

ENVIRONMENTAL LAW

and Management



Wild Law 2006–7

Rebalancing the system: an agenda for change

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Introduction¹

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.²

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.

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 2006.³ 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

³ 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 CO₂, 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 Review⁴ 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. UNEP⁵ and agreements like the Convention on Biological Biodiversity⁶ 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'.⁷ 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'.⁸ 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 (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

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.¹ 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.

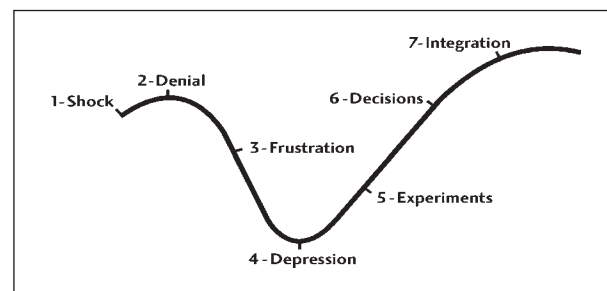
Creativity and change

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

I have previously written² 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.

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:³

- 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 CO₂ 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*,⁴ 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.⁵

In the field of economics, *The Ecology of Commerce*⁶ 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.⁷ 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.⁸ 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.

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*⁹ 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 writings¹⁰ 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).