

Wild Law 2006–7

## Creative regulation: how wild law can rehabilitate governance and regulation

Elizabeth Rivers *Environmental Mediator*

Regulation tends to have a mechanistic, bureaucratic image and is often seen as something that stops business doing what it wants to do, gets in the way of competitiveness and creates more 'jobs for the boys', ie the legal profession and regulatory agencies looking after their own.

It is worth going back to first principles and reminding ourselves of the function of regulation. Regulation has been defined as: 'bringing into conformity with a principle'. If the principle is the carrying capacity of the planet, then well-designed regulation that respects the fundamental laws of the universe (described by Cormac Cullinan as the 'Great Jurisprudence') defines the boundaries beyond which we must not go. The word governance comes from the Latin *gubernare* which means 'to steer'. So we can think of the purpose of governance and regulation as steering us into conformity with the principles which will keep the planet and the earth community healthy.

### The importance of law in social change

Historically, sustainability campaigners have directed their efforts at changing economic activity and human attitudes and behaviour. This is probably correct, but has missed out the importance of law, both as a reflection of society's attitudes, and for its ability to shape and influence subtly what we consider is possible. It is important to look at the role of law in supporting our current unsustainable economic system. In the same way that the South African legal system was co-opted by the apartheid regime to provide it with legitimacy – apartheid had the trappings of a legitimate legal system, but was profoundly unjust – so our current legal system throws a cloak of respectability over an economic system whereby the richest 500 people in the world own more than the poorest 3 billion (nearly half the world's population), and the richest 1 per cent are enjoying rapid growth in wealth, while the poorest 20 per cent are getting steadily poorer. Rather than wealth trickling down, it is being sucked up from the poorest to the richest.<sup>1</sup> Changing laws will not shift society's attitudes overnight, but as former US President Lyndon B Johnson said of legal reform during the US Civil Rights movement: 'Law does not change society in itself but it points the

way'. Rethinking our jurisprudence (ie our idea of the purpose of governance and regulation) is an important part of the overall strategy towards environmental sustainability and social justice.

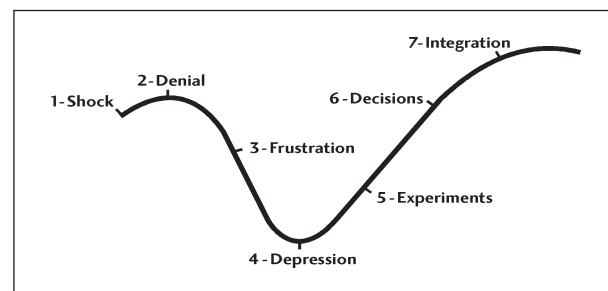
### Creativity and change

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

I have previously written<sup>2</sup> about the need for lawyers to embrace creativity and see themselves as agents of change rather than just implementing policy developed by others. I would like to expand on how they might do this, and also look at the relationship between creativity and change.

Society has undergone a sea-change in attitudes to climate change in the last 12 months, and I will use this topic to illustrate the process of change and where we need to be in that process to have maximum impact.

Figure 1: The Kubler-Ross change Curve



Stage 1: Shock, disbelief.

Stage 2: Denial that this is happening.

Stage 3: Frustration, anger, wanting to blame.

Stage 4: Depression: no point in doing anything.

Stage 5: Experimentation is better than depression

Stage 6: Deciding what will and won't work, accepting the change.

Stage 7: Integration: the change is now part of life.

At a recent conference of lawyers and business people, I asked the audience to identify where they were on the change curve. Eighty-five per cent admitted to being in denial, 10 per cent were in depression and 5 per cent in experiments–integration.

\* Elizabeth@elizabethrivers.co.uk.

1 Data from 'Change the Dream' symposium [www.bethechange.org/symposium.cfm](http://www.bethechange.org/symposium.cfm).

2 E Rivers 'How to Become a Wild Lawyer' (2006) 18 ELM 1 28.

Society is moving from denial. When we get to experiments, there is scope for greater creativity in responding to the challenges we face. There are already some examples of this from people who are further along the change curve. To take an example from the planning field, the eco-village movement is a way of reconfiguring how we organise our living and working arrangements more sustainably as a response to the current housing shortage, rather than simply building more conventional, inefficient housing in unsuitable areas such as floodplains (for example, the Thames Gateway) and the green belt.

Innovation can take two forms:<sup>3</sup>

- technical eg clean fuels, renewable energy sources
- adaptive eg changes in attitude and behaviour, such as taking steps to reduce our carbon footprint.

Some people place all their faith in technical fixes and think that we can continue our current lifestyles without having to make changes. I believe that this is unrealistic, and also misses the fact that adaptive changes can give us opportunities to increase well-being and social justice. For example, one suggestion for reducing CO<sub>2</sub> emissions is the contraction and convergence model, whereby there is an agreed cap on the total amount of carbon emissions allowed (contraction) and an equitable sharing out of carbon allowances between rich and poor countries (convergence). This has the advantage of both reducing emissions and redistributing wealth, thus tackling both environmental and social problems (see also Norman Baker p 77–81).

If we respond simply from fear, this will limit our creativity. Much environmental campaigning has been fear-based – shaking us out of our complacency and denial by apocalyptic visions of the future if we do not change our behaviour and mindset towards the planet on which we live (see also Satish Kumar p 82–3). This has perhaps been necessary but has its limitations. For some people the implications are so scary and overwhelming that they are simply pushed back into denial. It is difficult to be creative from a place of fear, as it constricts our thinking. In the seminal book *Emotional Intelligence*,<sup>4</sup> Daniel Goleman describes how the prefrontal cortex is the part of the brain responsible for ‘working memory’, ie the capacity to hold all the information necessary for a particular task. There are circuits connecting the prefrontal cortex with the limbic brain (our emotional brain) so that surges of strong emotion, such as frustration and anxiety, will create neurological static, sabotaging the ability of the prefrontal lobes to use working memory – the feeling of ‘I just can’t think straight’. When we can get beyond fear and depression into experiments and integration, we have far more access to our creativity.

How can we harness our creativity and capacity to innovate so as to devise the best possible system of

governance, in which all members of the earth community can flourish? This is vital, as no subset can thrive for long when the whole is damaged.

### Nature as inspiration

There have been a number of attempts to translate ideas from biology and ecology to other disciplines. Biomimicry looks at what the fields of engineering and design can learn from nature, to produce more sustainable design.<sup>5</sup>

In the field of economics, *The Ecology of Commerce*<sup>6</sup> by leading environmental thinker Paul Hawken looks at what natural systems can teach us about how to organise our economies, and argues compellingly that economics and the environment need not be seen as competing interests. Hawken advocates green taxes as a way of harnessing the positive aspects of market forces to bring economic activity into alignment with the needs of the planet. It is time for a similar process to take place in relation to law. What can natural systems teach us about how to structure and frame our laws and governance systems?

We need to replace our current mechanistic view of regulation with a biological model. Biological systems have innate ways of regulating themselves. For example, through the process of homeostasis, biological organisms regulate their processes eg temperature control. James Lovelock’s gaia theory, whereby the planet is seen as an entity with its own self-regulating mechanisms, can provide an important source of inspiration for framing our governance systems.<sup>7</sup> If we change our concept of regulation from a mechanistic, adversarial one to a biological, holistic one, what then becomes possible?

An example of good design from the field of social entrepreneurship is that of the ‘Good Earth’ project in Italy. Mafia land that has been confiscated is handed over to a social justice programme. Recovering drug addicts (drug addiction is a problem fuelled by Mafia organised crime) farm the land, and the food produced is then sold throughout Italy under the ‘Good Earth’ brand. People who buy this brand know that they are making a stand against the Mafia. The addicts often have little education and would struggle to find other work, but ordinary farm work is seen as low status and does not fit with the self-image of an addict. However, withstanding a degree of intimidation and harassment from the Mafia, who want to undermine the project, makes the addicts feel heroic and builds their self esteem, thus aiding recovery. Before this programme was started, Mafia land that was confiscated was sold at auction but usually found its way back into Mafia hands.<sup>8</sup> This is an example of a virtuous circle. By making a few changes to the system it has become far more effective.

3 R Heifetz *Leadership Without Easy Answers* (Harvard University Press 1994).

4 D Goleman *Emotional Intelligence – Why It Can Matter More Than IQ* (Bloomsbury 1996).

5 A pioneer in this field is Janine Benyus [www.biomimicry.net](http://www.biomimicry.net).

6 P Hawken *The Ecology of Commerce – A Declaration of Sustainability* (HarperCollins 1994).

7 For a succinct overview of gaia theory see J Lovelock *The Revenge of Gaia* (Penguin 2006) ch 2.

8 T Jones *Utopian Dreams* (Faber & Faber 2007).

## The contribution of corporations to creative regulation

Enlightened business leaders are increasingly waking up to the need to embrace sustainability fully and to understand that a compliance mentality is an inadequate response to the challenges we face. It is not possible to have long-term health in business within a compromised, unbalanced system. Rather than lobbying against regulation and pursuing short-term interests, business leaders need to focus on the interests of the whole, working in partnership with government and NGOs to create governance systems that work for the good of all. Corporations have invested heavily in developing the capacity for creativity and innovation in their people and MBA programmes teach the topic as standard. Corporations have significant resources in this area compared with the public or voluntary sectors, and if this expertise could be used in the service of creating a system of regulation that enhances the whole earth community, the results could be spectacular.

### *Wild law*<sup>9</sup> is a question, not an answer

Sometimes when people read *Wild Law* they criticise it by saying it does not explain how to put the ideas into practice. I think this misses the point as *Wild Law* is a question, not an answer. It seeks to bring into awareness our unexamined assumptions about the world: to help us to recognise that we are looking at the world through certain filters which will in turn produce certain results. It encourages us to take a different view of the world and then create something different from that place.

*It is not possible to access that space through the intellect alone* – this is vital to grasp. Those of us who wish to engage with these ideas and put them into practice must invest time and energy in creating the necessary shift in consciousness and integration – we need to slow down in order to speed up. In other writings<sup>10</sup> I have quoted the Bengali poet Tagore who said: ‘There are four rooms in my house: mental, emotional, spiritual and physical. I will spend more time in some rooms than others but to be a healthy person I must spend at least some time in each room every day’. What might that look like in practice for each of us?

### The importance of getting outside

Following the UKELA conference in November 2006, 20 people attended the weekend workshop, which Cormac Cullinan and I facilitated. Without any conscious effort to influence the composition of the group, we succeeded in having an incredible diversity of background and age: lawyers from the Environment Agency and Defra, private practice lawyers, US academics who are teaching the

world’s first earth jurisprudence course, law students and trainees, CSR practitioners, barristers and psychologists. Men and women were equally represented and the ages ranged from early 20s–60s.

The purpose of the workshop was to deepen our understanding of the ideas raised at the conference in a group setting and in the natural world. We structured the workshop around a series of relationships: with ourselves (intrapersonal), with the group (interpersonal/social), with the environment, with the ideas. Once we had established our first three relationships, through a series of experiential exercises and spending most of the day outside, we were then ready to work on the ideas. Our dialogues were far more productive than if we had simply launched into a theoretical discussion of the ideas. The relationships acted as a container to the discussion. The group became a human community for that weekend, which in turn was in community with nature. The workshop process gave people the opportunity at different times to access each of the four dimensions – mental, emotional, physical and spiritual – thus creating a far richer experience. I believe that events like these will be important in taking this field forward.

### Conclusion

We need to rethink our governance system and regulations radically and find ways to stimulate our creativity in order to do this. Key factors in this process will be:

- valuing creativity and innovation as much as intellect and analysis
- finding ways of connecting with the natural world and using this as our primary source of inspiration
- coming together in groups which are diverse but also have values in common – creating actual and virtual communities as containers and support for this work
- being eclectic and willing to learn from a variety of disciplines and sources
- being champions for good governance and regulation in the true sense of those words
- bringing all four dimensions of ourselves to this process and being willing to share those with others.

Time is very short, but let us take comfort from the words of Margaret Mead: ‘Never doubt that a small group of committed people can change the world, indeed, it is the only thing that ever has’.

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

10 Rivers (n 2).