

# Can Environmental Mediation save the Planet?

## 1. The Conflict Conundrum

Conflict seems to arise more swiftly and with more intensity than ever before in our lifetimes. People form opinions as quickly and with the same passion as they support their favourite football team. Of course conflict is an inevitable part of life - a natural result of human differences. Violence however is not. When we deal with conflict in an adversarial way, it generates polarisation and violence. When we collaborate to resolve our differences, conflict can catalyse positive change.

In recent years however conflict has been ramped up - and dumbed down - by unique factors which include

- the trauma of a world-wide pandemic
- restrictions of freedoms of movement & speech
- war - in our time and on our doorstep
- economic chaos
- an erosion of trust in politics and politicians
- the mixed blessing of social media - which has unquestionably created a more connected world. Yet with its soundbites and echo chambers and anonymity it has given free rein to hate speech, disinformation and other harmful content.

In this new and more polarised world we are being challenged to manage our inevitable differences in a nonviolent way, to find new resources. We've done so in the past, for example, as William Ury suggests in *The Third Side*<sup>1</sup>, in order to hunt mammoths. Drawing on his training as an anthropologist and his work among primitive tribes and modern corporations - collaboration and cooperation was our natural state. Unfortunately settling and planting spoiled it!

And the greatest conflict of all - that trumps (if you'll pardon the expression) all the others - is the climate and environmental crisis. The connection between our industrialised age and the degradation of our environment is now established beyond reasonable doubt. And yet... we need energy. Just about every aspect of our lives is dependent on a continuous and ever-increasing energy supply. Whatever steps are being taken to transition to sustainable and renewable resources, for the near to mid-future we - that is to say we earthlings - are stuck with fossil fuels.

So the crisis could be said to be a clash between civilisation's different needs - our need for energy and our need for a sustainable and healthy way of life in harmony with the natural world. Yet if fighting isn't an inevitable part of human nature, what's the alternative?

I want to suggest - predictably - that it is mediation that offers a way to reconcile and resolve these conflicting needs. Despite the bleak picture presented in the media, there is an equally vigorous movement to establish ways to work together, to 'heal the world'. Perhaps things have to get this bad - or worse - to motivate us to seek these out. Mediation and mediation principles have a vital role in developing these cooperative ways of working. So to claim that mediation and environmental

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<sup>1</sup> "The Third Side - why we fight and how we can stop" William Ury, Penguin Books 2000

restorative processes can save the world may seem an extravagant claim. However... the evidence suggests that it can!

## 2. Mediation in Environmental Issues

There is a growing body of experience of the use of mediation in the environmental context. Examples include harm to -

### land

*where a purchaser of land that included a former petrol filling station sued its previous owner (an oil company) for breach of contract, namely the environmental damage caused by hydrocarbon contamination of the land. A chain of prior owners was joined as defendants. Following mediation the parties arrived at a resolution which as well as financial compensation included a undertaking to restore the land to a healthy condition.*

### air

*As a result of hydrogen sulphide emissions from a landfill site, the local council issued an abatement notice. The site owners appealed. The issues included whether or not there had been a statutory nuisance and the trial of the appeal was due to take four weeks. The parties settled after a two-day mediation, with agreement on how the site could be managed in future to prevent a recurrence of the nuisance. From the community's perspective the outcome was far better than a successful litigation, where the court might have found the abatement notice to be justified but would have had no jurisdiction to resolve the underlying dispute.*

### and sea

*The 'Brent Spar' was an outdated oil platform which in 1995 Shell UK proposed to dispose of by sinking it in the North Sea<sup>2</sup>. The Government supported this. However an energetic media campaign, including a poll of the British public that showed that a majority were opposed to Shell's dumping plan and accompanied by boycotts, led to a mediation (by Andrew Acland). Shell agreed to withdraw their plan, and later had the Spar dismantled (some of it being upcycled as accommodation by the Stavanger Port Authority).*



*Shell's choice to engage in the mediation must have been based to some degree on the effect of the adverse publicity on their share price, perhaps an object lesson in 'shareholder power'.*

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<sup>2</sup> [https://en.wikipedia.org/wiki/Brent\\_Spar](https://en.wikipedia.org/wiki/Brent_Spar) accessed 5th December 2022

### 3. A Bigger Picture

The term 'mediation' is often used to cover a broader range of processes, such as stakeholder dialogue, Victim Offender Mediation (VOM) and Restorative Justice (RJ). The commonality between these approaches is that parties have opportunities to find resolution themselves, rather than turn to a third party to adjudicate on the issues. Perhaps 'dispute resolution by facilitated dialogue' would be a more accurate description of this variety of forms.

While each process may have its own characteristics - e.g. in a restorative meeting all participants will have the opportunity to speak - the fundamental principles are familiar to anyone experienced in mediation. So references to the term 'mediation' that follow should be taken to include these other aspects of dispute resolution by dialogue.

**Stakeholder Dialogue** has been defined as "a process in which parties with different interests and values at stake in a particular issue work together toward mutually acceptable solutions"<sup>3</sup>. An example is the International Atomic Energy Agency which increasingly sees stakeholder involvement as fundamental in managing nuclear power programmes. Its definition of stakeholders includes the media, the public at large, other States (particularly neighbouring States) and, significantly, future generations.

*To prepare for decommissioning a nuclear power station in Southern England, the regulatory body initiated a facilitated stakeholder dialogue. The process sought consensus on how to pre-empt the human and environmental harm that might result from the decommissioning process. Participants in the dialogue included local individuals, community and interest groups, environmental activists, the industry itself, scientific bodies and government agencies.*

**Victim Offender Mediation** is where a facilitator enables dialogue between the perpetrator of a crime and their victim to discuss the offence and its consequences, and decide what the offender should do to repair the harm caused by the crime. It has been shown to have a beneficial effect both for 'victim' and 'offender' and even a potential for transformation. One example is the experience of Pete and Will.

*Pete and Will first met in the middle of the night in Will's living room when he found Pete burgling his home. After a violent struggle Pete was arrested and charged with burglary. While on remand Pete agreed to meet Will in a VOM. Pete had agreed mainly "to have a day out" of his cell. However in the course of it - and for the first time in a lifetime of crime - he 'got' the harm he'd caused to Will and his family. Later Will was sufficiently inspired to start a charity enabling victims of crime to engage in VOM. Pete has gone on to become a restorative justice facilitator.*

**Restorative Justice** one definition of which is "a process where all the stakeholders affected by an injustice have an opportunity to discuss how they have been affected by it and to decide what should be done to repair the harm". While restorative

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<sup>3</sup> Perret, A. BNFL national stakeholder dialogue: A case study in public affairs. *Journal of Public Affairs* (2003) 3(4), 383–391.

meetings will include victim and offender, they are generally larger groups, which may include families, friends, workmates and members of the wider community. As well as in day-to-day crimes, RJ is also being implemented in other contexts including hate crimes and violent extremism, gender-based violence and larger scale conflicts e.g. criminal gangs in South Central LA.

In particular RJ is increasingly being used in contexts where damage has been caused to the environment, whether the harm is affecting people or the natural world or both.

*In New South Wales in 2006<sup>4</sup> the director of a mining company was prosecuted for carrying out unlicensed works causing damage to a designated Aboriginal Place and destroying Aboriginal objects. Following a recommendation from the Chief Judge of the Land and Environment Court an RJ process took place before sentencing. Participants included the director of the company and his family, representatives of the Aboriginal people and their families and of various state government departments.*

*Outcomes included both formal and informal ongoing contact between the parties, consultation with the Wilyakali people before further works were undertaken, and agreement to foster indigenous employment opportunities at the mine. The judge found evidence of genuine contrition and remorse on the part of the defendant, and a financial penalty was imposed.*

#### **4. Implementing Mediation in Environmental Harm**

As well as in criminal cases, there may be opportunities to implement restorative processes in civil litigation involving environmental harm. By way of example:

*The collapse of Samarco's iron ore tailings dam in 2015 was Brazil's worst environmental disaster, killing 19 people and displacing many more, and fatally contaminating the Doce river. The wave of toxic mud destroyed 650km of flora and fauna. Vale and BHP Billiton, the owners of Samarco, agreed with the Government to set up and fund the Renova Foundation for 'remediation and compensation'. The companies created a number of programs and committed \$hundreds of millions in funding (while the government dropped a \$5.3bn law suit).*



*However significant numbers of victims expressed frustration and anger – that homes were not rebuilt, compensation not paid, health issues not acknowledged. Civil litigation was initiated. Fortunately Renova engaged an RJ facilitator, Dominic Barter, to facilitate restorative processes to address the conflicts. One aspect was to*

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<sup>4</sup> Garrett v Williams [2007] NSWLEC 96

*respond to the conflicts that had arisen with the local communities. Another was to consider the organisation as a whole, and create dialogue spaces for employees in decision-making roles.*

## **5. Some Challenges in Implementation**

### **5.1 Encouraging parties to engage**

As in any mediation, there are challenges in 'getting the parties to the table'. One should not underestimate the resistance that individuals in a company might have to the idea of engaging with RJ. It is usually essential that participation in RJ requires an admission of guilt, or at least responsibility. Many directors and executives will be reluctant in the extreme to make such admissions or accept such responsibility, not least because it may impinge on their employment.

So what would encourage the directing minds of a corporation to engage with a environmental restorative process? How could the take-up of mediation and RJ in such cases be promoted and enhanced?

It seems that one answer is litigation. A fundamental principle of mediation has been its voluntary nature - until recently at least! So this is not a suggestion that the law should compel the use of RJ. But just as mediation takes place 'in the shadow of the law', environmental restorative processes take place in the shadow of a growing body of legislation and litigation, both civil and criminal.

And once court action, whether a civil claim or a criminal prosecution, compels a party to engage in a legal process, RJ is more likely to be adopted, either before trial or sentence or as a diversion from the justice system altogether.

**5.1.1 Climate change litigation** as a tool to strengthen climate action continues to expand. Increasingly citizens are calling Governments and companies to account for their actions and omissions on climate change. By June this year more than 2000 climate change cases had been brought in multiple jurisdictions around the world, as well as in the European Court of Justice and other international courts.<sup>5</sup>

**5.1.2** In England and Wales the **Crime and Courts Act 2013** gives the court power to defer sentencing in any adult crime for RJ to take place (always subject to the victim and offender agreeing). In any prosecution for serious environmental harm, the prosecutor can instigate an RJ process, the outcome of which could legitimately be taken into account in mitigating sentence. This would apply for example to prosecutions by the Environment Agency. Equally in other offences concerning environmental harm e.g. Health and Safety, regulatory, planning, the offer of an RJ process can be incorporated in existing procedure.

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<sup>5</sup> <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf> accessed 5th December 2022

5.1.3 The **International Criminal Court** in 2016 declared its intention to include environmental crimes in its remit. It was reported<sup>6</sup> that the Court would “prioritise crimes that result in the “destruction of the environment...exploitation of natural resources...and the illegal dispossession” of land. Reinhold Gallmetzer, a member of the ICC working group who drew up the policy document, said: “We are exercising our jurisdiction by looking at the broader context in which crimes are committed. We are extending the focus to include Rome statute crimes already in our jurisdiction.”

5.1.4 An **international crime of Ecocide**, the etymology of which is “to kill one’s home”. Ecocide has recently been defined<sup>7</sup> as “unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”

A law of Ecocide is being considered at parliamentary or government level by 25 countries so far, as well as the European Parliament, the Nordic Council and the Inter-Parliamentary Union. A recent poll indicates that Ecocide is supported by a majority of the UK public. Other support includes UN Secretary-General António Guterres, the Pope (reiterated on Nov 14<sup>th</sup> this year) and the World Council of Churches, investors - and even lawyers.

If it is adopted as an amendment to the Rome Statute as the fifth Crime against Peace, it is expected that the draft law will incorporate provision for voluntary engagement in a restorative process, the outcome of which may be taken into account in the sentencing that follows.

*In 2011 in the Supreme Court in London two oil company executives were tried under the law of Ecocide. No such legislation existed in reality, the trial was simulated and the defendants were played by actors. The environmental destruction however – involving oil extraction operations in the Athabasca Tar Sands in Canada – was real and the jury’s verdicts unscripted.*

*The defendants were convicted and given the opportunity to participate in an RJ conference. One, the Chief Executive of the fictitious oil company, agreed and the other did not. In the course of the day-long RJ meeting that followed, an action plan was developed by the participants, and the judge incorporated its principles in the sentence that followed.*



<sup>6</sup> <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases> accessed 5th December 2022

<sup>7</sup> <https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide> accessed 5th December 2022

This case is of course hypothetical but shows the potential for the criminal law to acted as a 'stick' to motivate a perpetrator to engage with RJ and participate in a restorative process.

## 5.2 What's in a Name?

A further obstacle to engagement in RJ may be its name. An invitation to participate in a process called 'restorative justice' does not seem to be welcomed by those who might be seen as perpetrators. Antoine Brossier, a mediator with more than 30 years' experience in the chemical industry, has observed that to those in business the word Justice is "quickly associated with court/tribunal/lawyer/penalty/sentence".

To bypass such reluctance and promote a more cooperative response from industry, it is important to consider other and less accusatorial names for such a process e.g. a restorative circle or meeting, or terms like Restorative Social Responsibility, Restorative Environmental Care or Responsible Care, which Brossier suggests is a well-established concept within the chemical industry.

*In 2010 a local council was planning to hold Britain's largest Air Festival for the third year running. The council argued strongly for the financial and marketing benefits to the town and its residents, but was concerned that many of its residents and local environmental groups were opposed to it on the grounds of the environmental damage from pollution, traffic, noise etc. In addition it had made a commitment to Sustainable Development.*

*A process was facilitated to give all stakeholders an opportunity to be heard. In effect it was a restorative dialogue, but it seemed crucial in gaining buy-in that it was described not as Restorative or Justice but as a 'symposium'. A consensus was reached as to how to manage this and similar future events, including practical steps to reduce the environmental footprint of the Air Show, and an improvement fund to help offset its environmental impact.*



## 5.3 Who are the victims?

One of the profound benefits of RJ is that it can give a voice to all those that have been harmed, directly or indirectly. So it seems fundamental that individuals and communities who have been affected by the harm - often indigenous people - should be represented e.g. fishermen and farmers who have traditionally lived by rivers.

However those affected also include the future generations acknowledged by the Atomic Energy Agency (above). It is noteworthy that in March 2021 the Constitutional Court in Germany struck down parts of the Federal Climate Protection Act as incompatible with the fundamental rights of future generations. The court found that the Act failed to provide for sufficient emission cuts and thus violated the

human rights of future generations as protected by the Constitution.<sup>8</sup> A subsequent Climate Act required a minimum reduction in emissions of 65% by 2030.

Nevertheless it is unlikely that in most jurisdictions courts would allow representations on behalf of future generations. Indeed as Aoife Nolan, Professor of International Human Rights Law, observed in a recent lecture<sup>9</sup>: “Children and future generations will bear the burden of environmental decisions made today. However, these non-voting groups cannot input effectively into decision-making around the environment.”

By contrast an environmental restorative process can allow input by representatives of future generations. Equally a voice can be given to other indirect victims e.g. representatives of wider humanity.

Non-human elements appear to present an even greater challenge. Where natural features of flora or fauna or ecosystems have been harmed, such as rivers, forests, mountains or birds or fish, the question that arises is who is able to speak on their behalf. Yet there are already real-time answers to such concerns.

*In March 2017 a New Zealand court granted the Whanganui River the status of a living entity. In this model the court ordered the appointment of two guardians to act on behalf of the river, one from the Crown and the other from the Whanganui iwi.*

*Later that month the Uttarakhand High Court in North India ruled that the Ganges and Yamuna Rivers should be accorded the status of living entities. The court ordered that a management board be set up, and appointed three officials as legal custodians to conserve and protect the rivers.*

*In July 2019 the Bangladesh Supreme Court declared that all Bangladesh’s rivers had the legal status of living entities, a move aimed at protecting them from growing pollution, encroachments and illegal dredging.*

Similar rulings have been made in Colombia, Canada and Ecuador, where Rights of Nature have been recognised in the Constitution. In Bolivia the Law of the Rights of Mother Earth in 2010 recognised the natural environment as having aspects of legal personhood.

Reflecting this trend, participants in the Ecocide RJ role-play referred to above included representatives of Future Generations, Wild Birds, Wider Humanity, and a Guardian *ad litem* on behalf of the Earth. Another key participant was a leader of the Haisla First Nation, who spoke compellingly from first-hand experience of the consequences of the degradation of their environment.

It should however be noted that Government was not represented. Yet as has been pointed out “it is clearly a key element in the wider system as the creator of the policy and regulatory framework which licenses the extraction activity.”<sup>10</sup>

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<sup>8</sup> Neubauer, et al. v. Germany [http://www.bverfg.de/e/rs20210324\\_1bvr265618en.html](http://www.bverfg.de/e/rs20210324_1bvr265618en.html)

<sup>9</sup> Climate Change, the Courts and the Rights of Children & Future Generations, Ulster University, 10<sup>th</sup> November 2022

<sup>10</sup> ‘Shareholder Return – a Nuremberg Defence?’ (2012) 24 Environmental Law and Management

The challenge to move mediation and RJ forward in the environmental context is often to identify who has been affected by the harm caused, and then to find individuals who can speak for such parties with authenticity and credibility. Part of the facilitator's role may be to build consensus around the legitimacy of those who speak for the victimised environment, and their inclusion in the process.

## **6. Implementing Mediation in Environmental Harm - living examples**

### **6.1 The Balkan Rivers case**

The Balkans are home to the last free-flowing rivers in Europe. However thousands of small hydroelectric facilities have been built in those rivers, some unlawfully in National Parks. Local communities as well as environmental activists and academics have major concerns about these dams which they say have had devastating impacts on ecosystems, water sources and animal populations. Among other impacts they are said to degrade habitat, alter river depth and width, interfere with fish migration routes, pollute surface and ground water and degrade air and soil quality. Secondary impacts are caused by road construction, demolition, water abstraction, timber cutting, and waste deposition into rivers.

Here the challenge is to get all relevant parties to the table, including dam owners and Government, both national and local. Unsurprisingly they have proved reluctant to engage in a process where they are seen as wrongdoers. However there is one river system where local communities and local government share concerns about the damage to the environment, and there is strong academic support for a mediated process to find solutions. There is a good prospect that a restorative meeting may be agreed - time will tell...

### **6.2 The Oil Company case**

Oil extraction in Africa has been taking place for decades. It has caused significant environmental, social, and economic harm e.g. contamination of rivers, air and soil and destruction of forests and crops. This has led to loss of livelihoods and even lives, and conflict and litigation between local communities and the oil companies concerned.

In February 2021 I was approached to facilitate a dialogue between communities in one particular region and the oil company in question ("Oilco"). The dialogue was described as a restorative process. Among other issues it was necessary to explore whether there was a business case for Oilco to participate. In due course the parties agreed to participate and the resultant dialogue was conducted in several online sessions, ending in October this year. It has culminated in a project in some of the areas affected for the provision of off-grid renewable energy networks or solar mini-grids.

These provide clean, reliable and low cost sustainable energy to local communities. They also create "productive use" initiatives so business ventures will be more secure, with more opportunities for local employment. Communities are more empowered and the rural environment starts to rejuvenate. They become a way to

break the dependency on fossil fuels There is an expectation that the first solar PV systems will be set-up and operational early next year.

## **Conclusion**

The conflict between our thirst for energy and our need for a sustainable future can be seen as an ongoing battle. And as the prospect of limiting planetary warming to 1.5°C becomes less and less likely, action becomes increasingly urgent. Our survival depends on our ability to resolve these conflicting needs.

Yet those of us familiar with mediation know its potential for addressing apparently incompatible needs, and empowering parties to find mutually acceptable solutions. What if mediation & RJ were routinely introduced and implemented in cases of environmental harm? What would it take for litigation, even where the defendants are governments, to incorporate the option of facilitated dialogue?

Perhaps one answer - in the spirit of 'think global, act local' - is for those of us who can to encourage any litigant in an environmental dispute to engage in dialogue. This might be before, during or even after any adjudicative process - so that as well as seeking mandated outcomes, restorative measures can be part of the solution.

Surely the time has come when citizens, communities, future generations, other species and the natural world have to be acknowledged as real stakeholders in these universal issues. We have the technology to bring about healing and hope in a divided world - let's use it.

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