

Wild Law 2007–8

Fighting for earth justice: the first wild law mock trial

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Can wild law form the basis of a coherent body of law capable of protecting a species like the orang-utan from extinction through rainforest destruction? This is a report of the first wild law mock trial of the *Borneo Orang-utan Protection Project (on behalf of the Bornean Orang-utan) v Palm Oil Malan Sdn Bhd*, held during the September 2007 wild law workshop in Derbyshire, England.

Introduction**

In September 2007 the United Kingdom Environmental Law Association (UKELA), the Environmental Law Foundation (ELF) and the Gaia Foundation held the third annual wild law event. An important focus of the event was the wild law mock trial based upon a 'wild law constitution' written by Cormac Cullinan, author of *Wild Law, A Manifesto for Earth Justice*.¹ The purpose of conducting the trial was twofold: to demonstrate to participants how wild law might work in practice and to examine whether wild law is capable of being a coherent body of law in itself, rather than just a tool for exposing the serious inadequacies in current environmental legislation.

The theme of the workshop was wild law and climate change. The mock trial was designed to show how a non-human species, adversely affected by a climate change-related issue (in this case, the production of biofuels), might be effectively protected by a court applying the wild law constitution. Following two previous successful annual events, the growth of an international wild law network, and of course, the increasingly wide realisation regarding the urgency of climate change, there was demand for a mock trial in which wild law principles would be put to the test.

Background

The trial is set in the state of Sabah, Bornean Malaysia. The claimant is the *Borneo Orang-utan Protection Project*, a non-governmental organisation which exists to protect

the orang-utan, to promote its long-term welfare and survival in the wild and is acting here on behalf of the orang-utan in Borneo. The affected orang-utan live in commercial logging reserves now owned by the defendant palm oil company. Employees of the claimant have been monitoring the orang-utan population in Sabah and claim that the conversion of forest into palm oil plantations by the defendant has resulted in a significant decline in orang-utan populations. As a result the claimant asserts that the orang-utan could be extinct within nine years.

The claimant seeks a declaration that the conversion of forest into plantation is unconstitutional because it threatens the survival of the orang-utan. The claimant also seeks an injunction against the defendant company to prevent the development of forested land that it has bought but not yet converted.

The defendant claims that climate change is the greatest threat to the future of mankind and the planet and that it is helping to reduce that threat by growing crops for biofuel, which is necessary to kick start a 'green energy revolution'. It argues that biofuels release less carbon dioxide (CO₂) emissions than fossil fuels and are therefore, a 'green' product. Furthermore, it claims that its activities are not unconstitutional because they are helping to tackle climate change. If alternative low-carbon energy sources are not developed, climate change threatens to engulf all species on earth, including the orang-utan. To allow this would not be in the interests of the earth community.

The constitution

The wild law constitution represents a serious attempt to formalise wild law principles to create a coherent body of law. Fundamental to the constitution is that living members of the earth community in Sabah have basic rights. Individuals and organisations also have standing to represent the interests of another species in court, where the constitution is being breached to their detriment. The rights of living earth members are relative and can be limited to the extent necessary to ensure that the community of life on earth flourishes as a whole. The provisions of the constitution relevant to this action are as follows.

- The preamble reveals the spirit of the constitution and states there is:

* Any views expressed in this article are those of the author and do not necessarily reflect those of Wragge & Co.

** United Kingdom Environmental Law Association (UKELA) Wild Law workshop 'Wild law: a response to climate change' 21–23 September 2007.

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

a common and sacred responsibility to the present and future generations of humans and other species to protect and care for all the living communities of Sabah and to ensure that we maintain and strengthen the integrity of natural systems that support us all.

- Article 1 outlines the fundamental principles of the constitution. In Article 1(4) the state is obliged to 'take all reasonable measures to ensure that human activities do not degrade the environment'.
- Article 2 explains the fundamental rights of living members of Sabah:

Each member of Sabah has the right to exist, the right to have a place where it can exist and the right to play its part in the ongoing evolution of Sabah. Every form of life is unique and each living being is entitled to be respected by humans, regardless of its worth to human beings. The rights of each member of Sabah are limited by the rights of other members and the rights of each member must be limited to the extent necessary to maintain the health, integrity and well being of Sabah and the earth community as a whole.
- Article 3 expands on the duties of human inhabitants: 'Human inhabitants of Sabah must respect and protect the other members of Sabah for the benefit of present and future generations'.
- Article 4 explains the role and duties of the state. The state has a responsibility to 'protect the forests ... maintain biological diversity [and] to protect the environment'.

The issues

The issues in the wild law mock trial for the court are:

- to decide if the actions of the biofuel company breached the constitutional rights of the orang-utan
- whether a private limited company should be prevented from developing its land for biofuel production in order to protect the orang-utan, which risks extinction from further destruction of its habitat.

In the mock trial speakers and delegates play the part of the witnesses.

Evidence for the claimant

Dr Dexter, a zoologist for the claimant reports to the court that his team repeatedly pick up orang-utans in areas of the Segama rainforests in Sabah which border the vast plantations owned by the defendant. These orang-utans are disorientated and malnourished, conditions consistent with their habitat being destroyed. Expert research shows that population sizes and the density in the remaining habitat patches in Sabah keep falling, but huge areas of rainforest continue to be chopped down and earmarked for plantations. Complaints have been made to the officials but the governor of Sabah refuses to intervene because

the forests in question are designated commercial logging reserves and are therefore, not protected.

Orang-utans rely on the rainforest for food and survival. They make their nests in the tall trees. Once forest is converted to plantation it can no longer support orang-utans because the huge expanses of monoculture do not provide the diverse range of fruit and vines that are necessary in orang-utans diet. Furthermore, plantations fragment and reduce the rainforest making it harder for orang-utans to find food and leaving them more exposed to poachers. The orang-utans (our closest genetic cousins) are left starving and destitute by the actions of the defendant.

Orang-utans are only found in the rainforests of Borneo and on the tiny island of Sumatra. With threats from poachers, wildfires, logging and now palm oil, they are on the knife edge of extinction: there are approximately only 45,000 wild orang-utans left in Borneo and only about 6000 left in Sumatra. The Bornean and Sumatran orang-utan species are classified as endangered and critically endangered, respectively, in the International Union for Conservation of Nature and Natural Resources (IUCN/2004). The Bornean orang-utan population is currently declining at the rate of 5000 per year.

Aerial surveillance in Sabah suggests that the majority of wild orang-utan (60 per cent) lives in commercial logging reserves. The animals are able to survive, albeit in a depleted environment, because selective logging in these reserves allows the forest to regenerate to some extent and to maintain its integrity. Orang-utan are creatures of habitat and tend to stay in areas of degraded forest rather than move elsewhere. Sabah is home to the second largest population of orang-utan in Borneo (approximately 11,000) and as such it is imperative to protect the orang-utan in this area. Isolated clusters of orang-utan in other areas are likely to dwindle to extinction, given their solitary lifestyles and low reproductive rates. If companies are allowed to convert commercial logging reserves into plantation this will further increase the threat to the orang-utan and they could be extinct in the wild within a decade. Even if the plantations could be converted back to forest after their cycle (of about 25 years), the animals are unlikely to survive this period.

Arguments for the claimant

The claimant's case is as follows.

- The unequivocal intent of the constitution is to ensure that the rights of all members of Sabah, including orang-utan, are secured. These rights include a right to exist and a right to a life free from severe distress in the appropriate surroundings. These rights are clearly compromised by the defendant's actions to an extent that entitles the claimant to the remedy sought.
- The reduction and fragmentation of habitats by the defendant cannot be said to comply with the duty to respect and protect indigenous animals.

- The state has a duty to provide proper protection for every form of life. The court, as an organ of the state, has a duty to prevent activities contrary to the spirit and purpose of the constitution. The deliberate creation of circumstances which threaten the habitats and ultimately the existence of naturally occurring species which are members of Sabah is such an activity and the constitution not only empowers the court, but requires the court to intervene.
- The constitution protects the rights of the orang-utan to exist and live in its natural habitat. If the orang-utan was a human population, its human rights would readily trump any property rights of a developer seeking to use its land in such a way as to cause it severe distress, death, and ultimate extinction. The constitution puts the orang-utan on an equal footing to humans and other members of Sabah. Therefore, the failure to protect the orang-utan breaches the constitution.
- The climate change defence effectively amounts to an assertion that constitutional safeguards in Sabah can be overthrown to preserve the unsustainable lifestyles of people mainly in western Europe. This is contrary to the spirit of the constitution and also suggests that human lifestyles have more inherent validity than those of other species.
- The defendant could produce biofuel without harming the orang-utan. This may be more expensive for the defendant, but economy of production is not a constitutional principle. Economics and expediency must not defeat the rule of law.

Evidence for the defendant

Mr Narang, a director of the defendant organisation does not take issue with the claimant's evidence, although he believes the effect of the defendant's activities on the orang-utan has been exaggerated. The defendant is a private limited company in the business of producing crude palm oil for biodiesel. The company exports to other countries in south east Asia and increasingly the EU. The defendant accepts that its activities are adversely affecting orang-utan in the area. Despite this, it does not believe that its activities are unconstitutional because it is addressing the greater evil of climate change. As a company, the defendant believes that climate change is the greatest threat facing mankind and the planet. The inherent dangers in allowing carbon emissions to increase are supported by the reports of the Intergovernmental Panel on Climate Change (IPCC). To help meet the challenge of climate change, new low-carbon alternatives to fossil fuels must be developed.

Biofuel is such a low-carbon energy source which can be used in transport fuel to mitigate CO₂ emissions. Biofuel is cost competitive compared to fossil fuels and, at present, can be mixed in with conventional fuels in motor vehicles in low ratios. It is the defendant's case that biofuel releases less CO₂ emissions than conventional fuels because the CO₂ emitted in the combustion of biofuel is compensated by the absorption of CO₂ from the

atmosphere during the palm oil growth. (For the purposes of this action the claimant does not take issue with this point.)

Mr Narang states that his company is doing all it reasonably can to minimise the effect on the orang-utan (eg by not carrying out illegal logging activities). The defendant believes the land it has bought is most suitable for biofuel production. The alternative, of using agricultural land for the production of biofuel, would result in an increase in food prices and this would have a very detrimental impact on the poorest people in Malaysia.

As people continue driving cars and using planes, biofuels currently represent the best alternative to petroleum products. Travel patterns are unlikely to change; in fact it is anticipated that CO₂ emissions from transport will significantly increase in the future both in the EU and worldwide, which makes the need to develop efficient biofuels all the more pressing. Mitigating the impact of climate change must be a priority because of its wide-ranging and pervasive negative effects, including mass extinctions.

Arguments for the defendant

The defendant's case is as follows.

- The IPCC Fourth Assessment Working Group I Report (published February 2007) recognises the clear causal connection between the burning of fossil fuels, the increase of CO₂ emissions and the steady rise of mean global temperatures. Working Group II of the IPCC Fourth Assessment Report produced a paper that assessed the potential consequences of climate change. At a 2 degree Celsius rise on 1980–99 levels the report predicted a total species extinction of 20–30 per cent. If global temperatures increase above 2.5 degrees Celsius then the same report predicts 'significant extinctions around the globe', meaning 40 per cent of all species. The Working Group I Report projections for global temperature increases over the century were between 1.1 and 6.4 degrees Celsius. Given this, and the constitutional duty in Article 3 to protect other species for the future, it must be an imperative to focus on reducing CO₂ emissions as far as possible so that as many species as possible have the best chance of survival, including the orang-utan.
- It is not realistic to expect the reduction in CO₂ to come from a reduction in the consumption of resources in the short term. People in the developed world are not willing to change their transport behaviours and people in the emerging economies such as China, are aspiring to live as those in the West. The only realistic option in the short to medium term is to develop low-carbon energy sources, such as biofuels, which can assist in reducing CO₂ emitted from the transport sector at little or no additional adaptation cost.
- For the above reasons, many countries have targets for biofuel production, including the EU which has a target of 10 per cent biofuel in petrol and diesel by

2020 as a result of the Biofuels Directive (2003/30/EC). However, growing biofuel requires a lot of land and there is competition with agriculture for suitable land. There are major problems with switching from growing food to growing biofuels, such as the rising price of basic foodstuffs which disproportionately affects the poorest people in the world and could lead to starvation. This means that large areas of undeveloped land will need to be utilised for biofuel. Therefore the defendant should not be penalised for forest conversion when the alternative is plantations on land used for growing food for human consumption, the result of which is equally as bad or worse. The constitution would not require people to be doomed to starvation in order that the orang-utan might live a little longer in the wild.

- Climate change is the biggest threat to this planet and it will force people to make difficult decisions. Whilst the actions of the defendant will have some adverse affect on the orang-utan in the area, these actions are, however, necessary in order to make biofuel production viable. The defendant has done all it reasonably can to minimise the damage to the orang-utan. The interests of the orang-utan cannot be allowed to defeat the interests of the many other innocent species who will be affected by climate change, including future generations of people. Article 2 of the constitution, stating that the interests of individual species must be limited to the extent necessary to ensure the well being of the whole, applies.

Judgment

The court is asked to decide whether:

- i) converting more forest for palm oil production is unconstitutional because of the effect it will have on the Bornean orang-utan, and
- ii) if (i) above is correct, whether relief in the form of a declaration and an injunction should be granted.

The claimant contends that an injunction is necessary to prevent the alleged ecocide of the orang-utan. The defendant contends that increased plantations for biofuel in its forests are justified, that biofuel production is in any event necessary to prevent dangerous climate change which would ultimately destroy the orang-utan habitat.

The first judgment of the wild law court turned to the constitution and its preamble: 'this beautiful land that has given birth to us as a nation, shapes our diverse cultures, and sustains us as part of the community of life on earth'. The constitution sees Sabah as a community of subjects, not a collection of objects. The court then considered 'the common and sacred responsibility to the present and future generations of *humans and other species* to protect and *care for all the living communities* of Sabah and to ensure that we maintain and strengthen the integrity of the natural systems that support us all' (emphasis added).

The court accepted the defendant's evidence and submissions in relation to the warming of the earth and the negative impacts on ecosystems if greenhouse gas emissions

are allowed to increase. In responding to (i) above, the court found that even though climate change is a result of human activities, the state does have a constitutional responsibility at Article 1 to take '*all reasonable measures*' to protect future generations, as well as individual species. Therefore, in the face of the mass extinctions that climate change might bring about, the state *could* be justified in protecting future generations at the expense of a single species. In addition, the court did not find that the activities of the defendant were likely to cause the orang-utan, as a species, significant harm (emphasis added).

However, under Article 2 the orang-utan have a right to exist and a right to a habitat regardless of their worth to human beings. That right, like all other rights in the constitution has limits, to 'the extent necessary to maintain the health, integrity and well being of Sabah and the earth community as a whole'. Here it seemed to the court that the right of the orang-utan to exist was being extinguished not to the extent necessary to maintain the earth community as a whole but to the extent necessary to maintain human over-consumption of resources and emissions of greenhouse gases. The pursuit of development should not undermine the integrity of the ecosystems which support and sustain life, neither should the orang-utan pay the price of extinction.

The claimant observed that there are other more expensive ways of avoiding increased CO₂ emissions and observed that economy of production is not a constitutional principle. The court agreed with the claimant and found that Article 2 was breached. The court also found that Article 3 was breached as landowners must not reduce and fragment habitats, and found the claimant's evidence that the orang-utan had just years to live compelling. Furthermore, the court as an organ of the state is responsible for protecting the forests and biodiversity, regardless of social utility.

Relief

The court found breaches of Articles 2 and 3 and so ordered the defendant to desist from the development of its new plantations. The defendant may return to the court if it can demonstrate that it and others in Borneo agree to set aside and protect sufficient forest in perpetuity to ensure that the orang-utan species avoids suffering ecocide.

Comment

Since the mock trial was held, biofuels have been intensely scrutinised in the media. The concerns about biofuels are now well known: food insecurity and price increases (particularly in countries least able to afford the increases); the loss of precious natural habitats; an acceleration in the rate of deforestation; the loss of biodiversity, and the forced removal of indigenous tribes by plantation companies, often without compensation.²

² This has been highlighted by the plight of the Penan in the BBC documentary *Tribe*. See also: <http://www.telegraph.co.uk/earth/main/jhtml?xml=/earth/2007/07/28/eamalaya128.xml> (26/04/08).

Perversely, some biofuels may even be helping to increase CO₂ emissions, especially if they displace rainforests (which absorb and store CO₂), and rely on petroleum-based pesticides and fertilizers to increase the yield. (These chemicals can also leach into water and harm aquatic systems.) A study in the *Science* journal found that converting peatland forest in Malaysia to oil palm plantation incurs a 'carbon debt' of 423 years; meaning it takes 423 years before the land can begin to mitigate CO₂ emissions and global warming.³ The 'carbon debt' is incurred because rotting trees when cleared emit vast amounts of CO₂. The carbon debt must be paid before biofuels produced on the land can be counted towards avoided CO₂ emissions.

Other sinister consequences of biofuel development are less well known: the proceeds of crude palm oil sales in some countries are alleged to be implicated in organised crime.⁴ Many of the issues involved in biofuel production were not raised or discussed in the mock trial due to time constraints and the need to make the issues relatively simple, as the wild law constitution itself was new for many participants. For example, the claimant did not take issue with the defendant's argument that its activities were directly helping to reduce CO₂ emissions. In a real court this would of course have been challenged.

What the mock trial has highlighted is the tension between market-based solutions to the threat of climate change and the wider environmental and social consequences of such solutions. The problem lies with the fact that the market is concerned with profit, not sustainability or social equity. The market gives those in the developing world little incentive to develop sustainable practices. Furthermore, market-based solutions arguably encourage increased consumption. Over-consumption of

resources by the few in occidental countries is one of the root causes of greenhouse gas emissions. Western lifestyles are energy intensive, relying heavily on cars and planes, and this lifestyle is not sustainable.

It is evident that a new cultural and legislative framework is needed to preserve the planet's ecosystems and rich biodiversity as well as to avert dangerous climate change. Wild law could provide such a framework, by prioritising the well-being of earth systems and by giving living beings rights. These ideas are not quaint or unachievable, nor are they necessarily unique or radical. The Indian constitution (Article 51A), for example, requires citizens to protect and improve the natural environment and to have compassion for living creatures. Article 49A of that constitution requires the state to improve and protect the environment and to safeguard the forests and wildlife. The same principles are contained in the wild law constitution. To take another example, months prior to the World Summit on Sustainable Development in 2002, 'The Johannesburg Memo: Fairness in a Fragile World' was published which called for community resource rights over forests, fisheries and ecosystems.⁵ This would require that the fully informed consent of the local population be obtained before companies are allowed to carry out activities that would compromise the ecological health of an area. Such a system would encourage greater public participation. The same report also advocates trusteeship (at the level of the international community) to protect the right of present and future generations to common resources. These ideas are gaining credibility as the only way to ensure sustainable human development, ecological well being and peace.

3 J Fargione and others 'Land Clearing and the Biofuel Carbon Debt' *Science* 8 February 2008.

4 See http://www.timesonline.co.uk/tol/news/world/us_and_americas/article1875709.ece (26/04/08).

5 http://www.worldsummit2002.org/publications/memo_en_without.pdf (26/04/08).