BOOK REVIEW

THE PHILOSOPHICAL FOUNDATIONS OF ENVIRONMENTAL LAW: PROPERTY, RIGHTS AND NATURE. By Sean Coyle and Karen Morrow (Hart Publishing, 2004. Paperback, 228 pages, £18.00)

Probably the prevailing modern view of environmental law sees no obvious connection to jurisprudence. Environmental law is about regulation. As a discipline it is composed of various discrete statutory or case law developments, which have nothing necessarily in common with each other save that each purports to respond to some problem of modern living. It is not about philosophy, nor does it depend on its own distinct jurisprudence, in the way that we might say that 'tort' does, or 'contract' does. Environmental law, as a category of legal thought, has no philosophical foundation.

It is with these kinds of comments that Sean Coyle and Karen Morrow introduce their recent offering, and it is these kinds of comments which their book ultimately will succeed in dispelling. The main argument of the book challenges the traditional view of environmental law as a collection of discrete legislative responses to specific problems, and argues instead that it is the product of a rich philosophical tradition. This it does by situating environmental law within the broader context of theories of rights (and in particular property rights) and of the relationship between pubic and private law. It is an ambitious and highly original project, and one which was recently the winner of the second SLS Prize for Outstanding Legal Scholarship.

After a short introductory chapter in which a summary of the main argument is offered, the substance of the book begins in Chapters 2 and 3. Taken together, these chapters provide a sort of philosophical history of the common law concept of property, and reveal a shift from a conception of property intrinsically limited by moral (and so environmental) values to one where such values can be pursued only instrumentally. Chapter 2 effectively deals with the former of these extremes, describing the views of the seventeenth century natural law theorists which saw in the idea of property an intimate and necessary connection with man's place in the world. Here there is lucid and lively discussion of the familiar writings of Grotius, Hobbes, Pufendorf, and Locke, and there is more than enough to chart the intellectual development of these theories of rights, and to stimulate in the reader an awareness of and reflection upon the key differences between their main advocates. But more significantly for the main argument of the text, the prevalent themes of stewardship, of man's unique and privileged position to use and care for creation, succeed in revealing that it is not inevitable that collective goals or substantive moral values are related to individual (property) rights only instrumentally. Indeed, the authors argue strongly for an intrinsic connection: 'the intellectual, political, and philosophical currents which led to the emergence of individual ("subjective") rights in fact

perceived the extent of an individual's rights to be *essentially* limited and determined by the nature of those rights themselves' (p.57).

In the third chapter we find the contrasting position. In the legal theory of the eighteenth century, the emerging view has property (indeed, has law) as the regulation of interpersonal relationships, underpinned by posited rules rather than philosophical ideals. Insofar as this is true, it represents a significant departure from the natural law theories. Far from being intrinsically limited by environmental (or any moral) goods or values, such a positivist view of rights has private property standing in direct opposition to the collective needs of the community. Liberal rights define a sphere of freedom for the individual, which is free precisely to the extent that it disapproves of any form of official interference in the name of public welfare. As the common law comes to display a concern with individual rights and duties (in itself a significant development, not at all in keeping with the traditional theory of common law as unconcerned with doctrinal coherence or systematicity: see pp.61-64), the law itself is set in opposition to those rights. Its function is to hem them in: it is a posited system of rules, which curtails, amends, and adjusts the rights of individuals to facilitate the common good (p.64). In other words, legal restrictions on individual rights in order to facilitate environmental protection (or pursue any other moral good) count as legislated (posited) restrictions on those rights, rather than as reflections of the intrinsic nature or quality of those rights. Rights in turn, are the product of conventions. They are constituted by the existence of contingent social rules and practices, and have no necessary connection to any moral truths.

This shift in our thinking about rights is admirably contextualised in Chapter 3, both historically and intellectually. A substantial section on 'Property and Liberal Rights' (pp.62-83) considers the transformation of property through the writings of Rousseau and Kant, which provide (sometimes novel) philosophical grounds for the treatment of the common law as a *system*. This latter finds its expression in the writings of Blackstone, and eventually Bentham, and the views of both of these are related to the general intellectual shift towards positivism and doctrinal legal science. Moreover, in all of this the authors' work is eminently readable, the prose lucid and consistent notwithstanding the complexity of the material, and indeed of the main argument.

In the fourth and fifth chapters the authors' attentions turn more ostensibly to environmental law. The analysis in the first of these details 'the evolution of common law attempts to reconcile pollution-based conflicts of property rights brought about by the Industrial Revolution' (p.6), first through the common law of nuisance, and then in the development of statutory schemes designed to regulate on a larger scale problems of public health, pollution control, and planning. Here the text takes on the character of doctrinal analysis, and contains a useful narrative account of the development of these environmental rules again set in its historical context. But what is most surprising (and most crucial for the central thesis) is that the authors find a doctrinal framework which is philosophically sophisticated, and reveals a concern, notwithstanding the developments in the theory of rights, with an exploration of the intrinsic moral value of property rights. With this in mind, the last chapter turns to the future of environmental law, and we find that we have completed a kind of intellectual circle. Modern environmental law concerns (for example stewardship of resources, sustainable development)

are portrayed as reflecting the same kinds of concerns found in the seventeenth century natural law theories of right insofar as they concern man's relationship to the world and his entitlement to use natural resources. The problem for the modern environmental lawyer is that arguments about environmental law must be made in the context of a legal system which is deeply positivistic and committed to a view of rights as interpersonal (that is, regulating relationships between man and man, not relationships between man and world). The authors acknowledge that given the developments not only in legal theory, but also in science, philosophy, and theology, an account of property as intrinsically limited by environmental concerns is probably no longer possible. The only answer is a fundamental shift in thinking, and to this end the book concludes with a kind of rallying call to environmental lawyers, who seem uniquely positioned to articulate 'a deeper conception of environmental responsibility and intrinsic value' (p.215) in the face of a legal order otherwise preoccupied with technicality and positivism.

This central argument, linking environmental law to its philosophical foundations through analysis of rights and the common law generally, successfully permeates the book. There are frequently short summaries to re-orientate the reader (usually in the form of a discreet prefatory paragraph here and there), and the overriding impression is of an original and rigorous argument well sustained throughout the text. Moreover, there is a good deal in this argument which is persuasive, and no doubt it offers a plausible challenge to the prevailing theory of rights in our common law. But that said, much of what is valuable and interesting about this text is that in the course of the argument it reveals so many more asides and lines of enquiry that will stimulate even the reader who has no commitment to the specific case of environmental law. For example, throughout there is evidenced a sophisticated understanding of positivism as a theoretical position, located in the idea of laws as *articulated* rules and standards. Such a (perhaps literal) view, not necessarily dismissive of work on the separation of law and morals, but neither depending on it in any way, allows the introduction of commonly unremarked features of positivism, perhaps best exemplified by the short discussion of Kantianism as a ground of positivism on page 71. Elsewhere there are comments on the relationship between the Roman ideas of *dominium* and *ius*, on the nature of legal commentary (specifically the legal treatise), and, perhaps most usefully of all, on the historical contingency of theories of rights. Of course, no review of this length could hope to do any justice to any of these issues. The present point is no more than that in this book we have a rich and varied text, which should stimulate as much as it informs.

In many ways this is a remarkable piece of scholarship. To capture not only the development of the rules of environmental law as those traditionally have been understood, but also the broad ideas and theories of rights and of common law upon which these rules must depend is a considerable achievement, and one seldom tackled (at least, not to this depth) by modern lawyers in related disciplines. Probably there is much in this text to support the general argument that the study of 'black-letter' law is made richer and more profitable by an appreciation of the philosophical and/or historical underpinnings of the rules in question, and with those given to this view this text will resonate happily. But it will appeal also to legal historians, to legal and political theorists, to property lawyers, (of course) to environmental

lawyers, and more generally to anyone interested in the development of the common law. None of which is to say that it is an easy text: far from it. The main argument is detailed and sophisticated, and affords evidence of a masterful understanding of the boarder political and legal theories involved, and whilst the text is throughout accessible and lively, parts of it will need to be read more than once to ensure complete understanding. But it is a text worth returning to, and surely will repay careful study.

Robin Hickey
Queen's University Belfast