

Nature in Court: Conflict Resolution in the Ecozoic Age

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The Challenge

If nature has rights that are recognised by our legal systems, and those rights come into conflict with the rights of humans, how is that clash to be resolved? The apparent impracticality of bringing plants, animals and ecosystems into court is often cited as an obvious reason why wild law is naive and unworkable. Indeed, when the owner of a tree in the USA sued a negligent driver for damage to the tree, the Michigan court dismissed the claim with the following judgment:

We thought that we would never see
A suit to compensate a tree.
A suit whose claim is prest
Upon a mangled tree's behest.
A tree whose battered trunk was prest
Against a Chevy's crumpled chest.
A tree that may forever bear
A lasting need for tender care.
Flora lovers though we three
We must uphold the court's decree.¹

The court clearly thought the notion of a tree having rights enforceable in court was ridiculous. Given the characteristics of our existing court system with its adversarial litigation process, I agree that it is difficult to see how nature (or more accurately the 'more than human' world) could be represented within that system.

The challenge is to show that there are systems for reconciling the rights of all the different elements of the planetary system in meaningful ways, that respect the rights of the individual elements as well as the integrity of the whole.

The Answer

Just as we need to change our jurisprudence and our ideas of who and what is entitled to protection before the law, we also need to change our systems for resolving conflicts of rights between different parts of the system.

To do this I will start by contrasting two different worldviews, then look at the underlying assumptions of our current court-based litigation system, which is not

fit for purpose as it perpetuates old ways of thinking and relating. I will contrast the current system to new practices and methodologies that are emerging around the world at grassroots level, which I believe could provide an answer to this challenge.

The Old Paradigm: 'Empire'

Writer David Korten uses the term 'Empire'² to describe the current dominant paradigm of our age, which we are seeking to evolve beyond. It is also described as the 'Industrial Growth Society' and is characterised by beliefs such as: it is possible to have unlimited economic growth; the Earth is a resource for the use of humans and corporations; the so-called 'free market' can solve all our problems; the way to be happy is to consume more; and the dangerous illusion that humanity can exist independently of the biosphere ('the illusion of independence' – Cullinan³). We have been literally brainwashed with these ideas, such that is hard to recognise them as ideology rather than reality.

When we live in a world where such assumptions go largely unnoticed and unchallenged, this leads to an atmosphere of scarcity, competitiveness, overconsumption and above all – fear. A world in which even the comparatively wealthy feel chronically insecure most of the time.

This in turn leads to a legal system where the law recognises no higher power than itself, only humans and corporations have rights, and nature is protected only to the extent that it has utility for humans.

Our Current Litigation System⁴

I was trained and practiced in the English legal system, from which the Common Law came, so I will speak from this perspective. This is the system which has now been adopted by most of the English-speaking world.

Litigation in the Common Law system can fairly be described as mired in a Newtonian worldview (mechanical, reductionist, cause-and-effect thinking). Undoubtedly the rule of law was a significant improvement over 'might is right' as a method of resolving differences. However, it has the characteristics of a system in decline, i.e. it is rigid, adversarial and not able to adapt to the evolutionary leap that we need to make. It is essentially about fault-finding and blame, only concerned with the past, and only takes into account information that it considers to be 'objective'. It does not value feelings or relationships.

It is hard to see how this process can be adapted to respond to the interests of the natural world in any meaningful way. As Cormac Cullinan says, we need a 'Copernican shift' of our systems,⁵ and I believe that this applies to our conflict resolution systems as well as our jurisprudence and primary laws.

Some attempts have been made to adapt the Common Law system to recognise the natural world in a different way. Andrew Kimbrell, a US Public Interest lawyer has identified the Guardian ad Litem process, the Public Trust Doctrine

and Citizen Suit provisions as possible mechanisms to extend our existing system.⁶ These are valuable as ways of reforming our current system but I do not think provide a complete answer to the challenge.

The New Paradigm: 'Earth Community'

If our current system is not fit for purpose, what could we replace it with? Before looking at specific options I will go back to the concept of worldviews. Earlier I described the dominant worldview as 'Empire'. I would like to contrast this with the emerging worldview of 'Earth Community'.⁷ Thomas Berry describes this eloquently when he says 'We are a communion of subjects, not a dominion over objects'. This worldview recognises that humans are only one part of a wider system, with which we are interdependent. It knows that nature has inherent value, irrespective of its utility to humans and corporations. When embraced fully, this approach leads to the enhancement of creativity, spontaneity, community, wildness, sufficiency in material things and abundance in the non-material. As Arnold Toynbee said 'Nature is going to compel posterity to revert to a stable state on the material plane and turn to the realm of the spirit for satisfying man's hunger for infinity'.

This leads to a very different type of jurisprudence, where the Universe is seen as the primary lawgiver, human law must operate within environmental limits and rights are seen as inherent in existence, rather than something granted by human society.

From this it flows that all members of the Earth Community enjoy the following rights:

- To be
- To habitat
- To participate in the unfolding Universe story⁸

Assuming we get to the point where such rights are recognised by our legal systems, how do we then resolve differences between different parts of the system (e.g. human-nature or nature-nature)? At this point I realise that our current language is an obstacle in itself. We talk about 'conflict resolution', 'dispute resolution' and 'dispute management'. The language is transactional and reductionist, it betrays a Newtonian worldview of separate entities clashing, with the only outcomes being win, lose and compromise, and assuming that at the end the disputants go their separate ways. If we apply such language to an ecosystem it sounds nonsensical, just as the idea of animals litigating in court sounds nonsensical to the conventional worldview. In an ecosystem there are many discrete entities that have their own qualities and yet they all come together and find a way to coexist that not only honours their individual qualities but creates a whole that is greater than the sum of all the parts. The system is in a constant dynamic state of change, with the different parts of the system adjusting to each other all the time – this is a *process* rather than an *event*.

The concept of biomimicry has become very popular in design and engineering.⁹ This is the idea that we can solve technical design problems by looking at how nature approaches these challenges. We need an equivalent biomimicry in conflict resolution – to learn from nature how it works with differences for the good of the whole, whilst protecting the integrity of the parts.

The Growth of Mediation: A New Paradigm Process

Although litigation remains the dominant formal method of resolving legal disputes across the developed (or the more accurately termed ‘ecological debtor’) world, a quiet revolution has been underway for the last 25 years. In an exquisitely Taoist fashion, the excesses of the US litigation system in the 1980s gave rise to the mediation movement, an evolutionary step in how we resolve our differences. Unlike litigation it is flexible, forward-looking, enables the participants to create their own outcomes rather than suffering an imposed outcome, and it seeks to uncover and meet underlying interests and needs rather than simply arbitrating between positions. It is much better suited to addressing complexity, and it values feelings and relationships.

Mediation has been spreading around the industrialised world since the mid 1980s (most indigenous cultures have had their own form of it for centuries). Although mediation is sometimes presented merely as a pragmatic alternative to adversarial processes, at its heart it is fundamentally different and represents an evolution in consciousness. Litigation tends to bring out the worst in people whereas mediation supports the expression of the best – it rehumanises, encourages listening, empathy, flexibility, learning and honouring of emotions. It recognises and enhances our interconnectedness.

Mediation sits as part of a wider movement which includes processes such as consensus building, stakeholder dialogue, conciliation and a range of other processes that share the same underlying assumptions and values. These are the foundations on which we can build our new processes. However, these processes are firmly rooted in the human dimension and so need to develop further. How can current mediation processes evolve to respond to a legal system that recognises the inherent worth of the whole of creation? What qualities would such processes need?

Jung and the Four Dimensions¹⁰

Jung’s four functions can assist us here. This is a model which has been in use since Platonic Greece. They are:

Thinking (Air Element) – the ability to use our rational minds to analyse, categorise and conceptualise. The thinking mind has brought us great technological advances which have transformed our lives. However, as Einstein warned: ‘We should take care not to make the intellect our god. It has, of course, powerful muscles, but no personality. It cannot lead, it can only serve’.

Feeling (Water Element) – the water element allows us access to our emotions, to empathy, emotional intelligence, rapport and compassion. Research shows that most decisions are made on the emotional level and then retrospectively justified with rational justifications. Certainly emotions play a far larger part in our actions than we give them credit for. The feeling function is also where our sense of values reside – the part of us that knows what is right and what is wrong.

Sensing (Earth Element) – this represents the wisdom of our bodies. In order to feel fully alive and to communicate a sense of presence to others we need to be grounded in our bodies, breathing freely and alive to our senses. When we are in this state we have access to different ways of knowing. There is a Polynesian saying: ‘All knowledge is only rumour until it is in the muscle’.

Intuiting (Fire Element) – this represents our passionate, inspired dimension. Where we get our vision and inspiration from, the sense of purpose that makes life worth living. ‘I have a dream’ is its rallying cry.

We live in a culture where Thinking dominates and the other ways of knowing have been devalued for millennia. This certainly shows up in mainstream culture and is reflected in our legal system, where a very narrow band of information is deemed to be legally ‘relevant’ to the resolution of a dispute. This dominant view has been challenged in recent years by concepts of emotional intelligence,¹¹ spiritual intelligence¹² and somatic intelligence.¹³ However, it has yet to permeate our legal system, which remains stubbornly situated in a nineteenth century view and atmosphere.

In my view, we need to embrace methods of dialogue and communication which honour all four dimensions of intelligence. This will be profoundly challenging to those who are rooted in a purely intellectual approach, and will attract ridicule as not being ‘objective’ or rational. It reminds me of the early days of quantum physics, when the scientists were confounded by the paradoxes they were discovering at the sub-atomic levels. It seemed nonsensical and ridiculous to the Newtonian worldview, and yet that is what their experiments were showing them. We need to enter the realm of quantum conflict resolution – a magical world where conventional assumptions are turned on their head and alchemical transformations are possible.

Environmental Constellations – A Case Study

One methodology which meets these criteria is Environmental Constellations. This is a therapeutic process based on the work of Bert Hellinger which has been adapted for family, organisational and environmental issues. In the words of Environmental Constellations practitioner Zita Cox¹⁴:

Environmental Constellations are a wonderfully versatile and creative tool. They allow us to observe our place in nature and our systemic relationship to other living beings. They assist us with new ways of thinking about and finding resolutions to

the problems we have created, such as climate change, pollution, alienation and accelerating species extinction etc; They are an aid to empathy and shared understanding in all situations.

Constellations facilitate 'joined up' thinking by mapping the environmental system in front of our eyes. They open up creative and imaginative possibilities, accessing the unconscious mind to work with us and for us.

We are all interconnected parts of family, organisation, community and ecosystem. The difficulties we struggle with are often best resolved when we work systemically. Constellations are an innovative way of gaining insight into the systems we are a part of. A constellation draws on emotional intelligence and intuition as well as logical thought. It provides a way of seeing below the surface to understand what the real issues are and what can actually be done to improve things.

How they work

To set up a constellation in a group of people the person exploring the issue is invited to choose individuals from the group to act as representatives for the various elements or parts of the system they wish to understand. The issue holder positions the representatives in the room as feels right to them, at this point a pattern becomes visible and the nature of the relationship between the different elements begins to be seen. The facilitator works with the dynamics that emerge, leading to further information, unexpected insights, ideas, strategies, a deeper understanding and sharing of knowledge and experience and, where appropriate, resolution.

One of the important tenets of the method is the belief that a system is by its nature inclusive, each person or element has their rightful place. If we attempt to exclude any element, the system becomes unbalanced, problems emerge and people and situations become stuck. The information revealed by the constellation allows the system to rebalance and the flow of energy to resume, or it may simply give us a new and unexpected way to understand a situation'.

At the 2007 UKELA Annual Wild Law conference, we held a mock trial in which the lawyers were invited to argue wild law principles. The particular legal problem chosen was that of palm oil plantations in the Borneo rain forest, where deforestation was affecting the orang-utan population.

We invited Zita Cox to attend the conference and to run a constellation on the same topic. For this process we chose as our starting point the question of how a lawyer representing the orang-utan could 'take instructions' from their client (i.e. find out what they wanted). One of the groups took the role of lawyer and another two were chosen to be the orang-utans. They were placed in relationship to each other. Next the remaining elements of the system were put in place. Representatives were chosen to play all the other elements: the rainforest, the indigenous people who lived there, the logger who wished to cut down the rainforest in order to plant a palm oil plantation and the palm oil plant. An interaction then started between

the various different parts of the system, careful facilitated by the practitioner. I remember particularly vividly an interaction between the logger and the orang-utan. The logger ceased to be the all-powerful conqueror, laying waste to all before him in the name of his god-given right to maximise corporate profit. His youthfulness and immaturity in this system of ancient wisdom he had entered became very apparent. The orang-utan said to him with innate authority: 'you are so young', and with that I gained a visceral felt sense of the integrity of this ecosystem and the need for any incomer to tread lightly and respectfully. The logger's composure and his sense of entitlement were challenged, yet not in an aggressive way, more like a sense of Gandhian 'soul force' or '*satyagraha*'. I gained a direct, felt experience of the system, its constituent parts and the relationships between them.

Although this event took place over two years ago I can still recall its power very clearly and have a strong sense of the atmosphere that was created. Cormac Cullinan, who took the role of the lawyer, described the experience as follows:

Learning how to engage empathically with the Earth Community as whole is essential if we are to act as responsive and responsible members of that community. My participation in Environmental Constellations guided by Zita Cox gave me an intriguing experience of what this might feel like. This is a fascinating technique for slipping past the self-imposed limits of 'logical' thinking into the communion of participation.

Other Possible Processes

I will briefly touch on a number of other processes which I think have value in this area.

For dialogue with the natural world

*Council of All Beings*¹⁵

This is a process developed by Deep Ecology pioneers Joanna Macy and John Seed to address the deepening sense of alienation from the natural world that many feel. Through a series of dynamic experiential exercises, movement work, reflection, visualisations, and time spent in nature participants explore their concern and love for our planet, rediscovering their 'deep ecology' – interconnectedness with the myriad species and landscapes of the Earth.

Shamanic Rituals

Liz Hosken of the Gaia Foundation talks about how the shaman in indigenous cultures has the role of maintaining the balance between the human group and the ecosystem in which they live. The shaman learns to read the signs from nature and will conduct rituals to restore the balance when things get out of kilter.

For Dialogue Between Humans About Worldviews

Applications of Systemic Family Therapy to Socially Divisive Issues

The Public Conversations Project is an organisation based in the USA which draws on systems theory and systemic family therapy in order to create powerful dialogue about socially divisive issues.¹⁶ They specialise in topics where the difference is rooted in people's deepest values and worldviews, and which are therefore not capable of easy resolution. The aim is not for participants to reach agreement but rather to increase their understanding of one another.

Spiral Dynamics¹⁷

This is a psychological theory that holds that individuals, groups and societies evolve through different worldviews, with different levels of complexity. In order to influence effectively, it is essential to diagnose the paradigm in which people are operating and speak to them in terms that will make sense to them.

Some would argue that purely consensual processes as I have described above will never be sufficient in themselves, that there needs to be an element of coercion before those in power will come to the table. As Barack Obama said 'Power never concedes voluntarily'. I agree that there needs to be some muscle in our formal processes in order to bring powerful parties, who might otherwise ignore the rights of nature, to the negotiating table or dialogue process. However, we should see these as transitional steps on the way to a world where all parts of the Earth Community recognise that either everyone wins or nobody wins; that to be winning a war against nature is to find yourself on the losing side (to paraphrase E.F. Schumacher).

In this table I summarise the two worldviews described above and the methods for resolving differences which flow from them:

	Old Paradigm ('Empire')	New Paradigm ('Earth Community')
Underlying worldview	Unlimited growth Earth is a resource 'free market' Illusion of independence Myth of superiority	'We are a communion of subjects not a dominion over objects' (Thomas Berry) We are part of a larger system with which we are interdependent and need to start behaving appropriately in relation to it
Values, attitudes	Scarcity Fear Competitiveness Materialism Mechanistic	Abundance Creativity Spontaneity Wildness Community
Jurisprudence (how we conceptualise law)	Law recognises no higher power than itself Nature is protected to the extent it has utility for humans (anthropocentric)	Nature/universe is the primary law giver (human law must operate within environmental limits) Rights are inherent to existence Nature has inherent value, irrespective of human utility (geocentric)

Legal system – who has rights?	Only: Humans Corporations Law is anything that humans say it is	<i>All</i> members of the Earth Community, including Animals Plants Habitats (e.g. rivers, mountains) Fundamental rights: To be To habitat To participate in the unfolding Universe story
Conflict resolution methods	Litigation Rigid Adversarial About blame Win/lose Denies relevance of non-rational 'subjective' data Linear, reductionist, transactional, analytical Does not value feelings and relationships	Mediation and dialogue Flexible Consensual Forward looking Aspires to win/win Recognises interests and needs Can encompass complexity Values feelings and relationships <i>But:</i> <i>Has not yet started to think about how to meaningfully engage with the natural world</i>
What next?	Guardian ad litem concept Public trust doctrine Citizen suit provisions	Specifically for working with natural world: Environmental Constellations Council of All Beings Shamanic Practices For working with worldviews: Systems theory and family systemic therapy Spiral Dynamics

Rights-based thinking – is it part of the problem?

My experience when presenting these ideas is that people often respond very positively to the underlying philosophy of Earth Jurisprudence, but feel jarred when the concept of rights for nature is mentioned. Somehow it does not seem to fit with the new paradigm. I believe that the concept of 'rights' as we currently use it belongs to the old paradigm (Empire) and at best they should be viewed as a stepping-stone towards the new paradigm (Earth Community). Rights tend to emphasise separateness and encourage competitiveness, rather than emphasising interconnectedness and synthesis. If we really felt our interconnectedness in our gut, we would have little need for rights.

If we take the metaphor of a family, in a healthy functioning family there is no need for any member to invoke their rights. It is only in very dysfunctional families that this is the case. Relationships with the 'family' of the Earth Community have become very dysfunctional, with the upstart newcomer (humans) acting like an out-of-control teenager. Mediators encourage people to look beyond rights to thinking about interests and needs instead. Maybe we need the concept of rights in the short term to restore some semblance of balance, and when that has been

achieved we can shift all members of humanity to a more sophisticated approach of looking at interests and needs.

The journey of the modern age has been to recognise the humanity in *all* humanity, and to extend recognition and respect beyond white wealthy males to women, children, people of colour and workers. In each case it was necessary for those groups to invoke their rights before they were treated with respect. So, maybe we need a concept of rights for nature as a transitional step towards widening our circle of compassion. As Einstein said:

A human being is a part of a whole, called by us 'universe', a part limited in time and space. He experiences himself, his thoughts and feelings as something separated from the rest ... a kind of optical delusion of his consciousness. This delusion is a kind of prison for us, restricting us to our personal desires and to affection for a few persons nearest to us. Our task must be to free ourselves from this prison by widening our circle of compassion to embrace all living creatures and the whole of nature in its beauty.

Notes

- 1 C. Cullinan, *Wild Law: A Manifesto For Earth Justice*, Green Books, Devon, 2002, pp. 106–107.
- 2 D.C. Korten, *The Great Turning: From Empire to Earth Community*, Berrett-Koehler Publishers, 2006, p. 54.
- 3 Cullinan, *Wild Law*, pp. 37–50.
- 4 I include arbitration in this term
- 5 Cullinan, *Wild Law*, pp. 44, 89–90.
- 6 For more detail see Andrew Kimbrell: 'Halting the Global Meltdown: Can Environmental Law Play a Role' *Environmental Law and Management* vol. 20, 2008, p. 1.
- 7 Korten, *Great Turning*, pp. 17, 37–38.
- 8 Thomas Berry, *Evening Thoughts: Reflecting on Earth as Sacred Community*, Sierra Club Books, San Francisco, 2006, pp. 110–111, 149–150.
- 9 Janine Benyus, *Biomimicry: Innovation Inspired by Nature*, Harper Perennial, New York, 2002.
- 10 I am indebted to Nicholas Janni for his clear explanation of this model www.oliviermythodrama.com 'Elements of Leadership'. He also talks of a fifth element of Ether.
- 11 Daniel Goleman, *Emotional Intelligence*, Bantam Dell, New York, 1995.
- 12 Danah Zohar, *Spiritual Intelligence: The Ultimate Intelligence*, Bloomsbury Publishing PLC, London, 2001.
- 13 Stanley Keleman, *Love: A Somatic View*, Center Press, Berkley, 1994.
- 14 www.environmentalconstellations.com
- 15 www.joannamacy.net
- 16 www.publicconversationsproject.org
- 17 www.spiraldynamics.org