in real terms above inflation; the cost of motoring has gone *down* 7 per cent in real terms against inflation. The cost of motoring has also continued to go down while the cost of bus and train travel have continued to go up. It should be the bus passengers and the train commuters who are out on the streets protesting, not the fuel protesters as in 2000.

So although education is important, price is also important in making sure that people are encouraged to take the right decisions in a way that they are presently not doing. For example, 17.5 per cent VAT is charged on the renovation of a building whereas no VAT is charged on a new house built on a green field site. Some of these market incentives are just crazy and the Treasury should be fully involved in changing them. The Stern Review<sup>4</sup> is very welcome because it brings home in economic terms to people in power and in the national and international financial sectors some of the truths about climate change. People who don't listen to Friends of the Earth or to Greenpeace *will* listen to economists, and if Sir Nicholas Stern is saying climate change is going to be damaging to the economy and we ought to do something about it, he probably has more chance of being heard than many others.

### Change at an international level

Equally important is changing the existing international and domestic legal framework to try and achieve some fundamental alteration in the way we lead our lives. International institutions such as the World Bank, the IMF, the Bank of International Settlement and the WTO don't take account of the environment any more than traditional economists. UNEP<sup>5</sup> and agreements like the Convention on Biological Biodiversity<sup>6</sup> have very little power. So we have to change the way we look at international agreements and international arrangements to try to give teeth to the protection of the planet in a way that is not being achieved at present. UNEP is nowhere near strong enough to adopt a leading role in either policy making or enforcement. In 1998, the UN Task Force on the Environment and Human Settlements said that the proliferation in environmental institutions such as the Global Environment Facility, or the Interagency Committee on Sustainable Development, had led to the creation of numerous structures parallel to UNEP and given rise to 'substantial overlaps, unrecognised linkages and gaps'.<sup>7</sup> In other words, little is being achieved. It is said of the UN environment system that the faults are 'basic and pervasive ... [they] harm the credibility and weight of the United Nations in the environmental arena; and damage the UN's working relationship with its partners in and outside of government'.<sup>8</sup> The UN is a body that should take responsibility for these matters and should be championing the attempt to change the way we live. But discussions about the preservation of the planet would

4 N Stern, *The Economics of Climate Change: The Stern Review* 30 October 2006 [http://www.hm-treasury.gov.uk/independent\\_reviews/stern\\_review\\_economics\\_climate\\_change/stern\\_review\\_report.cfm](http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm) (Cambridge University Press 2007).

5 United Nations Environment Programme <http://www.unep.org>.

6 Adopted at the Earth Summit in Rio de Janeiro in 1992; entered into force December 1993.

7 <http://www.un.org/documents/ga/docs/53/plenary/a53-463.htm>.

8 See for example French Memorandum on the UNEO, 16 July 2006.



seem only to be taking place at the margins, if at all. The erosion of UNEP's status has been reflected in the marked decline of UNEP's voluntary environment fund. In 2004/2005, \$130 million *only* was pledged for the next year, which doesn't mean to say that that sum will materialise. In 2006 *the increase alone* in the American defence budget was bigger than the entire British defence budget; if only 5 per cent of that had been spent, and continued to be spent on promoting sustainability in some shape or form, what a different planet we would be on.

So the money is there. The money is there to change things but it is not being used because the need to address the problem of climate change is not being given priority. There are over 500 multilateral environment agreements, which could add up to some sort of legal framework, but by and large, they don't have teeth and they are only allowed to operate if they don't obstruct the workings of traditional economics. The absence of an enduring structure for an international environment policy is very serious indeed. One suggestion would be to establish a World Environment Organisation, either to challenge, or at least run in parallel with, the World Trade Organisation. Or the World Trade Organisation should be totally reformed so its terms of reference give priority to protection of our natural resources and our natural ecosystems, which at the moment count for nothing. (The Canadians continue to cull seals because of the economics of the World Trade Organisation.) There have to be drastic changes in the way the international legal framework is set up and this can only happen through the UN. How would such changes and new organisations be funded? A possible idea would be for a token tax to be levied on the revenue stream which could be greater than that gained

through foreign exchange transactions outside national boundaries, and which would release a huge wad of money to start introducing some of these international structures. These could then be mirrored at a national level. Governments, for instance, could be obliged when they produce an annual budget to quantify the environmental consequences of that budget. If there are steps proposed in the budget which are negative for the environment they should be thrown out, and the overall package should be seen to be neutral in sustainability terms. There should be a measurement of sustainability, just as there is a financial measurement. Steps such as this, taken to bring about the sea change in behaviour and give it a legal basis, should gain the agreement of all political parties. Thus the politicians are important as it is the politicians who are going to have to deliver the change if an international political and legal system is going to work. If we get the economics right, and we get the law right, then it seems to me that we have a chance of getting the world right. We cannot carry on as we are.

So, to sum up my brief agenda for change: reform UNEP through the creation of a world environment body; reform the World Trade Organisation and other bodies to give them a clear and enforceable sustainability duty, which would include prohibited actions and which would halt environmental damage; set overall ceilings for carbon allowances, for example per nation, based on the policy of contraction and convergence; create personal carbon allowances within countries; and finally use a token tax to release money for the World Environment Fund. It is up to the politicians to deliver, and we are grateful to Cormac Cullinan for the philosophy and warnings in his published book and the inspiration that these ideas have given.

Wild Law 2006–7

## Economics and ecology – which comes first?

Satish Kumar *Editor, Resurgence*<sup>1</sup>

If we want to bring about the kind of transformation suggested by Cormac Cullinan and others in the way our society is run and in our attitudes to other living things on the earth we need to differentiate between the problem and its symptoms. Global warming is not the problem – it is a symptom of the problem and we need to go deeper than just to talk about treating the symptoms. It is a characteristic of the west to look at how to treat the symptoms, rather than to tackle the real reasons as to why we are changing the whole atmosphere that sustains us. Sir Nicholas Stern has written a 600 page review<sup>2</sup> but it does not go deep enough into the reasons underlying the position we now find ourselves in – how did we manage to reach the stage where we are sawing the branch of the tree upon which we are sitting? The answer is that we have lost the idea of the spirit and we have just concentrated on matter. And matter is no matter unless it has spirit. Matter on its own is useless. A body is made up of head, arms and legs but it is of no use without the spirit; it has no purpose unless it has a spirit to bring it to life. In the same way the letter of the law has no use without understanding the spirit in which it was written.

When we talk about law we talk about it in terms of the letter of the law and the spirit of the law. It is interesting to hear lawyers talking about the spirit of the law when at the same time they do not acknowledge that animals or trees or rivers have spirit – the world of nature is dead and material; to them only humans and law have spirit (Wild lawyers excepted).

In the last few hundred years a number of western philosophers and scientists such as Descartes and Newton looked upon the earth as subject to human dominance. Humans are the master race, the super species in charge of the earth. Over the years we have tried to rid ourselves of many of the ‘-isms’, such as imperialism, nationalism and sexism, but now we are in a world of species-ism, where we think that the human species is special and that humans are in charge of all else. We used to own slaves but now we own nature; matter is dead, matter has no rights and we can claim possession of material things where we can.

But the moment we have a different world view and see the earth as a living being, then suddenly we are in a relationship with the natural world. In fact humans are also part of nature. The Latin word ‘natal’ means born and is the root for the word nature and words relating to birth of humans such as ‘prenatal’. Similarly we refer to ‘native Africans’ meaning those who were born and lived there. We are part of nature too but we are not owners of nature, we cannot own the trees and the rivers.

The idea that we human beings own nature is a fundamental flaw of western thought and laws and unless we can change this idea global warming will never come to an end. Even if we change from burning fossil fuels to generating power in other ways – whether wind power, solar generation, nuclear energy or using biofuels – all we are treating are the symptoms. If we think we can control the rivers, the animals and the rain forest based on the ideas of material ownership then the Stern Review and all the efforts towards sustainability are just an illusion. There is a big difference between ownership and relationship. There was a time when men thought they could own women; this idea we have managed to change and now we say ‘You cannot own your wife; it is a relationship not ownership’. There was also a time when people owned slaves and wealth was measured by the number of slaves in a household. But the idea still remains that the forests and the animals are our slaves. We put animals into the factory farms and cages and use them as we like. As long as this arrangement – this anthropocentric view that we are the boss – continues, then global warming is not going to go away. We can live in an illusion thinking that the government is doing something about global warming because but the reality is that humans will never be free of global warming unless they change their relationship with the earth. We are guests here, we are not the bosses and we should be the friends of the earth. The Buddha was the first friend of the earth. He gave up all his possessions to sit under a tree and said that we are all related to the earth. This is a fundamental truth. Environmental law has to break with capitalism, and even socialism is out of date as it puts human society at the centre of everything rather than nature at the centre. We are all part of nature but as Gandhi said ‘there is enough in the world for everyone’s need but not enough for everyone’s greed’.

In the western world we follow fashions and the current fashion is to talk about climate change. In the

<sup>1</sup> <http://www.resurgence.org>.

<sup>2</sup> N Stern, *The Economics of Climate Change: The Stern Review* 30 October 2006 [http://www.hm-treasury.gov.uk/independent\\_reviews/stern\\_review\\_economics\\_climate\\_change/stern\\_review\\_report.cfm](http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm) (Cambridge University Press 2007).

1960s the fashion was to talk about nuclear war. When I met Bertrand Russell (then aged 92) I said 'Lord Russell you are my inspiration but I have one problem with your philosophy, and that is that your agenda on nuclear war is driven by fear'. The same is happening with the mounting public awareness of global warming – it is driven by fear, fear of the loss of a way of life and of possessions. It is fear that is driving the whole environmental movement. As I pointed out to Bertrand Russell 'Peace is a way of life – peace does not come from fear of nuclear weapons'. In the same way I say to you that sustainability is a way of life – it is not something we do just to save our possessions. We have to move away from the mindset of fear and learn a love of nature.

The Buddha was the first environmentalist 2,600 years ago before there was any global warming; he sat under a tree seeking enlightenment and said 'We must have love for the tree'. But nowadays we don't sit under the tree; instead we think 'how can I use the tree for my benefit – how can I build my house or make my furniture with it?' So for the Buddha the tree was sacred but for western civilisation it is just an object.

Spiritual ecology teaches us to have no fear and to celebrate the earth – that is the reason we are environmentalists. We do not want to save the earth because of our fear of global warming but because of our love for the earth. In spiritual ecology the relationship between every living plant or creature is a part of a delicate balance; (the worms are sacred for without them to condition the soil there would be no food – so we have to respect the worms). Once we have this reverence for the earth then everything will follow.

The endless talk now about global warming is distracting us from the real issue. The world's approach

to global warming is all about treating the symptoms and everyone, especially the politicians are jumping onto this bandwagon. The politicians have not learnt this love of the earth but are consumed by the philosophy of economics. For the 25 years that I have been in England I hear the politicians chanting only one mantra – 'economic growth, economic growth, economic growth'. I prefer my mantra which is 'Earth I love, earth I celebrate, earth I enjoy'. And to enjoy we must look after and preserve as a privileged member of life on earth.

Economics of course has its place but must be kept in its place and not be allowed to dominate. 'Ecos' is the Greek word for home, 'logos' the word for knowledge, and 'ecos' is the root for both economy and ecology. Once we realise the subservient place of economics to ecology then global warming will go away. Global warming is caused by economics and globalisation and as Einstein told us you cannot solve a problem with the same mindset that caused it.

My proposal is that we need to aim for something better than economic growth – a growth which is soulless and dead and leads to ecological destruction. And what happens to the trillions of dollars that economic growth has created? We see it spent on war or the weapons needed for war. Money beyond a certain limit can be a burden; it can bring unhappiness, and worse, poverty and exploitation. The middle way is the ideal to aim for, where there are no extremes of wealth and poverty.

There are 400 million other species on this earth which survive without money. Neither St Francis nor Gandhi had money. I walked around the world for two and a half years without a penny and I was fed and sheltered. From this experience I learnt that nature gives and is the real source of our wealth.

Wild Law 2006–7

## Creative regulation: how wild law can rehabilitate governance and regulation

Elizabeth Rivers *Environmental Mediator*

Regulation tends to have a mechanistic, bureaucratic image and is often seen as something that stops business doing what it wants to do, gets in the way of competitiveness and creates more 'jobs for the boys', ie the legal profession and regulatory agencies looking after their own.

It is worth going back to first principles and reminding ourselves of the function of regulation. Regulation has been defined as: 'bringing into conformity with a principle'. If the principle is the carrying capacity of the planet, then well-designed regulation that respects the fundamental laws of the universe (described by Cormac Cullinan as the 'Great Jurisprudence') defines the boundaries beyond which we must not go. The word governance comes from the Latin *gubernare* which means 'to steer'. So we can think of the purpose of governance and regulation as steering us into conformity with the principles which will keep the planet and the earth community healthy.

### The importance of law in social change

Historically, sustainability campaigners have directed their efforts at changing economic activity and human attitudes and behaviour. This is probably correct, but has missed out the importance of law, both as a reflection of society's attitudes, and for its ability to shape and influence subtly what we consider is possible. It is important to look at the role of law in supporting our current unsustainable economic system. In the same way that the South African legal system was co-opted by the apartheid regime to provide it with legitimacy – apartheid had the trappings of a legitimate legal system, but was profoundly unjust – so our current legal system throws a cloak of respectability over an economic system whereby the richest 500 people in the world own more than the poorest 3 billion (nearly half the world's population), and the richest 1 per cent are enjoying rapid growth in wealth, while the poorest 20 per cent are getting steadily poorer. Rather than wealth trickling down, it is being sucked up from the poorest to the richest.<sup>1</sup> Changing laws will not shift society's attitudes overnight, but as former US President Lyndon B Johnson said of legal reform during the US Civil Rights movement: 'Law does not change society in itself but it points the

way'. Rethinking our jurisprudence (ie our idea of the purpose of governance and regulation) is an important part of the overall strategy towards environmental sustainability and social justice.

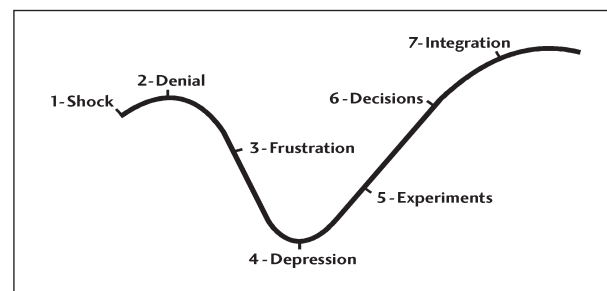
### Creativity and change

A more creative and innovative approach needs to be taken to the design of regulation and governance.

I have previously written<sup>2</sup> about the need for lawyers to embrace creativity and see themselves as agents of change rather than just implementing policy developed by others. I would like to expand on how they might do this, and also look at the relationship between creativity and change.

Society has undergone a sea-change in attitudes to climate change in the last 12 months, and I will use this topic to illustrate the process of change and where we need to be in that process to have maximum impact.

Figure 1: The Kubler-Ross change Curve



Stage 1: Shock, disbelief.

Stage 2: Denial that this is happening.

Stage 3: Frustration, anger, wanting to blame.

Stage 4: Depression: no point in doing anything.

Stage 5: Experimentation is better than depression

Stage 6: Deciding what will and won't work, accepting the change.

Stage 7: Integration: the change is now part of life.

At a recent conference of lawyers and business people, I asked the audience to identify where they were on the change curve. Eighty-five per cent admitted to being in denial, 10 per cent were in depression and 5 per cent in experiments–integration.

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1 Data from 'Change the Dream' symposium [www.bethechange.org/symposium.cfm](http://www.bethechange.org/symposium.cfm).

2 E Rivers 'How to Become a Wild Lawyer' (2006) 18 ELM 1 28.

Society is moving from denial. When we get to experiments, there is scope for greater creativity in responding to the challenges we face. There are already some examples of this from people who are further along the change curve. To take an example from the planning field, the eco-village movement is a way of reconfiguring how we organise our living and working arrangements more sustainably as a response to the current housing shortage, rather than simply building more conventional, inefficient housing in unsuitable areas such as floodplains (for example, the Thames Gateway) and the green belt.

Innovation can take two forms:<sup>3</sup>

- technical eg clean fuels, renewable energy sources
- adaptive eg changes in attitude and behaviour, such as taking steps to reduce our carbon footprint.

Some people place all their faith in technical fixes and think that we can continue our current lifestyles without having to make changes. I believe that this is unrealistic, and also misses the fact that adaptive changes can give us opportunities to increase well-being and social justice. For example, one suggestion for reducing CO<sub>2</sub> emissions is the contraction and convergence model, whereby there is an agreed cap on the total amount of carbon emissions allowed (contraction) and an equitable sharing out of carbon allowances between rich and poor countries (convergence). This has the advantage of both reducing emissions and redistributing wealth, thus tackling both environmental and social problems (see also Norman Baker p 77–81).

If we respond simply from fear, this will limit our creativity. Much environmental campaigning has been fear-based – shaking us out of our complacency and denial by apocalyptic visions of the future if we do not change our behaviour and mindset towards the planet on which we live (see also Satish Kumar p 82–3). This has perhaps been necessary but has its limitations. For some people the implications are so scary and overwhelming that they are simply pushed back into denial. It is difficult to be creative from a place of fear, as it constricts our thinking. In the seminal book *Emotional Intelligence*,<sup>4</sup> Daniel Goleman describes how the prefrontal cortex is the part of the brain responsible for ‘working memory’, ie the capacity to hold all the information necessary for a particular task. There are circuits connecting the prefrontal cortex with the limbic brain (our emotional brain) so that surges of strong emotion, such as frustration and anxiety, will create neurological static, sabotaging the ability of the prefrontal lobes to use working memory – the feeling of ‘I just can’t think straight’. When we can get beyond fear and depression into experiments and integration, we have far more access to our creativity.

How can we harness our creativity and capacity to innovate so as to devise the best possible system of

governance, in which all members of the earth community can flourish? This is vital, as no subset can thrive for long when the whole is damaged.

### Nature as inspiration

There have been a number of attempts to translate ideas from biology and ecology to other disciplines. Biomimicry looks at what the fields of engineering and design can learn from nature, to produce more sustainable design.<sup>5</sup>

In the field of economics, *The Ecology of Commerce*<sup>6</sup> by leading environmental thinker Paul Hawken looks at what natural systems can teach us about how to organise our economies, and argues compellingly that economics and the environment need not be seen as competing interests. Hawken advocates green taxes as a way of harnessing the positive aspects of market forces to bring economic activity into alignment with the needs of the planet. It is time for a similar process to take place in relation to law. What can natural systems teach us about how to structure and frame our laws and governance systems?

We need to replace our current mechanistic view of regulation with a biological model. Biological systems have innate ways of regulating themselves. For example, through the process of homeostasis, biological organisms regulate their processes eg temperature control. James Lovelock’s gaia theory, whereby the planet is seen as an entity with its own self-regulating mechanisms, can provide an important source of inspiration for framing our governance systems.<sup>7</sup> If we change our concept of regulation from a mechanistic, adversarial one to a biological, holistic one, what then becomes possible?

An example of good design from the field of social entrepreneurship is that of the ‘Good Earth’ project in Italy. Mafia land that has been confiscated is handed over to a social justice programme. Recovering drug addicts (drug addiction is a problem fuelled by Mafia organised crime) farm the land, and the food produced is then sold throughout Italy under the ‘Good Earth’ brand. People who buy this brand know that they are making a stand against the Mafia. The addicts often have little education and would struggle to find other work, but ordinary farm work is seen as low status and does not fit with the self-image of an addict. However, withstanding a degree of intimidation and harassment from the Mafia, who want to undermine the project, makes the addicts feel heroic and builds their self esteem, thus aiding recovery. Before this programme was started, Mafia land that was confiscated was sold at auction but usually found its way back into Mafia hands.<sup>8</sup> This is an example of a virtuous circle. By making a few changes to the system it has become far more effective.

3 R Heifetz *Leadership Without Easy Answers* (Harvard University Press 1994).

4 D Goleman *Emotional Intelligence – Why It Can Matter More Than IQ* (Bloomsbury 1996).

5 A pioneer in this field is Janine Benyus [www.biomimicry.net](http://www.biomimicry.net).

6 P Hawken *The Ecology of Commerce – A Declaration of Sustainability* (HarperCollins 1994).

7 For a succinct overview of gaia theory see J Lovelock *The Revenge of Gaia* (Penguin 2006) ch 2.

8 T Jones *Utopian Dreams* (Faber & Faber 2007).

## The contribution of corporations to creative regulation

Enlightened business leaders are increasingly waking up to the need to embrace sustainability fully and to understand that a compliance mentality is an inadequate response to the challenges we face. It is not possible to have long-term health in business within a compromised, unbalanced system. Rather than lobbying against regulation and pursuing short-term interests, business leaders need to focus on the interests of the whole, working in partnership with government and NGOs to create governance systems that work for the good of all. Corporations have invested heavily in developing the capacity for creativity and innovation in their people and MBA programmes teach the topic as standard. Corporations have significant resources in this area compared with the public or voluntary sectors, and if this expertise could be used in the service of creating a system of regulation that enhances the whole earth community, the results could be spectacular.

### *Wild law*<sup>9</sup> is a question, not an answer

Sometimes when people read *Wild Law* they criticise it by saying it does not explain how to put the ideas into practice. I think this misses the point as *Wild Law* is a question, not an answer. It seeks to bring into awareness our unexamined assumptions about the world: to help us to recognise that we are looking at the world through certain filters which will in turn produce certain results. It encourages us to take a different view of the world and then create something different from that place.

*It is not possible to access that space through the intellect alone* – this is vital to grasp. Those of us who wish to engage with these ideas and put them into practice must invest time and energy in creating the necessary shift in consciousness and integration – we need to slow down in order to speed up. In other writings<sup>10</sup> I have quoted the Bengali poet Tagore who said: ‘There are four rooms in my house: mental, emotional, spiritual and physical. I will spend more time in some rooms than others but to be a healthy person I must spend at least some time in each room every day’. What might that look like in practice for each of us?

### The importance of getting outside

Following the UKELA conference in November 2006, 20 people attended the weekend workshop, which Cormac Cullinan and I facilitated. Without any conscious effort to influence the composition of the group, we succeeded in having an incredible diversity of background and age: lawyers from the Environment Agency and Defra, private practice lawyers, US academics who are teaching the

world’s first earth jurisprudence course, law students and trainees, CSR practitioners, barristers and psychologists. Men and women were equally represented and the ages ranged from early 20s–60s.

The purpose of the workshop was to deepen our understanding of the ideas raised at the conference in a group setting and in the natural world. We structured the workshop around a series of relationships: with ourselves (intrapersonal), with the group (interpersonal/social), with the environment, with the ideas. Once we had established our first three relationships, through a series of experiential exercises and spending most of the day outside, we were then ready to work on the ideas. Our dialogues were far more productive than if we had simply launched into a theoretical discussion of the ideas. The relationships acted as a container to the discussion. The group became a human community for that weekend, which in turn was in community with nature. The workshop process gave people the opportunity at different times to access each of the four dimensions – mental, emotional, physical and spiritual – thus creating a far richer experience. I believe that events like these will be important in taking this field forward.

### Conclusion

We need to rethink our governance system and regulations radically and find ways to stimulate our creativity in order to do this. Key factors in this process will be:

- valuing creativity and innovation as much as intellect and analysis
- finding ways of connecting with the natural world and using this as our primary source of inspiration
- coming together in groups which are diverse but also have values in common – creating actual and virtual communities as containers and support for this work
- being eclectic and willing to learn from a variety of disciplines and sources
- being champions for good governance and regulation in the true sense of those words
- bringing all four dimensions of ourselves to this process and being willing to share those with others.

Time is very short, but let us take comfort from the words of Margaret Mead: ‘Never doubt that a small group of committed people can change the world, indeed, it is the only thing that ever has’.

9 C Cullinan *Wild Law – a Manifesto for Earth Justice* (Green Books Totnes Devon 2003) ISBN 1-9039998-35-2.

10 Rivers (n 2).

Wild Law 2006–7

## Earth, rights and insects: an holistic approach to environmental law

Ian Mason *Barrister\**

We have all heard of animal rights, but the idea that insects might have rights enforceable through the ordinary system of justice comes as a surprise to most lawyers. That the same notion might be extended to all forms of plants, trees, birds and also to rivers, mountains, forests and other natural formations may even invite pointed references to clouds and cuckoo land.

In serious debate about environmental protection, environmental justice and the human relationship with the natural world, however, these notions have real meaning and purpose. They derive from a different perspective on the origins of rights and obligations, which comes into sharp relief when the traditional human-centred approach is displaced by the wild law<sup>1</sup> approach. Wild law derives from the Great Jurisprudence which sees the whole universe as a lawful phenomenon embracing the whole of the natural world; human nature and the human race are only aspects of a much larger, interconnected and interdependent unity.<sup>2</sup>

Instead of the standard, piecemeal, fire-fighting approach to environmental law, wild law starts from the view that the human race should take its lead from the environment on which it depends and frame its laws accordingly. Following the Great Jurisprudence, it challenges lawyers and policy-makers alike to reassess and modify legal systems and remedies so as to create a legal structure in which human laws work in mutually-enhancing harmony<sup>3</sup> with the laws of the natural world. In some parts of the world practical foundations are already taking shape.

### Tamaqua law recognises rights of nature

An example comes from Tamaqua Borough in Pennsylvania, USA, where local authorities have considerably more law-making powers than they have in the United Kingdom. The Pennsylvania Constitution declares that the people have the right to clean air, pure water, and the preservation

of the natural, scenic, historic and aesthetic values of the environment. The Pennsylvania Borough Code states that local governments may adopt ordinances 'as may be necessary for the health, safety, morals, general welfare and cleanliness, and the beauty, convenience, comfort and safety of the Borough'.

Acting on these provisions, local activists in Tamaqua Borough thwarted plans by a local mining company to use a redundant anthracite pit for dumping 700,000 tons of toxin-containing river dredge. Coaldale Energy LLC backed down from the proposal in the face of protests and legal action threatened by the locally based pressure group, the Army for a Clean Environment (ACE).

The Springdale Pit is a disused open strip mine created over many decades of anthracite mining. It is 3500 feet long, 1800 feet wide and straddles the mountains between Tamaqua and Coaldale Boroughs. Coaldale Energy already had a permit authorising the dumping of a mixture of dredged sediment, coal ash, cement kiln dust and lime kiln dust which was due for renewal, until it withdrew its application in October last year. The pit is also being considered as a possible dumping ground for material to be dredged from the bottom of the Hudson and Delaware rivers to deepen shipping channels.

In September 2006, Coaldale Energy's predecessor company, LC & N, had asked Tamaqua Borough Council to confirm its support for plans to use the pit as a dumping ground for the river dredge. The dredge is alleged to contain heavy metals and toxin-forming substances which environmentalists say would leach from the unlined pit into the water table.

Only days before LC & N applied to renew its permit, the Mayor of Tamaqua, Christian P Morrison, announced his support for the Tamaqua Borough Sewage Sludge Ordinance, a local by-law providing for strong local control over corporations proposing to use local land for demolition, chemotherapeutic, infectious, hazardous and residual waste, dredged materials, PCB-containing waste and radioactive materials.

A second ordinance, the Tamaqua Borough Waste and Local Control Ordinance, was passed on 1 May 2007, when Mayor Morrison used his casting vote to break a 3–3 deadlock on the council. In addition to banning corporations from dumping or storing waste material, the new ordinance reaffirms that eco-systems in their community possess enforceable rights and asserts that corporations doing business in Tamaqua will be required to respect the rights of people and natural communities

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1 C Cullinan *Wild Law: A Manifesto for Earth Justice* (Green Books, Dartington UK 2003) [www.greenbooks.co.uk](http://www.greenbooks.co.uk).

2 The phrase and outlook are drawn from Cullinan (n 1).

3 See T Berry *The Great Work* (Bell Tower New York 1999).

within the borough. Enforcement is provided for by expanding the conditions under which Tamaqua residents can sue to enforce the rights of nature as well as their own rights.

Tamaqua's two ordinances are pioneering laws in the United States. Ben Price, Projects Director for the Community Environmental Legal Defense Fund, the organisation that assisted in drafting the ordinance, says:

Following only months on the heels of their groundbreaking Ordinance that bans corporations from land-applying sewage sludge, this new law puts Tamaqua on the map again. This was the first community in the United States to recognise the rights of nature, and now it is the first community in the United States to ban corporate waste dumping.

Price likens the Tamaqua community's actions to those of the abolitionists who 'launched a people's movement in the 1830s to end the legal but immoral treatment of slaves as property and to establish forever their rights as people entitled to fundamental and inalienable human rights'. He says:

... 'law' in the western world has treated rivers, mountains, forests, and other natural systems as 'property' with no rights that governments or corporations must respect. This has resulted in the destruction of ecosystems and natural communities backed by law, public policy, and the power of government. The people of Tamaqua have changed how the law regards Nature ....

In the coming months other municipalities are expected to adopt similar laws that assert the governing decisions made by local majorities. Municipalities across Pennsylvania and other states are reported to be considering similar ways to equip their citizens with self-governing authority to stop corporate assaults engineered by a handful of corporate officers and enabled by state permitting agencies. The aim is to use the law to enable people to protect their environment from corporate usurpations.

Mayor Morrison does not expect an easy ride. The new law is likely to be challenged at state and federal levels. The outcome is likely to have consequences for nature and the environment for generations to come.

## UK law

The present state of environmental law in the United Kingdom has a long history. To understand it and the possibility of change, it is necessary to understand some of that history, beginning with the Magna Carta (great charter) of 1215. The Magna Carta is credited with being the origin of our modern rule of law, although it is presumed to be a declaration of pre-existing common or customary law as it applied in late Norman and early medieval England. It is seen to have established the rule of law by placing strict limits on the power of the king,

particularly in relation to personal liberty, taxation and private property.

It often passes unremarked that the Magna Carta was drafted and exacted from King John by barons who were themselves landed proprietors. This had profound consequences for English law, because from that time until the start of the twenty-first century, when the hereditary majority in the House of Lords was removed, almost everything that passed through Parliament had to be approved by an elite of landed proprietors who for hundreds of years enjoyed the special distinction of being the only people eligible for election to Parliament and almost the only people eligible for appointment to the House of Lords.

We should not underestimate the importance of this for environmental law. Private property, particularly landed property, became the basis of social order and personal security, notwithstanding the fact that until after the First World War not more than 10 per cent of the population were actually landowners. By then the freehold absolute in possession was a statement of title to use and dispose of land in whatever way the proprietor thought fit. It is no coincidence that the extension of planning and environmental law in the twentieth century was accompanied by, and indeed followed, the extension of the franchise and the development of a property-owning democracy.

## Property rights

Until restrictions were imposed in the twentieth century, private property in land effectively conferred private ownership of the environment. In legal principle a landowner could deal with land entirely as the proprietor thought fit without regard to any other considerations.<sup>4</sup> In *Bradford v Pickles*, for example, a local Act of Parliament authorised Bradford Corporation to form a company for the purpose of supplying water to the City of Bradford. The company then built a reservoir in a nearby valley. Some years later, Pickles came into possession of 140 acres of land at the head of the new reservoir and in 1890 he sank a trial shaft to see if the rock underlying his land could be quarried.

The trial shaft was only 40 yards from the wall of the reservoir and whenever it was worked the water in the basin became unfit for use due to pollution and sand and had to be turned off at the main. Pickles served notice on the council that he intended to sink more pits or shafts to work his mines and minerals, almost certainly so as to force the council to purchase the land at a price determined by himself. The corporation sued for the tort of nuisance, seeking an order to restrain Pickles from continuing to drive his shaft.

The House of Lords eventually held that acts done by a person on his own land were not actionable when they were within his legal right, even though his intention was to prejudice his neighbour. Lord Halsbury declared:

<sup>4</sup> *Bradford Corporation v Pickles* [1895] AC 197.



'This is not a case where the state of mind of the person doing the act can affect the right. If it was a lawful act, however ill the motive be, he had a right to do it. If it was an unlawful act, however good the motive might be, he had no right to do it.'

Subject to planning constraints and environmental law, that is still the position. To the common law, this was a basic human right. The result is that environmental rights frequently and readily conflict with property rights. However, our legal system is based on the sanctity of property rights, which have produced a culture of absolute rights of ownership over land and the environment. This culture is deeply embedded in the legal, including judicial, profession and in our law-making process.

The question that faces environmental lawyers and campaigners now is 'How do we create a new culture sympathetic to environmental rights?'

### The rights of things

When Sir William Blackstone published his survey of the common law of England in 1776<sup>5</sup> he divided his subject into four parts. He considered that the law was concerned with rights and wrongs, and the four books of the *Commentaries* deal with the rights of persons, the rights of things, public wrongs and private wrongs. Public wrongs and private wrongs were essentially what we would now call criminal law and tort. There is no suggestion that the 'rights of things' means that 'things' have rights. It is all about the means by which people can have ownership and disposal of property both real and personal. In this sense the common law was, and remains, entirely anthropocentric.

It is interesting to note that Blackstone begins his discussion of property law with the observation that few people take the trouble to inquire into the origins of property in land:

... that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title ... not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or natural law, why a set of words upon parchment should convey the dominion of land.<sup>6</sup>

Blackstone traces the origin of property rights to some original use and occupation but, in fact, nearly all modern private ownership of land, certainly in the common law world, can be traced back to the rewards of armed conquest.<sup>7</sup>

<sup>5</sup> Blackstone's *Commentaries on the Laws of England* (1st edn 1776).

<sup>6</sup> *ibid* bk 2 ch 1.

<sup>7</sup> In England, land titles run back to the Norman Conquest or to 'time immemorial' which is taken to have ended in 1189. On the American

### Human rights

Blackstone's account of the rights of persons in common law is also instructive. He reduces them, with customary succinctness, to three: the right to personal security, the right to personal liberty and the right to private property. Sir Alfred (later Lord) Denning, in his Hamlyn Lectures in 1949, reviewed these common law rights under the title *Freedom Under the Law*.<sup>8</sup> In relation to the first two he makes the important point that the great merit of the common law system was not so much that it provided for the existence of these rights, which we would now call human rights, but that it provided remedies, independent of the governing power, so that the rights could be enforced. In his inimitable and entertaining style, he also showed that many of the remedies were the product of hard-fought constitutional battles and personal sacrifice.

Denning saw much less merit in the common law approach to the right to property. Commenting on *Bradford v Pickles*<sup>9</sup> he remarked:

The extent to which judges in the nineteenth century carried rights of property seems to us today to be almost incredible. They allowed owners of property to use it as they liked, even if it meant injuring others. A property owner's conduct may be 'churlish, selfish and grasping'. His conduct may be shocking to a moral philosopher.<sup>10</sup> But it was not unlawful.

Denning's verdict on this position:

The judges of England in the nineteenth century were inclined to protect these freedoms with as much vigour as they protected a man's personal freedom or his freedom of speech. In this they were wrong. They weighted the scale too heavily in favour of the rights of man. So much emphasis was laid on his rights that they seem to have forgotten that he had any duties.

### Human Rights

Even as Lord Denning was composing and delivering his lectures, new developments for the 'rights of man' were taking place in Europe. In 1949, the Council of Europe proposed the European Convention on Human Rights and laid the foundations for the establishment of the European Court of Human Rights. Britain was among the first signatories on November 1950 and was the first country to ratify the convention.<sup>11</sup> Its history thereafter offers

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continent and in much of the mis-named 'New' World, they run from some European invasion effected by force. One is reminded of the story of the Irish beggar who was refused hospitality at a country house and, on demanding to know what gave the owner the right to refuse him, was informed that the owner could trace his title back to the Norman invasion of Ireland in 1169. 'So you won it in a fight,' says he, 'Well, I'll fight you for it!'

<sup>8</sup> Sir Alfred Denning *Freedom Under the Law* (Hamlyn Lectures Steven and Sons 1949).

<sup>9</sup> *ibid*.

<sup>10</sup> Quoting Lord McNaughten in *Bradford v Pickles* (n 4).

<sup>11</sup> 8 March 1951.

important lessons for environmental law. First, the convention was a reflection of a widely accepted international instrument, the UN Charter on Human Rights. It was created in a pre-existing culture which, in the face of the tyrannies and genocide of the early twentieth century, had concluded that individual human rights deserved active and interventionist protection.

Secondly, and most importantly, it supported the rule of law by giving people an effective remedy against human rights abuses by powerful governments and an international tribunal to adjudicate. In this sense, the convention is not merely a statement of the rights belonging to human beings, it also limits and defines the powers of governments over individual citizens. It is a clear and effective reminder to governments that they do in fact have objective duties towards their citizens regardless of the extent of their power or the nature of their inclinations.

Thirdly, the convention assumes a certain intrinsic value, integrity and autonomy in human beings. It gives legal effect to the accepted view of what it is to be human and insists that governments respect that view if they wish to be accepted as part of a civilised international community. In this sense it is a formal expression of the culture which gave birth to it, protecting essential human values by imposing restraints on governments and, more positively, requiring them to ensure that essential human rights are observed by powerful entities within their jurisdiction.

The British government ratified the convention in 1951, but assumed that the rights it embodied were sufficiently protected in English law for any further action or provision to be unnecessary.<sup>12</sup> It was not until the Human Rights Act 1998 that the British people could rely on the rights contained in the convention in their own courts.

What happened in the five intervening decades is instructive. Many human rights issues were litigated on a piecemeal basis, some successfully, some not. At the same time, Parliament legislated on an issue-by-issue basis to deal with specific human rights abuses. One thinks, for example, of the Sex Discrimination Act 1975, the Race Relations Act 1976, the Police and Criminal Evidence Act 1984 and similar legislation. At the same time, organisations like Amnesty International campaigned on various issues both at home and overseas. Despite the cumbersome and lengthy procedures involved, increasing numbers of lawyers and individuals took cases to the European Court of Human Rights and won judgments against the British government.

The effect of all this activity was to create a new human rights culture in which the anomalies of failing domestic remedies became increasingly obvious until the provision of remedies in domestic law became inevitable.

<sup>12</sup> 'We have not undertaken at this stage to sign the optional clause. We think that in this country, with our obligations not only at home but overseas, our procedure for appeals stands very high, and we are not prepared, without further thought, to hand over these appeals to another body.' Ernest Bevin *Hansard* HC Deb vol 480 col 1499 (13 November 1950).

## The Great Jurisprudence

The history of human rights provision is relevant in the context of environmental law because a similar new culture is developing. Perhaps the most progressive expression of the culture is embodied in the idea of the Great Jurisprudence advanced by Thomas Berry in *The Great Work*.<sup>13</sup> *The Great Work* is a call for a complete re-appraisal of the human relationship with nature based on a 'mutually-enhancing human presence upon the Earth'.

The Great Jurisprudence is not the same as traditional natural law jurisprudence because it looks to nature and the natural world in the fullest sense, rather than to human nature, human reason and the law of God as its basis. It assumes that we live in a naturally lawful, well-ordered and harmonious universe and invites the human mind to take its lead from the universe and not from itself when establishing its laws. This presents an earth-centred perspective for law and policy-makers which assumes that human power is naturally circumscribed by the need to live without harm to the natural world, just as the power of governments is naturally circumscribed by the human rights of the citizens whose power they exercise.

## Wild law

Wild law is the practical application of the Great Jurisprudence. Its approach is to give effect to the intrinsic value of nature or the natural environment by the creation and enforcement of environmental rights in a way analogous to human rights regimes. Wild law advocates the re-structuring of governance systems around a sense of earth community so that human action is consistent with the maintenance and enhancement of the larger community of which human life and human nature are only an integral part.<sup>14</sup>

Some of the elements of a new culture are already in place. In 1982, the United Nations adopted the World Charter for Nature which proclaims general principles of conservation by which all human conduct affecting nature is to be guided and judged. The principles call for nature to be respected so that its essential processes are not impaired; the maintenance of genetic viability and protection of habitats; special protection for unique areas; management of eco-systems and organisms for optimum sustainable productivity; and the protection of nature against destruction caused by warfare and hostilities.

In asserting that mankind is part of nature, recognising that life depends on the uninterrupted functioning of natural systems and proclaiming principles by which all human conduct affecting nature is to be judged, the Charter points the way to a new evaluation of nature much as the Universal Declaration of Human Rights did for individual human beings.

A second important document that takes us in this direction is the Earth Charter adopted by the Earth

<sup>13</sup> The idea is from Berry although the 'Great Jurisprudence' is from Cullinan (n 1).

<sup>14</sup> For a full account of the idea of Wild Law see Cullinan (n 1).

Charter Commissioners in 2000 at UNESCO headquarters in Paris. This charter emerged out of a decade of negotiations and three years of drafting, with input from thousands of institutions and individuals from around the world. By 2004 it had been endorsed by 77 state governments and over 800 NGOs from 140 countries.

The preamble to the Earth Charter sees humanity as:

... part of a vast evolving universe. Earth, our home, is alive with a unique community of life ... [and] ... the well-being of humanity depends upon preserving a healthy biosphere with all its ecological systems, a rich variety of plants and animals, fertile soils, pure waters, and clean air. The global environment with its finite resources is a common concern of all peoples. The protection of the earth's vitality, diversity, and beauty is a sacred trust.<sup>15</sup>

The preamble recognises the interdependence of the human and the larger earth communities and proceeds on the principle that we are 'one human family and one earth community with a common destiny'. It calls on humanity to live with a sense of universal responsibility for the present and future well-being of the human family and the larger living world, based on respect and care for the community of life. More detailed policy objectives deal with ecological integrity, social and economic justice, democracy, non-violence and peace.

The weakness of these charters, of course, is that they are little more than declarations. There are no formal means of enforcement of the principles through any national or international tribunals. It is simply left to national governments to legislate with regard to the charters, without any particular requirement that they do so. Nevertheless, as a point of reference, they are a widely accepted entrée into a culture consistent with the principles of the Great Jurisprudence.

### Swedish example

A world leader in translating these principles into legislative effect is Sweden, which has its own environmental code. According to the Swedish Institute:

A new Swedish Environmental Code went into effect in 1999. Sustainable development and other overall principles also gained legal authority in the Code. These include the precautionary principle, the polluter pays principle, the product choice principle and principles related to resource management, ecocycles and suitable locations for activities. Those engaged in major activities that may harm the environment must present an environment impact assessment when applying for a permit. If a permit is granted, the regulatory authority in charge will state certain terms and conditions.

The Environmental Code allows the protection of endangered species and types of areas. Examples are

biotype protection, bird sanctuaries, shoreline protection, national parks and nature reserves.

The Code expands the concept of environmental crime. Environmental sanction charges can be levied directly by a government agency in charge of oversight, where it notes an infringement. Fines or imprisonment may also be imposed.<sup>16</sup>

The code consolidates 15 previous Acts with European legislation and international conventions. It aims to combine efficient law with effective implementation and enforcement. With 33 chapters comprising almost 500 sections, it sets out a framework of fundamental environmental principles, goals and laws, making them paramount in ensuring that people work in unison in the interests of the environment. More detailed provisions are laid down by ordinances made by government. Every community has a local environmental committee with power to issue injunctions stopping anything that is detrimental to the environment.

The code is the first integrated body of environmental legislation enacted in Sweden. Its rules relate to the management of land and water, nature conservation, the protection of plant and animal species, environmentally hazardous activities and health protection, water operations, genetic engineering, chemical products and waste. It is applicable to all citizens and economic operators who undertake operations or measures that conflict with its objects. Its provisions apply to all those whose activities are potentially detrimental to human health or the environment, damage the natural or cultural environment, or deplete biological diversity. The rules apply to all kinds of impacts whether large or small. They also apply to the housing environment and the built environment and to all other places to which the public has access. It contains provisions relating to such diverse activities as individual sewage treatment systems, compost heaps, 'sick buildings' and heat pumps, airports, thermal power stations and pulp industries.

All operations that give rise to emissions to land, water or air are deemed environmentally hazardous activities and must therefore comply with the rules. As soon as there is any risk of environmental impacts in the form of noise, smell, vibrations, light or other nuisances, operators must take the necessary protective measures, without being called upon to do so by a public authority.

The code even prevails over economic considerations. For example, where a modest environmental benefit can be achieved at considerable expense to a manufacturer, the manufacturer has an over-riding duty to the environment to implement the process.<sup>17</sup> Positive incentives to an environmentally sustainable economy are provided by attractive tax reliefs and other financial measures.<sup>18</sup>

<sup>16</sup> Swedish Institute (November 2006) JFS 134 B.

<sup>17</sup> Phillip Williams *Counsel* (December 2006).

<sup>18</sup> The source of much of what follows is the Swedish Environmental Code Education Commission [www.sweden.se](http://www.sweden.se).

<sup>15</sup> The Earth Charter [www.earthcharter.org](http://www.earthcharter.org).

The purpose of the code is expressed as 'to promote sustainable development', meaning that the present generation's lifestyles must not be such as to damage the environment and deplete natural resources. Both present and future generations must have a healthy and sound environment in which to live.<sup>19</sup>

Five basic points specify how the code is to be applied:

1. Protection of human health and the environment from damage. (This relates to both direct and indirect damage and damage to human health includes both physical and mental impacts.)
2. Protection and preservation of natural and cultural environments.
3. Preservation of biological diversity. The code adds an important note to this provision: 'Biological diversity must be protected since the natural environment is worth protecting *for its own sake* (emphasis added). This means that the long-term productive capacity of eco-systems must be preserved. Biological diversity relates both to the diversity of ecosystems and the diversity of plant and animal species.'
4. Ensuring sound land and water management, ie long-term good management in ecological, social, cultural and economic terms.
5. Encouragement of reuse and recycling of resources. The note adds: 'The rules of good management apply also to the conservation of raw materials, energy and other natural resources'.

The application of these principles requires operators to show that their operations are undertaken in an environmentally acceptable manner and that they are competent to carry out the operations in such a manner. They are expected to apply the precautionary principle, to use the best available technology, and to select the most appropriate location for their activities. They are expected to ensure efficient use of raw materials and energy and to minimise consumption and waste, reusing or recycling wherever possible.<sup>20</sup> At the same time, they are expected to refrain from the use or sale of chemical products that may involve hazards to human health or the environment if other less dangerous products can be used instead.<sup>21</sup>

Finally, a 'stopping rule' requires that where an operation or measure is liable to cause substantial damage, although the necessary precautions have been taken in accordance with the code, it is not to be permitted unless special reasons exist.

'Sustainable development' is not, in itself, an adoption of the 'wild law' approach, but the code goes further than usual in its pursuit of sustainable development by

recognising that the natural environment is 'worth protecting for its own sake', a view that is not necessary to a sustainable development agenda. Like the Tamaqua Ordinances, it begins to look at nature through the eyes of nature rather than through purely human eyes, valuing it for what it is rather than for what human beings can use it for.

## Conclusion

Thomas Berry encapsulates the rights of nature in this way:<sup>22</sup> 'Every component of the Earth community, both living and non-living, has three rights: the right to be, the right to habitat or a place to be, and the right to fulfil its role in the ever-renewing process of the Earth community.' Such rights are not unqualified. Berry adds:

All rights in nonliving form are role specific; rights in living form are species specific, and limited. Rivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights. Difference in rights is qualitative, not quantitative. The rights of an insect would be of no value to a tree or a fish.

The World Charter for Nature, the Earth Charter, and the Swedish Code all show the development of a new international culture of environmental consciousness, while the Tamaqua Borough Ordinances show how such a culture can be effective at a local level. It is perhaps going too far to say that any of them embody an 'earth-centred' approach to environmental rights beyond the human sphere, but in recognising and asserting the responsibilities of human beings towards the natural world they come close to doing so.

Human rights are one way of imposing obligations and responsibilities on governments towards the citizens they govern. The emerging culture of earth rights has the potential to become a potent force in protecting the rights of nature against the depredations of our modern, powerful and technologically adept human population by recognising and expressing human responsibilities to towards the natural world. A substantial cultural framework is already in place. Sweden and the citizens of Tamaqua Borough have demonstrated the possibilities. The real need now is for lawyers, legal professionals and policy-makers the world over to rise to the challenge of making earth rights effective by adopting and working within the new culture of wild law and earth jurisprudence.

19 This is a conscious application of the basic principle of sustainability expressed in *Our Common Future* the report of the World Commission on Environment and Development 1987.

20 The resource management and ecocycles principle.

21 The product choice principle.

22 T Berry *Evening Thoughts* (Sierra Club Books 2007).