

EARTH LAW ALLIANCE & GAPLA Conference on “New Thinking on Sustainability”

Background: Environmental Crises

The importance of a sustainable environment was put succinctly by an UN expert: “If we fail our environment we fail to protect our human rights.” However, scientific assessments show that we are still failing to act sustainably in that we are using up the planet’s resources at a rate which means that future generations will not be able to enjoy them. Worse, we are altering the physical state of the planet in a way that it will make it significantly harder for future generations to survive at all. If we are to fulfil argued duties to future generations, not to mention argued responsibilities to the survival of other species and the earth’s ecosystems on a larger scale, new thinking is needed on how to define and require true, ecological sustainability in law.

Increasingly, those who truly understand the problems faced are suggesting solutions that actually require quite a radical shift in our thinking as well as our behaviours. For example, in order to combat the nasty and catastrophic realities of future climate change, the world will have to eliminate net climate gas emissions, including sharply reducing them before 2030. This is likely to require the elimination of most fossil fuels, which our current world depends upon for various sources of energy. For another example, in many parts of the world, the only reason enough food is being produced is because of agriculture depending on the use of underground aquifers; however, these aquifers are being depleted at such a rate that many will have been effectively emptied by 2050. This has significant implications for future food and water supplies worldwide. Some countries are already looking to secure their own food and water supplies at the expense of other (e.g., downstream) countries. All of our oceans are overfished, increasingly acidic and increasingly polluted, and we are facing a return to an era of dominance of the jellyfish.

Related social problems include extreme and inequitable disparities in living standards between people in different countries around the world. What has been labelled as extreme individualism and mindless consumerism, fuelled by simple greed, is causing the destruction of natural resources on this planet at a rate which is unprecedented in the Earth's history. This destruction is caused by both the simple use of such resources (e.g., mining, agriculture, aquaculture) as well as the huge amounts of waste produced from the activities required to support the standards of living to which most of the world now aspires. This is negatively affecting both humans and the nonhuman natural world. For example, humans are increasingly being contaminated with various sources of pollution and radiation; species extinctions are occurring worldwide at a rate similar to that found during the era of extinction of the dinosaurs.

Humans will have to change their attitudes towards the use of all the world's natural resources in order to avoid various catastrophes in the future. We have to recognise the fundamental problems within our current system. Some fundamental tenets will need to be challenged, such as that continual economic growth is sustainable, that the best measure of how well a society is doing is how much wealth that is producing, and possibly even that liberty of the individual is the best and overriding goal for a society to pursue. For example, if our current values produce the results that humans are allowed and enabled to consume resources at the expense

of the natural world, to the point of destruction of the natural world upon which our life-support systems depend, then that suggests that our current values need to change.

We may need to adopt what are today seen as radical (and therefore undesirable) positions, simply in order to alter the results of our current behaviours which are based on these values. For example, we may need to believe that the natural world has intrinsic value and those rights to exist, even where that conflicts with a perceived human rights to make money from the use of the natural world. We may need to go back to more community-minded and less individualistic efforts in order to redress the extreme inequalities within and between human societies.

There are many ways in which it has been suggested we need to radically change in order to avert impending environmental catastrophes in the future. Such catastrophes would force change, but at huge cost to both humans and the natural world. The suggestion is that if we face it truly an early, we can make the necessary changes without the catastrophic costs.

We note that there have been increasing calls for civil disobedience in pursuit of the need for social change, worldwide. We also note that youth are becoming increasingly vocal and increasingly intolerant of the mindset of existing world leaders and decision-makers. The youth are stressing that it is they who will be inheriting the problems caused by those making decisions today, and that greater attention needs to be paid to likely future scenarios and the ethics involved in the future consequences of today's decisions.

Discussion of such environmental crises should not be seen as politically biased; it should be seen as recognising a problem and trying to address it effectively. It will certainly not be easy but the hard questions have to be asked and to be addressed properly. This conference will discuss some of these hard questions.

About the Conference:

The German Australian Pacific Lawyers Association (“GAPLA”) and the Earth Law Alliance of Aotearoa New Zealand, with the support of the New Zealand Centre for Public Law and Victoria University, have put together an exciting conference under the overarching scheme of sustainability that discusses some current ‘cutting-edge’ environmental law issues. For the first time in New Zealand the conference brings together a new generation of environmental academics and practitioners whose focus lies in achieving true sustainability in our laws, most notably through taking an alternative, ‘earth-centred’ approach to law. While this is a growing topic of concern worldwide, it is new to mainstream environmental law in New Zealand. That said, Earth jurisprudence reflects the tenets of Maori and other indigenous cosmologies. Integrating such an alternative approach into laws thus seems easier to imagine in New Zealand than in many other countries. Indeed, there are examples in New Zealand Law when this has already been achieved.

The conference seeks to introduce the concepts of Earth Law to a wider audience, both through the conference proper, its eventual publications, and the free side events aimed at the wider public. It also seeks to simply reinforce the need for better efforts to achieve true sustainability and to provoke more discussion on it and hopefully action toward achieving it.

A detailed programme is on the website and is attached as **Annex I**. The programme features not only some of New Zealand’s leading experts in the area of the new environmental law thinking but also leading experts in their fields from the United States and Australia. The

biographies of the key note speakers and the leader of the Wild Law Workshop (the Convenor of the Australian Earth Law Alliance) are attached as **Annex II**.

The conference also marks the founding of the Earth Law Alliance of Aotearoa New Zealand and the New Zealand chapter of GAPLA.

The Panels

The *first panel* will discuss the idea of a sustainability Bill of Rights. A sustainability Bill of Rights elevates the right to a sustainable environment to an overarching right which informs every other right within a rights catalogue. The keynote speaker, Linda Sheehan, is the drafter of the 2013 Santa Monica Sustainability Bill of Rights. Catherine Iorns is one of New Zealand's leading researchers in this area and has discussed the issue in New Zealand and overseas (see **Annex II**). Joel Colon-Rios is an expert in constitutional law and has particular expertise in South-American constitutions. Ecuador in its new constitution has made the right to a sustainable environment an overarching principle. Professor Klaus Bosselmann is New Zealand's and a world leading expert on sustainability and is in the process of writing a book on environmental constitutionalism. Sir Geoffrey Palmer will comment from his extensive constitutional legal and political experience, as well as in his more recent work on the topic of constitutional environmental rights for the current New Zealand constitutional Review.

The *second panel* will focus on indigenous and other critical perspectives on environmental law. The keynote speaker, Gerald Torres, is a well-recognised and extremely influential scholar applying critical race theory to environmental legal issues. New Zealand is already a world leader in the integration of indigenous perspectives into environmental law, partly through respect for the Treaty of Waitangi in mainstream law but also particularly through the Treaty settlement process. (The recent agreements to recognise the legal personality of the Whanganui River and Te Urewera National Park – including these legal entities holding title to their own land – are striking examples of the latter.) The aim of inviting Prof Torres is to introduce a perspective that is new to New Zealand as well, so we don't just pat ourselves on the back but wonder how we could extend our thinking, even if it already does more than other Western countries to adopt indigenous perspectives of environmental guardianship. The Maori panellists will comment on Prof Torres work and what it might mean for the development of both New Zealand law and Earth jurisprudence.

The *last panel* focuses on climate change and one very real effect: that of the creation of climate refugees. Climate change is a recognised effect of unsustainability in our laws and practices and only a focus on true sustainability can reverse this. The recognised effect of the production of climate refugees is very topical worldwide, with particular interest to GAPLA members. Its significance for New Zealand is evidenced by a decision of the New Zealand Immigration and Protection Tribunal of June of this year (*AF (Kiribati)* [2013] NZIPT 800413), recently affirmed on appeal by the High Court:

The appellant was a citizen of Kiribati. He lived with his wife's family in their village on South Tarawa, relying on subsistence agriculture and fishing, supplemented by support from his wife's brother. He claimed to be entitled to refugee status or protected person status on the basis of environmental changes in Kiribati associated with climate change. The Tribunal found that the limited capacity of South Tarawa to carry its population was being significantly compromised by the effects of population growth, urbanisation and limited infrastructure development, particularly in relation to sanitation. The Tribunal also found that these factors were exacerbated by the effects of both sudden onset

environmental events (storms) and slow-onset processes (sea level rise). However, the Tribunal found that the appellant was not a refugee or a protected person within the meaning of the Convention against Torture or the ICCPR.

The first speaker on this panel, John Corcoran, was the expert witness in this Kiribati climate refugee case. Alberto Costi will speak on current legal issues in relation to climate refugees, particularly the definition of “refugees” in international and domestic law and the inability to accept climate refugees within the existing system, and the issue of statelessness. Vernon Rive will speak on the state of international negotiations over climate change mitigation and adaptation measures, and any agreement on what to do about climate refugees. The keynote speaker on climate change is Brendan Mackey, the Director of the Griffith University Climate Change Response Program. Prof Mackey will address the negotiation of new rules consistent with the planetary boundaries, including the new IPCC proposed carbon budget, with an explicit focus on new ethical norms as a basis for rules.

On Sunday, another key and invited speaker is Peter Burdon, from the University of Adelaide. Peter is the editor of the key text on Earth Law in Australia and New Zealand: *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (2011) and can be fairly said to have started Earth Law movement in Australasia. Peter will be speaking on radical social change in order to achieve a more sustainable future, including why Earth capital may need/require civil disobedience.

All of the panels on Sunday have excellent speakers and will address key aspects of current problems with sustainability and possible solutions.

Annex I – Conference Programme

Friday 14 February 2014

2-4pm: **Public Workshop “Earth Laws for your Community”**

Run by Michelle Maloney, Convenor of the Australian Earth Law Alliance

5pm: **Conference Opening**

5pm: Welcome and Opening Speech from Sir Geoffrey Palmer (Distinguished Fellow, VUW)

5:30-7: **Keynote Speech by Professor Klaus Bosselmann** (University of Auckland) on
“Sustainability Alternatives – A German-NZ Perspective”

7:30: Conference Dinner (Karaka Café, Wellington Waterfront; incl entertainment and Dinner Speaker)

Saturday 15 February 2014

[9-9:30: Tea/coffee] 9:30 – 10:00: Introduction

10-12:00: **Environmental Constitutionalism and Sustainability Bills of Rights**

- **Keynote Speech by Linda Sheehan** (Earth Law Centre, San Francisco, USA)
- **Introduction:** Catherine Iorns Magallanes (VUW)
- Panel Discussion: Professor Klaus Bosselmann (U of Auckland), Joel Colon-Rios (VUW)

[12-1pm: Lunch]

2-3pm: **Indigenous and Critical Perspectives**

- **Keynote Speech: Prof Gerald Torres** (University of Texas, Cornell Law School, USA)
- Panel Discussion: Dr Jacinta Ruru (Otago), Andrew Erueti (U of Waikato), Linda Te Aho (U of Waikato)

[3-3:30pm: Tea/coffee break]

3:30-5:30pm: **Climate Change & Environmental Refugees**

- John Corcoran (U of Waikato): Pacific Island States and Climate Change
- Alberto Costi (VUW): Legal Issues of Climate Refugees
- Vernon Rive (AUT): Climate Change Laws and Negotiations
- **Brendan Mackey** (Director, Griffith Climate Change Response Program, Griffith University, Australia): Climate Change: What we need do differently

5:30-6pm: Closing Remarks: Catherine Iorns Magallanes (VUW)

6-7pm: drinks & nibbles

[8pm: *Karori Sanctuary By Night tour; for a separate fee*
OR: Earth Law Alliance inaugural AGM (over dinner, tba)]

Sunday 16 February 2014

8:45-10:30am: **Planetary Boundaries and Sustainability**

- Brendan Mackey (Director, Griffith Climate Change Response Program, Griffith University, Australia) "Can planetary boundaries help operationalize Earth system law?"
- Michelle Maloney (Griffith University, Australia) "Ecological Limits, Earth Jurisprudence and Planetary Boundaries"
- Cath Wallace (VUW/ECO) "Sustainability – wash your mouth out! The removal of sustainability from New Zealand law in the pursuit of economic objectives"
- Ben Gussen (U of Auckland) "Reflections on the relationship between the principle of sustainability and subsidiarity"

[10:30-11am: Morning Tea break]

11am-1pm: **Social Resistance & Civil Disobedience**

- Peter Burdon (U of Adelaide) "Why Earth Justice Needs Civil Disobedience"
- John Parnell (Solicitor, Wellington) "Philosophies of Civil Disobedience"
- Janice Gray & David Brown (UNSW) "Constituencies of resistance to coal seam gas mining, the political art of suture and the public good"

[1-2pm: Lunch]

2-3:30pm: (2 concurrent panels)

A: Adopting Earth Laws

- Nicole Rogers (Southern Cross University) "Developing a Wild Law Judgment Project"
- Gay Morgan (U of Waikato) "Writing Earth-centred Laws and Judgments"
- Ngozi Finette Stewart (U of Benin, Nigeria) "Promoting Development, Preserving the Environment: Crusading a win-win legislative response"

B: Law Change for Climate Change

- Tom Bennion (Barrister, Wellington) "Impediments to Environmental Protection in NZ courts and legal processes"
- John Iloabuchi Amadi (U of Auckland) "Climate Refugees or CliMates? Defining the Legal Status of Environmentally Displaced Persons"
- Greg Severinson (VUW) "Climate Change Solutions and NZ Law"

3:30-5pm: (2 concurrent panels)

A: Eco-constitutionalism

- Betsan Martin (Response, NZ) "Incorporating Responsibility in Laws and Governance"
- Daniel Kelly (U of Auckland) "Supporting Strong Sustainability: Eco-constitutionalism in a New Zealand Context"
- Thiti Waikavee (U of Auckland) "Ecological Covenants for Sustainable Governance"

B: Social Resistance & Civil Disobedience, cont.

- Peter Burdon (U of Adelaide) "Radical Social Resistance Movements"
- Stephen Iorns (Barrister, Wellington) "Civil Disobedience: A practical guide"
- 350.org Representative "Environmental Cause Civil Disobedience in NZ"

Annex II - Biographies

Linda Sheehan

Linda Sheehan holds a B.S. in chemical engineering from the Massachusetts Institute of Technology, an M.P.P. from the University of California, Berkeley's Goldman School of Public Policy, where she was a Berkeley Policy Fellow, and a J.D. from the University of California's Boalt Hall School of Law. She is also a Research Affiliate with the POLIS Project on Ecological Governance at the University of Victoria, British Columbia, providing collaborative support for the University's related "green legal theory" of rights for nature. Linda is a contributing author to *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, published by Wakefield Press in 2011. She also helped draft the 2013 Santa Monica Sustainability Bill of Rights.

She has 20 years of environmental law and policy experience. Most recently, Linda took action on behalf of California's waterways and ocean habitats as Executive Director of the California Coastkeeper Alliance, where she represented California's 12 Waterkeeper organisations on statewide water quality and water flow issues. Prior to the Coastkeeper Alliance, Linda Sheehan ran the Pacific Region Office of the Ocean Conservancy, advocating for clean coastal waters, healthy fish populations, and vibrant ocean habitats. Among other efforts, Linda has successfully advanced federal and state legislation, policy and litigation initiatives to: increase enforcement of clean water laws, provide state water quality data to the public, curtail sewage spills, boost water monitoring, conserve designated marine parks, improve oil spill prevention and response, control marine invasive species, reduce polluted runoff discharges, expand implementation of sustainable water supply strategies, and create new funding sources to ensure healthy waters. For her efforts in "fight[ing] pollution of the Pacific and the streams and rivers that flow into it," she was recognised as a 2009 "California Coastal Hero" by Sunset Magazine and the California Coastal Commission.

Linda Sheehan is currently involved in the Californian Earth Law Center after recognising, based on years of experience working at the highest levels of California environmental policymaking, that the deep flaws in California's current legal system will inevitably prevent the state from reaching the desired goal of a healthy planet. Linda uses her extensive research, partnership-building and advocacy skills at the Earth Law Center to move from this world-view toward a transformation of environmental consciousness and awareness achieved through advocacy for rights of nature in California and elsewhere.

Gerald Torres

Professor Gerald Torres is an expert in agricultural and environmental law. He is also a leading figure in critical race theory. Torres came to the University of Texas School of Law in 1993 after teaching at the University of Minnesota Law School, where he also served as associate dean. Torres has served as deputy assistant attorney general for the Environment and Natural Resources Division of the U.S. Department of Justice in Washington, D.C., and as counsel to then U.S. attorney general Janet Reno.

His book, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Harvard University Press, 2002) with Harvard Law Professor Lani Guinier, was described by *Publisher's Weekly* as "one of the most provocative and challenging books on race produced in years." Torres' articles include "Translation and Stories" (*Harvard Law*

Review, 2002), “Who Owns the Sky?” (*Pace Law Review*, 2001), “Taking and Giving: Police Power, Public Value, and Private Right” (*Environmental Law*, 1996), and “Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case” (*Duke Law Journal*, 1990).

Torres is a past president of the Association of American Law Schools. He has served on the board of the Environmental Law Institute, the National Petroleum Council, and on EPA’s National Environmental Justice Advisory Council. He is a member of the Council on Foreign Relations and the American Law Institute. Torres was honored with the 2004 Legal Service Award from the Mexican American Legal Defense and Educational Fund (MALDEF) for his work to advance the legal rights of Latinos. He has been a visiting professor at Harvard, Yale and Stanford law schools, and is currently visiting at Cornell.

Klaus Bosselmann

Dr Klaus Bosselmann is Professor of Law and Founding Director of the New Zealand Centre for Environmental Law at the University of Auckland. Before coming to New Zealand in 1989, he taught at the Freie Universität Berlin and co-founded Germany’s first institute for environmental law. He was a visiting professor at leading universities in the North America, Europe and Australia. He is chair of the World Commission on Environmental Law Ethics Specialist Group and co-chair of the Global Ecological Integrity Group. Klaus has published 25 books and over 120 book chapters and journal articles in the areas of political ecology and environmental ethics, law and governance. In 2009 he was the inaugural winner of Senior Scholarship Prize of the IUCN Academy of Environmental Law, the global body of environmental law scholars.

Brendan Mackey

Prof Brendan Mackey is Director of the Griffith University Climate Change Response Program. He has a PhD in ecology from the Australian National University. Brendan’s research addresses (1) the interactions between climate change, biodiversity and land use, (2) the role of science in policy formulation of environmental regulatory frameworks, and (3) the nexus between climate change responses and sustainable development. He has a special interest in the science and policy of climate change adaptation and mitigation and related public policy issues. He is a member of the International Council for the International Union for Conservation of Nature (IUCN). Brendan serves on various governmental advisory bodies including the science advisory group to the Australian Climate Change Commission. He has written over 150 academic publications including journal articles, books and book chapters.

Catherine Iorns Magallanes

Catherine Iorns Magallanes (BA, LLB (Hons), *Well*, LLM *Yale*) is a Senior Lecturer in Law at Victoria University of Wellington, New Zealand. She researches, writes, and teaches on both human rights and environmental law. Current projects include the development of eco-constitutionalism in New Zealand -- the inclusion of environmental rights and responsibilities in constitutional law – and the development of eco-centric approaches to law through recognition of indigenous perspectives on the environment.

For example, she has a forthcoming book chapter on the recognition of indigenous perspectives on the environment: “Native American Values and Laws of Exclusion,” in *Environmental Law*

and Contrasting Ideas of Nature: A Constructivist Approach, K Hirokawa (ed) (forthcoming, Cambridge U.P., 2014). In 2013 alone she has presented her work on eco-constitutionalism (in Wellington, Auckland and San Jose, Costa Rica), on personality and rights for nature (in Wellington, Hamilton, Brisbane, San Jose in Costa Rica, and Lund in Sweden) and on climate change (Wellington and Copenhagen).

Catherine is currently a member of the national Governance Team of Amnesty International for Aotearoa New Zealand, a member of the National Executive Committee for Environment and Conservation Organisations New Zealand, and the Convenor of the recently-established Earth Law Alliance Aotearoa New Zealand. She was a member of the International Law Association Committee on the Rights of Indigenous Peoples, which wrote a Commentary on the UN Declaration on the Rights of Indigenous Peoples.