

Eradicating Ecocide

Laws and governance to prevent
the destruction of our planet

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Introduction

It was 9:56 p.m on the 20th April when the fire started on the Deepwater Horizon oil drilling rig. Pressure mounted inside the marine riser and as it came up it expanded rapidly and exploded. The fireball could be seen 35 miles away. 11 men were killed, 17 others were injured in the blowout. Workers had less than 5 minutes to escape. After burning for more than a day, the rig sank on April 22nd 2010. That afternoon a large oil slick was observed and it was confirmed that the wellhead, a mile below the water, was damaged and pumping oil into the Gulf. Conservative estimates stand at +800,000 barrels a day pouring into the Gulf of Mexico. It is an environmental disaster of epic proportions, one of the largest in U.S. history. BP, the third largest corporation in the world, saw 42% of their share price collapse within 48 hours.

When the oil reaches the coastline it will seep into the surrounding marshland, destroying not only the habitat of wildlife but also the very roots of the grasses that bind the land together and prevent it from subsiding into the Mississippi River delta and the Gulf of Mexico. The importance of the survival of the marshlands is not only vital to wildlife but also to humans; it is the physical barrier that lessens the intensity of fierce storms like Hurricane Katrina. When that disappears, a lot more goes than just the death of the local fishing industry and surrounding aquatic wildlife.

Stemming the flow defeated BP for eight weeks. The Macondo well was eventually capped on 15th July 2010 when BP engineers performed a 'static kill'. BP claimed they would conclude final 'bottom kill' operations in the second week of September 2010.

This occurrence demonstrates a consummate failure on many fronts. Firstly of technology, reliance upon which betrays the hubris of an industry that believes technology provides all the

answers. Secondly, this has demonstrated a far larger abrogation of corporate responsibility not just to employees but to the wider ecological community. Thirdly, the failure to anticipate the potential failure of technology¹ led to the fourth failure, namely failing to have the means in place to stop the disaster. For BP and the other companies involved, their greatest fear is the final litigation bill arising from the individual and collective damages and lost income from local fisheries. The enormity defeats our comprehension, not just in size of disaster, but also in terms of identifying effective legislative controls.

It could have happened to any number of oil companies. The Deepwater Horizon tragedy is a warning of what can come in the future; for all the confidence of relying on technological innovation it just takes one small failure to result in catastrophe.

At the moment, aside from potential litigation for damages and loss to individuals there is no proper legislative mechanism that addresses the vast environmental impact of the oil spill. Quite simply the laws and governance we need to prevent such a disaster from happening again do not exist. The law as it currently stands, is not fit for purpose. Instead BP have the 'right to kill' the ocean without consequence.



Law can be employed creatively and constructively, effecting overnight change. Innovation can be nudged to suddenly flow in a very different direction, sometimes in unexpected areas. Law can close one door and open another. Law can inadvertently create a positive discrimination. Law can change our values and understanding. The inverse can also be true. Sometimes laws are put in place that directly or inadvertently cause damage and destruction. These are the laws that need to be rooted out and transformed. Change is what is required here, nothing less, if we are to change the current course of our trajectory of destruction. Sir David King, ex-chief scientific advisor to the former UK government, warns of a century of resource wars,² an era of ecocide.

By asset-raiding our natural capital we deplete our resources to such an extent that conflict and war over the remaining few spoils is inevitable. It is a certain and rapid escalation into anarchy, death and destruction of epic proportions.

Eradicating ecocide requires radical and bold decisions to be made. To eradicate ecocide, the means of doing so are embedded in the words themselves. We literally have to derail this unstoppable train of destruction that we have created. Applying the brakes gently is not going to work; it is a juggernaut that has acquired such powerful momentum that it is careering out of control. To stop it takes bravery, from those on the outside pulling up the railway track, and from those on the inside pulling the emergency cord. If both are done skilfully and quickly, very few will be hurt and the train will come safely to a sudden halt.

To eradicate means to pull up by the roots, to eliminate at source, overhaul. The Late Middle English origins of the word are derived from the Latin *radix*- 'root', *eradicat*- 'torn up by the roots'. We can pull up those roots, those railtracks. The word ecocide is prefixed with 'eco'; it derives from the 16th century Greek word *oikos* meaning 'house, dwelling place, habitation, family.' The suffix 'cide' means 'killer', from the use of the French *-cide*, from Latin *caedere* 'to strike down, chop, beat, hew, fell, slay.' To eradicate ecocide means to forcibly remove the systems that are killing and destroying our habitat.

Ecocide is like the virulent Japanese Knotweed – it spreads out of control, sucking the life out of all that comes in its way, strangling the life out of the very air we breathe. To stop it, it has to be eliminated literally at the roots. In oil industry terms, tackling the problem at the root is referred to as turning off the 'upstream', closing off the source. This means stopping the processes that extract and deplete the natural capital in its raw state. Do that and the downstream operations that are dependent on the life-force of the upstream operations shudder to a halt. In oil terms that includes the oil refiners, the product distribution terminals, the trucks, pipelines, marine transportation, the retail gasoline marketers. The wholesale, industrial and commercial customers

no longer have their commodity. Sounds radical, but all those downstream operators will be required for mobilizing mass innovation in the opposite direction. We need the constructive use of those skills to be applied elsewhere, and very fast.

Today we are faced with a collapsing habitat – threats of increasing instability of climate change and the breakdown of national economies inevitably lead to the conclusion that governance of our planet has failed. As we destroy this planet so our eyes are now set on the potential to pillage from other planets, governments racing to see who can be the first to extract uranium from Mars, water from the Moon. Somewhere along the way, we have lost sight of our role as stewards. Until we know how to clean up the mess we have created in our own house, surely it is presumptuous to believe we can merely take from another.

It is no coincidence that the word economy has its roots in the Greek word *oikonomos*, which when taken in its constituent parts of *oikos* and *nomos* provides us with the etymology of the word. *Nomos* means ‘manager, steward;’ *oikonomos*, or economy, is stewardship of our dwelling place. Our largest habitat is, of course, the planet itself. Where our habitat is damaged and destroyed, humans suffer. Critics of environmentalists who claim we are failing to consider human needs are missing the point. Without the wellbeing of the ecology of our planet, our wellbeing suffers.

On a smaller scale, each of us mirrors our global habitat. Our bodies are our most immediate dwellings, composed of over 70% water, and so too is planet earth covered by over two-thirds water. As we contaminate our own internal systems we start to suffer. Outbreaks, rashes, fevers are all indications of the body trying to rebalance and purge the poison. More serious and long-term abuse and exposure to toxins can lead to cancer, long-term disease. An acidic environment leads to loss of health and can result in pollution of our blood cells, the very life force our body depends on. This in turn opens us up to fatigue, infection and a downward spiral of illness with all its attendant symptoms if matters are left unchecked. Attending to our health and the health of others, not just human but of all life, is crucial if we are to optimize our wellbeing.

Therefore, as we do locally, so too we must do globally for the larger habitat we inhabit. For example, pollute the waterways by dumping toxic waste and the result is acidification; marine life is compromised and/or dies, the tributaries carry the contaminated water that seeps into nearby land poisoning the foodstuffs grown therein. We eat the fish and food, we drink the water, taking it all into our own habitats knowingly or unknowingly. The damage is pervasive: what is damaged here, comes out over there and remains in the system. Everything has consequences, and destructive practices come back to affect us and cause harm, if not locally then elsewhere and to others. Pollution created in one place can affect another quite randomly – Inuit women of Alaska have high levels of DDT in their breast milk but until notified, they had no knowledge of it.³ DDT was banned 15 years ago, yet its impact on future generations is playing out today in many ways. Pollution, transboundary in nature, does not adhere to man-made borders.

Nothing less than a radical and rapid shift from protection of private interests to protection of public interests is what I call for. We can rebalance the scales of justice by implementing laws to ensure the wider community is provided for, not just humans but also other species who are (or are at risk of being) adversely affected in a given territory. To remain rooted in protecting the private is to set apart, whereas a shift in focus to the community as the central determinant is to give voice to the many.

TEETERING ON THE BRINK

As a global society we stand at the precipice, teetering on the brink of shifting from independence to interdependence. Just as that moment comes when a teenager becomes an adult and starts to take responsibility for the consequences of his or her actions, so now is civilization as a whole poised to step into that space. Sometimes the moment of transition is identifiable – it can be triggered by an event, or series of events; often it is not. Just as with the teenager who seemingly overnight has become an adult, so there is that recognition that the shift in consciousness has somehow taken place. The teenager has become an adult, no longer

striving for independence but now embracing interdependence, creating relationships, understanding the intrinsic value of the self and others.

A shift in consciousness is not a gradual process. Rather, it is akin to a build up of pressure, sometimes resulting in outbursts, tantrums, the attempt to cling onto practices that are of no long-term benefit, but guarantee short-term satisfaction. So it is with society, with our banking systems, our blind use of damaging extraction of fossil fuel, unaccountable practices, mistrust and short-term trading gains at the expense of people and planet. Our governments speak of the necessity of 'independence' and 'security' of supplies. Yet true resilience, as seen in nature, is found in forging interdependent relationships based on sharing and the creation of abundance. Security concerns will become obsolete. Very soon a tipping point will be reached. We do nothing and all systems, ecological and human-made, will implode and we become mere spectators of our own destruction. Or, we collectively step forward to take responsibility for our actions and put in place the means to ensure the well-being of our *oikos*. Once we have that shift in consciousness where we assume collective responsibility, we will take the latter route and that will be the true journey of social progress.

In legal terms this means the journey of moving away from laws premised, either deliberately or accidentally, on compromise. Laws that are often put in place with the promise of robust sounding enforcement restrictions. Such laws are often no more than a sop to appease public opinion or are weak instruments which have been watered down by intense corporate lobbying. They can have the appearance of being radical, or are touted as innovative, but the reality is that they ensure the status quo remains. These types of laws are dismissed by lawyers as 'compromise laws.'

These are often laws that have been put in place to minimize – but not prohibit – an activity. Instead, the problem continues, often in time worsening. History demonstrates that laws dealing directly or indirectly with the environment, for example pollution reduction

measures, have comprehensively failed where reliance is placed on incremental mechanisms, limitations, efficiency measures and permit allocations. In reality corporations simply deal with these measures by making any breach, and the consequence thereof, a part of the profit and loss account of its operations. Modern-day climate negotiations are a further example; it has spawned a rash of laws premised on compromise which serve only to advance the interests of industry, not the people and planet.

The very idea of negotiating our way out of climate change is a premise that we have accepted without question, despite the impossibility of succeeding. The Kyoto Protocol is a commodity document, a trading document; it has nothing to do with protecting people and planet and is quite simply not fit for purpose. We need new rules, ones that create barriers to halt the gambling of our planet. As a lawyer who has experience of protracted divorce proceedings where two people cannot agree on the division of goods, it occurs to me that trying to get 192 different countries, with all their vested interests and teams of negotiators to agree on a range of topics, is a recipe for years of fatal compromise and disagreement.

Radical law, on the other hand is law that completely changes the landscape. Sometimes it is a law in a totally different arena that can do this. For instance, the first British Canal Enabling Act in 1759 opened the door to cheap commercial transport. Another, this time in the States, was the 1862 American Revenue Act, which placed an excise tax on alcohol. Both of these pieces of legislation, innocuous enough in themselves, removed a block and opened the floodgates respectively in each country (and subsequently throughout the world) to rapid uptake of coal and oil. Such laws are acupuncture points, the levers which facilitate the smooth flow of energy (in this case literally as well as metaphorically) in a completely different direction for innovation, investment and policy. At other times it is new law (and new language) that has had to be invented to prohibit destructive practices. The international law of Genocide is the most telling example of the 20th century.

JUST CALL ME TRIM TAB

Walking through Lincoln Inns Fields behind London's Royal Courts of Justice on a spring afternoon with Victoria, a wonderful and wise friend of mine, I was discussing application of a law of Ecocide. "What we need are trim tabs", she said. Not knowing what this was, she explained to me that a trim tab button is to be found on cruise liners, to be pressed when the ship needs to turn in the opposite direction very fast. While everyone else is flailing around in the water expending enormous amounts of energy trying to push the ship around manually, in the cruise liner the only energy that is expended is that which it takes for one person to press the button. The cruise liner turns without anyone else needing to push. The law of Ecocide, Victoria explained, is a trim tab.

Buckminster Fuller, (1895–1983) a self-described 'comprehensivist' who took a long view of history, had this to say when interviewed by *Playboy* in 1972:

Something hit me very hard once, thinking about what one little man could do. Think of the Queen Mary – the whole ship goes by and then comes the rudder. And there's a tiny thing at the edge of the rudder called a trim tab. It's a miniature rudder. Just moving the little trim tab builds a low pressure that pulls the rudder around. Takes almost no effort at all.

Fuller had been a naval officer in World War I and so experienced the use of a trim tab first hand. The slightest pressure on the trim tab moves the rudder, which in turn directs the ship. He applied the metaphor to our lives. We are all trim tabs, tiny pivots affecting the overall direction of humanity. As Fuller advised, it is time to take a long view. Zoom out, look at where we've been and where we might be going. Fuller urged leaders of government and industry to focus not on weaponry, but on what he called 'livingry' – the tools necessary to promote peace and prosperity for the entire planet's population. Cooperation, not competition, would signify the next step of human evolution. The law of Ecocide is a trim

tab to take us to 'livingry.' The epitaph on Bucky's gravestone was fitting: just '*call me trim tab*.'

HUMAN RESPONSIBILITIES

Over time as our understanding expands of the impact our activities have, so too comes the recognition of an expanding responsibility. The shift in consciousness required here is an espousal of our collective responsibility for the ecology of our planet.

We are only one of many millions of species, but our role as humans is particular. Whilst we are not the world's largest species in terms of numbers, our impact on our environment has been by far the most influential. We have built a world of beauty, but in the process destroyed far more in pursuit of our perceived path to progress. For life to reintegrate rather than disintegrate requires us to redefine our role.

When we step into the space that defines us as fully matured human beings, and fully embrace the meaning of being a *homo sapiens* (Latin: wise or knowing human), we shoulder with ease our individual and collective responsibilities. Our role shifts from conqueror to provider, from corporation to co-operation, from owner to steward. Competition, all too often bolstered by scarcity, blame and fear, is replaced by collaboration fostered by love, abundance and, most importantly, trust.

We can remedy all of this. We are learning to apply different language and different laws. Time has demonstrated that some laws work, some laws do not. Time has demonstrated the need to shift our emphasis from property laws to the use of existing trusteeship laws, conferring upon us duties, responsibilities, obligations. For those of us who live in a world of governance by written laws, we need bridges to take us to this new world. Law has an important role in providing some of the crossings to get us there. Some new laws, such as the law of Ecocide, will need to be created to provide the footpaths in our new responsible world. Some existing mechanisms that have been lying defunct such as the United Nations Trusteeship Council can be dusted down,

taken out of abeyance and put to good use once again. We can do all of this and so much more.

The implications of the proposals set out here for society, the environment and climate change strategy are enormous, both at international and national level. By applying both new and existing laws, we can impose upon international corporate activity, banking and governments a global standard of care, a pre-emptive obligation of ecological responsibility and accountability for and of our natural capital. International regulatory framework can be simplified, finance can be mobilized and infrastructure strategy can be exponentially accelerated. In so doing, a rapid transition to a cleaner world can be assured, without undue reliance on carbon markets, failed voluntary (and non-voluntary but unenforceable) mechanisms and compromise legislation.

At time of writing, the world is grappling with one of the largest manmade ecological disasters known to man. The tragic Deepwater Horizon Gulf oil disaster has served to demonstrate a shortcoming that all – banks, governments as well as corporations and society in general – have until now underestimated. Existing laws are deficient. This singular event has challenged our basic and fundamental assumptions on what is now deemed to be acceptable destruction of our ecology.

This book is applying Bucky's advice; it zooms out, to explain where we've been in our application of law to prevent ecocide in its various manifestations and where we might be going. It zooms back in to examine set examples and to set out guidance and legislative recommendations for use with immediate effect. All that is set out here is applicable to all nations and to all peoples, not only at an international level but also regional, national and local. This is a book not only to read but to be put to good use; to be used by decision-makers, policy-makers, law-makers and co-creators of the new world. Whether you are a Member state representative in the United Nations, an activist, a judge in an international court, a community spokesperson, a congressman sitting on an enquiry into an oil spill, a lawyer, an MP, a town councillor, a concerned parent – all of us have our role to play.

Trim tabs each and every one of us. In short, anyone who has a say in decision-making processes that have an impact on the community, be it with regard to one's own local community or the global community. In microcosm and macrocosm, the principles are universal and applicable to us all.

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