

Shareholder return – a ‘Nuremberg defence’? Ecocide and restorative justice

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At the Nuremberg war crimes trial after the Second World War many of the defendants put forward the defence ‘I was only obeying the orders of my superiors’, which became known as the ‘Nuremberg defence’. The tribunal decided that this was not a valid defence to war crimes as there is a higher moral duty to disobey orders which would lead to the commission of a war crime. Most of the defendants went on to be convicted and punished.

Modern company law enshrines the obligation of companies to maximise shareholder return. There are laws that restrict the means by which this can be achieved, such as health and safety. However, there is no ultimate restriction on companies pursuing shareholder return by taking unacceptable risks with ecosystems and the people who depend upon them. We have made serving the so-called ‘free market’ synonymous with the greater good and made the market our highest authority. At what point will shareholder return cease to be a justification for widespread social and environmental damage? At what point will it become a Nuremberg defence?

This gap in the law led barrister Polly Higgins to propose a new international law of ecocide, to sit alongside other international crimes such as genocide and war crimes. Under this proposed law, directors of offending companies can be held personally liable, prosecuted and sent to prison.

The workability of such a law was put to the test in September 2011 at the Ecocide mock trial in the Supreme Court. Two fictional CEOs of oil companies (played by actors) were tried of the crime of ecocide arising from oil extraction from tar sands in Canada. The jury found them guilty – maximising profit was not deemed an acceptable defence for their activities. In March 2012 their sentencing took place.

Courtroom dramas

Ever since *The Merchant of Venice*, the courtroom drama genre has entertained people. The suspense of hearing legal argument and heartfelt pleas to the jury, then waiting for it to return its verdict, has kept us gripped and entertained. If the defendant is convicted, that defendant is sent to prison and not usually heard of again.

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The law of ecocide

One of the tenets of the law of ecocide is that it is designed to be preventative – to change attitudes and behaviour so that ecocide does not happen, rather than simply punishing the perpetrators after the event. So simply sending the CEOs to prison would be of limited benefit. For this reason Polly Higgins came up with the idea of using restorative justice as part of the sentencing process for ecocide convictions.

Restorative justice

Restorative justice has been used in the criminal justice system for many years but does not have much mainstream visibility. It involves bringing together the perpetrator of a crime with its victim(s). The participants have a dialogue in which four questions are addressed:

- What happened?
- Who has been affected by what happened?
- What needs to happen to put things right?
- Who is going to take responsibility?

The outcome is often a commitment on the part of the perpetrator to take specific steps to make good the damage which has been caused, which can then be taken into account by the judge when sentencing. It also brings home to the perpetrator the impact of his or her actions and is far more effective at changing mindsets and behaviour than simply locking people up. The victim(s) are also more satisfied as they have a voice in the process rather than being excluded, as happens in the conventional criminal justice system.

Open source campaigning

One of the principles of the Eradicating Ecocide campaign is that it is ‘open source’. It is not owned by those working full-time on it, who are willing to ‘beta test’ their ideas in the public domain, in order to see how those ideas run in practice and ‘debug’ and improve the proposals. The mock trial was an example of this (the jury was independently recruited and the campaign had no control over what verdict it would return) and the sentencing process has been a further example. The whole process was streamed live on the internet for anyone in the world to watch.

The process involved a collaboration between the Eradicating Ecocide campaign, The Hamilton Group, the Institute for Democracy and Conflict Resolution at Essex University, human rights lawyer Mike Mansfield

QC and Restorative Justice expert Lawrence Kershen QC. It was witnessed by an audience on the day plus a wider audience viewing the process live online.

What happened in the restorative justice process?

Both defendants from the original trial, Robin Bannerman and John Tench, were given the opportunity to take part in the process. Robin Bannerman agreed and John Tench declined. Also present in the process were:

- oil company chief sustainability officer
- pension fund representative (representing shareholders)
- spokesperson for the birds damaged by the ecocide
- spokesperson for future generations
- spokesperson for wider humanity
- spokesperson for the Earth
- representative of the indigenous people living in the area affected.

The dialogue, skilfully facilitated by Lawrence Kershen, was an intense and dramatically gripping process to watch. I was particularly struck by the contribution from Gerald Amos representing the indigenous First Nations people of Northern British Columbia. His account of the detrimental impact of industrial activity on the way of life of his people and the land clearly had a profound effect on Robin Bannerman. He described tokenistic consultation processes his people had been subjected to where their views and concerns were blatantly disregarded and expressed himself with a palpable dignity that spoke volumes.

At times the exchanges were angry and intense and the discussion polarised into two positions:

- oil extraction from tar sands is unacceptably destructive and cannot be justified, therefore must be stopped immediately, whatever the consequences
- oil extraction is simply meeting the energy needs of society, in which everyone around the circle partakes, therefore Robin Bannerman is being scapegoated for all the ills of capitalism and industrialisation.

As the dialogue progressed, human connections formed between different members of the circle and attitudes started to shift. Also, as the focus of the questions shifted from the past to the future, ideas as to how the harm could be made good began to emerge. Robin Bannerman reported that all activity had been suspended on the site following his conviction. A number of innovative solutions were proposed including:

- restoring the tar sands area, at the company's cost
- appointing to the board a non-executive director with responsibility for sustainability, to be selected by sustainability organisation Forum for the Future
- funding a university chair to research the law of ecocide
- setting up a working group to investigate funding alternative energy sources such as solar.

When the judge heard the outcomes of the restorative justice process he took this into account and deferred Robin Bannerman's sentencing for six months to give him time to put the actions into practice. John Tench, who declined to participate, was sentenced to four years in prison.

What did we learn?

- The experiment proved that there is real potential for using restorative justice in conjunction with ecocide. It enables dialogue, understanding, healing and creativity to emerge. It is about making whole again rather than reinforcing separation and fragmentation through punishment of perpetrators and exclusion from the process of victims.
- It showed that it is possible to give voice to diverse and other-than-human elements of the system eg birds, wider humanity, future generations and the Earth itself in a meaningful way.

The process also showed ways in which both the restorative justice model and the proposed law of ecocide need to be modified in order to be truly effective.

Restorative justice

- As the focus of the dialogue shifted to the future, a voice that seemed to be missing from the circle was that of a positive vision for the future where humanity can meet its energy needs without causing undue destruction to people and planet. An advocate for alternative forms of energy and the pathways to achieve these would be useful.
- Government was not represented in the circle, and is clearly a key element in the wider system as the creator of the policy and regulatory framework which licenses the extraction activity. An underlying theme in the dialogue was 'who holds the power?'. The humanity/Earth participants within the circle saw Robin Bannerman/the oil company as holding the power to prevent ecocide and were seeking to hold him to account. His response was that they were simply acting within the confines of a permitted regulatory framework, therefore it is government which should ultimately be held accountable and be lobbied for change. Having government in the circle would make it easier to determine where power and accountability ultimately lie.

Adding these two elements would go beyond the classic restorative justice model and draw in principles from stakeholder dialogue, which is an approach where stakeholders are brought together to create solutions to complex public policy issues, using dialogue techniques. It may be that a hybrid model drawing on elements of both restorative justice and stakeholder dialogue is what is needed to fully support the implementation of the law of ecocide.

Ecocide

- The process very clearly illustrated that it is not enough simply to prosecute and convict individual directors of ecocide – the company needs to be a defendant too. The power of the restorative justice process in relation to ecocide is in creating actions that the perpetrator will take to make good the harm. In most situations these need to be carried out by the company. If only the directors as individuals are prosecuted then there is a risk that the company could simply terminate their employment and avoid all future responsibility to make good the harm. Therefore the company as a separate legal entity needs to be a defendant and be accountable too.

Conclusion

It was only through the willingness of the campaign to 'beta test' the use of restorative justice that the above points became apparent.

Old paradigm 'Newtonian' justice is about dissecting and analysing the different parts of a system and punishing/removing the rogue elements. We are now transitioning

to the realm of 'quantum' justice, where the starting point is the whole system and exploring what needs to be done to restore the integrity of the whole.

The combination of ecocide and restorative justice is groundbreaking and innovative, where the power of each is amplified by its synergy with the other. It may seem harsh to liken a corporate CEO to a Nazi war criminal, and of course a crucial distinction between war crimes and the law of ecocide is that with the former it is necessary to show *intention* to cause harm, whereas with ecocide it is enough to show that ecocide happened as a *consequence* of the defendant's actions. At the moment environmental destruction is seen as an unfortunate side effect of industrial activity and the pursuit of profit, yet the rules of the game powerfully incentivise the latter and do little to deter causing damage. CEOs are rewarded for obeying the orders of the market. The restorative justice process brings home these impacts very powerfully to both the minds and hearts of decision-makers and gives a voice to the victims in boardrooms around the world. With the implementation of the law of ecocide, supported by restorative justice, it will become much harder to say 'I was only obeying orders'.