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On the value of law for the planet

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If our current human cultures are to survive and have a flourishing tomorrow, we need to bring about global systemic change, and do so quickly. This change will amount to a renaissance. It will need to be expressed in laws and embedded in our governance structures. Lawyers working in the public interest have a key role to play in this great transition.

My client is the Earth and all who live upon her. The Earth has few lawyers. When we started ClientEarth five years ago, there were only a handful practising in Europe. Our rapid growth to a staff of around sixty suggests how needed the work is.

A lawyer of my type works in the public interest rather than for private gain. Our own habitat is inside a legal charity whose objectives include protecting the environment and human health, helping environmental groups, advising law and policy makers, and educating citizens, all for the public benefit.

Most environmental activists, including those in the name-brand organisations, do their work by campaigning. They campaign for protection of an environmental asset, for new regulations, against nuclear plants, and so on. They are often expert in politics and communications strategy.

In Europe, however, these organisations have not employed legal talent to develop legal strategies as integral parts of campaigns. This is in distinction to how both business and government operate. Neither of these great shaping forces in our society looks forward to the goals they wish to achieve or the pathways to reach them without generating and deploying sophisticated legal strategies. Campaigners tend to state general principles that should be followed. Those on the other side craft explicit legal proposals that meet their needs. When green campaigners face such calculated opposition without skilled lawyers on side, there is an inevitable inequality in arms. It is the environment that suffers.

The American and Australian environmental movements are different from their European brothers and sisters in this regard. Back in 2006 when I was doing the research that led to setting up ClientEarth the following year, there were estimated to be around 500 fulltime practising lawyers in the United States working for the planet inside environmental organisations. In Europe there was a small handful. In this way Australia is more like the United States, with a long history of public interest environmental lawyers - and in some cases in-house or private lawyers working for campaign groups - defending nature and indigenous people.

Photograph © Creative Commons: CEE Bankwatch Network 2011

Let us look at five separate dimensions of how law can serve the needs of ecosystems and the people who depend on them, which is to say all of us. Another way to put this is that we will consider five distinct types of public good that public interest environmental lawyers deliver. The examples are drawn mostly from the European Union (**EU**) given that is my current primary focus, but equivalent examples could be drawn from wherever such lawyers are active.

1. Writing good laws

Let us unpack what I mean by good laws. In the environmental arena, the right choices for society intricately depend on science. Air quality limits depend on a combination of physics and physiology. Fisheries laws depend on the ecology and biology of fish populations and ocean ecosystems. The appropriate regulation of toxic chemicals depends on toxicology and epidemiology. Guiding our actions on climate change, biodiversity loss, and so on, depends on sound science. The creation of policy follows from the science. We might say that the Earth speaks to us in the grammar of science.

Science gives us the goal. You generate policy by casting that goal into the templates of human institutions. Good environmental lawyers are systems thinkers. They start by understanding the relevant science. Then translate what the science is saying into a form the relevant political institutions can understand. Because lawyers are pragmatists, detail oriented and solution driven, policy created by lawyers is pre-adapted to succeed in the political process. This is not to say that every battle will be won, but that the strategic view of the experienced environmental lawyer will often give the clearest shot at realising meaningful environmental protection.

Moving from science to policy that embodies the best we know about what the environment or human health require, we move to the next step–legislation.

One day at a party I was explaining what ClientEarth does to the singer Annie Lennox. She is a quick study. Her reflection back was, "I see. It all comes down to legislation in the end."

It is legislation that embodies the balance of rights and responsibilities. And between the strong–commercial and governmental interests–and the weak–ecosystems and their organisms, ordinary citizens and indigenous peoples–it is only law that can level the playing field.

In the creation of law, lawyers can be helpful. That seems a tautology, but I was surprised to find that all the European environmental groups in Brussels worked on legislation without lawyers helping them. Even the European Parliamentarians, most of whom are not lawyers, were working on legislation with almost no legal input or support. This state of affairs reminded me of having an operation without a surgeon.

Companies, on the other hand, draw deeply on legal expertise as they engage in the legislative process. Of the 15,000 lobbyists in Brussels, many are corporate lawyers. Of the 100 or so full time environmental activists, none was a practising lawyer until I opened a Brussels office.

Partly as a result of this disposition of legal troops, European environmental laws often sound good. They have statements of objectives which are admirable, and a quick reading of the law leaves a high sounding impression. But they are frequently unenforceable. A law that is unenforceable is tantamount to authorising the behaviour you sought to prohibit.

In an air quality case that ClientEarth recently argued in the United Kingdom (**UK**) Supreme Court, the British Government told that Court with disarming honesty that they signed up to the EU Air Quality Directive (**Directive**)[2] because it never anticipated that anyone would enforce the Directive against them.[3]

Good environmental laws translate policy-based on science into enforceable obligations. Without laws of this kind, our planet's living fabric, which is our vital life, will not endure.

2. Implementation

Once a good law is passed, it needs to be well implemented. Regulatory measures need to be drafted. The regulated industries and individuals need to understand their obligations and be induced to comply with them. The regulators need to understand the law and its purpose and find the backbone to do the job of bringing about adherence to both the law's objectives and to its fine structure. All of this is patient, time consuming work, which can take real courage on the part of officials. Environmental laws are designed to change culture, within companies, within government and among citizens.

Even well-intentioned regulators will often have difficulty implementing laws because there is great countervailing pressure from the regulated community directed both at them and at their political superiors.

Take chemicals. The chemicals industry is one of the most powerful lobbies in both Europe and the United States. Teams of scientists and lawyers work to slow down the regulation and banning of profitable, hazardous chemicals such as neonicotinoid pesticides, implicated in the decline of bees in recent years.

If your focus is campaigning, you will see both a victory and an endgame when a law you campaigned for is passed. This was the case with the Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation (**REACH**), the European chemicals law introduced in December 2006 which is the current world standard.[4] All of the European green groups lobbied for its passage. Then the day the law passed they disbanded their teams. Not so the chemical manufacturers.

This makes sense if you assume laws are self-implementing, or you trust regulators to do a perfect job. From a lawyer's perspective, though, the fight for the change of culture envisioned in the law only begins with its passage. Everything depends on how it is implemented. If a good law is well implemented, it effects a shift in the relevant culture, and this counts as a profound public good.

If even a good law is not well implemented, it is a sham. Industry well understands this and has teams of experts working to have laws implemented in such a way that their culture is not disturbed. Much detailed, diligent legal work needs to be done on the other side as a countervailing force if even a good law is to have its intended effect. In the case of REACH, its ambitions have yet to create significant change. We are working on it.

Government agencies dealing with the implementation of laws often have dedicated people who are frustrated that only one side is pushing as a law is implemented. They often welcome a legal push on the side of the environment–it gives them the ammunition they need to do the right thing.

3. Enforcement

There will always be a need for enforcement. This is true of both companies and governments. Once legal duties are clear and enforceable and obligations bite, some regulated entities will not fulfil their duties.

Enforcement is another area where lawyers can help. Political pressure will often align against enforcement, to prevent even well-written and implemented laws from having their intended effect. When lawyers representing citizens bring enforcement cases, it is a strong and politically meaningful grass roots action for the environment.

Let me give a couple of examples. In the 1980s Ronald Reagan's government decided not to enforce environmental laws. As a young lawyer at the Natural Resources Defense Council (**NRDC**), I brought a series of cases against companies violating the Clean Water Act.[5] After scores of these cases, the government was embarrassed into getting into the enforcement business again.

I mentioned earlier an air quality case in the UK Supreme Court. ClientEarth brought this case because air quality in the UK is so poor it causes the death of 29,000 people a year, by the government's own calculations. In court, the UK Government admitted it had missed the Directive's 2012 deadline for cleaning the air, and that it had no intention of complying in London until at least 2025. When you say 2025, why not say 2075?

Although the lower courts refused to hold the UK Government liable even though it admitted violating the Directive, the Supreme Court reversed the preceding (High Court) decision. It held the government liable and is referring the case to the European Court of Justice for advice on how to craft the remedy.

I mention this case because it is just the kind of enforcement effort to give heart to citizens across Europe. Most EU capitals have unhealthily bad air, a result of Europe's unwise love affair with the diesel engine, coupled with inadequate regulation.

Because this is the first time the Europe wide Air Quality Directive has been enforced by a citizen's group, the hope is that citizens across Europe will now use the courts to fight for their health and that of their children.

Enforcement by citizens gives people hope. Environmental problems can seem overwhelming. Punishing offenders empowers the people.

4. Giving the right incentives

When it comes to climate change, neither governments nor the markets are providing the right incentives for companies to behave responsibly. By responsibly here I mean reducing carbon emissions. Interestingly, responsibility for carbon emissions is concentrated in relatively few hands. For example, two thirds of historic carbon dioxide and methane emissions from the 1850s until the present can be attributed to just 90 entities.[6]

There is a way that public interest lawyers can intervene and make a difference here too. How? By increasing the business risk of inappropriate carbon choices.

Let us look at coal fired power plants, because they are an irresponsible choice in today's warming world.

In Europe, Poland has a heavily dependent coal economy and a plan to build 14 large coal plants, around half of all those on the drawing boards for Europe. In this the present government is showing remarkably little imagination, because they are replicating the Soviet energy plan for Poland from the 1970s.

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ClientEarth decided to take a two pronged approach to increase business risk for coal as a way of nudging investment towards more responsible and sustainable choices. The first was to bring cases against all 14 investments in the Polish courts.[7] The cases sought to make the investments comply with Polish and EU law, which in all cases they failed to do. Partly, one suspects, because the investors did not suspect that citizens were watching.

We have won a number of these cases, and so far killed four plants. The rest are on hold. One company, Energa, which controls about 20% of the Polish electricity market, announced it was abandoning coal and moving to gas and improving the efficiency of the grid.

A second and parallel approach was to attack a taxpayer subsidy that the Polish operators wanted. The investors wished to get free allowances to emit carbon, rather than pay for their emissions under the Emissions Trading Scheme. We argued to the European Commission that these subsidies were illegal, and we prevailed, in the end killing €7 billion in free allowances, making coal more expensive.[8] Though the plants if ever built would still get subsidies–a mad idea–for construction, removing the free allowances nevertheless increases the business risk by making the coal investments pay more towards their true social costs.

Increasing the business risk for irresponsible investment is a strategy that will become increasingly important in the legal wars over climate change.

5. Building basic democracy

If we are to keep succeeding as a society, we will need to change both our legal frameworks and our attitudes. But there is also another set of changes that we will need to make. These are changes in institutions to make information more available to citizens, allow greater and more effective participation by citizens in decision making about how resources are used, land is developed, chemicals regulated, and all the rest of the decisions about how we fit into planetary systems. We also need to allow citizens to have more effective access to courts to enforce their environmental rights.

In even well developed legal systems such as we find in Europe, basic democracy needs to be improved in these ways. Let us take the example of access to the courts.

A democracy in which citizens cannot defend their rights against the authorities in court is not a fully realised democracy. In the UK, for example, the right to use the courts against the government, though available in theory since the 13th century, has not been available in practice. The courts are indeed open to citizens, but a pernicious rule on costs has made them effectively unavailable. This gave rise to the line that "Her Majesty's courts are open to all citizens–just like the Ritz."

The "English rule" on costs meant that if you lose you pay the other side's legal costs and fees. And because the English barristers are perhaps the most expensive lawyers in the world, this meant in practice that if you lost a relatively routine case you might be liable for hundreds of thousands of pounds. Few can afford such a contest. In the environmental arena, I was told that the World Wildlife Fund (**WWF**) UK, with a budget of then over £50,000,000 a year, did not bring a case for ten years because, having lost a case that cost them around £100,000, their board refused to take the risk.

At the EU level, the case has been worse, if that is possible. While the EU has its own system of courts, EU citizens do not have a right under those courts' jurisprudence to bring a case against EU institutions when they violate an environmental law. Though a sensible reading of the treaty that establishes the EU clearly gives citizens such a right, the courts refuse to confer it. Their view is that only direct economic harm gives a right to the courts,[9] or an 'individual' harm that is unique to the individual and suffered by no other human being.

But of course citizens seldom wish to argue an economic harm in environmental cases. Instead they want, and often need, to argue, that the government or another actor is not complying with the law, to the

detriment of human health or the environment. In the case of air pollution, for example, one wants to hold the government to established standards for clean air. And the air pollution example shows why the EU courts' idea of 'individual' harm is remote from reality. Environmental harms are never unique to a single individual, indeed the worse they are the more widespread the suffering. In the UK air pollution case, it is 29,000 people a year who die, and many others who are affected.

As a result of the EU courts' attachment to economic harm and their inadequate notion of 'individual' harm, there is a complete denial of citizens' rights to use the European courts to contest the EU's action regarding the environment. And because the EU will not appear in the court of a member state, it is entirely remote from challenge. Yet EU bureaucrats often wonder why there is a 'democratic deficit' in the EU.

In Germany too, the courts were closed to citizens in a way parallel to that of the EU courts, in that standing relied on a personal, economic injury, meaning essentially that public interest environmental cases could not be brought.

How can lawyers address these kinds of systematic injustice? The first set of actions we brought as ClientEarth were directed against the UK, the EU, and Germany. The basis of the action was a relatively obscure treaty called the Aarhus Convention.[10] The Convention was signed by all the EU countries and the EU itself. Signatories promised to give their citizens, regarding the environment, access to information, participation in decision making processes, and access to justice that shall not be prohibitively expensive. There is a panel sitting in Geneva, where representatives from signatory countries sit to hear cases in which citizens allege that countries are not abiding by their promises.

We won our cases against the UK[11] and the EU some time ago.[12] The case against Germany was on hold for several years as two cases and a piece of legislation relevant to our claims worked their way through the system. In November 2013, around six years after we filed the complaint, we won the case against Germany. Neither the legislation nor the other cases did enough to open the courts to citizens in environmental cases, and the ruling in our case therefore went squarely against Germany.[13]

The UK is now, partly due to this judgment, amending its cost rules, which will allow citizens access to justice. We are waiting to see how the EU courts handle their situation, in that their jurisprudence will have to change profoundly. And we are waiting to see how fully Germany gives citizens access to its courts.

Conclusion

The good news is that lawyers dedicated to serving the public interest can effect systemic change. For a very small investment, they can generate environmental public goods. Their work makes laws better, and sees laws implemented and enforced. They can improve basic democratic institutions. And where markets fail to do so, they can create the incentives for companies to do the right thing.

This is hard, patient and sweaty work in the boiler room of democracy. Because we need to bring about systemic changes in our legal systems to adapt them to the needs of people and the living world, it is work that I put at the heart of what is needed now. Either our civilisation winds down or we have a renaissance. My money is on public interest environmental lawyers to help design that renaissance.

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1 CEO, ClientEarth. http://www.clientearth.org/

2 Directive 2008/50/EC.

3 *R (on the application of ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25. Judgment available at: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0179_Judgment.pdf

4 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency.

5 33 U.S.C. §1251 et seq. (1972).

6 Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers 1854-2010, Richard Heede, Climate Change, 22 November 2013; http://link.springer.com/article/10.1007/s10584-013-0986-y

7 http://www.thelawyer.com/news/people/the-hot-100/hot-100-james-thornton-clientearth/1016131.article

8 See ClientEarth, *Eligibility of proposed fossil-fuel power projects in Poland for transitional free allowances under the EU emissions trading scheme: Due diligence report by ClientEarth (Executive Summary)*, January 2012. Available at: http://www.clientearth.org/reports/clientearth-due-diligence-report-executive-summary-january-2012.pdf

9 The one exception is under the freedom to information regulations (Regulation (EC) No 1049/2001 of the European Parliament and the Council), which give any person a right to obtain information. If you request and are denied information, you have the opportunity to contest the denial in EU courts. Because the EU institutions routinely deny such information, we routinely bring such cases. And the European Commission has been trying to completely deny citizens access to such information. The gambit, which we and a group of allies have quashed for now, was to redefine 'document' to mean only what the Commission wanted to publish. Something of the spirit of Kafka lives on.

10 Formally known as the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Note that Australia is not a signatory to this Convention.

11 Findings and recommendations of the Aarhus Convention Compliance committee with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom. Available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf

12 Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union. Adopted on 14 April 2011. Available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/DRF/C32Findings27April2011.pdf

13 For further information, see Communication to the Aarhus Convention Compliance Committee concerning ACCC/C/2008/31, dated 22 February 2013. Available at: http://www.unece.org/env/pp/pubcom.html