

**CLIMATE REGULATION AS IF THE PLANET
MATTERED:
THE EARTH JURISPRUDENCE APPROACH TO
CLIMATE CHANGE**

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ABSTRACT

It is now beyond doubt that humans are having an enormously detrimental impact on the natural world. In the face of the incredible environmental challenges we face, new and radical ideas have emerged about how we should regulate human behavior. This paper briefly focuses on the failure of current legal regimes to address climate change, and considers how climate governance would look under the Earth Jurisprudence approach: setting our laws within the context of fundamental principles of ecology and planetary boundaries. Consideration is given to how existing legal concepts could be used to achieve this vision. The paper concludes that a reframing of climate governance according to the Earth Jurisprudence approach is possible by changing the underlying principles and place of governance; expanding our conception of rights to cover natural systems; re-localizing governance; and lessening our reliance on markets, instead using the law to respect, rather than commodify, nature.

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INTRODUCTION

In *Collapse*, Jared Diamond sounds a warning for contemporary society, which, like many societies that have collapsed in the past, is currently living beyond its ecological means.¹ Diamond identifies, *inter alia*, environmental degradation, unsustainable resource use and climate change as the main drivers of societal collapse.² Though Diamond leaves it to the reader to apply his historical observations to our current situation, the clear implication is that our society is at great risk.

It is now beyond doubt that humans are having an enormously detrimental impact on the natural world, the very world that sustains us.³ In the face of the incredible challenges we face, new and radical ideas have emerged about how we should regulate human behavior to reduce our ecological footprint. This paper briefly assesses the failure of the current legal regime to adequately address the greatest environmental problem we face, climate change. Then, this paper envisions climate governance under a radical new perspective, that of Earth Jurisprudence.

The emerging theory of Earth Jurisprudence suggests that the core failure of modern human governance systems is that they regulate human behavior based on the fallacy that we are separate from nature and can operate outside the boundaries imposed by natural systems.⁴ The Earth Jurisprudence approach is to set our laws within the context of fundamental principles of ecology and the limits imposed by nature.⁵

¹. See generally JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2005).

². *Id.*

³. See U.N. ENVIRONMENT PROGRAMME [UNEP], *GLOBAL ENVIRONMENT OUTLOOK 4, ENVIRONMENT FOR DEVELOPMENT* (2007) http://www.unep.org/geo/geo4/report/GEO-4_Report_Full_en.pdf; see also Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2007: Synthesis Report, Summary for Policymakers* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

⁴. CORMAC CULLINAN, *A History of Wild Law*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 12 (Peter Burdon ed., 2011) 13. The tenets of Earth Jurisprudence are set out in Cullinan's earlier book *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* (2002)

⁵. *Id.*

This paper advances Earth Jurisprudence by undertaking a ‘thought experiment’, considering how climate governance would look under the Earth Jurisprudence approach and how existing legal concepts could be used to achieve this vision.

This paper suggests that that reframing international climate governance according to the Earth Jurisprudence approach is possible by:

- Changing the underlying principle of international climate governance and rethinking its place in our legal system;
- Expanding our conception of rights so that natural systems can be defended in the courts;
- Localizing governance; and
- Lessening our reliance on markets and instead utilizing the law to respect, rather than commodify, nature.

I. INTERNATIONAL CLIMATE CHANGE NEGOTIATIONS

The 2009 Copenhagen climate change negotiations,⁶ dubbed ‘Hopenhagen’,⁷ represented the high point of optimism that a new global agreement on climate change could be reached to succeed the Kyoto Protocol. Hopes and tensions ran high as young people wandered around the climate change negotiations wearing t-shirts saying, “You have been negotiating all my life. You can’t tell me that you need more time”.⁸ Outside the venue, many thousands of people gathered to call for faster and stronger action. Their rally cry, ‘system change, not climate change’, was met with mass arrests and suppression.⁹

⁶. United Nations: Framework Convention on Climate Change, *available at* http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php.

⁷. Mark Sweney, *Copenhagen Climate Change Treaty Backed by ‘Hopenhagen’ Campaign*, GUARDIAN (June 29, 2009, 12:57 EDT), <http://www.guardian.co.uk/media/2009/jun/23/hopenhagen-climate-change-campaign>.

⁸. Velcrow Ripper, *Facing the Ghosts of Copenhagen in Cancun: The Climate Talks in Mexico are Haunted by Past Failures*, NOW MAG. (Dec. 5, 2010, 8:14 PM) <http://climate-connections.org/2010/12/05/facing-the-ghosts-of-copenhagen-in-cancun/>.

⁹. *100,000 March for System Change Not Climate Change in Copenhagen with Mass Arrests*, INDEPENDENT MEDIA CENTER, Dec. 13, 2009, 20:46 GMT) <http://www.indymedia.org/pt/2009/12/932387.shtml>.

Meanwhile, inside the conference, thousands of diplomats, negotiators and government officials argued over precisely how much of the 'carbon budget' each country should be allowed to emit and who should pay for mitigation and adaptation.¹⁰ At the eleventh hour, high-profile international leaders of some of the world's richest and most profligate nations swept in to 'rescue' the negotiations.¹¹

The result of this intervention was the Copenhagen Accord (the Accord),¹² a non-binding document negotiated by only a handful of the 193 nations present:¹³ the US and the BASIC countries.¹⁴ The Accord was not adopted or recognized by the conference, but was instead 'taken note of'.¹⁵ The Accord does not commit countries to emissions reductions, does not specify a year by which global emissions must peak, and does not require countries to agree to a binding successor to the Kyoto Protocol.¹⁶

Opinion regarding the Accord was mixed. Those close to its negotiation and acknowledgment generally made diplomatic comments. For example, the UN's Chief Climate Change Negotiator hailed it as an

¹⁰. CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE*, 187-88 (2002).

¹¹. *Copenhagen Climate Change Summit - Final Day Live Blog*, GUARDIAN, Dec. 18, 2009 <http://www.guardian.co.uk/environment/blog/2009/dec/18/copenhagen-climate-change-summit-liveblog>.

¹². U.N. Framework Convention on Climate Change, Dec. 18, 2009, *Draft Decision -/CP.15 (Copenhagen Accord)* http://unfccc.int/meetings/copenhagen_dec_2009/items/5262.php.

¹³. Martin Khor, *Blame Denmark, Not China, for Copenhagen Failure*, GUARDIAN (Dec. 28, 2009 7:11 EST), <http://www.guardian.co.uk/commentisfree/cif-green/2009/dec/28/copenhagen-denmark-china>.

¹⁴. *Copenhagen Climate Summit Held to Ransom - Gordon Brown*, BBC NEWS (Dec. 22, 2009 9:02 GMT), http://news.bbc.co.uk/2/hi/uk_news/politics/8423831.stm.

¹⁵. *Id.*

¹⁶. See Gerard Wynn and Jon Hemming, *What was agreed and left unfinished in U.N. climate deal*, REUTERS (Dec 20, 2009, 8:09PM) <http://in.reuters.com/article/2009/12/20/idINIndia-44872920091220>.

“important political tool”,¹⁷ and Gordon Brown, Prime Minister of the United Kingdom, said it was a “vital first step” to fighting climate change.¹⁸ However, developing countries, climate scientists and environmental non-governmental organizations (NGOs) were much more forthcoming in their criticism. Lumumba Stanislaus Di-Aping, the Head of the G-77 Group, stated that the Accord, “asks Africa to sign a suicide pact... in order to maintain the economic dominance of a few countries”.¹⁹ Friends of the Earth called it an “abject failure”,²⁰ while Greenpeace noted that the negotiators seemed incapable of “looking beyond the horizon of their own narrow self-interest” in order to conclude a deal that actually protects the environment.²¹

Copenhagen was followed by Conference of the Parties (COP) 16 in Cancun in 2010 and COP 17 in Durban in 2011. The ‘Cancun Agreements’ and decisions made at Durban built on the Accord, institutionalizing an inadequate international response to one of the greatest threats that humanity, and the environment, has ever faced.²²

¹⁷. Sarah Clarke, *UN Says Copenhagen Failed to Deliver*, ABC (Jan. 21, 2010, 8:08 AM), <http://www.abc.net.au/am/content/2010/s2797520.htm>; see also Elisa de Wit, *Copenhagen: Success or Failure?*, NEW LAWYER (Jan. 27, 2010) <http://www.lawyersweekly.com.au/the-new-lawYER/law-firms/copenhagen-success-or-failure>

¹⁸. Allegra Stratton, *Gordon Brown Hails Copenhagen Success Despite Widespread Condemnation*, GUARDIAN (Dec. 18 2009, 20:47 EST), <http://www.guardian.co.uk/environment/2009/dec/19/copenhagen-reaction>.

¹⁹. *Copenhagen deal reaction in quotes*, BBC NEWS (Dec.19, 2009, 11:44 GMT), <http://news.bbc.co.uk/2/hi/science/nature/8421910.stm>.

²⁰. *Id.*

²¹. *Id.*

²². See generally SIR DAVID KING, KENNETH RICHARDS, SALLY TYLDESLEY, INTERNATIONAL CLIMATE CHANGE NEGOTIATIONS: KEY LESSONS AND NEXT STEPS (2011) http://www.smithschool.ox.ac.uk/wp-content/uploads/2011/03/Climate-Negotiations-report_Final.pdf.

A. THE FAILURE OF INTERNATIONAL CLIMATE NEGOTIATIONS

A number of analyses have been conducted to assess the prospects for our climate under the current international framework: they present an unattractive picture. An analysis published in *Environmental Research Letters*²³ noted the low probability of the Accord resulting in its stated aim - to limit the increase in global temperature to 2°C.²⁴ The International Energy Agency (IEA) in its *World Energy Outlook for 2010*²⁵ develops a scenario based on the pledges made in pursuance of the Accord. The IEA pragmatically assumes that the pledges will be acted on cautiously, given their non-binding nature. Under such a scenario, greenhouse gas emissions would stabilize at 650 parts per million CO₂-equivalent (CO₂-e) in the atmosphere. This concentration of CO₂-e could lead to global warming of more than 3.5°C above a pre-industrial baseline.²⁶

As such, the current framework is a woefully inadequate response to the problem it aims to solve. The UN Environmental Programme (UNEP) and the World Resources Institute (WRI) state: “despite a global commitment by most of the world’s governments... to stabilize anthropogenic greenhouse gases... at safe levels, emissions are still on the rise and pledges of future action, in aggregate, fall short of what science suggests is necessary. This bleak outlook calls for bold thinking and determined action”.²⁷

²³. Joeri Rogelj et al, *Analysis of the Copenhagen Accord Pledges and its Global Climatic Impacts—a Snapshot of Dissonant Ambitions*, 5(3) ENV'T RES. LETTERS, 1 (2010) available at http://iopscience.iop.org/1748-9326/5/3/034013/pdf/1748-9326_5_3_034013.pdf.

²⁴. *Id* at 9.

²⁵. See generally International Energy Agency [IEA], *World Energy Outlook 2010* (2010) http://www.energy.eu/publications/weo_2010-China.pdf.

²⁶. *Id* at 11.

²⁷. Remi Moncel et al., *Building the Climate Change Regime: Survey and Analysis of Approaches*, WORLD RESOURCES INSTITUTE (2011), http://pdf.wri.org/working_papers/building_the_climate_change_regime.pdf.

B. A RADICAL NEW PERSPECTIVE

Given the inadequacy of the current framework, the international institutional systems that created it have also come under scrutiny, and many commentators and stakeholders, have called for fresh thinking.²⁸

This paper advocates for a radical new approach to environmental law and governance generally, and to international climate change law and governance in particular. Climate change regulation cannot be fixed by the same frameworks and perspectives that caused the problems in the first place. The UNFCCC framework is focused, “not on the root causes of environmental exploitation—but ‘market fixes’ to the same corporate-led economic model and ‘endless-more’ value system that have driven us to the cliff’s edge.”²⁹

As Cullinan notes, “relatively few governments seem ready to acknowledge that the symptoms cannot be cured without addressing the underlying causes” despite growing acceptance that “climate change is not the problem but only one of many symptoms of underlying systemic dysfunctions.”³⁰ We must begin to target the root of the problem.

A recent report of the UN High Level Panel on Global Sustainability sums up this need for a fundamental rethink: “Economies are teetering. Inequality is growing. And global temperatures continue to rise... We need to change dramatically, beginning with how we think about our relationship to each other, to future generations, and to the eco-systems that support us.”³¹

Over the last few decades, such an approach to making these important changes has been gestating in the academic world, environmental organizations and, in some cases, government.³² This

²⁸. *Id.*; CULLINAN, *supra* note 4.

²⁹. *See generally* EDUARDO GALEANO ET AL, THE COUNCIL OF CANADIANS, DOES NATURE HAVE RIGHTS? TRANSFORMING GRASSROOTS ORGANIZING TO PROTECT PEOPLE AND THE PLANET (2011) *available at* <http://www.globalexchange.org/sites/default/files/RON%20REPORT.pdf>.

³⁰. CULLINAN, *supra* note 8, at 39.

³¹. United Nations Secretary-General’s High-level Panel on Global Sustainability, *Resilient People, Resilient Planet: A Future Worth Choosing*, 1 (2012), http://www.un.org/gsp/sites/default/files/attachments/GSP_Report_web_final.pdf.

³². *See* CULLINAN, *supra* note 4.

new approach notes that human beings do not exist in a vacuum: we are part of a greater system, the Earth System, that we rely on for our existence, and we cannot continue to flourish unless this system is healthy.³³ The environmental challenges we face suggest that we have been living on ‘borrowed time’ and that there is a need to change our governance structures to ensure the health of the Earth System that sustains us into the future: the planet we live on does not have the capacity for infinite economic growth and continued environmental degradation.³⁴

Earth Jurisprudence draws on theories of law, jurisprudence and governance, as well as ecology and environmental science, sociology, psychology and indigenous knowledge.³⁵ For the purposes of this paper, the focus will be on the jurisprudential and legal elements of an ecocentric approach to governance, and the implications of such an approach for international climate governance.

To date, much of the discussion of Earth Jurisprudence has been on theoretical aspects, with fairly little analysis of what our laws may look like if we adopt this radical new perspective. This paper is an attempt to remedy that by “leaping ahead and imagining” what climate governance would be like in its “healed state”.³⁶

III. EARTH JURISPRUDENCE: A BRIEF OVERVIEW

Perhaps the reason that much of the literature on Earth Jurisprudence has to date focused on theory is that it is very difficult to move to practical considerations while the theory is underdeveloped. The temptation is to gravitate toward theoretical discussions. The

³³. *Id.*

³⁴. See STEPHEN HARDING, *Gaia and Earth Jurisprudence*, in EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE 79 (Peter Burdon ed., 2011). (There are a range of scientific papers which discuss our growing environmental problems. See Harding for an Earth Jurisprudence perspective.)

³⁵. See EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE 79-179 (Peter Burdon ed., 2011), in particular *Part Two – Inspiration for Earth Jurisprudence*.

³⁶. CULLINAN, *supra* note 8, at 123.

theory of Earth Jurisprudence, however, is now coming of age,³⁷ and much can be gained, in both theory and in practice, by beginning to think about the practical applications of the approach. I therefore propose to briefly outline the core concepts of Earth Jurisprudence, leaving the more esoteric and theoretical questions to other fora.

A. THE GREAT JURISPRUDENCE

*Man takes his law from the Earth;
the Earth takes its law from Heaven;
Heaven takes its law from the Tao.
The law of the Tao is its being what it is.*³⁸

*The Great Jurisprudence is like the mountains.
It is what it is,
and our descriptions of it are abstract approximations.*³⁹

Throughout history there have been philosophies based on some notion of a universal code or framework or power. Natural Law, classically referring to the notion that human nature contains universal binding rules of moral behavior that can be deduced through reason, is perhaps the most well known in Western cultures.⁴⁰ In a similar vein, the Great Jurisprudence ‘is what it is’; it is the nature of the world, the “fundamental laws and principles of the universe”.⁴¹

The Great Jurisprudence arises from an understanding that, rather than being the center of the universe, humans are part of a greater

³⁷. See generally EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE (Peter Burdon ed., 2011).

³⁸. LAO TZU, THE TAO TE CHING OF LAO TZU 25 (Brian Browne trans., 1995)

³⁹. CULLINAN, *supra* note 8, at 78.

⁴⁰. See Mark Murphy, *The Natural Law Tradition in Ethics*, THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2011), available at <http://plato.stanford.edu/entries/natural-law-ethics/>.

⁴¹. *Id.*

system, the Earth System.⁴² The Earth is a self-regulating system that has existed, developed and flourished for millennia, and can provide us with a universal framework in which to bound human laws.⁴³ The Great Jurisprudence is therefore not an esoteric flight of fancy, but merely recognition that certain fundamental laws and principles are embedded in the natural world, in its ecology and interdependent systems: “the natural world (i.e. the universe functioning as it should) provides the best guide we have to the essential nature of the universe”.⁴⁴

Berry and Swimme propose that the three most basic elements of the Great Jurisprudence are: differentiation (in that ‘nature abhors uniformity’), autopoiesis (literally, ‘self-making’), and communion (the interconnectedness of all aspects of the universe).⁴⁵ As our understandings of ecology, science and biology improve; we will be able to more clearly understand and delineate ecosystem boundaries and understand the fundamental principles of the Great Jurisprudence.

B. EARTH JURISPRUDENCE

Earth Jurisprudence is the name for the legal philosophy that “recognize[s] the Earth as the primary source of law which sets human law in a context which is wider than humanity”.⁴⁶ Earth Jurisprudence is an attempt to place our laws within the fundamental nature of the Earth system-within the Great Jurisprudence. Earth Jurisprudence includes, *inter alia*:⁴⁷

⁴². See HARDING, *supra* note 34; PETER BURDON, *The Great Jurisprudence*, in EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE 59 (Peter Burdon ed., 2011)

⁴³. CULLINAN, *supra* note 4.

⁴⁴. CULLINAN, *supra* note 8 at 78.

⁴⁵. THOMAS BERRY & BRIAN SWIMME, *THE UNIVERSE STORY* (1992); see also BURDON, *supra* note 41.

⁴⁶. The Gaia Foundation, Earth Jurisprudence – Earth Law, <http://www.earthjurisprudence.org> (last visited Oct. 30, 2011).

⁴⁷. CULLINAN, *supra* note 8 at 117.

- Recognition that rights stem from the nature of the universe, from the nature of existence itself, rather than from human legal systems;
- Recognition that all beings play a role in the interconnected and interdependent Earth system;
- Recognition that human conduct must be restrained to prevent impinging on the roles of other beings; and
- Ensuring that human governance arrangements are based on what is best for the whole Earth system.

C. WILD LAW

The term “Wild Law” was coined by Cormac Cullinan in 2002 to describe both a legal philosophy and an approach to human governance that infuses our modern anthropocentric⁴⁸ legal systems with Earth Jurisprudence and laws made in accordance with these principles. In re-centering legal systems around the environment, rather than solely basing them on short-term human concerns, Wild Law aims to redress the imbalance that current models of regulation are causing in our ecosystems.⁴⁹

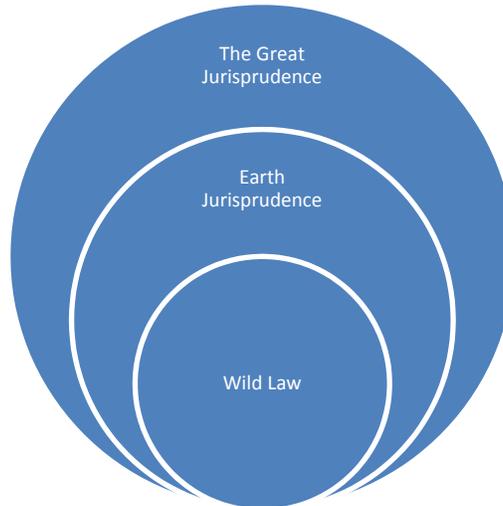
Wild Law is sometimes used synonymously with Earth Jurisprudence, though it can be seen as a separate concept, denoting laws and policies that accord with Earth Jurisprudence:⁵⁰ such as “binding prescriptions, articulated by human authorities, which are consistent with the [Great Jurisprudence] and enacted for the common good of the comprehensive Earth Community”.⁵¹

⁴⁸. *Anthropocentrism Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/anthropocentrism>. Anthropocentric refers to a mindset that considers that human beings are the most significant entity of the universe and/or interprets the world in terms of human values and experiences.

⁴⁹. CULLINAN, *supra* note 4.

⁵⁰. Cormac Cullinan, *Sowing Wild Law* 19 ENV'T L. & MGMT. 71, 72 (2007).

⁵¹. MACFARLANE, *supra* note 29, at 64.



Deforestation is an easily understood example of this conceptualization. Nature has predefined limits as to how much deforestation can occur without affecting an ecosystem (the Great Jurisprudence). We can attempt to understand these limits through observation of the ecosystem in its natural state (Earth Jurisprudence). This observation would tell us that the system is well balanced and functioning, such that allowable deforestation might be very limited and require replenishment. Laws could then be passed that respect the inherent nature of the ecosystem (Wild Law).

Earth Jurisprudence may initially seem unintuitive to Western peoples with our prevailing anthropocentric worldview, our “autism in relation to nature and our cultural amnesia vis-à-vis tens of thousands of years of our tribal histories”.⁵² However, there are many indigenous cultures in the world to which an ecocentric approach to governance is intuitive. For example, Both Bolivia and Ecuador have moved to implement the Earth Jurisprudence approach to environmental law, driven by strong indigenous support.⁵³ To these cultures, giving a river

⁵². CULLINAN, *supra* note 8, at 109.

⁵³. Cole Mellino, *Bolivia and Ecuador Grant Equal Rights to Nature: Is “Wild Law” a Climate Solution?*, THINKPROGRESS (Nov. 21, 2011, 10:22 AM), <http://thinkprogress.org/romm/2011/11/21/373273/bolivia-and-ecuador-equal-rights-to-nature-wild-law-climate-solution/>.

rights is far more intuitive than ascribing powers to a fictitious being such as a corporation, a feature characteristic of Western legal systems.⁵⁴

IV. REFRAMING INTERNATIONAL CLIMATE GOVERNANCE

This paper is intended to be a thought experiment, an imagining of what climate governance would look like if we took a genuinely ecocentric approach. It is noted that many of these ideas are underdeveloped; developing them more fully would require a considerably more detailed exposition. However part of the Earth Jurisprudence approach is that ideas should be free flowing, in the full understanding that some will flourish and others will perish: creativity and innovation are essential an essential component of the Earth Jurisprudence approach to legal reform.⁵⁵ It is on this basis that the following section proceeds.

In his book *The Ecology of Eden*, Evan Eisenberg dichotomizes human opinion on the environment into two categories: ‘planet managers’, who see the earth as “a garden that we are to dress, keep and humanize”,⁵⁶ and planet fetishers, who romanticize the natural world and chastise human existence within it.⁵⁷ Modern human beings are almost universally in the former category: the dominant worldview places humans at the center, controlling nature as a resource. Whilst it is unrealistic and undesirable to advocate a return to a Paleolithic hunter-gatherer existence,⁵⁸ it is equally unrealistic for us to continue our current trajectory of environmental destruction. However, like all dichotomies, there is space between the two extremes, and it is within this space that Earth Jurisprudence is intended to operate: maintaining something akin to current human societies, whilst transitioning to a

⁵⁴. *Id.*

⁵⁵. Rivers, E., ‘Creative regulation: how wild law can rehabilitate governance and regulation’ 19 ENV’T L. & MGMT 84, 86 (2007).

⁵⁶. Eisenberg, E., *The Ecology of Eden: Humans, nature and Human Nature* (Picador, London 2002) 286.

⁵⁷. *Id* at 283.

⁵⁸. *Id.*

more sustainable model that respects the systems we ultimately depend on.

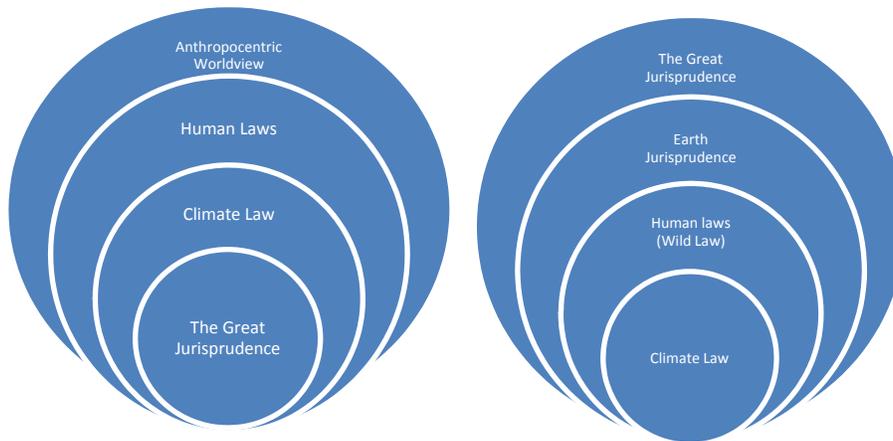
Earth Jurisprudence can maintain a balance between these two extremes by reinventing environmental governance mechanisms, but also using familiar and existing legal mechanisms and concepts to implement ecocentric climate governance.

A. THE PLACE AND PRINCIPLE OF CLIMATE GOVERNANCE

The focus of climate negotiations on parts-per-million, carbon budget and market mechanisms show that we have not made a fundamental paradigm shift in our thinking. From an Earth Jurisprudence perspective, the key limitations of climate law are that it does not:

- Respect the natural world as having intrinsic value or rights in itself;
- Acknowledge that the Earth system functions sustainably absent human interference; nor
- Seek to govern human behavior according to the Great Jurisprudence, i.e. according to what the natural world ‘tells us’ is sustainable.

The schematic diagrams below show where climate law is situated in our current framework and where it would be situated if we governed human behavior according to the Earth Jurisprudence principle that we are not masters of the natural world, but are a part of it.



Climate law in our current governance framework, showing that our laws are bound only by an anthropocentric worldview and that the Great Jurisprudence, the limits of our environment, is the last consideration.

The Earth Jurisprudence view of climate law, showing how climate law is bound within the limits of an ecocentric approach to law and, ultimately, the Great Jurisprudence.

The shift from the perception of humans as ‘planet managers’ to a worldview where we are part of a greater whole is the obvious starting point for an Earth Jurisprudence conception of climate governance. ‘Regulation’ can simply be defined as “bringing into line with a principle”, while ‘governance’ comes from the Latin *gubernare*, ‘to steer’.⁵⁹ The first step for reform of international climate law is therefore to change our underlying principle from one of maximum consumption to one of minimum impact (the principle that all laws are bounded by the laws inherent in nature, the Great Jurisprudence). Once the principle is changed, governance and regulation will begin to follow.

As environmental problems such as climate change worsen, it may be more likely that people will begin to seek a paradigm shift rather than a piecemeal approach to governance. In 2008, 30,000 people from 100 countries met in Bolivia for the World People’s Conference on Climate

⁵⁹. Elizabeth Rivers, *A Wild Law Wild Weekend? 10 Principles of Earth Jurisprudence*, 20(2) ENVTL. L. & MGMT. 81 (2008).

Change and the Rights of Mother Earth (World People's Conference).⁶⁰ The World People's Conference adopted the Universal Declaration of the Rights of Mother Earth which, in its preamble, states that "we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings", clearly signaling a move away from the fallacy of humans as separate from nature.⁶¹ This is undoubtedly the most impressive demonstration to date that a large section of the global community is ready for a change in perspective.

B. RIGHTS FOR NATURE

The notion that nature should have rights was most famously proposed by Stone in his book *Should Trees Have Standing?*⁶² For Stone, the idea was a passing comment meant to reignite interest from bored students,⁶³ yet he quickly realized that the idea was of real philosophical interest. Stone argues that there is no reason not to reframe rights so as to include nature,⁶⁴ just as we have reframed rights numerous times in the past.

A core tenet of Earth Jurisprudence is the notion that all Earth subjects have inherent rights that should be enshrined in, and respected by, the law.⁶⁵ Article 2.1 of the Declaration on the Rights of Mother Earth attempts to clarify these rights, which include, *inter alia*:⁶⁶

- The right to life and to exist;

⁶⁰. See *Peoples Agreement*, WORLD PEOPLE'S CONFERENCE ON CLIMATE CHANGE AND THE RIGHTS OF MOTHER EARTH (April 22nd, Cochabamba, Bolivia), <http://pwccc.wordpress.com/support/>.

⁶¹. *Id.*

⁶². CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING?:LAW, MORALITY, AND THE ENVIRONMENT* 30 (2010).

⁶³. CULLINAN, *supra* note 8, at 93.

⁶⁴. STONE, *supra* note 47.

⁶⁵. CULLINAN, *supra* note 4.

⁶⁶. WORLD PEOPLES CONFERENCE, *supra* note 60.

- The right to be respected;
- The right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions; and
- The right to maintain its identity and integrity as a distinct, self-regulating and interrelated being.

The Constitution of Ecuador provides a glimmer of hope that the idea of rights for nature is an achievable prospect.⁶⁷ Chapter 7 sets out the rights of nature, which has “the right to exist, persist and maintain and regenerate its vital cycles”.⁶⁸ Likewise, Bolivia has passed The Law of Mother Earth,⁶⁹ which enshrines rights for nature.

While some countries may have established cultures, which do not find rights for nature absurd, the notion that all beings have certain rights may be difficult for Western legal systems, and other systems based on this dominant worldview, to understand. One US case attempting to argue standing for a tree resulted in ridicule from the judge his amusement in rhyme, opining:

“We thought that we would never see
A suit to compensate a tree.
A suit whose claim is prest
Upon a mangled tree’s behest.”⁷⁰

Nonetheless, the mechanisms to integrate and enforce rights for nature already exist in our legal systems. Western legal systems are centered on rights and are therefore well equipped to accommodate new ones.⁷¹ Indeed, history gives us a number of examples of how our

⁶⁷. REPUBLIC OF ECUADOR, CONSTITUTION OF 2008. English translation available at the Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

⁶⁸. *Id.* Title VII.

⁶⁹. Ley de Derechos de la Madre Tierra, Ley 071 (21 Dec, 2010), *available at* <http://bolivia.infoleyes.com/shownorm.php?id=2689>

⁷⁰. *Fisher v Lowe*, 122 Mich. Ct. App. 418, 419 (Mich. 1992) (rejecting the notion that the tree had any rights, the court continued: *Flora lovers though we three, We must uphold the court’s decree.*)

⁷¹. *Earth Rights*, BBC World Service (Apr. 12, 2011), <http://www.bbc.co.uk/programmes/p00g91mp>. Cullinan notes that some training etc. would be required.

conception of rights has expanded, the abolition of slavery and the granting of equal rights to women being the two most obvious. In 1999, New Zealand extended rights further still to apply to great apes,⁷² and in 2002 the German Parliament voted overwhelmingly in favor of adding “and animals” to a clause obliging the state to respect and protect the dignity of humans.⁷³ This addition requires that animals’ interests be weighed against those of humans in decision making.

Such rights would be generally applicable, but are particularly pertinent in an era of climate change. Cases could be brought, for example, against companies proposing polluting projects. In an Australian context, the most obvious example is coal mining. Whereas at present greenhouse gas emitting coal mines are perfectly legal, subject to planning law requirements, the Earth Jurisprudence approach would allow claims to be brought against the company on the basis that they interfere with the rights of nature generally, for example, the right of the natural world to continue its processes unmolested.

This may not necessarily mean the immediate end of coal mining, but it may mean that a court could enjoin the company from mining coal without effectively sequestering or offsetting the emissions produced, or require a much more holistic and long-term environmental impact assessment to be undertaken than that currently required.

If this example seems far-fetched, it is worth noting that a number of cases have already been brought which seek to push the boundaries of conventional law, to the extent that some are coming very close to applying a Wild Law approach to climate change. To offer one current example, a local branch of Friends of the Earth in Australia are currently awaiting a decision in a case in the Land Court of Queensland, in which an objection was raised to a mine being proposed by Xstrata Coal.⁷⁴ The objection is not based on any failure of Xstrata to comply with

⁷². Animal Welfare Act (1999) (NZ). For discussion, see Rowan Taylor, *A Step at a Time: New Zealand Progresses Toward Hominid Rights*, 7 ANIMAL L. 35 (2001).

⁷³. See Kate M. Natrass, “. . . Und Die Tiere” *Constitutional Protection for Germany’s Animals*, 10 ANIMAL L. 283 (2004).

⁷⁴. *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane – Co-Op Ltd & Ors (No 2)* (2012) QLC 67 (Austl.). See also Environmental Law Publishing, Wandoan Coal Mine Case <http://www.envlaw.com.au/wandoan.html> (last visited May 25, 2013).

environmental laws, but on the basis that the emissions of the mine⁷⁵ are contributing to climate change and ocean acidification. Further, this objection is not raised on behalf of humans whose rights have been infringed, but on the basis that the activity proposed is inherently disruptive of natural cycles.

Cases such as this demonstrate that rights for nature could be integrated into our current legal system with little difficulty, and that they could be effective in curbing climate change causing activities. A number of commentators have already begun to detail how existing doctrines could facilitate such litigation. For example, Judith Koons suggests the doctrines of standing and the public trust could be leveraged to implement nature rights.⁷⁶ The idea that standing could be used to represent natural subjects other than humans was the subject of Stone's work,⁷⁷ and in *Sierra Club v Morton*, a strong dissenting judgment recognized that there was no barrier to recognizing the standing of natural subjects, such as trees.⁷⁸ Kimbrell⁷⁹ develops the idea of expanding the *guardian ad litem* principle, which would require a guardian to be appointed for natural subjects in cases, in the same way that guardians are appointed for children. This idea was also suggested by two US Supreme Court Judges almost 40 years ago in *Sierra Club*.⁸⁰ Finally, 'citizen suit' provisions in environmental laws could facilitate litigation in the interests of the environment.⁸¹ Citizen suits are already

⁷⁵. *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane – Co-Op Ltd & Ors (No 2)* (2012) QLC 67 (Austl.). Expert Report to the Land Court by Dr. Chris Taylor, 9 <http://www.envlaw.com.au/wandoan9.pdf>. The mining and use of the coal could contribute 0.15% of global CO₂-e emissions.

⁷⁶. Judith E. Koons, *Key Principles to Transform law for the Health of the Planet*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 45 (Peter Burdon ed., 2011).

⁷⁷. STONE, *supra* note 47.

⁷⁸. *Sierra Club v Morton*, 405 US 727, 741-55, 755-79 (1972).

⁷⁹. Andrew Kimbrell, *Halting the global meltdown: can environmental law play a role?*, 20(2) ENV'T L. & MGMT 64, 68-69 (2008).

⁸⁰. See *Sierra Club*, 405 US 727, 741-755 (Douglas, J) and 755-759 (Blackman, J).

⁸¹. KIMBRELL, *supra* note 59, at 68-69.

common in environmental law and involve a private citizen bringing a lawsuit: against another party for engaging in conduct prohibited by statute, against a government body for failing to perform a non-discretionary duty, or requesting an injunction to abate imminent and substantial endangerment regarding waste, regardless of whether the defendant's conduct violates statutory prohibition. Citizen suits could therefore be brought, without any modification to arrangements, to enforce laws that apply Earth Jurisprudence.

C. FROM INTERNATIONAL TO LOCAL

The discussion above illustrates a further consequence of the Earth Jurisprudence approach to climate governance – the move away from internationally negotiated agreements to local level stewardship. In the example above, a community organization would be acting to represent the rights of nature.

In addition to the localization that logically flows from the recognition of rights, the Earth Jurisprudence approach to climate governance would also involve a conscious shift toward the localization of climate governance and environmental protection more generally.

In *Wild Law*, Cullinan devotes considerable space to considering why a shift to communities is desirable.⁸² He argues that:

- The Earth Community is made up of many smaller sub-communities; the health of the whole depends on the health of each part;⁸³
- Local communities, when allowed to self-govern, typically display characteristics of the Great Jurisprudence, such as differentiation, diversity and self-regulation;⁸⁴
- The diversity and creativity of local communities are under threat from the homogenization of cultures and governance structures;⁸⁵ and

⁸². CULLINAN, *supra* note 8, at 146-56.

⁸³. *Id.* at 147.

⁸⁴. *Id.* at 148.

⁸⁵. *Id.*

- Small community units themselves tend to perpetuate a more sustainable worldview.⁸⁶

Applying Wild Law principles to governance generally will require a move away from centralized, top-down international processes. This is particularly true of climate change governance, where the focus has long been on the ‘holy grail’ of reaching international agreement on reducing carbon emissions.

Whereas recognizing the rights of nature will, to an extent, result in a level of community involvement vis-à-vis enforcement, this will not, alone; cause the regeneration of community governance more generally. As Cullinan notes, in many areas of the world, we have lost our sense of community governance – we need to think consciously about localizing our governance structures.⁸⁷

One particularly interesting Wild Law approach to localizing climate governance is the idea of a ‘bioregional’ approach, whereby autonomous, democratic and participatory bodies govern small areas based on distinct biological, geographic and cultural characteristics.⁸⁸ While this approach would be localized, it will still, in many cases, be international, as bioregions do not respect our political boundaries. The idea of a bioregional approach is perhaps another example of where law and governance are yet to catch up with science. Scientists already use the idea of bioregions for study and conservation purposes.⁸⁹

Another approach to localization is to actively transfer rights to communities. For example, rights currently ascribed to corporations, which do not generally concern themselves with the limits of the environment, could be transferred to communities. Given the power of corporations, such a change is likely to occur in small steps at the local level, where power is slowly handed back to communities over time.

An instructive and interesting example comes from the US, where “Wild Lawyers” have been excited by the Tamaqua Borough Sewage

⁸⁶. *Id.* at 148-49.

⁸⁷. *Id.* at 151.

⁸⁸. Joel Catchlove, *Place as Inspiration*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 97, 99 (Peter Burdon ed, 2011).

⁸⁹. See Department of Sustainability, Environment, Water, Population and Communities, *Interim Biogeographic Regionalisation for Australia* (Version 6.1, 2011) <http://www.environment.gov.au/parks/nrs/science/pubs/subregions.pdf>.

Sludge Ordinance (the Ordinance).⁹⁰ The Ordinance removes the previously held ‘right’ of corporations to spread sewage sludge as fertilizer on farmland, even when the landowner consents. Instead, the Ordinance recognizes ecosystems and local communities as legal ‘persons’ with rights. One newspaper amusingly and optimistically suggests that we “[p]eer deeply into the sewage sludge of Tamaqua. It may contain the future of the law”!⁹¹

In a climate change context, localization in this manner could allow communities to take action on behalf of the environment in cases such as coal mines, as suggested previously, or other potential greenhouse gas emitting activities such as the building of a new road or landfill facility. There is of course a question as to whether local communities would use such powers to prevent greenhouse gas emitting activities, given that the impacts of greenhouse gas emissions are felt beyond the confines of local communities. At the very least, giving communities the right to decide what activities are appropriate, rather than giving a free pass to corporations, would act as a fetter on unencumbered action.

D. MOVE AWAY FROM MARKETS

The Earth Jurisprudence approach to climate governance suggests that market solutions to climate problems should be abandoned. This is a sweeping statement, particularly as the current international law approach to climate change makes extensive use of market mechanisms, seeking to place a monetary value on a carbon in order to lower emissions.

Hepburn notes that only a century ago it would have been “difficult to imagine that the carbon sequestration process, an ineluctable constituent of natural progression, would constitute a verifiable property resource”.⁹² Yet the idea of carbon rights, not only from sequestration

⁹⁰. Community Environmental Legal Defense Fund (CELDF), Tamaqua Borough Sewage Sludge Ordinance. <http://www.celdf.org/article.php?id=440> (last accessed Oct. 10, 2011).

⁹¹. Silver Donald Cameron, *When Does a Tree Have Rights?*, THE CHRONICLE HERALD (Jan. 8, 2007) http://www.precaution.org/lib/07/when_do_trees_have_standing.070108.htm.

⁹². Samantha Hepburn, *Carbon Rights as New Property: The Benefits of Statutory Verification*, 31(2) SYDNEY LAW REVIEW 239, 270 (2009).

under mechanisms such as the Reducing Emissions from Deforestation and Forest Degradation mechanism (REDD+),⁹³ but also from emissions reductions under carbon trading systems or the Clean Development Mechanism,⁹⁴ has quickly gained acceptance as a cornerstone in efforts to ‘fix’ climate change.

In relation to land law, Cullinan notes that by conceptualizing land as a commodity, “the dominant legal philosophies legitimize and facilitate our exploitative relations with Earth”.⁹⁵ The commodification of carbon only furthers this relationship of exploitation and the perception of nature as an endless resource to be exploited rather than protected. The Earth Jurisprudence approach to climate governance would require humans to have “less rights over and more responsibilities towards other members of the earth community”.⁹⁶

Over the last fifty years or so, markets have transformed from a useful governance tool to the fundamental ideology and pinnacle of all governance efforts. There is an assumption that creating the perfect market is the touchstone of governance.⁹⁷ This predilection for markets is often inappropriate and ineffective, but seems particularly ill suited in the context of the emergency situation we face in light of climate change. Markets are essentially driven by the wish to profit, and not to conserve. Attempting to utilize the same forces that encourage us to dig coal out of the ground to reduce our use of coal seems counterintuitive.

It is submitted that we must, at least in the context of climate change, return to ‘real’ governance, whereby we take a considered

⁹³. See UNFCCC, Reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD), <http://unfccc.int/methods/redd/items/7377.php>.

⁹⁴. See CDM website, <http://cdm.unfccc.int/>.

⁹⁵. CULLINAN, *supra* note 8, at141.

⁹⁶. C. Roberts, paper presented at Wild Law 2011, *A wild law look at carbon rights in trees and soils*, (Sept. 16-18, 2011) <http://www.wildlaw.org.au/wp-content/uploads/presentations/Roberts,-C-A-wild-law-look-at-carbon-rights-in-trees-and-soils.pdf>.

⁹⁷. See MICHAEL PUSEY, *ECONOMIC RATIONALISM IN CANBERRA: A NATION-BUILDING STATE CHANGES ITS MIND* (1992); See also STEPHEN BELL, *UNGOVERNING THE ECONOMY: THE POLITICAL ECONOMY OF AUSTRALIAN ECONOMIC POLICY* (1997).

approach and attempt to render an effective solution, rather than leaving it to the market. In the case of climate governance, this may well entail a return to traditional ‘command and control’ measures, whereby strict limits are imposed on potentially environmentally-degrading activities with strong penalties in order to ensure that ecosystem limits are not breached.⁹⁸ From an ecocentric perspective, such measures must be for the benefit of the ecosystem itself and the broader ecological communities it serves, not just humans.

CONCLUSION

If Wild Law is to be implemented in respect of international climate governance, there is a formidable mountain to climb. Cullinan compares the shift in perspective required as being somewhat akin to that required when Copernicus suggested that the earth was not at the center of the solar system after all.⁹⁹ To overcome this we may have to “do everything that is possible, and the impossible too”.¹⁰⁰

Despite the challenges, there are already indications that the ecocentric approach to governance is gaining acceptance and support. In addition to widespread academic interest,¹⁰¹ in 2009 the UK Environmental Law Association and the Gaia Foundation undertook a detailed analysis of whether Earth Jurisprudence already occurs to some extent in existing legal systems.¹⁰² The organizations found that

⁹⁸. See, e.g., ROBERTS, *supra* note 74.

⁹⁹. CULLINAN, *supra* note 8, at 82.

¹⁰⁰. Nikhil Aziz, “System Change, Not Climate Change”, GRASSROOTS INTERNATIONAL, (May 17, 2010) (quoting Edward Galeano <http://www.grassrootsonline.org/news/blog/%E2%80%9Csystem-change-not-climate-change%E2%80%9D> (last visited Oct. 20 2011)).

¹⁰¹. The UK and Australia host annual Wild Law conferences, while Peter Burdon’s recent book boasts 31 contributors *see supra* note 29.

¹⁰². UK Environmental Law Association and the Gaia Foundation, Linda Warren, ‘Wild Law: Is there any evidence of Earth Jurisprudence in existing law and practice? An International Research Project’ (2009) <http://www.ukela.org/content/page/1090/Wild%20Law%20Research%20Report%20published%20March%202009.pdf>.

“[e]lements of Wild Law are apparent in some instruments and decisions;” though they also noted that there is a very long way to go before a “seriously Wild Law approach” is taken.¹⁰³ The Declaration of the Rights of Mother Earth is an important step toward the Earth Jurisprudence approach to climate governance, as are the Ecuadorian and Bolivian examples noted above.¹⁰⁴

The Earth Jurisprudence approach to climate change does not require us to become luddites or return to hunter-gathering, it is an optimistic approach that implores us to restructure our existing governance systems in such a way that respects the limits of, and takes inspiration from, the planet that sustains us. In the context of an ailing planet and a failing international climate governance regime, Wild Law could well be an idea whose time has come.

¹⁰³. *Id.*

¹⁰⁴. *Supra* notes 65, 67 and 69 above respectively.