A walk on the wild side: wild law in practice

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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 Stone[9] 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 zebrakind 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 zebrakind 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 environment[12] 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. Buttel[18] 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 1971[21] 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]

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,

25 ibid 77.
26 HLA Hart *The Concept of Law* (2nd edn OUP Oxford 1997).
27 ibid 191.
28 ibid 196.
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.