

ENVIRONMENTAL LAW & MANAGEMENT

Volume 18 Issue 1 2006 ISSN 1067 6058

Special Issue

Articles and commentary from the

Wild Law Conference

A UK Environmental Law Association Conference on
'The Principles of Earth Jurisprudence'

Based on the book 'Wild Law' by Cormac Cullinan

November 2005, in association with the University of Brighton

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ENVIRONMENTAL LAW & MANAGEMENT

Volume 18 Issue 1 2006 ISSN 1067 6058

Environmental Law & Management
www.lawtext.com
ISSN 1067 6058

Volume 18 [2006]
6 issues plus index
£425

CONTRIBUTIONS

The editors and publisher welcome submissions for publication. Articles, letters and other material should be submitted to:

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Environmental Law and Management
Lawtext Publishing Limited
Office G18 – Spinners Court
55 West End
Witney
Oxon
OX28 1NH

E-mail: elm@lawtext.com
Tel: +44 (0) 1993 706183
Fax: +44 (0) 1993 709410

This journal is a refereed journal and may be cited as: (2006) 18 ELM 00

Environmental Law and Management is published by Lawtext Publishing Limited

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PUBLISHER
Nicholas Gingell

PUBLISHING EDITOR
Rachel Caldin

Typeset by:
Connell Publishing Services,
Oxon OX44 7NW

Printed and Bound in the United Kingdom by
Information Press, Eynsham

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Foreword

Simon Boyle

Argyll Environmental Ltd, UKELA Council

The papers that follow were presented at the United Kingdom Environmental Law Association (UKELA) Wild Law Conference held at the University of Brighton on 18 November 2005.

The main purpose of the conference was to debate some of the ideas set out in the book *Wild Law: A Manifesto for Earth Justice* by Cormac Cullinan. Its central theme is that our current legal system endorses the continued unsustainable exploitation of our natural resources rather than protecting them, which will inevitably lead to the consequent destruction of the Earth and its life support systems. Cullinan argues that in order to stop this it is necessary to move to a governance system that is not wholly anthropocentric but, instead, is aimed to promote the well-being of the entire Earth community.

There can be no doubt that over many decades our single-minded drive for economic growth – with little regard for the environmental consequences – has been detrimental to the well-being of the planet. Many of these planetary ills were remarked on by Michael Meacher in his opening speech at the conference. Each of these is immensely serious in isolation. At the very minimum, they are collectively likely to provide a severe check on future economic growth.

However, the most serious threat we face has to be climate change. In 2001, the IPPC predicted global increases over the next century would be between 1.4 and 5.8 degrees centigrade. Recent research assessing more of the positive feedback mechanisms such as the release of methane as the tundra thaws out and other factors such as global dimming that were not considered in the IPPC's assessment indicate that these figures will need to be revised upwards.¹ Unfortunately or fortunately, depending on how you look at it, global temperature increases of around six degrees and over² will not just affect other species but will, almost certainly, lead to the end of civilisation as we know it.³

The threats presented by climate change and the recent research on positive feedback mechanisms add to

the absolute urgency with which we must find genuinely viable solutions, and this, in turn, places an imperative on us to assess Cullinan's ideas with the utmost care. To this end, and because his book examines our legal system and proposes radical new alternatives, UKELA wanted it critically assessed by leading environmental lawyers. We were fortunate that Professors Lynda Warren and Robert Lee agreed to undertake this task and to provide detailed papers accordingly. Regrettably, the author himself, who lives in South Africa, could not be present, though the intention is that he will be at the second wild law conference to be held in November this year. However, he did review their papers and his response to them is also published here.

One of the main criticisms made against *Wild Law* is that it purported to provide a non-anthropocentric alternative, based largely on Cullinan's concept of the Great Jurisprudence. Professor Lee believes that this is not possible, as being human, we will inevitably view the world through a human lens. Along similar lines, Professor Warren argues that Cullinan's attempt to provide a solution that is 'more natural' is impossible: we are part of nature and we simply carry out actions in accordance with our inherently selfish natures. Cullinan, she feels, is just as human-centred as the rest of us, albeit he is looking at the survival of our species over a longer term than is usual.

At the conference Begonia Filgueira of Gaia Law suggested that it was a mistake to be too hung up on whether Cullinan could or could not provide a truly objective non-anthropocentric viewpoint. What really mattered was his reminder that the continuing existence of humankind depends entirely upon the maintenance of the delicate life support systems of our planet.

We are now running a very real risk of upsetting these systems without any real understanding of the consequences. To use the language of Monbiot, we will not survive if we stay in a state of denial. We need to start looking at alternative futures, and *Wild Law* provides a basis from which environmental lawyers can start to work.

1 James Lovelock *The Revenge of Gaia* (Penguin London 2006).

2 See G Monbiot (2005) 17 ELM 57.

3 The BBC is currently carrying out a research project about climate change and the results are to be published in May 2006.

Introduction

I was very pleased to be asked to chair this first UKELA Wild Law conference, based around the ideas set out in Cormac Cullinan's ground-breaking publication, *Wild Law: A Manifesto for Earth Justice*.

Cormac's book faces up to the greatest challenges that mankind has so far experienced, making it clear that we need to rethink our legal and political systems if we are to stop the destruction of our planet.

Consideration of just some of these challenges, all of course interconnected, can give rise to the depressing realisation that we are inevitably walking towards irreversible planetary disaster.

The heart of this destructive force is the monstrous engine of world industrialisation with its ever more rapacious appetite for the exploitation and consumption of the natural resource base. Unless this is brought under control, and quickly, the opportunity to save our species and many others will have gone.

If we look at just a few of these global issues we can quickly see that by subordinating everything to unsustainable economic growth and the trade imperative we entirely fail to plan for longer term well being.

We have already used up at least half of the planet's known oil reserves and given the current rate of consumption the oil wells will be dry within 40 years.

Fish stocks have plummeted over the last few decades so that many species such as cod are on the verge of commercial extinction. Despite this we continue to fish at entirely unsustainable levels and as we extinguish one species we simply look for others.

Across the world the destruction of natural habitats such as the rain forest, is wiping out species of plants and animals about which we know next to nothing.

Climate change as a result of man-made emissions is already clearly evident and we are only just beginning to appreciate how the effect of positive feedbacks could cause runaway increases in global temperatures. No one should be in doubt of the risks we are running if we fail to curb our CO₂ levels and allow the mean global temperature to continue to rise. The Greenland and Antarctic ice sheets have already started to melt and if this accelerates it will mean sea level rises which will cover most of the major cities, including New York and London. The Amazon rainforest – the lungs of the planet – will not remain

sufficiently cool and will die back and dry out contributing further to climate change.

Cormac Cullinan recognises all these threats and emphasises the fact that our species is in the process of destroying its own vital life support systems. Because we have distanced ourselves so far from the natural world we have forgotten that our civilisation is wholly and utterly dependent upon the well being of our planet. What we urgently need is a new global governance system which is not entirely anthropocentric but one where all the members of the Earth Community have rights.

It is true that there are some constraints imposed by certain UN institutions, especially UNEP, International WTO, IMF, and the World Bank, and we do have some international treaties, such as the Antarctic Treaty, the Convention on Biological Diversity and Kyoto but these are generally piecemeal, poorly enforced and ultimately subordinate to the trade imperative.

Wild Law offers us a profound thesis which challenges the fundamentals of the current world order created and driven by globalised capitalism. If the ideas put forward in *Wild Law* appear radical, then it pays to remember the plight we are in and that conventional attitudes have got us where we are.

I would like to pose six questions that need in my opinion to be asked:

1. Can Cormac Cullinan's legal framework be made to work in practice?
2. Will his alternative thinking actually resolve the underlying problems?
3. How would the new framework fit with the current world order of global capitalist governance?
4. What is the realpolitik for its introduction?
5. How are forces to be mobilised to promote the ideas onto the worldwide public agenda?
6. How are the principles in *Wild Law* compatible with the almost universal aspiration across the world for economic prosperity?

At the conference there was much debate over the issues raised by these complex questions. There is a long way to go. However, thanks to Cormac Cullinan we have made a good start.

Rt Hon Michael Meacher MP

Wild Law

A Manifesto for Earth Justice – A Summary

Cormac Cullinan

*Enact International, Winstanley & Cullinan Inc, Cape Town*¹

Cormac Cullinan argues in his book *Wild Law* that the fact that our species is rapidly destroying our only habitat, Earth, indicates that our governance systems are dysfunctional and need to be completely rethought. Furthermore, the many environmental treaties, laws and policies adopted in recent years have, by and large, failed to slow down, let alone halt or reverse, the destruction of the planet. This, he maintains, is because the legal systems of the dominant cultures and the policies and institutions associated with them, are based on a mechanistic and dualistic understanding of the world, and on various myths, all of which we now know to be false. Myths such as the belief that human society is separate from, and superior to, the natural world, are now 'hard-wired' into most legal and political systems. Consequently, the overall effect of these governance systems is to facilitate and legitimise the ongoing degradation of our planet.

Cullinan explains how we need to change our entire approach to governance so that we can continue life on a liveable planet. He describes how his experiences as an environmental law and policy lawyer and consultant, and his encounters with the eminent American cultural historian and 'geologist' Thomas Berry, convinced him that we must completely rethink our approach to governance and jurisprudence by recognising that human society is situated within a larger system of universal order (which he terms the 'Great Jurisprudence') and that a primary purpose of human governance systems must be to ensure that we live as 'good citizens' of the wider community of life on Earth. *Wild Law* analyses the deficiencies in our current legal systems and the devastating consequences for the wider Earth community. These include the fact that in the eyes of the law, all other members of the Earth community are objects and as such, incapable of having rights. On the other hand, the law recognises artificial entities such as companies as persons and grants them very extensive rights and powers to exploit the Earth community for private gain. Indeed these entities are designed to pursue profit rapaciously even if it means jeopardising the Earth's vital systems that support all living creatures.

Cullinan outlines what a governance system might look like if it were based on the recognition that we humans are merely aspects of a larger system and that in the long term human communities can only flourish by playing a productive role within the wider Earth community. He

reminds us that our cultures have forgotten not only how to live harmoniously within that community, but also that one of the main purposes of human regulatory systems must be to facilitate this. He also explores the thorny issue of recognising the rights of other species and discusses the elements of a new 'Earth jurisprudence' that we would need to inform the transition from our current governance systems to Earth-centric systems of governance. In doing so, *Wild Law* emphasises that making this transition will require us to make fundamental shifts in how we think; to reframe and broaden our ambit of concern (to include the whole Earth community), to engage our hearts as well as minds and to take responsibility for personal transformation.

The logic of the argument presented in *Wild Law* is that because humans are an integral and inseparable part of the Earth system, in the long term human societies can only flourish if they govern themselves in a manner that is consistent with the context of the larger Earth community. This means that a fundamental purpose of governance systems must be to ensure that the pursuit of human well-being does not undermine the integrity of the Earth. Cullinan argues that only by creating a jurisprudence that reflects this reality will we be able to begin a comprehensive transformation of our societies and legal systems. This philosophy or 'Earth jurisprudence' can then be used to guide the development of legal systems that foster human connections to nature, of personal and social practices that respect Earth, and of social structures based on communities, and communities of communities, as found in nature.

However, Cullinan's argument is not based on the application of logic alone. He also argues that we need to re-imbue our governance systems with wisdom and 'soul' and to recognise the sacred dimension of our relationships with the planet. In his view, if we are to recover our lost sense of identity and purpose as particularly gifted members of the Earth community we must become far more skilled in listening to, and in being guided by, both nature and by those cultures that have been more successful in living harmoniously with nature.

As Thomas Berry says in the foreword to *Wild Law*, 'we need legal structures and political establishments that will know that our way into the future is not through relentless industrial development but through the living forces that brought us into being and are the only forces that can sustain us in the coming centuries'. *Wild Law* is an important and inspiring first step in exploring how we might develop such laws and institutions.

¹ Green Books, Dartington UK, 2003, ISBN 1 903998 35 2, 240 pp, p/b £9.95.

A walk on the wild side: wild law in practice

Professor Robert Lee¹

Co-Director, ESRC Research Centre for Business Relationships, Accountability, Sustainability and Society, Cardiff University

Introduction

For those who have not read *Wild Law*² it certainly repays its moderate cost most generously. There are two reasons in particular for this. The first is that it is an invigorating book to read. Although it will be apparent from what is written below that there are ideas that I find hard to entertain, that does not stop the book itself providing genuine entertainment, (in the richest sense of that word) to anyone with an interest in or commitment to the environment. Once engaged in the text, it is difficult to put the book down, and it is a fulfilling experience. A second reason, particularly for lawyers and law students, it begs the questions, throughout, of what is law and what is its purpose. In that respect the book deserves a readership far beyond those interested in environmental law and could genuinely be recommended for anyone engaged by problems of the limits of law and legal regulation.

That said, the book presents some difficulties, and addressing the theme of putting *Wild Law* into operation, as I am asked to do, is never likely to be easy, but it is a task made harder by Cullinan's own writing. In the early stages of the book, we are promised that in Part 4 we will begin the 'journey into the wilderness' looking at how 'we might move towards 'Earth Governance' systems'. If we do embark on this journey, rather than stare curiously at the path leading into the undergrowth, then I, for one, am quickly lost. The problem is that for all of the promises Cullinan offers few concrete examples of wild laws consistent with 'Earth Jurisprudence'. It is a book that – for all of its rhetoric – flirts with revision of legal principles and shies away from reform.

This is illustrated by reference to notions of property and property holding. Starting from the somewhat dubious premise at the beginning of Chapter 12 (entitled The Law of the Land) that 'land is another name for Earth', Cullinan asserts that 'by pretending that land is a form of commodity to be owned ... legal systems legitimise and encourage the abuse of Earth by humans'.³ This is described as 'the conceptual and legal transformation of a natural reciprocal relationship into a unidirectional exploitative relationship'⁴ such that 'the costs of continuing to maintain our current

ideas of property rights are expatriation and virtual excommunication from the Earth community ...'⁵ it seems that we must re-think concepts of property and ownership and Cullinan concludes Chapter 12 by stating that:

'Radical as completely rethinking property law may seem, on a wider evaluation of the costs and benefits, it seems fully justified.'⁶

This is heady stuff and invites a response, which is delivered below. Imagine the disappointment, however, when, turning to how we might transform the law in Chapter 14, Cullinan retracts, disavowing the 'call for wholesale abolition of existing legal and political systems' stating that such a reading of his argument on approaches to governance is a misunderstanding. It transpires that when Cullinan argues in Chapter 12, that 'treating land as any other commodity is misconceived' he is not in fact 'proposing that property laws be abolished overnight'.⁷ This it transpires is a recipe for chaos. Even in the longer term, however, there is no explanation offered as to how we might move to this non-property world.

Examples from Earth Governance

The first difficulty, then, is to begin to establish some sort of hold on what it is that wild law might look like. Searching for examples from Chapters 8 and 9 in relation to the substance of wild law there are two prominent examples cited on more than one occasion and one further example introduced on a one-off basis. The first example is that of the 'fundamental river right'.⁸ This is a right to flow because if a water body does not flow it loses its essence as a river. It follows that constructing a dam so that the river cannot flow to the sea is an abuse of its Earth rights. This is easy enough to follow but it begs a host of further questions, beginning with whether there is a right to flow in a defined channel. Four pages later, this question is apparently answered; because a flooding river is acting in accordance with its nature, canalising rivers is wrong.

This notion of 'riverhood' owes much to the earlier writings of Stone⁹ and, while attractive as a concept, it

1 I am grateful for the generous help and encouragement of Simon Boyle and Begonia Filgueira even though I know that they do not share all of the views expressed in this paper.

2 C Cullinan *Wild Law: A Manifesto for Earth Justice* (Green Books Dartington 2002) (hereafter *Wild Law*) 80.

3 *ibid* 162.

4 *ibid* 166.

5 *ibid* 170.

6 *ibid*.

7 *ibid* 186.

8 *ibid* 117.

9 C Stone *Earth and Other Ethics: The Case for Moral Pluralism* (Harper New York 1987).

produces difficulties in differentiating between conduct that prejudices the river and that which does not. Clearly we would allow some abstraction from the river because part of the riverhood may be to provide a water source for creatures including humans. Equally at some point over-abstraction will jeopardise the river itself and cannot be permitted. However, where and how do we draw these boundaries? Similarly with discharges; they do not inevitably threaten riverhood so that all must be banned, since the regenerative capacity of a rapidly flowing river may cope with discharge in a way that is supported by nature. At some point, riverhood is threatened by discharge – but at which point? Although I will return to this point, for now it is sufficient to make the point that however attractive the concept of riverhood *in itself* it is insufficiently robust to determine the all appropriate interactions in relation to the river.

A second example concerns hunting.¹⁰ In this context the role of zebra-kind offers no protection to zebras against lions because part of their function is to provide nourishment for lions. Can a human hunter shoot a zebra? A bushman gets the seal of approval, but then we turn to the example of a hunter 'out to make some extra cash by shooting pregnant zebra mares in the hope that ... the foetus will be at just the right stage of development to yield a fluffy, brown striped pelt'. Unsurprisingly, this conduct is frowned upon as wasteful act 'by a person who regards wild animals as commodities'. But the use of this emotive, somewhat extreme example is unhelpful since it appeals to intuition that the bushman's conduct is acceptable and the hunter's conduct is not – even though both regard the zebra as a commodity. The moral basis of the distinction goes unexplained. Moreover, the example (again) leaves a host of questions unanswered. What if I rear an animal for its fur rather than shooting one in the wild? What if I rear it for meat? Or milk? There are many who would claim that all of these things are wrong. But Cullinan, judging by the bushman example, may not be one of them. It is hard to say, as the approval of the bushman killing for food is not explained. The point is that zebra-kind as a concept in isolation is not that helpful in determining the rights and wrongs of actions directed at zebras.

Finally there is the example, frequently cited in the book, of GM manipulation which issue is conflated with questions of the patenting and ownership of GMOs. There is no question that the exorbitant extension of patent rights to (say) natural compounds by courts in certain nation states is regrettable. So too, are the activities of biotechnology companies in seeking to patent or protect staple foods (such as basmati rice)¹¹ or use terminator genes to prevent plants being propagated, thus forcing the repurchases of seed. Nevertheless, these commercially dubious practices do not as such help determine our stance

towards genetic modification using recombinant DNA technologies.

That Cullinan opposes GM crops is not in doubt. They do not 'fit' with and contribute to the environment¹² and unlike indigenous organisms do not manifest an ability to enhance, but instead degrade the environment. Cullinan is not alone in his opposition to this technology and it is not hard to see that approval of the manipulation on natural plant species would not fit within a model based on Earth Jurisprudence. It transpires, however, that it is only the manipulation of crops using GM techniques to which Cullinan appears to object:

At some point early humans began consciously to direct the evolution of species of crops and domestic animals by breeding only from those that displayed the traits most beneficial to humans. However, this did not have a very significant impact on those communities and can be understood as a new form of symbiotic relationship.¹³

This seems a startling position to adopt. Cullinan is describing an activity pursued from an entirely anthropocentric position that is designed deliberately to reduce biological diversity yet is entirely permissible, and indeed is approved of, providing the mode of genetic modification does not employ particular technologies. Once again, the margins of Earth Jurisprudence are perplexing rather than enlightening.

Wild law or ecological modernisation?

This anti-technology stance is a significant issue in its own right. Juxtaposed against the lament in the Foreword of the book at the 'loss of soul and the related loss of life meaning' brought about by technologies are technocrats with faith in the regenerative capacity of those technologies. Time (and eventually bitter experience) may prove the technocrats wrong. Even in the face of a record of unremitting economic growth, present attitudes to climate change must provoke doubts about just how much faith is placed in the capacity for technological innovation. But for all that, ecological modernisation has become the dominant philosophical driver behind European approaches to environmental laws.

The concept of ecological modernisation is founded on the possibility of environmental improvement and enhancement through technological development. As such, it has been described as 'an optimistic message'¹⁴ and disavows any necessary tension between economic development and environmental protection. Central to the notion of ecological modernisation is the claim that technological progress delivers cost savings as well as

¹⁰ *Wild Law* 120.

¹¹ Largely struck down by the USPTO in August 2000 – see Binenbaum et al 'South-North Trade, Intellectual Property Jurisdictions, and Freedom to Operate in Agricultural Research on Staple Crops' (2003) 51 *Economic Development and Cultural Change* 309–316.

¹² *Wild Law* 126.

¹³ *ibid* 157.

¹⁴ I Massa and M S Andersen 'Ecological Modernisation – Origins, Dilemmas and Future Directions' (2000) 2 *Journal of Environmental Policy & Planning* 337.

environmental gains. For example, the claim would be that the introduction of a new manufacturing or industrial process, such as the use of flue gas scrubbers to curb air pollution, or the recycling of otherwise 'waste' heat, for example, ensures increased economic efficiency as well as minimising environmental degradation. Other change of a more fundamental and structural nature takes the form of 'industrial ecology'¹⁵ whereby shifts to information products and the use of ICT may allow economic growth while leaving a much lighter environmental footprint than the heavy industry that it replaces.

As an optimistic message, ecological modernisation may be contrasted with the gloomier prognosis of Beck's *Risk Society* thesis,¹⁶ although the two are sometimes linked.¹⁷ Cullinan does not cite Beck, but *Wild Law* could itself be seen as part of a (somewhat fragmented) social, sub-political form of environmental activism set in opposition to the technologies for which environmental benefits are claimed. Buttel¹⁸ argues that such movements fit with Beck's thesis of reflexive modernisation (the modern condition in which the social order becomes the object of its own forces and is forced to turn 'back on itself' to face problems of its own making). Indeed Cullinan's stance on biotechnology might illustrate this point. For Beck, post industrial risk is *manufactured* risk rather than that of *natural* hazards. Again, there are strong resonances with Cullinan's underpinning notion of a 'self-destructive war with Earth'.¹⁹ Beck sees little reason to offer solutions to the dilemmas of risk society, but it is clear that he would place little trust in technology, which is a source of risk rather than a solution to it. For Cullinan too hope lies in *societal* change rather than *technological* innovation.

However much one subscribes to this view along with Cullinan, it is important to understand that this is not the direction in which modern environmental law is headed.²⁰ The driving thrust behind legal approaches based on ecological modernisation might be said to date back to the German Environmental Action Programme of 1971²¹ which emphasised technological foresight in the hope of promoting longer term gains through process changes. The notion was one of creating a climate in which those best placed to develop and utilise the technologies might be encouraged to do so in an environmentally sustainable manner. Principles of prevention at source and of precaution were central to the programme. It is worth noting that ecological modernisation envisages solutions to

environmental degradation emerging from technological innovation. This fits with the wording of the precautionary principle (below) which demands that cost effective measures to curb pollution should not be postponed. From this viewpoint, technological developments will intervene to reduce environmental costs.²² Similarly, notions of prevention at source envisage process change to eliminate environmental impacts and find voice in notions of 'best available techniques' and integrated controls. Supported by market instruments such as tradable permits these approaches look to provide incentives for investment in environmental technologies.

Consistently with his view that humans dominate and control the environment rather than live in harmony with it, Cullinan must reject both the theory of ecological modernisation and its operational role in modern environmental law. Cullinan's call made time and time again is to develop 'a new vision of self-regulation for post industrial societies'.²³ This new vision is one of restraint and indeed constraint. We must be prevented from, for example, being able to dam a river. Cullinan rehearses well enough the historic failures of government to utilise such command and control systems to prevent environmental degradation and is not so foolish as to advocate this; self regulation is the preferred option for restructuring. The self regulation referred to constitutes an exercise of individual will made possible by our desire to govern ourselves through an Earth Jurisprudence consistent with the Great Jurisprudence – a set of laws that (inherently) govern the universe. I will reflect on our capacity to move in this direction below. What this section has tried to explain, however, is that *Wild Law* asks us to invest our faith in this process of self governance and to disinvest in and to discard much of modern environmental regulation because it is based upon notions of ecological modernisation that are destined to fail.

A note on the jurisprudence

The Great Jurisprudence mentioned above is set alongside Earth Jurisprudence. The latter would seem to be the product of humans, while the former is 'written into every aspect of the Universe'.²⁴ Earth Jurisprudence should be derived from and consistent with the Great Jurisprudence. But if the Great Jurisprudence is written into the universe, who is it that does the reading? In other words, the Great Jurisprudence cannot be perceived other than through the human lens, so that there are conceptual difficulties in knowing that Earth Jurisprudence is accurately derived from and consistent with the Great Jurisprudence. It will inevitably appear so. Anthropocentrism is difficult indeed to cast off – after all we are only human.

Not sharing the same spiritual leanings as Cullinan, I find these jurisprudential underpinnings difficult. This is

15 F H Buttel 'Ecological Modernisation as Social Theory' (2000) 31 *Geoforum* 57.

16 U Beck, *Risk Society, Towards a New Modernity* trans M Ritter (Sage Publications London 1992).

17 A P J Mol *The Refinement of Production: Ecological Modernisation Theory and the Chemical Industry* (Van Arkel Utrecht 1995) and see the discussion in FH Buttel (n15).

18 *ibid.*

19 *Wild Law* 19.

20 Since I am more timid than Cullinan in speaking of some 'World order' the remarks that follow largely confine themselves to European legal systems.

21 I Massa and M S Andersen (n15) and M Jänicke *State Failure: The Impotence of Politics in Industrial Society* (Pennsylvania State University Press Pennsylvania 1990).

22 S Boehmer Christiansen 'The Precautionary Principle in Germany' in T O'Riordan and J Cameron (eds) *Interpreting the Precautionary Principle* (Earthscan Publications London 1994).

23 *Wild Law* 56.

24 *ibid* 85.

especially true of the claim that rational analysis is not the only method of developing the jurisprudence. Indeed, in his section on the 'Demise of Natural Law' in Chapter 5, Cullinan is for once consistent in rejecting a natural law approach that at first blush might seem close to his thesis. This is because advocates of natural law would begin from the premise that it is derived from human reasoning. Interestingly Cullinan presents HLA Hart as a supporter of natural law on the basis that he argues for a 'minimum content of natural law'.²⁵ This seems somewhat misleading.

It is true that Hart rejects Austin's legal positivism, in terms of law as a threat backed by force, as capable of explaining the richness of law in terms, for example, of how law is recognised, interpreted or subject to change. In developing ideas about recognition, Hart considers natural law issues in the context of examining the purpose of law. In spite of Hart's elegant analysis of natural law in *The Concept of Law*,²⁶ however, the book is essentially a text on legal positivism. This is a somewhat crucial distinction. Natural law could never accept that whether or not something is law is a matter of social fact because the moral content of the law is a defining element of it. Classically for the natural lawyer: '*lex iniusta non est lex*'. This seems close to Cullinan's position in rejecting as valid laws that perpetrate environmental injustice. So wild law has a moral content, although the morality is not derived from some rule of reason but is somehow instinctively derived from the Great Jurisprudence. In spite of his denial, one is left with the impression that Cullinan is at H(e)art a natural lawyer without St Augustine's belief in God.

In many ways this is the kindest interpretation to give to the musings on jurisprudence. For all attempts to reject an anthropocentric stance, Cullinan is left with a problem, which is that we would ordinarily regard law as that normative domain within the social order that governs human conduct. Why have an Earth Jurisprudence if not to guide human behaviour? However, there are other competing domains within which human conduct may be ordered – including morality. One general task of legal philosophers such as Hart is to differentiate law from these other normative domains. This is what Cullinan never manages in *Wild Law*. If 'the proper province of human jurisprudence and law (is) the self regulation of human beings'²⁷ how do we differentiate this as law as opposed to morality or mere social convention?

This is not a purely theoretical issue. Humans do engage in processes driven largely by self regulation in every day life. Perhaps the most frequent example is by way of market exchange. In so far as we can gather Cullinan is dismissive of the work of markets:

The idea that legal rules designed to foster free trade ... should be treated on a par with obligations intended to preserve absolutely fundamental aspects of the Earth community is absurd and wrong.²⁸

²⁵ *ibid* 77.

²⁶ HLA Hart *The Concept of Law* (2nd edn OUP Oxford 1997).

²⁷ *ibid* 191.

²⁸ *ibid* 196.

Chapter 2 points to the significant disparities between rich and poor but thereafter there is surprisingly little on the whole issue of development, a surprising omission for someone writing out of Africa. But development is a tricky subject. Cullinan asserts that the disappointing progress following the Stockholm Declaration of 1972 just goes to show that we can't really leave the job of protecting the environment to governments. But, in no small part, one of the reasons why the early progress following Stockholm began to draw to a halt was the addition of developmental agenda by the time of Rio. We see from the Kyoto Protocol that it is proving difficult to embrace a common (but differentiated) responsibility. The developing world made it clear that the problem of global warming was a problem largely attributable to the developed world, which should assume responsibility for it. The lack of common responsibility in turn has granted some spurious legitimacy to those who would decry the structure as unfair or unworkable.

So when we begin to add questions of development to the environmental agenda issues become much more complex. Returning to trade, it cannot be the case that rules on environmental protection are obviously superior to rules on trade as long as people are starving. Only the ability of such people to utilise environmental resources to produce goods that can be sold at value will lift such people out of poverty. This is not to argue that present rules promote fair trade; that is a different issue. But as long as people starve to death it is difficult to make out the case that it is more important to protect the environment than to allow people to trade in those commodities generated by the utilisation of that environment. It may be that Cullinan lays aside questions of sustainable development because the developmental content seems hopelessly anthropocentric, but for many, and in spite of its lack of precision and clarity, a model based on meeting human needs for both this and future generations seems a clearer guiding principle than Earth Jurisprudence.

The problem of property

In his famous essay, *The Tragedy of the Commons*,²⁹ Garrett Hardin envisages a pasture open to all. I was reminded of this literature by page 74 of *Wild Law*. Cullinan speaks at this point of the failure of laws on fishing quotas because of a failure to accept that human government systems are ultimately subservient to the unyielding rules of nature:

We have not only forgotten to live in accordance with the rhythms of the planet, but we have also forgotten that doing so was once the chief purpose of human regulatory systems.

Cullinan's call to a shared purpose might evoke Hardin's idyllic vision of the pasture, except that, in Hardin's words,

²⁹ G Hardin 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

'the inherent logic of the commons remorselessly generates tragedy.'³⁰ As each cattle herder tries to keep as many cattle as possible on the commons, to realise the benefit of the additional animal, the pasture becomes overgrazed to the disadvantage of all. The problem is caused in part by the considerable positive benefit accruing from an additional animal in contrast to the negative utility of that additional beast which (on its own) does not seem great at all, making the choice of an extra animal entirely rational. Even if the danger of overgrazing is realised, forgoing the additional animal is not a rational choice for any single individual since the remaining herders will still overgraze, locking into a system of increasing the herd without limit even though the cattle graze on a limited resource. 'Ruin' says Hardin 'is the destination towards which all rush.'

In such a situation Cullinan's hope of self regulation 'in a manner that maintains the whole' seems somewhat utopian. We can place our faith in self restraint but this will demand that each and every herder subscribes and keeps to this, or we can look for some other solution. Daniel Cole has considered such solutions, which (importantly) may apply even if community self regulation is attempted.³¹ These may include the privatisation of the pasture (to one or to all herders) or the regulation of the commons (eg by someone, whether the community or government, licensing cattle to graze and thereby limiting their numbers). Cole makes the important point that whichever system is adopted it depends on the allocation of property rights. In all instances the tragedy is averted by the use of property rights. Property rights can be seen as 'unhelpful and destructive'³² or they may be seen as the *inevitable* consequence of an attempt to save humankind from its own nature that is to consume past the point at which there is utility in so doing.

As stated earlier, Cullinan ultimately fights shy of abandonment of property regimes as any immediate move would cause chaos. Might it not be the case that these regimes are already ordering the chaos that would otherwise exist? This is a highly significant question, because if Hardin and Cole are correct then it is not a case of it being difficult to get to where Cullinan wants to go because of where we start out;³³ it is more the case that he is headed for the wrong destination. Rather than allowing that property rights smack of a regime in which 'it is right and proper to dominate all aspects of the Earth community'³⁴ it may just be that the job of property rights is as an essential legal tool to produce order within that Community.

Conclusion

It is hard to read Cullinan's *cri du coeur* and not empathise with the objectives of re-orientating our values to re-

establish ecological contact and halt the degradation of the planet. Above all we must believe, as he undoubtedly does, that the way in which we behave is important and can influence like-minded people towards ecological responsibility. Yet changing behaviour is a rather different proposition than changing law, and a book that proposes a (novel) legal system sets itself the Herculean task of mapping out its domain. Ultimately *Wild Law* fails to do this, and this should come as no surprise. Legal systems regulate human conduct, so, beginning from a standpoint which rejects anthropocentrism as a guiding construct, Cullinan falls into immediate difficulty. To say that we could and should live in greater harmony with nature and that this might be a guiding principle in terms of our behaviour is admirable and constitutes a code that, hopefully, many people inspired by the book will choose to follow, but it does not constitute a legal regime.

Cullinan accepts this in the concluding chapter by reining in ambition to the point that we should reorient our governance systems by establishing some laws that are 'wild'.³⁵ A little earlier in the book, however, we read that 'This is not the place to attempt a proper assessment of the extent to which proto wild law provisions already exist.'³⁶ The preceding paragraph discusses environmental impact assessments of projects as a possible example of 'wildness breaking out.' Of course whether this is so or not may depend upon how one handles questions of cost and benefit, for as the author acknowledges elsewhere such processes have the capacity to sanction longer term environmental loss for short term economic gain. Few impact assessments approach the questions and answers in the way that Cullinan would: does this project deny riverhood? If so it cannot proceed. Many are moving, however, to ask questions about the sustainability of projects. Should we reject this approach because it is based on the needs of the *human* population as seen through the lens of intergenerational equity? Or should we embrace it as a positive evaluative tool? Call me pragmatic or anthropocentric but I believe this to be a powerful force, and we see it beginning to sweep through governmental policies in a more holistic manner as sustainability criteria – in the manner of the Cardiff process – is used as a tool to review different policy sectors and integrate the environment into many realms of governance.

Progress is frustratingly slow, but Cullinan is hardly offering immediate answers either. There is not necessarily much wildness about sustainability assessments, which follow ordered and painstaking approaches. But while the wilderness may be an exciting place it can be hard to find your way out of. Ultimately, the call of the wild is hard for a lawyer, trained to deal with order, to hear. Indeed the final and most intriguing question about the book appears to be: Is 'Wild Law' an oxymoron?

³⁰ *ibid.*

³¹ D H Cole *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* (CUP Cambridge 2002).

³² *Wild Law* 123.

³³ That is, that we can't move to immediate abandonment of property rights because of short term difficulties in re-ordering interests in land.

³⁴ *ibid.*

³⁵ *ibid* 204.

³⁶ *ibid* 189.

Wild Law – the theory

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Cormac Cullinan's basic philosophy of wild law

Cormac Cullinan's ideas, as presented in *Wild Law: A Manifesto for Earth Justice*,² have been described as 'provocative and groundbreaking',³ a 'milestone'⁴ and 'radical'.⁵ They are certainly extremely ambitious; it is not often that you read a book proposing a complete rethink of governance, and not just for one society but for the world as a whole. At the heart of his concerns is the distance that seems to exist between humans and the rest of the living world, so he is looking for a reform in governance that places humans in their ecological context.

Cullinan's book is founded on his perception and understanding of the state of the living world and the extent to which this is being determined by human societies. His starting point is that there is an on-going destruction of life on Earth and human societies are largely responsible for this destruction. The thrust of *Wild Law*, then, is that it is necessary to bring about a fundamental change in the way societies work in order to reverse this downward spiral. However, the book is much more than simply a description of ecological disasters and an analysis of their causes. Cullinan adopts a deeply personal approach to the problem, which reflects his belief that the emotional and spiritual side of life cannot be separated from the intellectual and professional side. In other words, the 'book is about issues at the core of who we are as individuals and as a species'.⁶ His basic premise, then, is that humans are degrading the Earth and that we cannot leave it to governments to safeguard the Earth because governments are creatures of flawed legal systems – which are outmoded and take no account of the non-human constituents of the world.

There are several big assumptions behind this view of the world, namely: the world is being destroyed; the cause is human action or inaction; individuals would like to see this changed; inappropriate systems of governance prevent this change occurring. Cullinan then goes on to assert that the way to address this problem is to look to nature itself

for assistance in shaping a new jurisprudence. He acknowledges that, if this is to happen, there will need to be some radical re-thinking but looks to examples provided by societies of indigenous peoples as evidence that this will be possible.

This article addresses three aspects of Cullinan's hypothesis in turn. First, I will look at whether the assertion that we are heading for disaster is the only conclusion to be drawn from current evidence about the state of the global environment. I will then go on to consider Cullinan's solution to the problem by attempting to analyse his notion of the Great Jurisprudence and Earth Jurisprudence and finally I will make some personal observations on the practicability of his manifesto. In doing this, I will look briefly at how our present environmental jurisprudence stacks up against his vision.

Before I begin, however, I must issue a word of warning. My critique of the *Wild Law* philosophy comes from my perspective as an academic scientist and environmental lawyer, with experience in shaping and implementing environmental policy. I am particularly interested in Cullinan's understanding of human beings as part of nature; his perspective on the impact of humans on nature; and the characteristics of Earth rights. Because of my background, however, I may not be able to bring the objective analysis to Cullinan's ideas that I would like to. He believes that accomplishing the huge societal changes he thinks are necessary 'will take far more than the cold, hair-splitting intellectualism and cynicism so beloved by many academics, professional experts and self-styled "pragmatists"'.⁷ I admit to most of these things (perhaps not the bit about being cold!). I like to think of myself as an intellectual. Over the years, I have developed a degree of cynicism and pedantry that I consider wholly appropriate. I have shamelessly exploited these skills both in my academic life and as a professional expert on government committees and in consultancy. I also own up to being fully wedded to the notion of pragmatism, if by this, he is referring to the art of the real. It may be then, that he and I see the world rather differently! My training as a natural scientist exacerbates the differences. Cullinan writes a lot about the human species and its position in the biosphere but he does so in an unashamedly emotive and personal way. There is nothing wrong with this but equally, my personal way must inevitably encompass my thinking on the biology of the *homo sapiens* that may lead to a conflict of philosophies.

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2 C Cullinan *Wild Law: A Manifesto for Earth Justice* (Green Books, Dartington, 2003).

3 M von Hildebrand, COAMA, coordinator of COAMA as quoted in frontispiece to Cullinan *Wild Law*.

4 Vandana Shiva, President of the Research Foundation for Science, Technology and Ecology, and Martin von Hildebrand as quoted in frontispiece to Cullinan *Wild Law*.

5 'Wild Law shows just how radical we now need to be' – Jonathon Porritt, Director, Forum for the Future as quoted in frontispiece to Cullinan *Wild Law*.

6 Cullinan (n 2) 19.

7 *ibid* p 19.

Heading for disaster?

Cullinan refers to ‘the relentless destruction of life on Earth and the accompanying impoverishment of our inner selves that is so characteristic of most societies today.’⁸ This statement is highly subjective. That the natural world is undergoing a pattern of change unprecedented in human history is undeniable. Whether this amounts to a ‘relentless destruction’, and thus a ‘bad thing’ is more questionable. It depends on your view of extinction.

My view is based on my understanding of humankind as a species and a consideration of the basic attributes that have led to its evolutionary success and which will contribute to its eventual demise. The single most fundamental attribute is the ability to change the environment in which we live. It is an inevitable consequence that such changes will impact other species. In some cases, the extent of the change may be so great that a species may not be able to adapt to the changing circumstances and, as a result, its numbers will decline until it eventually becomes extinct. From the perspective of the individual at the tail end of a species’ ‘life’ this is, perhaps, unfortunate but we must beware sentimentality – a sure sign of anthropocentric thinking. On the positive side, the loss of one species makes room for another; evolution is, after all, only a product of change with time.

It is possible to model the ‘life cycle’ of a species mathematically.⁹ The model predicts that species increase in number rapidly, reach a plateau, and then decline just as rapidly, although the rate of change near the birth and death of a species is much slower, with a few individuals lingering on. It could be that the human species is about to reach its pinnacle. At the beginning of the nineteenth century there were about 900 million people. By the beginning of the twentieth century this number had doubled and now there are an estimated 7000 million of us.

We know from geological science that the Earth is not static and that ecosystems, habitats, species compositions and even species are constantly in a state of change. It is a fact of life that species come and species go. Sometimes many species go over what seems to be a very short period of time, in geological terms. As shown in the following table, a number of these so-called mass extinctions have been identified in the fossil record. The effects on the Earth’s biosphere appear to have been truly enormous. So far these appear to have been caused by catastrophic events, such as impacts from meteorites, upsetting the dynamic equilibrium of life on Earth. Cullinan’s fear is that we, as humans, are setting the next one in motion. This fear may have some grounding in fact. There is plenty of evidence that *homo sapiens* has brought about the extinction of species. Boulter¹⁰ has amassed a large body of evidence on the extinction of species from which he concludes that the rate of extinction is accelerating to such an extent that we might, indeed, be about to enter

another period of mass extinction, this time caused from within the system by the human species.

Mass extinctions

Permian/Triassic (245 million years ago)

- 90% marine animals
- 70% terrestrial vertebrates
- 90% land plants

K–T (65 million years ago)

- 100% dinosaurs
- 100% ammonites

So far I have tried to stick to the scientific facts and predictions and avoid subjective references to disasters. As Boulter points out, evolution can only happen in the face of changing circumstances. If any large groups of organisms reached a steady state in a stable environment, there would be no evolutionary change because there would be no need for adaptation. If a mass extinction had not occurred 65 million years ago, mammals may not have become the dominant large animals and humans may never have existed. From the human perspective, therefore, this so-called K-T¹¹ catastrophe was a ‘good thing’. This, I feel, would not accord with Cullinan’s understanding of the situation.

His thinking starts from the notion that a human-induced mass extinction (‘relentless destruction’) would be a ‘bad thing’. He might deny it, but I believe this is an anthropocentric viewpoint. He is clearly speaking from a human perspective as illustrated by the way that he links the destruction with human emotional impoverishment. He is highly critical of ‘those who believe that the ... destruction ... is all part of a natural evolutionary process ... [that] will all sort itself out eventually’.¹² He acknowledges that they might be right in the long term but is appalled at the prospect of standing back and doing nothing in the confident belief that everything will come good in the next thirty million years or so.

I share Cullinan’s unhappiness at the loss of biodiversity that human activity is inflicting on the world; to me it is a negative aspect of ‘modern’ life and one I would dearly like to see reversed. But let’s play devil’s advocate for a moment. Cullinan wants us to place humans in their proper ecological setting. From this perspective, his ‘relentless destruction’ might be better described as a form of spring-cleaning that makes way for new and different patterns of biodiversity. The fact that it is not so described suggests to me that, whatever we may claim about humans being part of nature, we do not wholly adhere to this notion. There is a

⁸ *ibid* p 19.

⁹ For further details of the science of extinction, the reader is referred to M Boulter *Evolution and the End of Man* (Columbia University Press New York 2002).

¹⁰ *ibid*.

¹¹ Cretaceous/Tertiary.

¹² *Wild Law* 38.

conundrum here. Cullinan wants us to base our future systems of governance on the rules of nature as manifest in the universe but he does not seem ready to accept that everything that we do must, therefore, be natural. To explore this conundrum further, we need to look in a little more detail at the evolutionary behaviour of *homo sapiens*. First, though, I shall turn to Cullinan's ideas for heading off the disaster.

A Manifesto for Earth Justice – The Great Jurisprudence and Earth Jurisprudence

Cullinan believes that nothing short of a radical change in the way human societies work will halt this accelerating race to destruction. He is particularly concerned at the dominance of corporations over individuals and sees this as evidence of, and symptomatic of, our remoteness from the rest of the natural world. Cullinan is proposing a new legal philosophy. This philosophy is firmly rooted in the need to consider humans as a part of a living universe. Most critically, he wants us to see the Earth itself as the most important aspect, moving away from the anthropocentrism which dominates jurisprudence today.

The logic of Cullinan's argument can be summarised in the following table taken from his book:

1. Humans are integral and inseparable from the Earth system;
2. so social systems are inextricably embedded in the Earth Community; and
3. governance must be consistent with this context because otherwise
4. human fulfilment is unattainable.
5. Transforming societies and legal systems requires a jurisprudence that recognises these points and to develop this
6. we need wild laws to foster our connection to nature and
7. social structures based on natural communities for their effective implementation.

Cullinan's Manifesto for Earth Justice centres on the Great Jurisprudence, a set of laws that govern the universe, and Earth Jurisprudence, legal philosophies developed by humans but derived from, and embedded in, the Great Jurisprudence.

Cullinan has difficulty in describing what he means by the Great Jurisprudence but it is clear that he is referring to something that is inherent within, and of, the universe itself. At one stage he refers to it as 'the "laws" or principles that govern how the universe functions. These [laws] are timeless and unified in the sense that they all have the same source.'¹³ This source would appear to be the universe itself. Later, he considers that 'it is better understood as a quality of the universe rather than as a rule or principle that governs it.'¹⁴ It would seem that he is referring to something that would be recognisable to natural scientists,

especially physicists for whom the rules of the universe provide a foundation for the development of their subject. These are not rules to be obeyed or disregarded; they are fundamental blocks in the template for the universe as these are perceived and understood. In fact, then, they are nothing more than descriptors of what 'is'. Cullinan, however, seems to imply that their status as part of a universal foundation equip them with some special property that enables us to derive rules for human behaviour from them.

Earth Jurisprudence, in contrast, refers to legal philosophies developed by humans. Cullinan states that 'to a large extent [these are] derived from, and consistent with, [the] "Great Jurisprudence".'¹⁵ In the sense that it is not possible to do anything that goes against the fundamental rules of the natural world, it may be true that Earth Jurisprudence could be consistent with the Great Jurisprudence and could even be derived from it; but this assumes that we are able to understand the Great Jurisprudence sufficiently well to be able to do this. Any scientist will tell you that a theory is only adhered to pending further evidence to disprove it. It is important to remember that our understanding of the way the universe works, and hence the nature of the Great Jurisprudence, will be constrained by the limitations of the human intellect. Nevertheless, the idea is clear enough. We should model our laws on the world in which we live and not treat human society as somehow outside and remote from the rest of the world. This is a premise that I think most environmentalists would adhere to and most environmental lawyers would argue they were working to achieve.

The idea of deriving an Earth Jurisprudence from the Great Jurisprudence bears comparison with one of the oldest legal philosophies – natural law. At first sight, the similarities seem obvious. The classical doctrine of natural law is based on the existence of a body of law – natural law – that is universal and immutable. It has been described as a higher law against which the morality of 'ordinary' laws can be judged. This higher law is discoverable by humans through a process of reason. Cullinan is somewhat dismissive of the doctrine of natural law. He argues that the inherently anthropocentric flavour of natural law as currently conceived by writers such as Hart and Finnis¹⁶ makes the debates over the validity of the doctrine seem rather artificial. From my perspective, however, the similarities are greater than the differences. Both philosophies acknowledge the existence of a higher 'natural' order and both argue that the 'rightness' of human laws can in some way be assessed against this higher order. Cullinan does not have any real sympathy for the natural law doctrine because of its anthropocentric bias. Yet his Earth Jurisprudence is made by humans and, arguably, must be made for humans. The issue here is the extent to which anthropocentrism can really be avoided.

¹⁵ *ibid* 84.

¹⁶ For a useful summary of these approaches see J W Harris *Legal Philosophies* (2nd edn OUP 1997). See also, H L A Hart *The Concept of Law* (2nd edn OUP 1997) and J Finnis *Natural Law and Natural Rights* (OUP 1980).

¹³ *ibid* 84.

¹⁴ *ibid* 84–85.

However, Cullinan does have a lot to say about the laws of nature – and how we relate to them. He is concerned that the laws of nature (as distinct from natural law but presumably broadly equivalent to Earth Jurisprudence) apparently have little relevance to human beings today and that our legal philosophies deny the need to take account of any considerations outside of human society. He urges us to acknowledge the inherent knowledge of the Great Jurisprudence that is within us and which, unlike natural law, can be grasped through the emotions rather than through reason. Acknowledgement of the characteristics of the Great Jurisprudence has the following implications for the development of the Earth Jurisprudence:

- the ultimate source of jurisprudence and law rests beyond human control
- human jurisprudence is therefore embedded in the Great Jurisprudence
- human laws and governance systems must be designed to promote behaviour that contributes to the health and integrity of the whole Earth
- we must re-evaluate our desire for uniformity in deference to self-regulating systems.

The question is, does recognition of this higher order, whether in the form of the Great Jurisprudence or natural law, actually help us shape a system of laws and governance that will promote preservation of the Earth's environment rather than the self-centred anthropocentrism Cullinan abhors. Critics of natural law have argued that it does not. One line of thinking – non-cognitivism – suggests that this is because there is no causal link between how the world *is* and what we *ought* to do. Another school of thought – legal positivism – says that there is no essential moral content in laws; they are simply what we make them. The link between Cullinan's Great Jurisprudence and Earth Jurisprudence is susceptible to the same criticisms but for different reasons. There may be a deep-seated inherent understanding of the Great Jurisprudence in the human psyche but does this mean that it can be drawn upon to shape human laws? Even if the Great Jurisprudence includes 'ought' type rules as well as simple descriptors, how can these 'oughts' be translated into human laws? Some understanding of the nature of human behaviour is needed in order to address this question.

Is Earth Jurisprudence a practicable alternative?

The central assumption in Cullinan's philosophy is that human beings are, first and foremost, a species. It follows that the laws of natural selection will apply to humans just as for any other animal. However, *Homo sapiens* is different from other species because we are sentient beings. Unlike other animals groups where complex behaviour patterns can be accounted for by genetically determined innate responses, we are equipped with a conscience and free will. There is a continuing debate over the basis of human behaviour. At one extreme, human behaviour is explained

in religious terms encompassing notions of moral and ethics; at the other, human behaviour is, indirectly at least, determined by our genetic makeup. The difference is important when it comes to assessing whether society can be redirected in terms that conform to the Earth Jurisprudence.

If *homo sapiens* is nothing more than another species of animal, it follows that our entire sphere of activity is constrained by what is biologically possible for us. Just as our physical features are shaped by our genetic makeup, so too our potential repertoire of behaviour is set down in our genes. It is important to note that this assertion does not provide a justification for behaviour that others might find morally reprehensible; it says nothing more than that we are equipped with a template from which our behavioural traits are developed. We are 'lucky' in that the genetic blueprint for our behaviour has provided us with a phenomenal intellectual potential; not only can we manipulate and change our environment but also we do so with free will and not according to some predetermined pattern. The result is the adaptive flexibility that typifies human behaviour.

Some evolutionary biologists have suggested some basic behavioural traits that are innate features of the human psyche. For our purposes, the most important of these is our supposed inherent selfishness, and the aggression that is associated with it. Boulter believes that this trait, coupled with our ability to change the environment, is inevitably leading to extinctions. Because *homo sapiens* is a part of the Animal Kingdom, it follows that human beings themselves might face extinction. That extinction would be a natural event in Earth history. Darwin, in his description of the process of natural selection did not talk of progress but adaptation. But once the notion that different animal groups could be traced back to common ancestors gained acceptance, scientists began to draw up 'family trees' demonstrating apparent degrees of relationship. *Homo sapiens* is at the top of one branch of the tree. What we fail to acknowledge is that every living species is at the top of its own branch; there is nothing in the theory of natural selection to justify a hierarchy of fitness. Boulter puts this idea particularly well:

All life and all environments changing together are part of one large self-organising system. As we are part of it ourselves, it is particularly difficult to recognise it and see how it works. The very recognition of such a single system does help our understanding of evolution. It means that we should adapt a philosophy that does not place humans at the peak of a pinnacle.¹⁷

The fact that a species exists today is evidence enough that its individual members are sufficiently well adapted to their world to be able to survive. However, natural

¹⁷ M Boulter (n 7) 162. Note the reference to a single self-organising system. This is not a direct reference to the Gaia Hypothesis as such, but Boulter's thinking is certainly in tune with the ideas behind Gaia.

selection is not predictive; it is simply adaptive. Therefore there is nothing to suggest that a species that is well adapted today will remain so tomorrow – even if it has existed for thousands or even millions of years. It is possible then, that the behavioural characteristics that account for the evolutionary success of *homo sapiens* to date may not be sufficiently adaptable to meet the changing circumstances brought about by our ‘success’ at manipulating our environment and increasing the size of the collective human population.

If it is true that human behaviour, like the behaviour of any other animal, is as much a part of the biological make up of the species as any physical attribute, this might go some way towards explaining why humans do, or allow others to do, things which are clearly not beneficial to them in the long term. True, the pattern of behaviour is susceptible to change and influence by environmental factors (the nature – nurture argument) but the ability to respond to environmental conditions must, itself, be built in to the genetic blueprint. One classic example of a pattern of detrimental behaviour is ‘The Tragedy of the Commons’ as so eloquently expounded by T G Hardin back in the 1960s. Applying Hardin’s thinking to the problems surrounding the commercial exploitation of marine fish in international waters, we see that time after time fish are over-exploited to the point where stocks must inevitably crash. Individual fishing units (individual trawlers, fleets, nations – it doesn’t matter what the unit is) carry on taking fish even when they know that their actions will result in fewer, or even no, fish in the future because if they don’t take the fish, someone else will. One of the functions of society is to apply controls that ensure the greater good – of the society as a whole – over individual aspirations. As Cullinan eloquently relates, our systems of governance have failed to achieve this objective time after time. A telling recent example would be our collective failure to address the impact of global warming despite an increasing body of highly persuasive empirical evidence. As George Monbiot¹⁸ observes, we simply cannot accept that climate change will happen unless we do something very drastic indeed.

There is also much talk in *Wild Law* about humankind going against nature rather than acting in tune with it. Cullinan wants us to act in tune with our nature and assumes that we are not at the moment. The arguments above, however, assume that humankind can do nothing but act in tune with our environment. Like all animals, we are biologically programmed to behave in ways that increase our likelihood of survival and the survival of our family. We have free will, yes, but we can only exercise this in accordance with this basic survival drive. Unfortunately, there does not seem to be anything in that makeup that looks to the survival of the species; we are content with protecting our short-term interests.¹⁹ It may even be the

case that, as Monbiot²⁰ suggests, we are living in a dream world created by the here and now and project this dream world forward as our future.

Turning to a cultural or religious basis for human behaviour does not help the situation. The emphasis is on the individual and his or her ability to lead a good life with the prospect of a good afterlife. Because humans are vested with some form of ‘soul’ they are elevated above mere animals. The religious doctrine known as the Great Chain of Being describes the living world in terms of a scale of life forms progressing from the ‘lower’, more primitive, through to the ‘higher’ life forms. Humankind, of course, is at the top of the scale. The traditional Judaeo-Christian view of the world, as described in Genesis, is extremely anthropocentric. It emphatically sets humankind out as separate from, and superior to, the rest of the living world. At its best, humankind’s separateness leads to the notion of stewardship over other living things; at its worst, it is a justification for exploitation without thought. A more cynical view of humankind is illustrated in the following definition:

Man, n. An animal so lost in rapturous contemplation of what he thinks he is as to overlook what he indubitably ought to be. His chief occupation is extermination of other animals and his own species, which, however, multiplies with such insistent rapidity as to infest the whole habitable Earth and Canada.²¹

It is hard, even for Cullinan, to escape anthropocentrism. One of his concerns is how we deal in legal terms with non-human species. He writes interestingly and thoughtfully on the subject of animal rights but he cannot avoid the inevitable conundrum of how the rights of other species can be taken into account without anthropocentrism. Cullinan is well aware of the problem and talks in depth of the need to ensure that our species does not infringe the rights of another member of the Earth community. He provides some interesting insights into the ways in which different societies try to establish relations with other species and with non-living elements of the environment. It is not clear to me, however, whether these insights will enable us to develop laws that provide the level of protection that Cullinan desires. The fact that a group of indigenous people is able to communicate with the souls of the dead, for example, does not help me understand how to construct laws.

Cullinan’s distrust of present systems of governance leads him to the conclusion that the solution lies with the individual, or rather groups of individuals. In a nutshell, he sees a need to ‘galvanise our collective wills to act, engage emphatically and use all our imaginative and other powers

18 George Monbiot ‘Climate change: a crisis of collective denial’ (2005) 17 ELM 57.

19 Interestingly, this does not mean that we do not look forward into the future at all. As Barbara Adam points out, the desire to leave a lasting monument as a legacy of ourselves, presumably as an attempt to achieve a sort of proxy-immortality, has a long history; witness, for

example, the pyramids. Barbara Adam, Ethics and Radioactive Waste – CoRWM Ethics Panel. ‘What did the ethicists think?’ September 2005 video recording available at www.corwm.org.uk.

20 Monbiot (n 16) 59.

21 Definition taken from Ambrose Bierce *Devil’s Dictionary* as cited by Steven Pinker in *How the Mind Works* (W W Norton and Co Inc New York 1997) 186.

both to conceptualise the future that we want and to find ways of bringing it about.²² He believes that prospects for successful governance are increased if the governance system is designed to take account of the attributes of what is being governed. Our system of laws for governance does not protect the Earth from destruction because that is not its purpose. We need to go through a paradigm shift to a new understanding of ourselves as part of the Earth and develop governance systems imbued with this new understanding. The stumbling block comes with how you actually make the laws that will enable society to work this way. If we could start from scratch it might be possible but adapting our present complex and complicated systems of governance – now largely based on a free market philosophy – is more problematic. Re-shaping an entire society is a difficult task to contemplate.

Cullinan seems to hold a composite view of humankind as, on the one hand a species – *homo sapiens* – albeit on the other one with special attributes that justify the imposition of a responsibility to protect the world. He repeatedly makes the point that mankind is suffering because of a failure to acknowledge our biological roots and our mutual need for the rest of the biosphere. At the same time, however, he appears to be endowing humans with a magic wand that will enable us to solve the world's problems if only we put our mind to it. Despite all his pleas for a return to the natural order, he repeatedly singles the human species out for special treatment. This point is best illustrated by an example taken from the text of *Wild Law*:

The starting point for humans is the principle that each member of the Earth Community should be at liberty to fulfil its role. ... In order for this liberty to exist, humans must have no right to prevent another member of the Community from fulfilling its role. This means that we must establish governance systems that prevent humans from being able to dam a river to the extent that it can no longer fulfil its role in an ecosystem. ... it does not mean that we must ensure that ... a species continues ... to exist. Extinctions also occur without human intervention. It is another matter, though, if we create the conditions that are likely to result in extinction, since we would then clearly have restricted or extinguished the freedom of the species in question to play its role.²³

Leaving aside the observation that the whole notion of roles has a teleological overtone that implies the operation of some undefined mechanism beyond natural selection, why is it that Cullinan imposes this responsibility on the human species to limit its actions in ways that cannot apply to other species? For this to work, in scientific terms, there would need to be some extra mechanism working in the human animal.

By his own admission, the author is not a scientist; his background in the Humanities shines through. In my view,

therefore, he fails to understand that much of what he dislikes about the way that human societies work can be traced back to behaviour that could be explained in terms of natural selection. He also holds a rather romantic view of the world in pre-industrial days when humankind was in greater harmony with nature.

By his own admission, achieving the radical changes necessary to achieve Earth Jurisprudence will require a fundamental and radical change in governance. In the meantime, it is worth considering whether our present laws are really as inadequate as Cullinan suggests or whether there is some hope for the future to be found in the existing regimes.

The basis of present environmental jurisprudence

The Brundtland Report defined sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. This, of course, is openly anthropocentric in that it puts human beings at the centre; the purpose of taking action is to improve the lot of humankind. This would, presumably not accord with Cullinan's philosophy because it fails properly to put human society in the wider environmental context. On the other hand, it is probably more workable. Laws regulate people, not animals, not ecosystems, not the universe. Therefore an overall objective that focuses on human behaviour may not be such a bad thing.

Of course, interpretations of what sustainable development means in practice are many and varied and there is no simple legal interpretation. As with most soft law, the detail is left to the circumstances. The UN Conference on Environment and Development (UNCED)²⁴ developed the concept further and was supposed to move towards integration of development with environmental consideration. The Rio Declaration,²⁵ which came out of UNCED, offers some hope for Cullinan; at least it mentions the importance of involving indigenous peoples. However, the main principle is the alleged right to development and this colours all the environmental components. Furthermore, very little came out of UNCED or its follow up, the World Summit on Sustainable Development (WSSD),²⁶ to help shape appropriate laws. Even the treaties decided at UNCED lack detail. The Climate Change Convention²⁷ is nothing more than a framework. The ongoing problems with the Kyoto Protocol²⁸ sadly provide a very good example of our failures to get priorities right. The underlying objective, of reducing the threat of global changes resulting from anthropogenic changes to the atmosphere, has been tempered by concerns over

22 Cullinan (n 2) 20.

23 *ibid* 118–9.

24 Held at Rio de Janeiro Brazil June 2002.

25 Declaration of the UN Conference on Environment and Development UN Doc. A/CONF.151/26/Rev.1.

26 Held at Johannesburg South Africa June 2002.

27 Framework Convention on Climate Change (1992) 31 ILM 851.

28 Protocol to the Framework Convention on Climate Change (Kyoto Protocol) (1997) 37 ILM 1436.

economic development and disputes over who should bear the brunt of the burden – this latter being an example of the tribal mentality where each group fights for its own.

Even the Convention on Biological Diversity,²⁹ the most ecologically focused output from UNCED, regards the living world as a common concern of humankind³⁰ – again, a strongly anthropocentric approach. Furthermore, its objectives are tempered by economic and practical constraints requiring contracting parties to act only within their means.³¹

Nevertheless, the outcomes of these big international environmental conferences have led to major changes in the way governments think about the environment. Perhaps the nearest we can get to Cullinan's ideas is environmental impact assessment. In essence, it seems that this is what Cullinan is driving at: that we need to think about our decisions in the broader environmental context. Unfortunately, of course, the way the law is shaped and implemented fails to achieve what Cullinan wants. For a start, the law only requires an environmental impact assessment where there is a likelihood of a significant environmental effect. Secondly, the practice still leans heavily towards supporting the development but accommodating the environmental needs. Exactly *not* what Cullinan is seeking.

The same arguments apply to the precautionary principle. Again, there is a requirement for a degree of environmental damage to be envisaged before the principle is invoked. Cullinan's philosophy would surely obviate the need for the precautionary principle because it would be a fundamental basic building block of all laws and decision-making processes.

Conclusions

Our present environmental laws do little more than serve as a reminder that there is a wider world out there. When it comes to it, the chances are that developmental pressures – be it the need for homes, infrastructure, or even profit – almost always take precedence. This is why we legislate for protected areas. It is only in this way that we can tip the balance slightly towards the environment. Even our most strongly protected areas, however, are not immune from human interference.

It seems to me that the key difference between what Cullinan wants and what we already have is the time element. Cullinan's vision looks at the world as a whole and sees it extending forward into the future and back into the past. We tend to act for short-term gains and benefits. Even when we take care of our environment, we fail to take account of the fact that it is dynamic. The early legislation on nature reserves, for example, referred

to preservation. While this wording has now changed to conservation and protection, we do not seem able to plan for the future. There is a lot of evidence in support of this contention. The most obvious is our slow response to climate change.

Homo sapiens has remarkable powers of adapting to its environment that extend to being able to change that environment to meet its own needs. This has enabled humans to establish societies in an incredible range of environments and therefore display an adaptability that is surely unique in the animal kingdom. However, it is equally possible that these same traits might lead to the eventual demise of the species (and, no doubt, many others on the way) because it is unable to check its own success. Cullinan refers to the wisdom of indigenous peoples. Undoubtedly, these human societies appear to be better attuned to their environment – show better ecological adjustment if you like – than western society. It may well be that the future of the human species rests with these peoples. The rest of us, following the road started by industrial development, are running so fast to keep up with progress that we have lost touch with our ecology. In this I agree with the author. However, I question whether it is possible to turn round and go back down the road – maybe it is a one-way-street.

I appreciate that many, possibly most people will not agree with this analysis. Most people have more faith in humanity. The majority are probably technocrats at heart believing that technological advantages will get us out of any environmental fix from an impending flu pandemic to global warming. The rest, and I would put Cormac Cullinan in this category, put their hopes on the development of deeper ecological understanding and a society that knows its place in the world. I fear, however, that at the heart of Cullinan's philosophy lies a contradiction that he is either unaware of, or cannot resolve. Stated simply, he wants us to regard human beings as part of a larger natural world but at the same time wants us to act against our nature and display a degree of altruism towards the rest of the biosphere.

In summary then Cullinan's book has given me great cause for thought. I have tried to look at the world in the way that he does. In so doing, I have concluded that *homo sapiens*, the species, may be neither perfect nor even perfectible. It is a fundamental impossibility for us to go against nature because nature is all there is – everything we do must, by definition, be natural. I accept that our actions may be the cause of a mass extinction and that we might well bring down many other species in the rush towards our own demise but this is where I lose sympathy with Cullinan's thinking. I question whether this 'destruction' would be a disaster and, furthermore, I question whether it would be a breach of the Great Jurisprudence to seek to resist it.

29 Convention on Biological Diversity (1992) 31 ILM 818.

30 *ibid* preamble.

31 The phrase 'as far as possible and as appropriate' is included in many articles of the Convention and is an embodiment of the 'common but differentiated responsibilities' of States.

Finding our way to a viable future: A response to Professors Warren and Lee

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The debate¹

There is an old joke about city folk lost in the countryside who stop to ask a local person the way to the nearest big town. After several abortive attempts to give them directions, he shakes his head and concludes ‘Ah no – you can’t get there from here’. I was reminded of this story when asked to respond to the papers on *Wild Law* prepared by Professors Lynda Warren and Robert Lee for the UKELA conference on 18 November 2005. While Warren, Lee and I agree broadly that our current governance systems are not protecting the environment adequately and that our desired destination is a world in which humans live in an ecologically sustainable manner, we disagree about whether or not we can get there from here, what direction we should head in, what our compass should be, and what vehicle we should use to get there. Warren appears to believe that we are in a one-way street leading to extinction, both seem to support using anthropocentric formulations of sustainable development as a compass, and Lee suggests that property rights may be a useful vehicle rather than an obstacle.

In *Wild Law* I express my belief that the governance systems of the dominant contemporary cultures will continue to fail to prevent environmental destruction for as long as they are founded on a jurisprudence based on false premises and characterised by a mechanistic and dualistic understanding of the natural world and our place in it. As I see it, these false premises include the perception that humans are separate from natural systems, that we are superior to all other species, and that we, together with legal persons such as companies, are the only subjects in a world of objects. I also argue that establishing governance systems that are up to the challenge of regulating human behaviour in a manner that will secure a viable future for humans and other species, will require discarding these false premises and re-orienting our governance systems so that their primary purpose is to ensure that we act as ‘good citizens’ from the wider perspective of the community of life on Earth rather than exclusively from the narrower human perspective.

Professors Lynda Warren and Robert Lee both express reservations about the feasibility of this project and suggest that the concept of sustainable development as formulated

in the Brundtland Report² and implemented, among other ways, by sustainability assessments, provides a more workable approach.

Warren, although sympathetic to many of the objectives of Earth Jurisprudence, ultimately inclines to the view that we are unlikely to be able to meet the challenge of achieving ecologically sustainable societies. She argues that the very genetic traits that have made *homo sapiens* so successful (notably, an ability to change its environment and a predisposition to be selfish and aggressive) will ultimately consign us to extinction because we can only exercise our free will in accordance with our basic survival drive to prioritise the short-term interests of our immediate family. If she is right then the struggle to re-orientate consumer societies and our lives towards a sustainable future is futile and the logical thing to do would be to maximise our enjoyment of Earth’s fruits while there are still some left.

Lee discusses ecological modernisation (which as he puts it ‘envisages solutions to environmental degradation emerging from technological innovation’) as the means of reforming our governance systems. His argument appears to be that since this approach is dominant in Europe, that is what we have to work with and it is fanciful to believe that we could adopt a wholly different approach.

The importance of how we approach these issues

Unsurprisingly, I disagree with many of the conclusions reached by Warren and Lee, and discuss a few below. However, before explaining why I disagree, I would like to draw attention to crucial differences in *how* we approach these issues.

I firmly believe that the means shapes the ends and that fundamental change of the magnitude required cannot be achieved without also changing how we think. Many of us, particularly lawyers, have been trained to rely virtually exclusively on logic and to think in a manner that values deduction, differentiation and the division of concepts into categories over more lateral, integrated and systemic thinking that tends to focus on relationships. Resistance to change is also entrenched by our training to rely on precedent. We are comfortable in a world in which

1 This is an edited version (31 January 2006) of a paper dated 16 November 2005 that I wrote as a response to the papers prepared by Professors Lynda Warren and Robert Lee for the United Kingdom Environmental Law Association (UKELA) conference on 18 November 2005. See pp 6–23.

2 Report of the World Commission on Environment and Development (1987) UN Doc. A/42/427 reprinted as World Commission on Environment and Development (1987) *Our Common Future* (OUP Oxford).

there are clear distinctions between mind and matter, reason and emotion, humans and animals, law and other normative domains, wild and order, and so on. In this world 'wild law' is indeed an oxymoron as Lee suggests because we have shut the doors of perception in the face of experience and have defined human law in opposition to the natural order. Earth Jurisprudence on the other hand demands that the relationship and dynamic balance between wildness and human order be maintained.

In *Wild Law*, I suggest that we need to rethink our jurisprudence so fundamentally that we cannot do so without also revising our frame of reference (to include the whole community of life), and moving away from dualistic thinking in favour of engaging with our environment in a fuller and more empathic way. This approach is inherently subjective and requires a willingness, not to abandon logic and reason, but to be present to the natural world and to apply reason within a context of relationship.

For example, Warren examines my 'highly subjective' and 'questionable' view that human-induced mass extinction is a bad thing and points out that the last mass extinction 65 million years ago was probably a good thing for humans because it facilitated the evolution of large mammals. I think that one can construct a sound logical argument that from a non-anthropocentric view, the mass extinction of species would not, in the end, be a 'disaster' for Earth. I also think that from a similar perspective one can argue that the AIDS pandemic is a 'good thing' for Earth because it is dramatically reducing the number of an over-abundant species by targeting its breeding populations and offspring. The trouble with these arguments arises when one enters into relationship with the world. I for one could not make these arguments in good faith standing among the stumps of a clear felled rainforest or in the company of AIDS orphans. This is not just a question of using an emotive argument to sweep aside logic but rather to draw attention to the fact that we must supplement logic and reason with the touchstone of real, heart-felt experience.

I believe that experiential understanding, informed by reason, is a surer touchstone of 'right' and 'wrong' or 'good' and 'bad' than measuring something only against an intellectual yardstick. I can argue logically that designing human legal systems that are consistent with the principles that govern the system of which we are part (ie the Great Jurisprudence) is likely to make them more successful. However, I know that my confidence to follow this path is derived more from a heart-felt conviction that I wish to exercise my free will in favour of protecting life, a conviction that is informed more by the beauty of the moonlight and the enthusiastic clicking chorus of the frogs in the pond as I write, than by theories and logic.

The 'ecological thinking' needed to grasp and apply Earth Jurisprudence requires us to burst out of the strictures imposed on our thinking by an exclusive reliance on detached, 'objective' rational analysis. We need fuller, more integrated ways of thinking like the Eastern idea of 'heart-mind'. As John Welwood puts it:

In our culture, 'heart' is considered to be something

quite distinct from 'mind', the latter usually referring to our rational, thinking capacity. In the Eastern traditions, however, the word 'heart' does not mean emotions or sentimental feelings. 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 that 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.³

Furthermore, at the heart of Earth Jurisprudence is the perception, as Thomas Berry puts it, that 'the Universe is a communion of subjects and not a collection of objects'. It is inappropriate and unhelpful to relate to fellow citizens of a community as if they are objects with which we have no connection other than as owners and for which we have no empathy.

Seeing Earth Jurisprudence through a dualistic lens

In reading the thoughtful commentaries of Professors Warren and Lee I was struck by several instances in which I had clearly failed to communicate some of the essence of Earth Jurisprudence. These miscommunications seem to have occurred when the arguments for Earth Jurisprudence are viewed through a lens that splits into components and categories that which I have attempted to deal with as a whole. This is, of course, exactly how we are taught to analyse and evaluate arguments and is a useful example of how getting to grips with Earth Jurisprudence demands new ways of thinking.

For example, Lee is correct in saying that in *Wild Law* I deal with the legally sanctioned patenting of life forms and the issue of genetic manipulation using recombinant DNA technologies as aspects of the same problem and focus more on looking at governance systems rather than on distinguishing between what is and is not law. However, in my view, it is more important to look at the behaviour and impacts of the system as a whole rather than analysing component parts in isolation. Indeed, a fundamental insight of systems thinking is that the system is crucial in determining how its components function and accordingly we cannot understand how the system as a whole functions by analysing its components in isolation.

³ John Welwood (ed) *Awakening the Heart. East/West Approaches to Psychotherapy and the Healing Relationship*. Shambhala Boston and London 1985 (Introduction viii).

The difference in focusing on the system and the relationships of which it is comprised rather than analysing its components is also illustrated by Lee's comments on my discussion of the killing of a zebra by a lion, a bushman and a commercial hunter.⁴ Lee finds this discussion emotive, extreme, and unhelpful since it doesn't explain the moral distinction between the killing by the bushman and the hunter. I chose to contrast the bushman with a commercial hunter who kills to obtain the pelts of zebra fetuses because I once came across such a person and wanted to use two extremes to make the point more obvious while drawing attention to the need to develop techniques for making finer distinctions. However, the point I sought to convey was that despite the fact that two humans (a bushman and a commercial hunter) both killed and used an animal, from an Earth Jurisprudence perspective there was a significant qualitative difference between the two acts. The bushman consciously recognised, and ritually observed, the killing as a sacred transaction between beings, while the commercial hunter saw the animal merely as a commodity (ie as a thing to be traded). The distinction is, I think, obvious if one views the issue through the lens of relationships but perhaps easy to miss if one is using the conventional legal mindset of analysing the act perpetrated by a person on a thing.

Splitting issues into separate conceptual compartments can also lead to what I regard as startlingly inappropriate conclusions. For example, on the issue of trade, Lee argues that rules to protect the environment cannot be privileged over trade rules while people are starving, and that the issue of whether these trade rules promote fair trade is 'a different issue'. From the perspective of many in the developing world the overall effect of the current international trading regime is to privilege the richer countries (eg the heavily subsidised agricultural sector in the European Union) while forcing developing countries to abolish measures designed to protect local workers and the environment, and to facilitate market dominance by those players that are already powerful. These rules do more to facilitate and promote environmental and social destruction in the developing world and to enrich a few, than to alleviate starvation. The point is not about stopping poor people trading commodities generated from the environment, it is about exposing the foolishness and destructiveness of a system that gives greater weight to rules of commerce than it does to the fundamental rights of an environment conducive to health and well-being, and our duty to protect it.

Equally, the idea that we cannot prioritise the protection of Earth while people are starving is deeply problematic. Environmental protection, like human rights, is not a luxury to be afforded only once all the mouths of the current generation have been fed. The health of the people cannot be separated from that of the system and poverty can be alleviated in many ways besides accelerating the exploitation of nature, including by the re-allocation of resources and the conservation of environments that

provide sustainable livelihoods. The logic of first the people and then the environment misses the point that these issues are inextricably interlinked and must be addressed systemically and holistically.

Anthropocentrism

Warren and Lee correctly point out that *Wild Law* places great emphasis on the importance of making a shift from an anthropocentric to an Earth – or eco-centric approach. By this I mean that it is important to recognise that the universe does not revolve around us and that we must regulate ourselves with due regard to the fact that we are part of a bigger system with which we must conform in order to flourish. However, I do not mean that when we are talking about the governance systems for human societies we should not pay particular attention to humans. Our governance systems were constructed by us to regulate human behaviour to achieve certain ends, and if we have the will and imagination to do so, we can undoubtedly reform these systems (as has occurred many times in the past) to achieve other ends.

Despite the stress that I place on personal transformation and responsibility I have no doubt that changing the system of governance can have a profound effect on the behaviour of individuals in that system. Racist practices among the same population of South Africans have declined markedly in response to the legal and policy reforms introduced since the advent of democracy. In many cases even the beneficiaries of the *apartheid* system who resisted change have adapted quickly to the new, more just, social order.

Is Earth Jurisprudence a Luddite approach?

Quite understandably, Professors Warren and Lee are concerned to define and analyse Earth Jurisprudence and to locate it in relation to other approaches such as natural law and ecological modernisation. However, in some instances in attempting to categorise and contextualise Earth Jurisprudence in relation to other theories they have inadvertently read propositions into it that were not intended. For example, Professor Lee concludes that *Wild Law* 'shies away from reform', has an 'anti-technology stance', advocates dismissing command and control regulatory systems and discarding much modern environmental regulation in favour of self-regulation, and like natural law, rejects laws as invalid if they perpetuate environmental injustice. I do not actually hold these views and indeed make my living from reforming governance systems and drafting legislation. My objections are not to regulatory systems or technology themselves, but to those systems and technologies that have been designed to achieve purposes that are incompatible with the interests of the Earth community and are harmful to it.

Although *Wild Law* focuses primarily on the future, it also advocates re-examining and seeking inspiration from the governance systems of cultures that have been more successful at living as responsible members of the Earth community. The fact that many such cultures may be

4 *Wild Law* 119–20.

ancient, non-industrial cultures should not be interpreted as a call to return to a rosy-tinted version of hunter-gatherer culture.

Does Earth Jurisprudence provide a practicable and workable alternative?

The beauty of a theory or philosophy is that it provides a way of understanding the world that can be used to uncover deeper layers of meaning in many different circumstances and to connect particular experiences with others in a way that is coherent and meaningful to the observer. A 'good' philosophy or theory should be helpful in helping a person to make sense of what he or she experiences in a way that provides a sound basis for making choices about how to be and act in the world. Conversely, a 'bad' one would either not provide any sensible practical guidance or would encourage the observer to interpret experiences in a way that is misleading and so would be an unreliable framework within which to make decisions. (Obviously, a single theory or philosophy could have elements of both.) Therefore, it is important to evaluate the practical value of Earth Jurisprudence.

Warren, Lee and I broadly agree that our current governance systems as a whole (including laws, institutions, policies and 'normative regimes' such as morality) are not protecting the environment adequately and that our desired destination is a world in which humans live in an ecologically sustainable manner. The main differences between us revolve around what we should be doing differently and whether the Great Jurisprudence and Earth Jurisprudence offer any helpful and practical guidance in reforming our governance systems.

Warren and Lee both seem to prefer the sustainable development paradigm on the basis that it is more 'workable'. By 'workable' I think they mean easier to apply and more useful in practice, but of course, these attributes are useless if the approach chosen doesn't actually work in the sense of producing the desired effect. The desired effect – in my view – is establishing governance systems that regulate the behaviour of human societies; so that our species plays a constructive and ecologically sustainable role in the community of life on Earth rather than a destructive and unsustainable one. Therefore, it is important to consider whether Earth Jurisprudence is just a 'heady' theory or if it is sufficiently down to earth to be a useful guide to practice.

Applying Earth Jurisprudence in practice

Shifting our understanding of the purpose of human governance systems is at the heart of the Earth Jurisprudence approach. We need to decide whether we are correct in continuing to govern so as to maximise human freedom to exploit the Earth, intervening only (or primarily) when that use threatens or undermines the rights of other humans, or whether our purpose must be to govern ourselves so that we function as productive members of a community of life that exists within a larger universal order. The personal shift required to move from the former anthropocentric

approach to an Earth – or ecocentric approach may be dramatic. However, applying Earth Jurisprudence in practice is likely to be more evolutionary and gradual, although at times sudden changes may be needed.

For example, in common law systems the purpose of an Act may be reflected in the long title or objects, and typically this is translated into practice by requiring the persons to whom the Act gives decision-making powers to be guided by this purpose when making decisions. Legislation may also stipulate that in making a particular decision, such as whether or not to grant a permit, a decision-maker must apply certain principles (eg the precautionary principle) and must have regard to certain matters, such as the views of interested and affected parties. In drafting legislation in South Africa over the past few years, my colleagues and I have tried to give effect to some of the understandings of Earth Jurisprudence by focusing on defining appropriate principles and decisional referents so that when enacted, these provisions will infuse a new purpose and approach into multitudes of specific decisions.

Legislation also commonly refers to decisions that must be taken in 'the public interest' or in 'the national interest'. These can be replaced by new terms such as 'in the interests of the whole community' that can then be defined to mean the long-term, collective interests of present and future generations of humans and other species. Similarly, we are currently helping to develop legislation that will require land-use planning decisions to be based on an assessment of what would constitute a wise use of land from the perspective of the whole community, rather than an assessment of (human) 'needs and desirability' as is so often the case in planning decisions. Although such reforms have the potential to re-orientate all land use decisions towards the attainment of ecologically sustainable development, this is being done by adapting the current systems in a way that is acceptable to politicians, government officials and other stakeholders while allowing flexibility for the system to evolve further.

Earth Jurisprudence is not intended to be a lofty, transcendental theory. It must be, literally and metaphorically, down to earth, and grounded in our experience of the natural world. At every turn we must look at particular laws and aspects of our governance systems and ask ourselves 'How would this look from the perspective of the whole Earth community?' What might a particular law say if the subjects of it were not only human and we really acted as if the flourishing of the whole Earth community was our primary concern? For example, how would we reformulate a requirement that interested and affected parties must be given an effective right to participate in the making of decisions that affect their environment, if we accept that humans are not the only interested and affected parties? Do we have adequate techniques and methodologies for 'consulting' and ascertaining the current and future interests of rivers? If not, how might they be developed?

Finding adequate answers to these questions requires us to be creative and to think in new ways. For example, most lawyers would probably agree with Lee when he rejects

the concept of what he calls 'riverhood' on the basis of the difficulties in drawing boundaries between what levels of water abstraction and pollution will be permitted and what will not. However, it is important to remember that such difficulties in the precise application of a jurisprudential concept in particular circumstances often occur and do not invalidate the concept. In fact, in South Africa, the National Water Act of 1998 (which predates the publication of *Wild Law*) applies just such a concept. The Act requires the Minister of Water Affairs to determine the 'Reserve' for all or part of any significant water resource. The Reserve refers to both the quantity and quality of the water in the resource, and varies depending on the class of the resource. Once the Reserve is determined for a water resource it is binding in the same way as the water quality objectives required by the Act, and state bodies and functionaries must give effect to the Reserve when exercising any power or performing any duty under the Act. The Reserve comprises a basic human needs reserve and the ecological reserve. The basic human needs reserve provides for the essential needs of individuals served by the water resource in question and includes water for drinking, for food preparation and for personal hygiene. The ecological reserve relates to the water required to maintain the integrity of aquatic ecosystems. Therefore, the Reserve concept provides a legal mechanism for ensuring the continued existence and health of rivers, and so protects 'riverhood' even though the law does not recognise rivers as subjects.

Property laws

Unlike Lee, I see no contradiction or retraction in simultaneously arguing for a fundamental and radical rethinking of our *ideas* of property law, and advocating a more judicious and strategic approach to reforming property laws themselves. In fact, we are currently drafting legislation that specifies the duties of landowners to care for land in order to balance these against the rights of land owners. As mentioned above, the legislation also requires authorities to refuse permission for any development that, from a long-term perspective, cannot be regarded as a 'wise use' of land. (Broadly speaking, uses that take society closer to ecologically sustainable development and social equity would be regarded as wise uses.) These may be small reforms and certainly do not abolish the concepts of property law as we know it, but if enacted will – I believe – have the effect of re-orienting many small decisions towards the desired objectives and play a role in changing attitudes.

I am also concerned about Lee's reliance on Hardin's the Tragedy of the Commons thesis as the basis for suggesting that property laws are 'an essential legal tool to produce order within ... [the Earth] Community'. As several subsequent commentators have pointed out, Hardin got it wrong when he concluded that 'the inherent logic of the commons remorselessly generates tragedy'.⁵

The tragedy that Hardin described does not occur as a result of common ownership but as a consequence of unrestricted access to a resource. If there is no effective governance system to limit access and off-take, the tragedy is likely to occur whether the pasture or other resource is privately owned, state owned or communally owned. Indeed, there are many examples of strong communities with intact governance systems that conserve the natural environment without parcelling it out into private ownership. Nevertheless, Hardin's thesis has been used to discredit communal property regimes. For example, Mathews⁶ argues that the complete collapse of the cod fishery in Newfoundland was at least partially attributable to inappropriate Canadian Federal fisheries policy which, as a result of Hardin's thesis, was prejudiced against existing common property regimes managed on a local basis by inshore fishing communities. This resulted in the existing regimes being replaced by a federal licensing system.

In any event, my observations in many countries of the environmental damage wrought by land owners that are not subject to effective controls on how they may use their land, leaves me deeply sceptical of the long-term value of continuing to maintain property rights that entrench exploitative attitudes to land.

Conclusions

Reforming laws and governance systems to reflect Earth Jurisprudence is difficult and challenging. It demands a lot from us, the willingness to try to engage differently with the world, and the courage to begin a journey with a general direction but without a clear map to our destination, equipped only with an unfamiliar compass. As Lee points out, *Wild Law* does not map out the domain of a novel legal system and offers few examples of wild laws consistent with Earth Jurisprudence. The reason for that is that the book is about a new jurisprudence and explores what our governance systems might be rather than analysing what they are. The domain of 'wild law systems' in post-industrial societies is yet to be explored let alone mapped. The precise form that such laws might take has not yet been determined and will, I hope, engage the minds of many committed and creative people.

This task may seem daunting but we must remember that there is no road back into the past and that the consequences of failing to develop governance systems that secure a viable future are dire. However, I have great faith in the ingenuity, spirit and will of humans. I do not subscribe to Warren's view that we are genetically predestined to be selfish and aggressive and ultimately to destroy our habitat and our species and prefer instead to take courage and inspiration from the many human communities that bear witness to the power of co-operation and wise self-regulation. Nevertheless, I do think that the fate of many species on Earth, and of many humans, will be determined by the decisions that the

5 G Hardin 'The Tragedy of the Commons' (1968) 162 Science 1243–1248.

6 D R Mathews 'Common versus open access: the collapse of Canada's east coast fishery' (1995) 25 Ecologist 213.

dominant societies make over say the next 50 years, and that on current performance we are not making the grade.

I do not have faith in ecological modernisation, markets and sustainability assessments as the means to achieve a viable future because they are all based on what I regard as fundamentally flawed premises and a philosophy of exploitation. However, that is not to say that these approaches should merely be discarded. If it is more effective to adapt these approaches to reflect a new purpose then that is what we should do. If not, we must develop new approaches and tools and throw out the old.

For example, I do not believe that we should reject sustainable development out of hand, since it has been crucial in shifting perceptions. However, from an Earth Jurisprudence perspective the concept of sustainable development as currently formulated and understood, is

too superficial and ambiguous to bring about the degree of societal change that will be necessary to avert catastrophic ecological destruction and the material and psychic impoverishment of humans. We need an approach to governance that is more 'radical' in the sense of exploring the roots of the problem rather than the overt symptoms of unsustainability.

I feel privileged and excited to be working in the field of law and governance at a time when the Earth is in a period of transition that is significant – even in geological timescales – and when so much is at stake. I hope that many others will avoid succumbing to despair or to the complacency that we are on the right track and will instead play their part in undertaking what Thomas Berry calls 'the Great Work' of our times.⁷

⁷ Thomas Berry *The Great Work: Our Way into the Future* (Bell Tower New York 1999).

How wild did it get?

Begonia Filgueira

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Introduction

In late November 2004 a colleague¹ brought to my attention a book called *Wild Law: A Manifesto for Earth Justice*. I was invited to join a group to debate the need for a change in environmental jurisprudence and law. How exciting I thought, environmental lawyers thinking about how we could change the law, talking about environmental jurisprudence. This certainly felt like a worthwhile project and a change in the legal tide, although as part of the legal establishment I did initially struggle with the 'wild' bit.

UKELA decided to back a 'wild law' conference to encourage jurisprudential debate. I was privileged to be asked to help organise the conference and to speak linking two of the speakers' speeches. I did this by looking at the main themes presented by *Wild Law* and how the speakers responded to these. I also contributed my own thoughts on how we could achieve better governance of the environment. Those are the basis of this paper.

Heading for disaster

Wild Law tells us that we are heading for disaster, for the extinction of the human species because we are destroying the very being we depend on. We destroy Earth by 'consuming or destroying those aspects of Earth that sustain human and other life', by causing global warming and climate change which 'is not only raising average temperatures, is also causing a rise in sea levels and unpredictable changes in the global climate system', 'ripping apart the web of life which we depend on',² together with losing our sense of community and doing little about all of this.

The doom and gloom should make us all stand up and listen. Alternatively, are we just greedy, selfish, destructive by nature and egotistical or ignorant enough not to do anything about it? Cullinan makes a number of assumptions regarding these questions. Namely, that humans as a species are moving towards extinction, that they are causing their own decline by directly causing the degradation of the Earth and that [we] as sentient beings can stop doing all of these things.

Further, Cullinan argues that the Earth is more important than human life because we depend for our survival on the Earth. If we regulated our conduct to give priority to the interests of the Earth, we could have a chance of survival.

So what did Professor Warren think of this? The basic attributes of humans that have led to their evolutionary success will contribute to their decline³ and 'I question whether this "destruction" would be a disaster'.⁴

Both Warren and Cullinan agree that humans face extinction by their own actions. We are the cause of the Earth's problems. However, they disagree on a very fundamental issue – Warren as a scientist allows for the possibility that it may be in our very nature, in our genetic makeup even, to act in a self-destructive manner.⁵ Further, if we look at the evolution of most species, they develop, grow, peak and decline.⁶ Why should humans be any different? In fact, some species need to disappear for others to thrive; a perfect example of this is the extinction of the dinosaurs during the Jurassic age, which allowed *homo sapiens* to evolve.⁷

Cullinan argues that we can act differently and therefore he implies that we are not programmed for extinction; that we can change our behaviour and put a stop to the destruction of the Earth; that we can achieve this through a change in jurisprudence and the law,⁸ but only if we are able to re-connect with nature.

Lee believes that if we align ourselves to Cullinan's thinking we need to ask ourselves an ethical question: 'If I follow *Wild Law's* thinking – I wonder whether it is actually a good or bad thing that the human race becomes extinct?'⁹ Unsure of whether humans are heading for disaster, Lee appears positive and shares Cullinan's belief there is room for change. Lee has said that there are many factors at play that may assist our survival. For example, if we learn from our previous mistakes, change our behaviour and use technology to our advantage then we may find solutions to the problems we have caused.

Where Lee and Cullinan part paths, one stumbling across the wilderness the other instinctively finding his

1 I would like to thank Simon Boyle and Vicky Elcoate for involving me in the Wild Law Conference and Professor Robert Lee for all his encouragement and support on this project.

2 C Cullinan *Wild Law: A Manifesto for Earth Justice* (Green Books Dartington 2002) 38.

3 Professor Lynda M Warren 'Wild law – the theory' 11.

4 *ibid* 17.

5 *ibid* 14.

6 *ibid* 12.

7 *ibid*.

8 *Wild Law* 188.

9 Professor Robert Lee 'A walk on the wild side: wild law in practice' 7.

way amongst the undergrowth,¹⁰ is in the belief that laws should give the interest of the Earth priority over those of human life. If we did this, Lee would argue that logically the next step would be to rejoice in the disappearance of our species since humans' natural instinct is to strive for survival.

So humans are programmed to evolve: simple Darwinism at play here. We could argue that we have evolved by using technology to provide us with the things that improve our lives or at least extend our biological life span. Where the problem arises is that the very natural act of evolution is said to cause the decline of the human species. If I follow this thinking, coupled with the fact that the Earth is so much more powerful than our species, I confess that I can see the dark side of the Gaia Principle coming into play here. If the Earth will self-regulate to keep itself alive, then perhaps the extinction of our species is required for the Earth's survival.¹¹ Survival of the fittest certainly does not equate with our survival here, nor does the mathematical expression of the evolutionary path of most species.

Human centric shift and rights for all

As a solution to humankind's problems *Wild Law* argues that we need to stop putting humans at the centre of our entire decision-making process. In our minds, our hearts and in our laws we need to do a Copernican shift and start accepting that the planet does not revolve around humankind but that we revolve around the planet. If we depend on the Earth's survival to survive, we are causing Earth's destruction and if we want to continue to live on this planet, then we need to re-evaluate our actions. This all seems quite logical to me.

So how do we stop giving priority to humans? Cullinan believes that we should grant rights to every aspect of the planet; we give rights to fictional entities such as corporations,¹² why not grant right to things that really exist such as a rock, a river or a rhinoceros? To grant a right includes enshrining those rights in law and giving rights a value ranking. Human rights would compete with other rights – for example the rights of the sea or an ant. Sometimes our rights would not prevail.

The trump that decides which right prevails is the fundamental right to fulfil one's role in nature. The most important interest to be defended, the inalienable one, is that of being able to fulfil one's role. Cullinan gives the example of a river. The river's fundamental right is to flow, that is its role, its essence. Thus if damming a river would endanger the flow of the river, the damming should not be allowed, even if this means choosing to let the local population go thirsty or without crops.

In choosing the prevalence of the right of a species over that of the human species a conflict of interest with an ethical twist will always arise. Do we cut a tree to build a hut to give us shelter even though the role of a tree is to

grow; do we fish in areas with sustainability problems even if that is the only way we have of feeding our children?

At the conference we heard Warren say 'The issue here is the extent to which anthropocentric can really be avoided' and 'why is it that Cullinan imposes this responsibility on the human species to limit its actions in ways that cannot apply to other species?'¹³

Humans are the ones granting rights to other species. I agree with Warren that that is an anthropocentric act. Humans also need to be altruistic and allow, at times, the interests of other things in nature to prevail over their *own* interests, a very human act indeed. Warren makes the point very well throughout her paper that everything humans do must be anthropocentric because it is humans who create rights, make choices about the hierarchy of rights and enforce those rights.

Lee says that 'Anthropocentrism is difficult indeed to cast off after all we are only human'¹⁴ and 'For all attempts to reject an anthropocentric stance, Cullinan is left with a problem, which is that we would ordinarily regard law as that normative domain within the social order that governs human conduct'.

Lee is quite right. In making laws that govern human conduct we are being anthropocentric, we are creating a legal system to regulate human conduct, and in making that legal system we are making human ethical choices. This normative domain can only be created by humans for humans. Beavers could not read signs placed by humans at a small brook with a flow at risk saying 'please do not dam'. Any even if they could read I wonder if they would care. Is its home more important to a beaver than the flow of a river? Alternatively, if beavers were becoming extinct and they could only find the *at risk* river to dam, should the rights of the beaver – or the river prevail?

With all due respect to Warren and Lee, I believe they have both shied away from what Cullinan referred to as anthropocentric. Anthropocentric can be defined as creating and interpreting reality exclusively in term of human values and experience but also as regarding humans as the central element of the universe.

Aristotle maintained that 'nature has made all things specifically for the sake of man'¹⁵ and that the value of non-human things in nature was merely instrumental. This view has imbued our legal thinking for centuries now and that, I believe, is what Cullinan was referring to when he speaks about a 'paradigm shift'.

In looking at how humans have treated the planet in the last 1000 years it seems that something has gone wrong.¹⁶ We have had a one-track mind. Something is stopping us from making the right decision about how we

10 *ibid* 6.

11 See James Lovelock *The Revenge of Gaia*. Allen Lane 2000.

12 *Wild Law* 69.

13 Warren (n 3) 10.

14 Lee (n 9)6.

15 Aristotle *Politics* (Book 1, Ch. 8).

16 For example, some 70 per cent of bird species are either in decline or facing extinction (Worldwatch estimates, Nigel Collar, Birdlife International, as cited in Lester Brown *Vital Signs*, Norton & Co, NY 1994, p 128); fish catches have grown from 22 to 100m tons between 1950 and 1982, 17 major fishing areas of the world have either reached or exceeded their natural limits and 9 are in serious decline (UN FAO Yearbook of Fishery Statistics, vol 69–86).

use the finite resources on Earth on which we have underpinned our very survival. Is that something human nature or nurture? Probably a bit of both. Some scientists tell us that we are genetically selfish,¹⁷ and our society has certainly thrived on uncontrolled consumerism since the industrial revolution and the availability and accessibility of mass produced articles.

In terms of roles and rights in nature, I am not sure I follow Cullinan's logic. The role of a river is to flow; ultimately, that is the only thing it can do. Gravity and gradient demand that a river flows into the sea. The river has no choice. The role of humans is not so easy to define: what is our inalienable right? Is it to live and cover our basic needs? That would be called anthropocentric.

How can we define the role, the essence of human nature when humans have so many choices about what they do? Perhaps we could argue here for a naturalist utilitarianism and advocate that a right should prevail if it provides the greatest gain for the greatest number, for example, a right would prevail if it enabled the survival or ceased the destruction of the Earth because without it none of us would survive.

The Great Jurisprudence

Wild Law says that there are immutable laws out there 'written in to every aspect of the universe'¹⁸ dictated by nature which are the standards against which we need to create human laws that would allow us to live in harmony with the planet and all species within.

Cullinan believes that rational thinking will not always allow us to access these laws, that as we are part of nature – if we integrate and commune with it – we will have more respect for nature, understand it better and be able to seek out the Great Jurisprudence. We will discover the global consciousness and that this consciousness will allow us to make decisions as to what is right or wrong for the planet.¹⁹

Warren views these universal laws as being akin to the laws of physics, 'these are not rules to be obeyed or disregarded ... they are nothing more than what is not what ought to be.'²⁰ Also that Cullinan implies that 'their status as part of a universal foundation equip them with some special property that enables us to derive rules for human behaviour from them.'²¹ Warren seem to intimate that the idea that these rules should be special in any way is non-sensical. However, this point is at the heart of *Wild Law*, that the laws of the universe are the most important laws of all because they rule the universe and if they rule the universe and the Earth they rule humans. It is the very foundation of *Wild Law's* hierarchy of laws.

Lee argues that '... wild law has a moral content, though the morality is not derived from some rule of reason, but is something instinctively derived from the Great

Jurisprudence.'²² Here Lee remarks that Cullinan confuses laws with morals: 'This is what Cullinan never manages in *Wild Law*. If "the proper province of human jurisprudence and law (is) the self-regulation of human beings" how do we differentiate this as law as opposed to morality or mere human convention?'

I too agree with Lee that the Great Jurisprudence as exposed by Cullinan is a moral code rather than a 'law' out there that we can discern through reason. However, the difficulty with *Wild Law's* Great Jurisprudence is that I am not sure how to find out what it is. There is no method for differentiating morals, religion or the law.

Cullinan would argue (I think) that we are an indelible part of nature, that it is in our very genetic makeup to perceive this Great Jurisprudence and perhaps if we embraced this fact we would be in a better position to find out what the Great Jurisprudence is. However, I do struggle with the concept of making laws by intuition as this can easily lead to abuses. Legal systems are complex structures that need some clearly defined common denominators.

I think Cullinan would do wild law a service if he came clean about nature providing a moral code with which we could then make law. I can clearly understand that concept and I do ascribe to it. An easy example is organic food. I buy organic food where available because I make a moral choice; I make a choice neither to pollute my body and the earth with pesticides nor to support industrial farming. Nature instinctively tells me to do this and I learnt this by getting closer to nature and understanding the harm those activities cause. If I were using only my rational consumer thinking I would go for the cheaper mass produced food which would last longer in my pantry.

Earth Jurisprudence

Earth Jurisprudence is the law that governs humans. It is to be based on and not to be contradictory with the Great Jurisprudence. From the universe we learn what laws humans on Earth should abide by.²³ It is concerned with 'maintaining and strengthening relations between all members of the Earth community, and not just between humans.'²⁴ Cullinan puts forward a very good case of how we have divorced ourselves from nature and the community that nature is. If our laws are to be morally right they need to respect nature and promote the integrity of the Earth community.²⁵ For Warren this means 'treat human society as somehow outside and remote from the rest of the world'. I think that is right. Cullinan argues that we have disengaged so much from nature that we forget that we are part of nature. Lee is not convinced and firmly argues that 'a model based on meeting human needs for both this and future generations seems a clearer guiding principle than Earth Jurisprudence'²⁶ – a statement with which I wholeheartedly agree and which I do not think is contradictory with

17 Richard Dawkins *The Selfish Gene* (2nd edn Oxford University Press 1989).

18 *Wild Law* 85.

19 *Wild Law* 86.

20 Warren (n 3) 13..

21 *ibid*.

22 Lee (n 9) 9.

23 *Wild Law* 125.

24 *ibid* 130.

25 *ibid* 135.

26 Lee (n 9) 9.

Cullinan's thinking: in order to meet humans' needs today and in the future, we must also respect the needs of nature, otherwise neither humans nor the planet will survive.

Our society, in general, has become so detached from the Earth and nature that many children do not know where their food comes from. Many people care more about watching television than talking to their neighbours or going for a walk. If the laws that govern humans need to be based on nature, then we best start looking outside rather than inside our houses. Perhaps Earth Jurisprudence is within us; perhaps we do need to look inside ourselves to discern the value of nature. As humans we can change our attitude towards the Earth, we certainly have the intellectual ability to do so, but do we want to? A good starting point would be to remember that we are part of nature and depend on nature for our survival.

Any wild law in practice?

Cullinan does argue that indigenous societies were more in tune with nature and understood better the delicate balance between taking from the Earth and giving back to the Earth. In today's modern society, Cullinan argues that environmental impact assessment²⁷ is an example of the 'wilderness breaking out'.²⁸ However, I agree with Lee who argues that 'Few impact assessments approach the questions and answers in the way that Cullinan would: does this project deny riverhood?'²⁹ And even if environmental impact assessment asked itself this question which it does not, whose interests would prevail? Under current legislation that of man, otherwise the environmental aspects of a project would have to be given prevalence and this is not always the case.

Nature conservation legislation is in my view a better example of wild law in practice. Protected areas are protected because either they are sensitive and would be damaged by human action or because they increase our enjoyment of nature – such as the new legislation on our right to roam.³⁰ Cullinan argues that indigenous societies live more in tune with nature. I completely agree that they lived closer to nature, but they also managed to collapse and many of these due to development and relentless destruction of their environment.³¹

My own thoughts

To deny that our modern society is overexploiting Earth's resources would be foolish and as Monbiot put it, 'live in denial'.³² I think this is the starting point of any change, if

we acknowledge that any effect has a cause and that we are the cause, then we can start to change our behaviour. Thus, the way forward is collectively to become aware of our actions and individually take responsibility for these.

We need to wake up, stand to attention and realise that there is a problem. The 'we' means all humans living on this planet. There will be no change if only the developed world, which has consistently polluted the Earth, decides to reduce emissions and create laws that could – in principle – be called 'wild'. The developing nations also have a responsibility to change, to learn from the mistakes of others and to understand that we are all part of nature. To argue they want what we have will get us nowhere.

Secondly, we need to start to participate as a society in the conservation of this planet. There has to be a change to the way we live. A change in the way we think about how we live and in this, I believe, Cullinan hit the nail on the head. We are so alienated from nature that our relationship with nature could be termed autistic. We have spent so long creating a concrete jungle, a sanitised and clinical space that we have forgotten to teach our children that nature is out there, that it's wild and that wild is beautiful; that there is not always a need to tame things.

Once we have made conservation of the planet a long-term goal of our Earth community and not an interest that can be manipulated by politicians, then we will have a better chance of keeping the planet alive.

I strongly believe that much can be done to improve the situation we are in now, but that this can only be done by changing our values. I believe that we need to ask ourselves questions such as, do we really need to consume as much as we do? Throw away the old in favour of the new? Why not use market forces and technology to our advantage, and at a minimum use it to help us put right and clean up the wrongs we have caused. Consumers have a huge amount of power in this.

Conclusions

Wild Law has had a tremendous impact and brought together many people with a common goal, that of debating how we can improve environmental laws and make them more in tune with our planet. Cullinan has brought home to (or reminded) many of those who attended the conference, that humans are not separate from nature – that we are part of nature. To galvanise lawyers into talking about 'nature' and use terms such as 'wild' and 'communing with Earth' is a tremendous achievement and Cullinan has to be gratefully thanked for that.

As Einstein put it 'We cannot solve a problem with the same thinking that created it', and here is where Cullinan has succeeded. Whatever criticisms have been thrown at him or whether people agreed with his theories in *Wild Law* or not, he is opening the doors for debate on how we can change our values. If we change our values and have more respect for nature then surely changes in the law will follow.

27 Environmental impact assessment is an exercise in which, before approving any major project, a planning authority needs to balance the economic, social and environmental impacts of the project. EIA is a recent practice that has now become mandatory across all the Member States including the UK.

28 *Wild Law* 9.

29 Lee (n 9) 9.

30 The Countryside and Rights of Way Act 2000.

31 Jared Diamond *Collapse, How Societies Choose to Fail or Survive* (Penguin Books 2005).

32 George Monbiot 'Climate change: a crisis of collective denial' (2005) 17 ELM 57.

How to become a wild lawyer

Elizabeth Rivers

*Environmental Mediator**

If the ideas in *Wild Law* appeal to you in principle, you may now be wondering how to put them into practice. You may feel daunted by the challenge of how to translate them into our current system, and feeling overwhelmed, be tempted to give up and revert to the old ways of being, or decide that the ideas have no validity because it seems like too big a stretch to apply them.

Help is at hand. Some intermediate steps can be taken that will make the task easier. The worlds of management, systems theory, humanistic psychology and other disciplines contain useful approaches that lawyers can adapt in order to equip themselves to play a full role in addressing the environmental challenges we now face.

First, it is important to recognise that the way lawyers are currently trained and organised in practice is not particularly conducive to the type of holistic thinking which is necessary to integrate *Wild Law*. As someone who has followed a conventional legal education of a law degree at a red brick university, law school, articles in a city firm, eight years' practice as a commercial litigation solicitor and 10 years as a mediator working alongside lawyers to resolve disputes, I have first hand experience of this. From my 25 years' involvement with the legal profession, I have observed a habitual way of operating, which I describe as 'traditional lawyer'. Below I will set out the characteristics of 'traditional lawyer' and the shifts needed to become 'wild lawyer'.

The shift from traditional lawyer to wild lawyer

Role and Identity

Mostly lawyers do not create policy – they implement policy decisions that are made by others. Occasionally lawyers can shape policy when drafting considerations dictate structuring things in a certain way, or more overtly by bringing test cases, but this is not generally part of everyday life for the average lawyer.

Lawyers are generally cautious, risk-averse and concerned with maintaining the status quo. *Wild Law* challenges lawyers to take on a different identity as agents of change, which will feel unfamiliar and possibly uncomfortable to many lawyers.

Wild Law has identified that governance is a crucial aspect of creating a healthy relationship with the planet, so lawyers have a vital role to play in redesigning our

governance system so that it can operate effectively. If lawyers do not seize this opportunity, it is likely to be taken by others and lawyers will be sidelined.

Linear versus holistic thinking

There is a fiction in legal reasoning that the world operates in a linear, cause and effect way. The concept of 'causation' from damages law is a good example of this. Legal reasoning is still based on a Newtonian worldview, whereas we have known for over a century from quantum physics that the world is a complex system of energy and that events do not happen in a linear way. Lawyers would benefit from learning more about systems theory and ecology in order to design governance systems that are more organic and biological than the mechanistic, Newtonian systems within which we are currently operating.

Lawyers tend to be more comfortable commenting on the ideas and proposals of others, than creating ideas of their own. *Wild Law* places demands upon them to envision radically new ways of being – and be willing to advocate them.

Cross disciplinary working

Creating a new vision will require collaborating with other disciplines. When I did my law degree we touched on social sciences and philosophy, but other than that, law operated in a separate silo and did not recognise the need to learn from other disciplines.

As *Wild Law* says, if we are to honour our relationship with the natural world, we need to design laws that are consistent with the Great Jurisprudence – the innate laws of the universe. This requires that we have at least some understanding of ecology and natural self-renewing systems, not subjects currently taught on most law degrees. Interdisciplinary working is vital in order to deal with the challenges ahead. No one discipline has the answers alone, so collaborative working will be essential. This requires lawyers to build working relationships with other disciplines and to find ways to communicate with them that transcend the jargon that each discipline uses when they are conversing with their peers. It may be that lawyers will need the assistance of professional facilitators, who can create an environment where deeper dialogue and communication with other disciplines is possible.

Detail versus the big picture

Part of the skill and training of a lawyer is to pay great attention to detail. Small errors in drafting or time limits

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can have disproportionately huge consequences, so lawyers tend to be vigilant and constantly checking the minutiae. They also need to relate this to the bigger picture and understand how the detail relates to the overall objective and how different parts of a structure interrelate to each other. However, most of the attention tends to go on the detail.

In order to grasp the magnitude of the challenges now facing us and comprehend the degree of paradigm shift necessary to embrace *Wild Law* and move forward, it is necessary to look at the big picture, both in terms of where we have come from and where we may be going to. This can be scary. As T S Eliot said: 'Mankind cannot bear too much reality.'

When we look at the 4.6 billion year history of the planet, it is astonishing to think that the activities of the last 100 years may be sufficient to bring life on Earth – as we know it – to an end. We are currently living in what Thomas Berry calls 'The petroleum interval'. It has been around for less than 100 years and is unlikely to survive more than another 100 years, and yet because it is all that any of us who are alive now have known, it is hard to envisage anything different. Nevertheless, envisage it we must. Oil will run out and we need another plan in place. This is not just about alternative energy sources, but our lifestyles and behaviour. As governance is a crucial part in all of this, lawyers have a role in creating a sustainable future, rather than simply just implementing the ideas and decisions of others.

Lawyers' preference for detail over the big picture is borne out by the typical psychological profile of most lawyers. The Myers-Briggs Type Indicator (MBTI)¹ is the most popular psychological profile in the world. Based on Jung's theory of personality type, it measures a number of polarities, including how we take in information about the world around us. This polarity divides into 'Sensors', who tend to focus on facts, figures, detail and concrete examples and 'Intuitives', who are drawn to patterns, possibilities, trends and the bigger picture. Most lawyers (and most of the population in general) are Sensors. In order to implement *Wild Law*, lawyers would benefit from developing their Intuitive function.

Creativity

Law as it is taught and practised tends to be a rational, logical, primarily left brain activity. Lawyers will talk about looking for creative solutions to problems, and may well come up with them at times, but precious little effort is put into actively nurturing the conditions in which creativity can flourish. The world of management has now amassed considerable knowledge about how creativity can be encouraged and this is a standard module on most MBA courses, yet lawyers lag behind. An investment in creativity training would go a long way to creating the mindset necessary to come up with innovative solutions as to how

to put *Wild Law* into practice. At the very least there needs to be a recognition of the contribution of right brain thinking, which is relational, artistic, visual and uses metaphors rather than words. The concept of 'emotional intelligence' or EQ is now fairly mainstream. Daniel Goleman, author of *Emotional Intelligence*² established that EQ was a far more reliable predictor of success in life than IQ. Again, this is not given much attention in the average legal day, which tends to value intellect above all. We need to recognise, value and harness a variety of intelligences in order to use our creativity to the fullest to address the challenges ahead.

The current culture of working long hours definitely does not nurture creativity, which requires downtime. Recent research on brain function shows that the time when the brain synthesises ideas and puts them together in new and novel combinations is in theta brainwaves, which occur when just dropping off to sleep, meditating or when relaxed. Our busy, pressured lifestyles tend to keep us in beta brainwaves most of the time, which is less conducive to having good ideas.

Profession or occupation?

Historically, one of the hallmarks of a profession as opposed to an occupation is that it sees itself as having a wider role in society beyond just serving the needs of its immediate clients and making money. It has been said that law started as being a profession, then became a business and now has become an insurer of last resort (an indemnity policy to claim against if the deal goes wrong). It is not surprising that it is easy to lose touch with what it means to be a professional.

Former US Supreme Court Judge Warren Burger once said 'In the next century lawyers will be reconcilers not warriors, healers not hired guns'. How can lawyers take up their role as healers of the planet? One of the factors that caused me to leave legal practice was my increasing discomfort with acting as a 'hired gun' for clients whose values I did not share. Lawyers have an individual and a collective challenge to decide whom they serve and how they will do this.

It is not possible to be value neutral in the practice of law. There are all sorts of values and assumptions embedded in our jurisprudence and lived out by clients. We need to make those values explicit and take responsibility for which values we choose to serve. Corporations have huge power now, and it is questionable, to say the least, whether they are exercising that power in a way that serves the environment. We each have personal decisions to make as to how we engage with those vested interests.

Homosphere and biosphere

Cormac Cullinan makes the point very eloquently in his book that we now spend most of our time in highly artificial environments ('the homosphere'), divorced from the

1 I Briggs Myers, *Introduction to Type*, Oxford Psychologists Press, 1987.

2 Daniel Goleman *Emotional Intelligence* (Bloomsbury, 1996).

natural world, which make it easier to maintain the myth that we can somehow exist separately from the biosphere. Modern working life certainly emphasises this, especially as we often spend most of our time looking at a computer screen rather than another human, let alone plants, animals and scenery. Modern office workers count themselves lucky to have a window from which they can see the outside world, and are very unlikely to be able to open it; instead, they are confined within hermetically sealed, air-conditioned offices. We need to make a deliberate effort to spend as much time as possible in the natural world, and find ways of reminding ourselves of it in the working day, whether with pictures, plants, a quick walk to the park at lunchtime, taking time to look at the sky or listen to birdsong whilst waiting on a train platform. Even these small snatches can go some way to keeping us connected to the biosphere.

Summary

The table below summarises the points made above.

There are a number of routes to move from the left to the right column. Here are some ideas.

- Take the long view. Rather than being caught up in the here and now and the minutiae of the current project, take time to reflect on where we have come from and where we are going to.
- Take responsibility for envisioning a new future beyond the petroleum age. This concerns all of us and cannot be left to just a few people.
- Develop your Intuitive side – MBTI is a good tool for doing this.
- Decide to explore your creativity. Learn under what conditions you have your best ideas, how you work best with others and how to encourage creativity in your workplace.
- Take time to reflect on your values and who you are ultimately responsible to – notice where you may be compartmentalising.

Traditional Lawyer	Wild Lawyer
Putting into effect the decisions of others	Creating policy and future directions
Maintaining the status quo (cautious, conservative, risk-averse)	Being an agent of change
Linear, reductionist, mechanistic (Cartesian/Newtonian)	Holistic, systemic, organic (quantum physics)
Reviewing the ideas and proposals of others	Working with others collaboratively to create something new
Specialist focus on legal expertise (operating in silo)	Drawing from other disciplines and ways of thinking (eg biological sciences, ecology, systems theory, change)
Focusing on detail and the here and now (Sensing function – MBTI)	Seeing the bigger picture and taking the long view (Intuiting function – MBTI)
Left brain – primarily valuing logic and rationality	Right and whole brain – valuing experiential learning, intuition, creativity and EQ as well as logic
Ruled by timesheet and ‘long hours’ culture	Allowing downtime to nurture ideas and creativity
Primarily serving the interests of corporations – being an occupation (‘hired gun’)	Recognising a wider duty to the whole Earth Community – connecting with the historic function of a profession (‘healer’)
Maintaining the fiction that law is value-neutral	Recognising the embedded values and assumptions within our governance systems and taking responsibility for what values we choose to pursue
Office-based and relating primarily to technology (living in the homosphere)	Taking time to be in the natural world (connecting with the biosphere)

- Remember why you wanted to be a lawyer in the first place. What motivated you to want to join the profession?
- Learn from other disciplines, eg by actively seeking out multidisciplinary groups. In particular, we need some understanding of ecology in order to align with Great Jurisprudence.
- Be open to learning from indigenous peoples – what other models for governance are there?
- Aim for balance in your life. Are you giving attention to all four dimensions of mental, emotional, spiritual and physical? How can you build in more balance, both personally and organisationally. Allow for downtime – that's when ideas are germinated.
- Be open to redefining your role as a lawyer more widely, both individually and collectively as a profession.
- Find others who think and feel like you, create groups and networks for support, encouragement and momentum.
- Spend time in the natural world and reconnect with the biosphere, as a way of balancing the time we spend in the homosphere.

The Indian poet Rabindranath Tagore once said 'There are four rooms in my house; the mental, emotional, spiritual, physical. I will spend more time in some than the others, but to be healthy I must visit each room at least once a day'. ('Spiritual' does not imply any particular religious tradition, simply 'that which inspires us', a universal human drive.) Lawyers undoubtedly spend most of their time in the mental room, and if they visit others, they are unlikely to do so during the working day. To become a wild lawyer, we need to integrate all four dimensions into our lives. This is a paradigm shift in the way that lawyers function. I hope that as many as possible rise to the challenge.

Postscript: A view from Europe

Summary of paper given by Professor Jacqueline McGlade*

Executive Director, European Environment Agency

Wild Law already has a home in some parts of Europe – ‘today’s European environmental strategies are visionary. Maybe the UK needs to look up and out and learn more from other parts of Europe where they take Wild Law for granted because they know it so well – Scandinavia for example.’

However, Professor McGlade did not agree with Cormac Cullinan that legal frameworks should be disbanded; rather Europe should go back to the founding aims of the European Union, while at the same time absorbing the aggressive growth of Europe through enlargement and looking at the current influences. Among these she listed the loss of biodiversity and the growth of rural land cover, the future of the waste mountain, demographic change as seen in population longer life and depopulation of rural areas, growth of greenhouse gas production, air pollution and water pollution and shortage.

She did not feel that economic growth need be at the expense of the environment and for example much work was being done to decouple waste growth from economic growth. She accepted that in some areas there was still a great deal to be achieved; for example the Waste Packaging Directive had not achieved its objective in reducing such waste but merely in measuring it. In other areas, however, there had been notable successes from which much could

be learnt, for example the implementation of the Urban Wastewater Treatment Directive. Twenty years ago Denmark and the Netherlands set about implementing this legislation but proceeded by means of very different strategies. Denmark opted for technological end-of-pipe solutions whereas the Netherlands took a holistic approach with an emphasis on conserving and reusing water. Twenty years later, whilst both countries comply with the Directive, the cost to the Danes is six times more than the cost to the Dutch.

In summary Professor McGlade thought that we should go back to the original environmental aspirations of the European Union. There was often the political will and enthusiasm to achieve these aims; although the current Commission President Senhor Barroso’s policy is concentrating more on economic growth than on environmental issues. What was required was for those with the political vision to assist in providing the legislation that would deliver these aims.

*Professor McGlade has been unable to make her paper available in full.