

WORKING TOWARDS AN ENVIRONMENTAL JURISPRUDENCE

Lynda M Warren, Department of Law and Criminology, Aberystwyth University, Penglais, Aberystwyth SY23 3DH, UK, lm.warren@btopenworld.com

A Personal Perspective

I have been working in the environmental field for 40 years, first as a biologist and latterly from a legal perspective. A lot has happened in that time. Governments now acknowledge that the environment is something that comes within their remit, even if they don't always agree over what that remit means. Environmental law is truly a political discipline. Environmentalists have become mainstream and you are as likely to find the "eco-warrior" walking the corridors of power as you are to see her at a protest camp. There has been an explosion of environmental rules, regulations and principles at all levels of society around the world and this has been matched by a, possibly misguided, dependence on sound science to deliver the answers. So why isn't it working? As the Millennium Ecosystem Assessment clearly demonstrates, environmental degradation is accelerating not diminishing. The ecological footprint of the average person is way out of kilter with the carrying capacity of the world. We seem now to have reached the stage where we generally acknowledge that this is happening and that it is a bad thing but we don't seem to be anywhere near close to solving the problems that caused it.

So Why Isn't It Working?

Anyone who has followed the scientific case presented by the Intergovernmental Panel on Climate Change (IPCC) can be in no doubt that our current environmental laws are not succeeding in addressing global environmental problems.

The big question then is this. Given that we are committed to environmental protection, based on sound science with policies enacted in law, why isn't environmental quality improving rather than deteriorating?

To answer this question, I believe we have to go back and look at our motives for environmental protection so that we can get a better understanding of what it means to protect the environment for anthropocentric purposes. I think we have failed to understand what it means to be a species, part of the natural world. Making a distinction between natural and human activities is not always helpful; we would do well to remember that we are part of nature. The most obvious manifestation of this failure is our inability to think environmentally at the level of the individual in a way that is meaningful at the society level.

There have been some genuine efforts to address the limitations of our environmental protection measures and come up with something that is more effective. Prime amongst these is the sustainable development concept which is now the foundation of much environmental policy. A commitment to sustainable development, it is argued, is the best way of ensuring that the needs of the environment are met.

The definition is obviously anthropocentric. This, in itself, does not explain why it has not been effective. The real problem lies in its interpretation. The concept is a creature of international negotiation and suffers from a common characteristic of agreements made through diplomacy – it is imprecise. It has been described variously as 'a debased currency ... or a useful profit line for advice by consultants', and as 'very vague' with 'its normative content ... ill-defined'.

The polluter pays principle can, in theory, play an important role in shaping industrial and commercial enterprises. If the cost of pollution is sufficiently high, this should be incentive enough to direct business away from polluting activities. But, unfortunately the payment is always conditional. Most environmental protection law does not

absolutely prevent pollution. Instead it sets standards. Guth has made the extremely telling observation in this respect that the amount of pollution that can be allowed will increase alongside development because that is the way the legal mechanisms are shaped. It is bit by bit, day by day, chipping away at the environmental capital. In a society that is based on progress through development with controlled pollution, this is inevitable.

The same arguments apply in relation to the precautionary principle. It may (or may not) amount to a reversal of the burden of proof but it certainly doesn't amount to a prevention of environmental harm. All it does is legitimise a subjective evaluation of the risk being undertaken to the extent that lack of conclusive scientific evidence should not prevent action that is reasonable. The difficulty lies in determining what is reasonable. Unfortunately, there is little guidance for determining this. What may be reasonable or unreasonable in any given situation will be coloured by whether the wider consequences are taken into account or not. Short-termism is a particular problem in this respect.

One of the major problems with founding our environmental policy on sound scientific evidence is that there is often a paucity of sound scientific evidence. The obvious response is to resort to the precautionary principle but this can only operate where it is possible to make a reasonable prediction of likely impacts. It can help decision-makers faced with uncertainty but it is of no use where the problem is one of fundamental ignorance.

What Might Make Things Better?

There are two things that need to be addressed if we are to achieve more effective environmental protection. The first thing is for policy makers and legislators to express their objectives in a clear enough way so that laws can be interpreted correctly. The second, and more fundamental, need is for policy makers and legislators to have a sufficiently clear understanding of the relationship between

human society and the natural world to be able to formulate appropriate objectives for the well-being of both. There are some fairly simple, straightforward measures that can be adopted to improve environmental competencies but some of the underlying issues present a far greater challenge and may require some imaginative thinking.

Environmental Courts

Courts devoted to hearing cases falling into specific categories are nothing new; in England, for example, there are specialist courts for family law and barristers can associate themselves with specialists chambers dealing, for example, with planning law. The idea of an environmental court should not seem that unusual therefore. Indeed, in some jurisdictions there has long been such a body. Recent research in the UK has advocated the establishment of an environmental tribunal but this approach has been resisted. The advantage of a specialist tribunal lies mainly in the ability to develop the expertise of practitioners and build up a body of law that can be applied in the future. However, precedence requires the establishment of clear decisions aiding the interpretation of laws by future courts. Too often environmental law cases are decided on procedural matters. The courts do not consider the facts behind the case and, at best, refer the matter back to the decision-making body for re-consideration.

This is not to say that there have not been some clear decisions of considerable importance in the development of environmental law some of which have strengthened the application of environmental principles. But in all too many cases, the issues are specific to the facts in question and the issue in contention is the balance of interests between conflicting claims. If legislators cannot formulate laws clearly enough to define where that balance should lie, it is unlikely that the judiciary will be able to come up with any general rules; instead they will look at each case purely on its own merits.

Standing

A relaxation of the rules of standing is one area in which considerable progress has been made in environmental law. Traditionally, plaintiffs in common law nuisance or negligence cases have to establish that they have a personal interest that has arguably been injured. One response to this was for non-governmental organisations to purchase land so that they could claim such interests. More recently, however, the rules of standing in English law have been relaxed to allow other people to bring cases, on behalf of society. Various international and European Union measures aimed at implementing more relaxed approaches to the freedom of access to environmental information and providing for public participation in decision-making have further eased the opening up of access to justice in the environmental sphere. This is not the case in all jurisdictions, however. The USA is a notable exception to this approach and retains a much more restrictive view of standing.

The ideas expressed by Christopher Stone in his seminal paper 'Should Trees Have Standing?' take the standing issue a step further. Under European and English legal systems, non-governmental organisations are able to bring actions because they are deemed, or assumed, to be acting on behalf of a wider public. There is no suggestion that they are there to represent the environment as such. Nor is there any formal system or mechanism for ensuring that deserving cases are brought to justice. Whether a case is taken up will depend on its relevance to the aims and objectives of the non-governmental organisation and, of course, to the availability of resources. Stone's idea of an environmental guardian would regularise judicial access to environmental disputes and would lead to more even-handedness so that it would not be only the *cause celebre* issues that made it to the courtroom.

As Stone illustrates in his paper, the idea of a guardian at law for the environment is not that outrageous a suggestion, there being several other instances of legal representation on behalf of people, corporations etc. that cannot speak for themselves. The difficulty with this approach however is that it does not resolve the

fundamental question of what the objectives of environmental law are and what rules we are seeking to enforce. The existence of a guardian at law, and the paraphernalia that would be associated with such a post, would probably result in more cases coming before the courts and increase the resources spent on environmental assessment but whether it would lead to improvements in environmental protection is less clear.

Human Rights

If focusing on protection of the environment through the creation of an environmental personality wouldn't work, maybe capitalising on the anthropocentric approach would. One way of doing this might be to acknowledge the right to a healthy environment as an indisputable human right. Certainly the European Convention on Human Rights could be used to support such a claim. But would it, in fact, result in better environmental protection? Those opposed to the idea argue that it would not because it would tip the balance too far towards an anthropocentric perspective of the environment and its needs. As argued above, however, this need not be a problem if there is an understanding of the context of the human species within the wider environment that points us towards safeguarding that environment even when it does not obviously deliver human benefits. The issue of human rights is closely related to the debate over standing, of course. Unless wide rules of standing are applied, it is unlikely that the human rights argument will achieve wider environmental protection.

Constitutional Rights

Environmental rights are sometimes incorporated into constitutions either expressly or by implication. For example, environmental protection is a duty imposed on both state and citizen under Article 51-A(g) of the Indian Constitution. In the UK, the legislation establishing the devolved administration for Wales imposes a duty on the National Assembly for Wales to make a scheme setting out how it proposes to promote sustainable development. The constitution of Ecuador, which was approved by the populace in a vote in September 2008, goes further by establishing

environmental rights on behalf of the environment itself. The new constitution states that nature has the “right to exist, persist, maintain and generate its vital cycles, structure, functions and its processes in evolution”. It also gives citizens the right to sue on behalf of an ecosystem. This measure accords strongly with the ideas of those advocating a new philosophical underpinning for environmental law based on the notion of Earth Jurisprudence which I will turn to in the next section.

A New Environmental Philosophy

Most of us are familiar with James Lovelock’s Gaia Hypothesis which regards the Earth and all that is in, or on, it as a living entity in homeostatic balance. The environmental degradation that we are now witnessing is particularly alarming to advocates of this theory because damage to this balance could result in unstoppable changes leading, ultimately, to the demise of the human race and even all life on Earth. Recent scientific predictions about the impact of increased levels of greenhouse gases add fuel to this view of the world.

Earth Jurisprudence is the socio-legal take on Gaia which has been developed by Cormac Cullinan from the ideas of Thomas Berry. It shows considerable similarity to traditional formulations of the natural law philosophy in that it places the human species firmly in the context of a living world but goes farther by arguing that all species – and even non-living things – have fundamental rights to exist. It is our responsibility, it is argued, to enable everything to fulfil its promise. In Thomas Berry’s words: “As regards law, the basic orientation of American jurisprudence is towards personal human rights and towards the natural world as existing for human possession and use. To the industrial-commercial world the natural world has no inherent rights to existence, habitat, or freedom to fulfil its role in the vast community of existence. Yet there can be no sustainable future, even for the modern industrial world, unless these inherent rights of the natural world are recognised as having legal status. The entire question of possession and use of the Earth, either by

individuals or by establishments, needs to be considered in a more profound manner than Western society has ever done previously.

““To achieve a viable human-earth situation a new jurisprudence must envisage its primary task as that of articulating the conditions for the integral functioning of the Earth process, with special reference to a mutually-enhancing human Earth relationship. Within this context the various components of the Earth – the land, the water, the air, and the complex of life systems – would each be a commons. Together they would constitute the integral expression of the Great Commons of the planet Earth to be shared in proportion to need among all members of the Earth community”.

My first thoughts on this philosophy was to dismiss it as entirely irrelevant for any legal system as I understand it. On reflection, however, I have come to appreciate that looking at the world from an Earth Jurisprudence perspective might point us towards a more effective environmental jurisprudence. For the past few months I have been involved in a research project undertaken under the auspices of the UK Environmental Law Association and the Gaia Foundation. This research has involved an analysis of legislation and case laws from around the world to see how well they shape up to the principles of Earth Jurisprudence. The results suggest that there are examples of what look like laws to protect the environment for the environment’s sake. The Ecuadoran constitution, which was adopted after we reported, is the epitome of the Earth Jurisprudence approach.

The next stage in the research is to investigate whether, and if so how, it might be possible to reach a position where the principles of Earth Jurisprudence form the fundamental basis of environmental law. My personal view is that, if the impacts of global climate change are as imminent and as dramatic as predicted, we don’t have the time for this new way of thinking to permeate society. But, perhaps just as importantly, thinking about the world in Earth Jurisprudence terms does help us to

sharpen up our thinking about why we want to protect the environment. This alone could lead to more effective lobbying for more effective laws.

The Human Condition

Before concluding this paper, I need to reflect for a moment on what it is to be human because I believe it is only by understanding this that we can effectively develop a governance regime to address global environmental problems. As a scientist my starting point is that *Homo sapiens* is a species just like any other and that we finish up being where we are because of the way natural selection works, i.e. as the result of evolutionary processes. One of the characteristics that appears to separate us from all other species is our ability to reason. It is this ability that allows us to grasp the idea of a future and to plan for it. It also allows us to articulate philosophical notions about the meaning of life and to indulge in religious thought. Regardless of one's personal view on religion, there can be no doubt that belief in a superior being has been central to the human psyche for as long as our species has existed and, as such, it cannot be ignored. There are strong moral and ethical arguments in most religions for the protection of the environment. The one that has been most influential in shaping our governance regimes has been the Judaeo-Christian notion of stewardship which puts the human species in the position of master of the environment.

Our whole approach to science is based on this. The Darwinian theory of natural selection is more often than not interpreted as a progressive evolution with *Homo sapiens* at the top of an evolutionary tree. Closely related species are further down the branch of the tree and more distantly related species are consigned to branches lower down the tree itself. Furthermore, there is no ready acceptance that the tree might continue to grow, i.e. that the human species may not be the ultimate end-point of natural selection. This totally ignores the underlying rationale behind Darwin's theory which was that natural selection works randomly and results in adaptation not progress. With this thought in mind, ask yourself which is the more

successful, *Homo sapiens*, which has been in existence for a few million years, or the coelacanth, *Latimeria*, a so-called living fossil which has been around for over 400 million years.

If you prefer the creationist theory rather than evolution, you still finish up with an understanding of the human race occupying a superior place in the world. In some ways this view of the world is easier to manipulate for environmental protection purposes because it exerts a strong sense of moral responsibility and duty. The downside is that it tends to underrate scientific evidence and puts too much reliance on intuitive responses.

Whichever theory you choose, however, the moral imperative to care for other species stems directly from the concept of human superiority. Alongside any moral imperative, however, we would do well to remember that we are, in essence, animals and are subject to biological pressures just as every other species is. There is a continuing debate over the relative importance of 'nurture and nature' as a determinant of human behaviour but it is not disputed that both are involved to some extent. Much of our behaviour stems from largely pre-conditioned responses to external stimuli. Most religions appreciate this, of course, and focus on the need for the individual to reach beyond her basic instincts, or human nature, in order to achieve some higher aspiration. If we could all do this successfully and could fully adhere to a moral duty to care for the world, there would be no need for this paper.

The fact that the environment is suffering all around us, however, suggests that religion alone will not enable us to achieve harmony with the rest of the planet. The essence of my argument is that it is impossible for most people to reach this ideal because we can't go against nature in this way. If we look for a moment at the way ecosystems function, we can see that there is dynamic process of checks and balances with some species increasing in numbers over time while other decrease. There are innumerable feedback mechanisms in the web of existence that will keep any given more or less in balance with its habitat. It is only when circumstances

change to the extent that a species can no longer adapt that extinctions will occur. Some years ago an eminent Scottish zoologist put forward the theory that animals are able to keep their numbers in check through adjusting their reproduction to the availability of food. In this way they did not have to waste resources on breeding young that had no chance of survival. The evidence, however, is overwhelmingly against this theory. Instead it seems that there is an extremely strong drive for reproduction and survival. As explained in purely mechanistic terms by the evolutionary biologist Dawkins, it is the individuals, or rather their genes, that count in evolution. So striving for oneself and one's immediate family is a perfectly natural, and arguably irresistible, human imperative.

The dilemma we now face is how to deal, collectively, with our over-success. Because we have been so successful at manipulating our environment and removing or at least restraining many of the threats to individual survival that would have served as a feedback mechanism, we have increased in numbers to a point where we cannot avoid having adverse impacts on other parts of the world. To use current terminology, our ecological footprint is too big. But it is the collective ecological impact that is the problem here. I may be using more of the world's resources than my ancestors did but my impact on the world is never going to cause environmental disaster. It is our collective impact that is causing the problem and our inability to come up with a collective response that prevents us solving it. The Tragedy of the Commons is the classic example of this. Even when we know that a resource is finite and that over-exploitation of it will mean it will run out, we still opt for the "jam today" solution rather than plan our exploitation in a way that will maintain the resources so that exploitation can be sustained. It is only when we reach the point of no return that we take action. And the underlying reason for this is that we find it very difficult to think and act for the collective good where it is remote from our immediate circumstances, either because it concerns people or things that we don't know or care about or because it relates to the future. The logical conclusion to this argument is that *Homo sapiens* will become extinct because the very characteristics that led to its success will also lead to its downfall. As Boulter demonstrates, species

come and species go and there is no scientific reason to think that humans are immune from this process.

To summarise this argument, I think there are two sides to the relationship we have with each other in respect of the environment and the two sides do not balance each other out. On the first side is the fact that our global impact on the environment is a summation of all our individual impacts. No living thing could remain alive if it did not exploit its environment. So every single individual has something to gain by exploiting natural resources. On the flip side is the fact that a reduction in our global impact will result from a summation of all our individual restraints. But as an individual, I can only lose out by restraining my exploitation of natural resources. Making hay while the sun shines is a really good philosophy if I can argue that my individual impact is so small. Let someone else take the strain. Faced with this dilemma, the purpose of environmental law should be to focus on the collective, cumulative impacts rather than individual rights and grievances.

Conclusion

All of this seems very gloomy and depressing and, indeed it is. However, all hope is not lost. There are some practical measures that could be taken to change the way we treat the environment. In my view we need a two-pronged approach. On the one hand we need to be educating ourselves about the importance of the environment so that we can re-think what it means to us and what our responsibilities towards it should be. In the long-term this is probably the only way of ensuring effective legal protection of the environment.

In the short-term, meanwhile, we need to ensure that the environment is given a fair hearing in disputes and that the balance of interests in conflicts doesn't so consistently pitch socio-economic needs against environmental ones. I think the simplest way of doing this would be for legislators to grasp the nettle and make clear rules and standards for environmental protection. It is a fundamental tenet of family

law in England and Wales that the rights of the child are paramount. Maybe we need a similar, legally enforceable statement with respect to the environment. This idea is gaining credence in academic fields. Guth, for example has argued for a tort of ecological degradation and Pardy proposes the formulation of an environmental rule of general applicability.

Clear legal duties, whether or not they are couched in terms of environmental rights, coupled with a more environmentally astute judiciary, perhaps with the wider use of the environmental tribunal, may go some way towards halting the decline in environmental quality.