Preface

The project which led to this book was inspired by a number of factors. First, the continuing loss of biodiversity, despite the volume of law and policy designed to prevent this, suggested that it may be time for a reconsideration of how we go about the task of conserving biodiversity for our own sake and that of future generations. Secondly, across many areas of environmental law there have been moves away from the established 'command and control' model of regulation to introduce a more varied range of approaches, including economic instruments and market-based mechanisms. So far there has been only a limited application of these to biodiversity issues and limited exploration of what that might entail. Yet it seems inevitable that more attention will be paid to such possibilities, especially in the dominant climate of deregulation and austerity. This gives rise to the danger that seemingly attractive ideas might be blindly applied without proper appreciation of the special features of biodiversity in comparison to other environmental issues (such as greenhouse gases) or of the risks as different mechanisms move from playing a supplementary to a central role. Thirdly, in recent years there has been a major movement towards discussing biodiversity in terms of ecosystem services and natural capital, which opens the door to conceiving of the value and role of biodiversity in ways quite different from those embedded in current regulatory and legal frameworks. The final spur was the realisation that there was a comparative absence of discussion of such issues from a legal perspective, despite the wealth of literature on the economic, ecological and ethical aspects of 'valuing nature'. Our aim is to make a contribution to filling that gap.

The focus, therefore, is on the legal issues and questions arising in the design and operation of systems, not the underlying economic, regulatory and ethical arguments. Writing this book would have been easier (and reading it possibly more exciting) if we held passionately fixed views on one extreme or the other. A simpler account could be given if we saw an economic approach as, on the one hand, the ideal way of dealing with all the relevant regulatory problems, or on the other hand as requiring a fundamentally misconceived and unacceptable attempt to value nature in financial terms alone. Instead, and along with most of the stakeholders

we have come across, from many different backgrounds, our view is more pragmatic. Market-based solutions will not be appropriate for all aspects of biodiversity conservation, but they may offer opportunities for improving on the current position, where despite the laws that are in place, biodiversity too often is on the losing side when competing against other interests. A lot depends on the specific scope and design of particular schemes and it is considering these design challenges which lies at the heart of this book.

We speak of a shift from the more established regulatory style to the 'new' mechanisms and approaches discussed in this book, but that description must be seen simply as a useful short-hand and certainly not as a wholly accurate term. As is made clear in the following pages, around the world there are many schemes currently in operation that apply the methods explored below. The management agreements which play an important part in looking after habitat in the United Kingdom are a form of payment for ecosystem services (based on something akin to a short-term conservation covenant); biodiversity offsetting and bio-banking schemes are established in Australia and the United States; and conservation easements are widely used across the United States.[1] Nevertheless, even in such contexts, the mechanisms are a more recent addition to the more established 'command and control' approach and the contrasts between that approach and the 'new' one are central to the analysis here.

THE BOOK

The book begins with an overview of the factual, legal and regulatory background to biodiversity conservation and then in Chapter 2 offers some consideration of a number of pervasive issues which arise, with differing intensity, across all of the topics discussed in the book. The next five chapters then offer more detailed consideration of various mechanisms through which the law can be used to further conservation, before the underlying ethical issues are explored in Chapter 8. The final chapter offers some reflection on what has gone before. Throughout the book we have generally avoided discussion of the further substantial challenges, but also opportunities, which arise when mechanisms are designed to operate at an international level rather than within single jurisdictions. Likewise, we touch on, but do not fully develop, the particular challenges

[1] See Chapters 3, 4 and 5 respectively.

faced in adopting any conservation measures across the developing world where, for example, the ownership of much land may be unclear, or at least the formal legal interests may not properly reflect the interests of the people who depend on it.

Given our academic histories and the place where we are working, we recognise that we are writing from a background steeped in the thinking of western (especially common law) legal systems and western ethical debates. Different philosophical, cultural and legal traditions in other parts of world may have a lot to offer, but we are in no position to do justice to that contribution. Similarly, we recognise that our default position is to consider issues from a UK perspective. This again has limitations, but does offer a consistency of view in exploring the ramifications of various schemes, rather than jumping between jurisdictional viewpoints when the varying contexts of apparently similar measures can produce quite different results. Since Professor Reid has written about the implications for environmental law of devolution within the United Kingdom, it should be pointed out that strict accuracy has been sacrificed for the sake of an easier flow of the text and there has not been rigour in distinguishing in detail between matters which are ones for UK law, those for the law of Great Britain (i.e. Scotland, England and Wales, without Northern Ireland) and those for the law of each jurisdiction separately.

In carrying out our research we have drawn on literature well beyond legal sources, particularly in ecology, environmental economics and philosophy. It should be stressed, though, that we have not attempted any comprehensive survey of all the relevant works across these fields. We send our apologies to the authors whose work we would have benefited from but have overlooked and omitted.

The book is very much the product of joint work, but in preparing the book the initial draft of Chapter 3 was prepared by Dr Nsoh and the remainder by Professor Reid.

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learned so much from the other contributors and participants. The comments of the advisory panel for the project were also very much valued: Mary F.B. Christie, Charles Cowap, Tom Huggon, Dr Maggie Keegan and Professor Andrew Watkinson.

We are grateful to the publishers for their indulgence as the preparation of this book has dragged on longer than anyone had envisaged. Exceeding the original timetable is hardly an unusual feature for academic works, but was something we sought to avoid. Some explanation, if not excuse, is provided by three factors: the fact that the UK Border Agency wrongly refused Dr Nsoh a visa when he started work at Dundee, requiring his employment to be suspended for several weeks until the position was rectified; the commitments of Professor Reid as a member of the Law sub-panel for REF 2014, which imposed a heavy workload just when the writing should have been getting under way as the funded period of the project was coming to an end; and the fact that Dr Nsoh had to cope with the disruption and many other commitments arising from his moves to start a career as a Lecturer in Law at one institution and then in the middle of 2015 to his current post at Birmingham.

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